

radiculopathy with frozen shoulder. Appellant underwent surgery on November 22, 2000 and returned to work without restrictions on March 2, 2001. Appellant accepted a limited-duty job offer on June 22, 2001. On February 22, 2003 appellant accepted a modified limited-duty job offer and continues to work with restrictions.

On February 1, 2002 appellant requested a schedule award and was referred to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on Dr. Kaffen's April 22, 2002 report, on July 17, 2002 the Office granted appellant a schedule award for a nine percent permanent loss of his left upper extremity.

Following a fall in his bathroom, on May 3, 2002 appellant filed a claim for compensation (Form CA-7) alleging that he was totally disabled due to his accepted work-related injury from April 28 through May 6, 2002. On October 25, 2002 the Office denied appellant's claim for recurrent compensation, finding that the evidence failed to establish a causal relationship between his claimed disability and the accepted condition. The Office hearing representative affirmed the Office's denial on July 14, 2003.

On June 6, 2003 appellant filed a Form CA-7 claiming compensation for the periods May 16 to 18, May 24 and June 1 to 2, 2003. In support of his claim, appellant submitted medical evidence, including an attending physician's report dated June 5, 2003 signed by Dr. Deborah Vicario, a Board-certified family practitioner, reflecting a diagnosis of cervical spine disc herniation, spinal fusion and cervical neck pain with radiculopathy to the left arm and hand. Dr. Vicario indicated that she had treated appellant since December 5, 2002 and that he was incapacitated due to the accepted December 31, 1999 work-related injury. In response to the question on the form regarding whether she believed appellant's condition was caused or aggravated by an employment activity, Dr. Vicario checked the "yes" box and stated that his repetitive duties "likely contributed." Appellant provided several notes written on Dr. Vicario's prescription pad including a note dated May 16, 2003 bearing an illegible signature containing the words "off work on May 16, 17 and 18, 2003;" a note dated May 23, 2003 bearing an illegible signature containing the words "off work today, light duty times 3 days;" and a note dated June 5, 2003 signed by Dr. Vicario stating that appellant "was unable to work June 1 and 2, 2003. He was incapacitated from cervical neck pain with radiculopathy."¹ On July 9, 2003 appellant filed a Form CA-7 claiming compensation for the period May 16 to June 2, 2003.

On October 30, 2003 appellant filed a Form CA-7 claiming compensation for the period October 23 to October 30, 2003. In support thereof, he provided a note signed by Dr. Vicario dated October 30, 2003 indicating that appellant was "incapacitated for work from October 23 through 29, 2003 due to recurrence of IOD injury of December 31, 1999." In an attending physician's report dated October 30, 2003, Dr. Vicario reported a diagnosis of "C5-C6 disc herniation; C6-C7 radiculopathy" and checked the "yes" box, indicating her belief that the condition was caused or aggravated by employment activity.

Medical evidence of record reflects that appellant was treated originally by Dr. William S. Richardson, a Board-certified internist, and by Dr. Gale Hazen, a Board-certified neurosurgeon, who performed appellant's November 22, 2000 discectomy, fusion and plate

¹ The Board notes that the signatures on the aforementioned notes are different from one another.

fixation. The record contains numerous emergency room reports, physicians' notes and doctors' reports. In a report dated October 3, 2002, Dr. Hazen opined that appellant was not incapacitated and should continue working with restrictions, including not lifting more than five pounds, not standing more than one hour in an eight-hour period, not performing "over-the-shoulder" work, and using a lumbar chair with arm rests. Dr. Hazen's unsigned notes dated January 2, 2003 reflect appellant's complaints of chronic pain in his neck, shoulder and groin and Dr. Hazen's impressions of fibromyalgia, right scapula and shoulder bursitis, probable transient right tardy ulnar palsy and left groin strain. Dr. Hazen did not provide an opinion as to the cause of appellant's condition. The record shows that appellant sought emergency medical care on May 9 and 23, 2003 for neck pain. The May 9, 2003 EDP history and physical worksheet reflects appellant's allegation that he strained his neck when he turned suddenly while driving to check traffic. The worksheet dated May 23, 2003 indicated that appellant sprained his neck while helping his brother-in-law lift an air conditioner and that he declined a neck x-ray but was "asking for a day off." A report of an x-ray performed on May 9, 2003 revealed no evidence of a fracture or malalignment of the cervical spine.

By letters dated August 22 and November 13, 2003, the Office notified appellant that the information submitted was insufficient to establish that he had suffered a recurrence of disability or a consequential injury which caused him to be totally disabled for the periods May 16 to June 2, 2003 and October 23 to 30, 2003 respectively. The Office advised appellant that, in order to establish that he had suffered a recurrence, he was required to submit definitive medical evidence establishing total disability from work during the periods alleged in the form of a comprehensive medical report with an opinion detailing his disability and its causal relationship to his accepted condition. In response to the Office's request, appellant submitted two duty status reports signed by Dr. Hazen dated September 23 and November 1, 2003. Neither report addressed the issue of appellant's total disability during the alleged periods of time. Appellant also provided what appeared to be x-ray reports dated May 9 and 17, 2003.

By decision dated January 12, 2004, the Office denied appellant's claim, finding that the evidence did not establish that his time lost from work was causally related to accepted work-related conditions.

On June 17, 2004 appellant filed a claim for recurrence of disability stating that "during the past three years (December 31, 1999) the problems were nominal, no extreme pain until today."²

A hearing was held on June 23, 2004 during which appellant testified that he experienced a muscle spasm on May 16, 2003 when he turned his head while driving his vehicle. He further stated that he missed work due to total disability on May 16 through 18, May 24 and June 1 and 2, 2003. Appellant indicated that he was unclear as to the dates he missed work in

² The Board notes that appellant submitted additional evidence after the Office rendered its June 2, 2004 decision. As this evidence was not previously considered by the Office prior to its decision of June 2, 2004, the evidence represents new evidence which cannot be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

October 2003 but that on approximately October 23, 2003 he experienced another episode of muscle spasms. When he was asked what he was doing when the spasms began, he stated, “Nothing that I don’t normally do.” The Office hearing representative left the record open for clarification of the dates appellant missed work.

Subsequent to the hearing, appellant submitted several documents relating to his claim, including an x-ray report dated October 23, 2003 reflecting “unremarkable anterior intervertebral fusion at C5-6, with advanced discogenic degenerative disease at C6-7. Remaining levels are intact.” Appellant also submitted a calendar on which he indicated that he was “off work” from October 23 through 29, 2003.

By decision dated September 9, 2003, the Office hearing representative affirmed the January 12, 2004 decision, finding that appellant had failed to present sufficient medical evidence to establish a worsening of his condition to that of total disability during the alleged period of time.³

LEGAL PRECEDENT

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either 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.⁴

This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with medical reasoning.⁵ Where no such rationale is present, the medical evidence is of diminished probative value.⁶

An award of compensation may not be based on surmise, conjecture, speculation or appellant’s belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was

³ Appellant filed a claim for compensation (Form CA-7) on May 28, 2004 and a notice of recurrence on June 17, 2004. As of the date of the filing of this appeal, the Office had not issued a final decision with regard to either matter. Therefore, appellant’s claims are interlocutory in nature and not subject to review by the Board. *See* 20 U.S.C. § 501.2(c), the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case.

⁴ *See Shelly A. Paolinetti*, 52 ECAB 391, 392 (2001); *see also Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁵ *Ronald A. Eldridge*, 53 ECAB 218, 221 (2001).

⁶ *Mary A. Ceglia*, 55 ECAB ____ (Docket No. 04-113, issued July 22, 2004).

caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.⁷

ANALYSIS

The Board finds that appellant failed to sustain his burden of proof in establishing that he had a period of recurrent total disability due to an employment-related condition from May 16 to June 2, 2003 or from October 23 to 30, 2003 entitling him to monetary compensation.

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a 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 he 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 job requirements.⁸

Appellant's original claim was accepted for musculoskeletal sprain and was later expanded to include herniated disc at C5-6 and left C6 radiculopathy with frozen shoulder. After recovering from surgery, appellant returned to work and accepted a limited-duty job offer, which was modified on February 22, 2003. On July 9, 2003 appellant filed a Form CA-7 claiming compensation for the periods May 16 to June 2, 2003.⁹ On October 30, 2003 appellant claimed compensation for the period October 23 to 30, 2003. Appellant did not submit any probative medical evidence demonstrating total disability for either period of time.

The medical evidence submitted in support of appellant's claim for the period May 16 to June 2, 2003 fails to establish either a causal relationship between appellant's alleged condition and the accepted employment injury or a worsening of his condition such that he was rendered totally disabled. In her June 5, 2003 attending physician's report, Dr. Vicario's makes a diagnosis of cervical spine disc herniation, spinal fusion, cervical neck pain with radiculopathy to the left arm and hand and, without explanation, states that appellant was incapacitated due to the accepted December 31, 1999 work-related injury. In response to the question on the form regarding whether she believed appellant's condition was caused or aggravated by an employment activity, Dr. Vicario checked the "yes" box and stated that his repetitive duties "likely contributed." Dr. Vicario's checkmark is insufficient to establish a causal relationship.¹⁰ Lacking rationale relating appellant's claimed recurrent condition to the original employment injury, Dr. Vicario's opinion is of little probative value. Similarly, Dr. Vicario's disability slips provide little assistance to appellant. Blanket statements that an employee is unable to work or that he was incapacitated due to a diagnosed condition are insufficient to establish that appellant was disabled. The Board has repeatedly held that a medical opinion not fortified by medical

⁷ *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

⁸ *See Shelly A. Paolinetti*, *supra* note 4; *see also Terry R. Hedman*, *supra* note 4.

⁹ The Board notes that appellant originally filed a CA-7 form on June 6, 2003 seeking compensation for the periods May 16 to May 18, May 24 and June 1 to 2, 2003.

¹⁰ *Ricky S. Storms*, 52 ECAB 349 (2001).

rationale is of little probative value.¹¹ The Board notes that, although Dr. Vicario stated that appellant was incapacitated on June 1 and 2, 2003, the record does not reflect that she examined appellant on or immediately prior to those dates, and her disability slip dated June 5, 2003 provides no explanation as to how she knew he was disabled on those dates. Moreover, in his June 6, 2003 CA-7 form, appellant alleged that he was disabled from May 16 to 18 and May 24, 2003, as well as from June 1 to 2, 2003. In his July 9, 2003 CA-7 form, appellant claimed compensation from May 16 to June 2, 2003. There is no medical evidence of record, in the form of disability slips or other reports, supporting appellant's allegation that he was disabled during the additional periods alleged in his July 9, 2003 claim form.

Likewise, the medical evidence submitted in support of appellant's claim for the period October 23 to 30, 2003 fails to establish that his time lost from work was causally related to his accepted condition. Dr. Vicario's October 30, 2003 note stating that appellant was incapacitated for work from October 23 through 29, 2003 due to a "recurrence of IOD injury of December 31, 1999" and the October 30, 2003 attending physician's report, in which she again indicated her belief that appellant's condition was caused or aggravated by his employment by placing another checkmark in the "yes" box, provide no rationale and do not explain based on objective findings how or why appellant's accepted condition worsened to the point that he was totally disabled on the dates in question. Therefore, the reports lack probative value. In an October 3, 2002 medical report, appellant's attending physician, Dr. Hazen, opined that appellant was not incapacitated and that he should continue working with restrictions. While his report is not rationalized and therefore is of diminished probative value, it does not provide any support for appellant's position that he was totally disabled.

Although appellant sought emergency medical treatment on or near the dates in question, nothing in the record reflects that his condition had worsened to the degree that he was unable to work. The May 9, 2003 EDP history and physical worksheet reflects appellant's allegation that he strained his neck when he turned suddenly while driving to check traffic. However a report of the x-ray performed on that date revealed no evidence of a fracture or malalignment of the cervical spine, and there is no indication in any report related to the May 9, 2003 emergency room visit that appellant was totally disabled. The May 23, 2003 worksheet indicated that appellant had sprained his neck while helping his brother-in-law lift an air conditioner and that he declined an x-ray but was "asking for a day off." Without the benefit of a reasoned medical opinion, there is no medical evidence whatsoever that appellant's condition was related to his accepted condition. In fact, logic would dictate that his condition on May 23, 2003 was a direct result of lifting an air conditioner on his personal time.

Because appellant returned to a light-duty position after an accepted employment injury, he had the burden to establish by the reliable, probative and substantial evidence a recurrence of the total disability and to show that he could not perform that light duty. He was required to show either a change in the nature and extent of the injury-related condition or a change in the

¹¹ See *Brenda L. DuBuque*, 55 ECAB ____ (Docket No. 03-2246, issued January 6, 2004); see also *David L. Scott*, 55 ECAB ____ (Docket No. 03-1822, issued February 20, 2004) and *Willa M. Frazier*, 55 ECAB ____ (Docket No. 04-120, issued March 11, 2004).

nature and extent of the job requirements. No evidence was presented with regard to a change in appellant's job requirements or that she was required to perform duties outside of her job restrictions. The medical record in this case lacks a well-reasoned narrative from appellant's physicians relating appellant's claimed recurrent condition to the December 31, 1999 employment injury.

For the reasons stated above, the Board finds that appellant failed to sustain his burden of proof in establishing that he was totally disabled due to his accepted employment condition from May 16 to June 2, 2003 or from October 23 to 30, 2003.

CONCLUSION

The Board finds that appellant has not established entitlement to wage-loss benefits from May 16 to June 2, 2003 or from October 23 to 30, 2003.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 9 and January 12, 2004 are affirmed.

Issued: April 13, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member