

**United States Department of Labor  
Employees' Compensation Appeals Board**

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LOUISA MACKIE, Appellant )  
and ) Docket No. 04-994  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: September 20, 2004  
New York, NY, Employer )  
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)

*Appearances:*

*Thomas R. Uliase, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On February 25, 2004 appellant, through her representative, filed an appeal from a November 26, 2003 merit decision of the Office of Workers' Compensation Programs in which an Office hearing representative affirmed a finding that appellant had not established a recurrence of disability on June 28, 2002 causally related to her October 7, 1997 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that she sustained a recurrence of disability on June 28, 2002 causally related to her October 7, 1997 employment injury.

**FACTUAL HISTORY**

On October 7, 1997 appellant, then a 46-year-old clerk, filed a claim for a traumatic injury occurring on that date when she injured her lower back lifting a box. She stopped work on October 8, 1997. The Office accepted appellant's claim for lumbar disease and lumbosacral

strain superimposed on preexisting spondylolisthesis. The Office began paying appellant compensation for temporary total disability on November 22, 1997. She returned to part-time limited-duty employment on September 14, 1998. Appellant again stopped work on November 23, 1998 and returned to work on January 4, 1999.<sup>1</sup> On April 20, 1999 the Office accepted that appellant had sustained a recurrence of disability and placed her on the periodic rolls effective January 30, 2000.

The Office found a conflict in medical opinion between Dr. Calvin C. Matthews, an orthopedic surgeon and appellant's attending physician, and Dr. Kenneth A. Kevitsky, a Board-certified orthopedic surgeon and Office referral physician, on the issue of the causal relationship between her current condition and any disability therefrom and her employment injury. The Office referred appellant to Dr. Michael J. Bercik, a Board-certified orthopedic surgeon, for resolution of the conflict.

In a report dated December 20, 2000, Dr. Bercik diagnosed lumbosacral sprain and lumbosacral spondylolisthesis at L5-S1. He found that she could return to full-time employment with restrictions of "not lifting over 10 [pounds] or frequently bending her back over 45 degrees. [She] should be limited in standing." He further recommended that she work on the night shift so that she could car pool to work and reduce travel time. In a work restriction evaluation of the same date, Dr. Bercik found that appellant could sit, walk, stand and perform repetitive movements of the wrists and elbows for eight hours per day without limitations. He also determined that she could reach for 7 hours per day, reach above the shoulder for 2 hours per day, twist for 1 hour per day, operate a motor vehicle for 4 hours per day, and push, pull and lift 10 pounds for 8 hours per day. He opined that appellant could not squat, kneel or climb.

Based on the December 20, 2000 report of Dr. Bercik, the Office referred appellant for vocational rehabilitation on May 4, 2001. On October 25, 2001 the employing establishment offered appellant the position of modified distribution clerk. The position required appellant to sit at a table with a modified case to eliminate reaching above the shoulder and placing mail weighing around three ounces into a case. Appellant accepted the limited-duty job offer from the employing establishment on November 21, 2001. She noted on her acceptance form that her physician recommended that she begin working only three days at the beginning and to sit in a chair with a back.

Appellant returned to work on June 21, 2002.<sup>2</sup> On July 15, 2002 she filed a notice of recurrence of disability on June 28, 2002 casually related to her October 1997 employment injury. She related that "while sitting in a chair (doing nothing) the pain in my back became unbearable and incapacitating." On the reverse side of the claim form, appellant's supervisor related that appellant was accommodated upon her return to work with modified duty "in strict compliance with her medical restrictions."

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<sup>1</sup> Appellant filed a notice of recurrence of disability on November 23, 1998 due to her October 7, 1997 employment injury, which was denied by the Office in a decision dated March 17, 1999.

<sup>2</sup> Appellant stopped receiving compensation on December 15, 2001. She delayed her work start until June 21, 2002 for personal reasons.

In a statement dated July 22, 2002, the employing establishment controverted appellant's claimed recurrence of disability. The employing establishment noted that appellant worked boxing mail while sitting at a table with a case modified to prevent reaching over the shoulder. The employing establishment indicated that the mail was placed on the table and that appellant boxed one letter, weighing about three ounces, separately. The employing establishment also noted that the date of the claimed recurrence of disability, June 27, 2002, was an off day for appellant.

By letter dated August 5, 2002, the Office requested additional factual and medical information from appellant and enclosed a recurrence development checklist for her completion.

In an unsigned report dated July 31, 2002,<sup>3</sup> Dr. Matthews stated:

"[Appellant] returned to work, however, [she] continues to have moderate to severe pain in her back and legs. She indicates she has difficulty with standing, sitting. The [pain] appears to radiate into the back, buttock and to the legs bilaterally. She also has upper back and neck pain."

Dr. Matthews listed findings on physical examination of tenderness in the cervical, thoracic and lumbar spine. He related, "[Appellant] has returned to work with the pain but was noted to have an exacerbation of symptoms at work. I recommended today that she has a permanent disability."

Dr. Matthews completed a disability certificate in which he indicated that he had treated appellant on July 31, 2002. He diagnosed a lumbar sprain/strain, sciatica, acquired spondylolisthesis and lumbar disc disorder. Dr. Matthews opined that appellant was permanently disabled from July 31 to September 18, 2002.

In a disability certificate based on a September 18, 2002 examination, Dr. Matthews diagnosed sciatica, spondylolisthesis, degenerative joint disease of the lumbar spine, and a bulging disc at L4-5 and L5-S1. Dr. Matthews opined that appellant was totally disabled from September 18 to December 18, 2002.

In a statement dated August 26, 2002, DeLois Sweeney, a supervisor with the employing establishment, related that on June 26, 2002 she "observed [appellant] taking constant step-offs and being missing from her place of assignment. I spoke to [appellant] and told her I was not going to tolerate this type of behavior from her."

The Office received a letter from appellant entitled "recurrence development checklist" on September 3, 2002. Appellant stated, "I have tried to comply with my new job requirements, however, this condition only gets worse when I attempt to work. It [is] not work it [is] my ailment." She also noted that sitting at her desk increased her pain. Appellant further related that she had to walk two blocks to get anywhere from her desk due to her location in the

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<sup>3</sup> While Dr. Matthews' July 31, 2002 report is not signed, also of record is a signed treatment plan dated July 31, 2002 from Dr. Matthews diagnosing low back pain and referring appellant for therapy and a disability certificate indicating that he treated appellant on that date.

building. She concluded, “All in all, it was [not] any particular thing I did at work; it is the same injury from October 7, 1997 that plagued me before and especially after I was compelled to come back to work.”

In a decision dated November 4, 2002, the Office found that appellant had not established that she sustained a recurrence of disability beginning June 28, 2002 causally related to her accepted employment injury. The Office noted that the recurrence of disability checklist was of no probative value as it was unsigned and further found the medical evidence was insufficient to establish that she was unable to perform her limited-duty position.

By letter dated November 15, 2002, appellant, through her representative, requested a hearing on her claim.

In a follow-up report dated December 11, 2002, Dr. Matthews diagnosed a lumbar spine strain or sprain, a herniated nucleus pulposus of the lumbar central spine, spondylolisthesis at L5-S1 and bulging discs at L4-5 and L5-S1. He stated, “[Appellant] has attempted on multiple occasions to return to her prior work location, but has continued symptomatology of the back and legs, which have rendered her unable to do the job as requested in her work site.” Dr. Matthews opined that appellant was totally disabled from employment.

A hearing was held on August 5, 2003. At the hearing, appellant noted that she had originally injured her back in 1970 and was out of work for 15 years. She related that she returned to work in the mid-1980s in a limited-duty capacity until 1995 or 1996, when she resumed regular employment. Appellant described her October 7, 1997 employment injury and the reasons she was out of work until June 21, 2002. She related that due to the location of her workstation she had to walk a great distance every day. Appellant also stated that her work differed from that described in the job offer. She related that instead of the mail being placed in front of her she was brought “buckets with mail in it,” including magazines, and that she had to “either reach in and get it out or stand up and get it out, count it and whatnot and then put it back.” Appellant also stated that she had a long table and “they did put a little case on it, but the case was never actually sitting in front of me.” She indicated that taking the mail in and out hurt her back and that she had a different chair or stool every day.<sup>4</sup>

In a report dated March 19, 2003, Dr. Matthews noted appellant’s complaints and listed findings on physical examination.<sup>5</sup>

In a letter dated July 10, 2002, received by the Office on September 12, 2003, appellant related that she returned to work on June 21, 2002 and worked until June 27, 2002 when she had to stop due to pain. She stated, “It was [not] any specific thing I did at work, though the long trek across the second floor did not help; it [is] the same back injury I [have] been disabled with for the last six years.”

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<sup>4</sup> Appellant also noted that she wrote the statement entitled recurrence development checklist. Appellant further noted that, contrary to the June 22, 2002 statement from the employing establishment, she worked on June 28, 2002, the date of her claimed recurrence of disability.

<sup>5</sup> The record contains a disability certificate with an illegible signature dated July 9, 2002 which provides a diagnosis of low back pain and a finding that appellant should remain off work June 28 to July 30, 2002.

In a report dated September 8, 2003,<sup>6</sup> Dr. Matthews noted that he treated appellant for “severe back and leg pain.” He related:

“[Appellant] had a recent exacerbation of her symptoms in June 2002. When she was at work on June 21, 2002, when she began to return to work of lifting mail, [and] placing it in a container on a table. She states that over the period of time between June 21 thr[ough] June 27, 2002 she had to take mail out of a stand which was above her and she had to stand and take it out from a sitting position. She also had packages on the floor which she had to bend to obtain to bring it to this container, none of this was in her return to work package. The work was also involving stuffing and taping mail. On June 27, 2002 [appellant] states that she began to have increasing back pain in the lumbar area when she was sitting in a chair. She had been doing the work as stated above prior to this and began to have these particular symptoms. [She] also complains that she should have a specific ergonomic chair provided for her as per my prescription which was not provided and this may have contributed to her continued pain.... I do feel her recurrence is related to the work she had to perform.”

Dr. Matthews diagnosed lumbar sciatica, lumbago, radiculopathy, lumbar degenerative joint disease and a herniated nucleus pulposus of the lumbar spine and found that she was totally disabled.

By decision dated November 26, 2003, the hearing representative affirmed the Office’s November 4, 2002 decision. The hearing representative noted that the record contained no medical evidence showing that the work restrictions of Dr. Bercik, the impartial medical specialist, were “no longer valid.”

#### **LEGAL PRECEDENT**

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.<sup>7</sup>

A “recurrence of disability” means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous

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<sup>6</sup> Dr. Matthews’ September 8, 2003 report is a duplicate of an unsigned report in the record dated August 13, 2003.

<sup>7</sup> *Terry R. Herman*, 38 ECAB 222 (1986).

injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>8</sup>

Office procedures state that a recurrence of disability includes a work stoppage caused by a spontaneous material change, demonstrated by objective findings, in the medical condition that resulted from a previous injury or occupational illness without an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>9</sup>

The Office procedures, regarding recurrent disability within 90 days of a return to employment, provides as follows:

“a. *Burden of Proof.* The claimant is not required to provide the same evidence as for a recurrence claimed long after apparent recovery and return to work. Therefore, in cases where recurring disability for work is claimed within 90 days or less from the first return to duty, the focus is on disability rather than causal relationship.

“b. *Disability for Work.* Assuming the requirements described in paragraph 5 above concerning causal relationship are met, the CE [claims examiner] should ask the employee to submit a Form OWCP-5 and/or narrative statement from the attending physician which describes the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for renewed disability for work.”<sup>10</sup> (Emphasis in the original.)

Paragraph five of the Office’s procedures, which is applicable to a recurrence of a medical condition within 90 days of release from medical care, provides that the claims examiner “may accept the attending physician’s statement supporting causal relationship between the claimant’s current condition and the accepted condition, even if the statement contains no rationale unless” there is evidence of an intervening injury, an intervening decision, the claim was accepted for a temporary aggravation of a preexisting condition or the “*renewed claim involves a different diagnosis*” from the accepted condition.<sup>11</sup> (Emphasis in the original.)

## ANALYSIS

In this case, the employing establishment offered appellant a limited-duty position of a modified distribution clerk based on the opinion of Dr. Bercik, the impartial medical examiner selected to resolve the conflict in medical opinion between Dr. Matthews, appellant’s attending Board-certified orthopedic surgeon and Dr. Kevitsky, an Office referral physician and Board-

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<sup>8</sup> 20 C.F.R. § 10.5(x) (1999).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a) and (b) (September 2003).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5(a) (September 2003).

certified orthopedic surgeon. Dr. Bercik found that appellant could work an eight-hour day with certain restrictions. Appellant accepted the limited-duty position on November 21, 2001 and returned to work on June 21, 2002; however, she stopped work on June 28, 2002.

Appellant may establish a recurrence of disability by showing a change in the nature or extent of her light-duty job. Appellant alleged at the hearing that her job duties differed from those described in the job offer that she accepted on November 21, 2001. She stated that the mail was placed in buckets rather than in front of her and that she had to reach in or stand up to get the mail out of the buckets. Appellant also noted that she had a long walk to her workstation and received a different chair every day. However, appellant has not alleged, and the evidence does not establish, that she performed work outside the restrictions found by Dr. Bercik, the impartial medical examiner. Dr. Bercik found that appellant could sit, stand, walk and perform repetitive hand and wrist movements for eight hours per day without restrictions. He further found that she could push, pull or lift up to 10 pounds for 8 hours per day. The employing establishment, in a letter dated July 22, 2002, contended that appellant performed work boxing mail while sitting at a table with a modified case in accordance with her physical limitations. Appellant has not submitted evidence that her work duties changed or that limited-duty position involved duties in excess of the restrictions imposed by Dr. Bercik, the impartial medical examiner.<sup>12</sup>

Appellant also has not submitted sufficient medical evidence to establish that she was disabled from her limited-duty position on or after June 28, 2002 due to her accepted employment injury. Dr. Matthews, in a report dated July 31, 2002, indicated that appellant had continued pain in her back and legs with an “exacerbation of symptoms” after returning to work. He listed findings of tenderness on physical examination in the cervical, thoracic and lumbar spine and found that appellant was totally disabled. However, Dr. Matthews’ report does not contain a specific diagnosis or objective evidence demonstrating a change in appellant’s condition such that she was unable to perform the duties of her limited-duty position beginning June 28, 2002. Further, Dr. Matthews failed to provide any rationale for his opinion that appellant was disabled from employment. Therefore, his report is insufficient to meet appellant’s burden of proof.<sup>13</sup>

In a disability certificate dated July 31, 2002, Dr. Matthews diagnosed a lumbar sprain/strain, sciatica, acquired spondylolisthesis, and lumbar disc disorder and found that appellant was permanently disabled from July 31 to September 18, 2002. In a disability certificate dated September 18, 2002, Dr. Matthews diagnosed sciatica, spondylolisthesis, degenerative joint disease of the lumbar spine, and a bulging disc at L4-5 and L5-S1. He opined that appellant was totally disabled from September 18 to December 18, 2002. However, Dr. Matthews did not address the cause of appellant’s diagnosed conditions and therefore his disability certificates are insufficient to establish that appellant sustained a recurrence of disability beginning June 28, 2002. Medical evidence that does not offer any opinion regarding

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<sup>12</sup> See *Kim Kilts*, 51 ECAB 349 (2000) (finding that only changes that cause the light-duty assignment to exceed the employee’s work tolerance limitation result in a compensable recurrence of disability).

<sup>13</sup> *Caroline Thomas*, 51 ECAB 451 (2000) (a medical opinion not fortified by medical rationale is of little probative value).

the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>14</sup> Further, Dr. Matthews' disability certificates did not contain findings on examination. Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled from work.<sup>15</sup>

In a report dated December 11, 2002, Dr. Matthews diagnosed a lumbar spine strain or sprain, a herniated nucleus pulposus of the lumbar central spine, spondylolisthesis at L5-S1 and bulging discs at L4-5 and L5-S1. He opined that appellant was unable to return to her "prior work location" due to her continuing back and leg symptoms. However, Dr. Matthews did not specifically relate appellant's disability to her employment injury. He attributed appellant's disability to back and leg symptoms and listed multiple diagnoses, including a herniated nucleus pulposus and bulging discs. The Office did not accept either of these conditions as employment related; appellant, therefore, has the burden of establishing that these conditions are related to her employment through the submission of rationalized medical opinion evidence.<sup>16</sup> In this case, Dr. Matthews did not address the cause of appellant's diagnosed conditions and thus his opinion is of little probative value.<sup>17</sup>

Dr. Matthews, in a report dated March 19, 2003, listed physical findings of tenderness in the lumbar spine with limited range of motion. However, as Dr. Matthews did not provide a diagnosis, an opinion regarding causation or address the relevant issue of whether appellant sustained a recurrence of disability beginning June 28, 2002, his report is insufficient to meet appellant's burden of proof.<sup>18</sup>

In a report dated September 8, 2003, Dr. Matthews diagnosed lumbar sciatica, lumbago, radiculopathy, lumbar degenerative joint disease and a herniated nucleus pulposus of the lumbar spine. He noted that appellant had a "recent exacerbation of her symptoms in June 2002." Dr. Matthews described appellant's job duties from June 21 to 27, 2002 and her increase in back pain on June 27, 2002 while sitting in her chair. He noted that appellant was not provided with an ergonomic chair as requested. Dr. Matthews stated, "I do feel her reoccurrence is related to the work she had to perform." However, while Dr. Matthews opined that appellant's recurrence of disability was due to her employment, he did not provide any rationale or explanation supporting his conclusion, and thus his opinion is of little probative value.<sup>19</sup> The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background.<sup>20</sup> Additionally,

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<sup>14</sup> *Willie M. Miller*, 53 ECAB \_\_\_\_ (Docket No. 02-328, issued July 25, 2002).

<sup>15</sup> *Laurie S. Swanson*, 53 ECAB \_\_\_\_ (Docket Nos. 01-1406 & 02-765, issued May 2, 2002).

<sup>16</sup> See *Diane Williams*, 47 ECAB 613 (1996).

<sup>17</sup> See *Willie M. Miller*, *supra* note 14.

<sup>18</sup> *Donald R. Pippin*, 54 ECAB \_\_\_\_ (Docket No. 03-205, issued June 19, 2003).

<sup>19</sup> *Albert C. Brown*, 52 ECAB 152 (2000).

<sup>20</sup> *Conrad Hightower*, 54 ECAB \_\_\_\_ (Docket No. 02-1568, issued September 9, 2003).

Dr. Matthews included diagnosed conditions not accepted by the Office as employment related without providing any rationale relating these conditions to appellant's employment injury.<sup>21</sup> Further, Dr. Matthews attributed appellant's recurrence of disability to the performance of her work activities. As noted above, a recurrence of disability is a work stoppage caused by a spontaneous material change, demonstrated by objective findings, in the medical condition that resulted from a previous injury or occupational illness without an intervening injury or new exposure to factors causing the original illness.<sup>22</sup>

As appellant has not submitted sufficient evidence substantiating a change in her light-duty position or an objective worsening of her accepted lumbar condition beginning June 28, 2002, she has not met her burden of proof in establishing a recurrence of disability.

On appeal appellant's attorney contends that as appellant's disability occurred within 90 days after she returned to duty, the issue is disability for employment rather than causal relationship. The Office's procedure manual provides that an appellant's burden of proof to establish a recurrence of disability within 90 days of a return to work is not the same as that "for a recurrence claimed long after apparent recovery and return to work" and that the "focus is on disability rather than causal relationship."<sup>23</sup> However, this cited section refers only to the extent of the medical rationale required in the supporting medical evidence to establish causal relationship.<sup>24</sup> In accordance with Board case law, in order to establish a recurrence of disability due to a worsening of her condition, appellant must establish a change in the nature and extent of her accepted injury-related condition such that she can no longer perform her light-duty employment.<sup>25</sup> Appellant failed to provide evidence establishing a change in her accepted conditions of lumbar disease and lumbosacral strain superimposed on preexisting spondylolisthesis such that she was disabled from her employment and, consequently, did not meet her burden of proof.

As noted above, the Office's procedures further provide that the claims examiner should, if causal relationship is met under paragraph five of its procedures regarding recurrences of disability within 90 days of a return to work, request medical evidence addressing the duties the employee cannot perform and objective medical findings supporting disability.<sup>26</sup> However, in this case, as the medical evidence includes diagnoses which differ from the accepted conditions, appellant has not established causal relationship under paragraph five of the Office's procedures.

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<sup>21</sup> See *Diane Williams*, *supra* note 16.

<sup>22</sup> See *supra* note 9.

<sup>23</sup> See *supra* note 10.

<sup>24</sup> *Maria Addis*, Docket No. 97-2748 (issued September 22, 1997).

<sup>25</sup> See *Albert C. Brown*, *supra* note 19; *Sherry A. Hunt*, 49 ECAB 467 (1998); *Glenn Robertson*, 48 ECAB 344 (1997).

<sup>26</sup> See *supra* note 11.

**CONCLUSION**

The Board finds that appellant has not established that she sustained a recurrence of disability on June 28, 2002 causally related to her October 7, 1997 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 26, 2003 is affirmed.

Issued: September 20, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member