

failed to establish fact of injury.¹ The Board found that the evidence of record supported that an incident occurred on August 22, 1999 when appellant was moving a tray of mail that began slipping from his hands. He moved forward to grab the tray and experienced low back pain. The case was remanded to the Office to determine whether the medical evidence established an injury related to the accepted incident.² The law and the facts of the case, as set forth in the Board's prior decision, are hereby incorporated by reference.

The Office referred appellant, together with a statement of accepted facts, to Dr. Joseph Verska, a Board-certified orthopedic surgeon, for a second opinion examination. In a July 17, 2001 report, Dr. Verska reviewed appellant's history of injury and found that the accepted incident was sufficient to cause the disc herniations to appellant's low back. He noted that an MRI scan obtained in 1998 showed no significant disc herniations while that obtained in September 1999 showed an increased size of the herniation at L4-5 and a disc bulge at L5-S1. Although appellant had a preexisting history of degenerative changes to the spine, Dr. Verska noted that appellant was able to function well up to the August 22, 1999 incident. He opined that surgical treatment by Dr. Bishop was appropriate for the injury and noted that appellant experienced residual discomfort in his low back which limited some activities he could perform.

On August 28, 2001 the Office accepted that appellant sustained herniated discs at L4-5 and L5-S1 for which he underwent surgery. Appellant received appropriate benefits on the periodic rolls.³

Prior to the acceptance of the claim, appellant was referred by Dr. Bishop to Dr. James H. Bates, Board-certified in physical medicine and rehabilitation, for treatment of low back pain following surgery. In reports dating from November 13, 2000, Dr. Bates treated appellant conservatively with medication, physical therapy and a pain management program. An August 10, 2001 computerized tomography (CT) scan of the lumbar spine revealed minor annular disc bulges at L4-5 and L5-S1 with no focal disc herniation and degenerative disease bilaterally. On November 12, 2001 Dr. Bates provided a work capacity evaluation in which he set forth physical limitations on appellant's capacity for work, starting at six hours a day and progressing to eight hours over a two-month period. Appellant was referred by the Office for vocational rehabilitation services.

On January 10, 2002 Dr. Bishop reported that he examined appellant in follow up to the decompression surgery and noted lingering low back and right leg pain, spreading predominately to the right knee and, on the left, radiating to the buttock and hip. He advised appellant against any repeat surgery and indicated that the constant standing, leaning and repetitive motion

¹ Docket No. 00-2072 (issued June 5, 2001).

² Medical evidence from Dr. John E. Bishop, an attending Board-certified orthopedic surgeon, diagnosed sciatica. A September 12, 1999 magnetic resonance imaging (MRI) scan revealed a herniated disc at L4-5 and disc protrusion at L5-S1. Dr. Bishop diagnosed disc degeneration of the lumbar spine and recommended surgery. On November 15, 1999 the physician performed a laminectomy at L5 with foraminal decompression at L4, L5 and S1 bilaterally with disc enucleation at L4-5 and L5-S1.

³ The record indicates that appellant had retired and, effective May 6, 2000, elected benefits under the Act.

required in his postal duties required that appellant be retrained or given other sedentary job options.

On July 17, 2002 the employing establishment prepared a limited-duty job offer in which appellant would be responsible for repairing and returning to the manual mail stream any and all damaged flats. On July 24, 2002 Dr. Bates noted his approval of the job offer as within appellant's limitations and appellant accepted the position on July 31, 2002. These materials were forwarded to the Office, which found the limited-duty clerk position suitable to his work capabilities on August 22, 2002. The Office advised appellant of the penalty provision of section 8106(c)(2) and afforded him 30 days in which to accept the position or lose entitlement to his wage-loss compensation.

On August 27, 2002 Dr. Bates reviewed the position description and recommended a gradual return to work, starting with four hours a day for the first two weeks and increasing this over a two-month period to eight hours a day. He stated:

“The question has been raised as to whether [appellant] should undergo a formalized work hardening program. This has been recommended.... At this point, I feel that [he] would be able to return to work at the schedule as listed above. However, if during his transition into work, we discover that he has difficulties with the work schedule when he is working six or seven hours a day, then I think that it would be wise to reevaluate his progress and maybe consider a program [at a local rehabilitation hospital].”

Appellant returned to limited-duty work on September 4, 2002. On September 9, 2002 he stopped work. Appellant indicated that on September 6, 2002 he experienced low back soreness that affected his ability to walk or rise from a seated position. These symptoms worsened, until he was advised by Dr. Bates on September 9, 2002 not to return to work. On September 12, 2002 Dr. Bates stated:

“Today [appellant] reports that he has had an exacerbation of his back pain. Last week he returned to work for the first time. They did provide for him a job that fit all the descriptions and time requirements. He was working four days at a time, no lifting, changing of positions from sit to stand ad lib and he did do that. After the first day of work he noted some stiffness of the back. The second day he had more stiffness throughout the day. By the third night of work, he was having problems walking and reports grimacing with pain, and he did have a couple of days off within this time frame. He contacted the office and we put him off work until he could be evaluated today.”

Dr. Bates noted that appellant experienced a sharp shooting pain in the left gluteal area when walking and noted that his transition from sitting to standing was guarded. He advised that appellant would be off work pending further evaluation and medical consultation with other attending physicians. On September 20, 2002 Dr. Bates recommended a treatment program at a local rehabilitation hospital, noting that appellant did not tolerate his return to work.

On October 7, 2002 the Office advised appellant of the provisions of section 8106 regarding abandonment of work. It noted that, if he stopped work due to a worsening of his medical condition, he should submit a narrative report from his treating physician within 30 days.

On November 18, 2002 appellant filed a notice of recurrence of disability, alleging that on September 9, 2002 he stopped work due to residuals of his accepted condition. He submitted the October 2, 2002 report of Dr. Bates who noted that in light of the exacerbation of appellant's back pain following his return to restricted work there were two treatment options under consideration: referral to a rehabilitation program for a multidisciplinary approach to treat appellant's chronic pain with an emphasis on returning to work, or referral for a medical panel evaluation for potentially more invasive management techniques. Dr. Bates indicated that the rehabilitation program would be his preferred option.

On November 20, 2002 Dr. Bates noted that it had been requested that he clarify appellant's work status from August 15, 2002 when he was released to return to work and September 12, 2002 when he was taken off work. He stated that, as of August 15, 2002, appellant was doing well, ambulating occasionally with a cane and could change positions from sitting to standing and move around the clinic without significant difficulty. After returning to work, appellant experienced a recurrence of his symptoms and, upon evaluation on September 12, 2002 Dr. Bates found that his general mobility had significantly decreased with an increased guarding in range of motion and generalized muscle stiffness and tenderness throughout the low back region. He stated: "I would definitely consider this instance to be a recurrence of pain or an exacerbation of pain, not as a new injury." Dr. Bates reiterated that further examination of appellant by another specialist would be appropriate over treatment at a rehabilitation program as appellant continued to experience an exacerbation of his low back condition.

On December 4, 2002 the Office noted that appellant had begun working at a light-duty position on September 4, 2002 which was consistent with his physical limitations. It found that as of September 9, 2002, he abandoned suitable work and that his reasons for abandoning the position were not justified as he failed to submit medical evidence concerning any worsening of his accepted condition. The Office stated: "Pain is a subjective complaint which does not justify staying away from work." Appellant was provided 15 days in which to accept and return to work without penalty.

In a December 10, 2002 decision, the Office denied appellant's recurrence of disability claim. It found that appellant failed to submit adequate medical evidence from his physician containing an objective description of medical findings that convinced him that appellant's work-related medical condition had worsened to the extent that appellant could no longer perform his light-duty position.

On January 8, 2003 appellant requested reconsideration and submitted a December 12, 2002 report from Dr. Bishop, who noted that appellant had been treated by Dr. Bates for ongoing pain management following surgery. He indicated that appellant had returned to a limited-duty job at the post office in September and lasted only a few days before his low back pain worsened, describing pain radiating into the left thigh and both calves. Dr. Bishop noted that

appellant was returned to active pain management with medication. He listed findings on examination, noting that active extension caused tingling to the left hip and straight leg raising on the left caused withdrawal and an electric shock sensation running down the left leg. Dr. Bishop questioned appellant as to why he had returned for examination. Appellant noted that the Office had not accepted the reports of Dr. Bates and that the employing establishment wanted him to obtain a further work tolerance evaluation. Dr. Bishop also questioned whether he was the appropriate physician to do a work tolerance assessment and noted that Dr. Bates had recommended further examination by specialists, which Dr. Bishop found to be appropriate. He stated: "It does seem clear clinically that [appellant] is capable of only the very slightest physical demanding activity."

In a January 15, 2003 treatment note, Dr. Bates indicated that appellant's comfort level appeared stable and examination revealed positive straight leg raising on the left. He described continued guarding and stiffness in appellant's transitions and ambulation. Dr. Bates stated that appellant remained on his current medication regimen and that he had heard nothing further on the recommendation for a further functional evaluation or examination.

On January 16, 2003 the Office wrote to Dr. Bishop addressing appellant's return to work and treatment by Dr. Bates. It requested that he state objective findings on examination and explain why appellant was not able to perform the modified position and whether he was capable of performing other work.

The record contains Office memoranda indicating that it paid compensation to appellant on the daily roll based on four hours of wage loss a day, the first payment being made through October 20, 2002. On February 11, 2003 the Office paid compensation for the period November 3, 2002 to February 8, 2003 for four hours a day.

On February 14, 2003 Dr. Bates reiterated his recommendation for a medical consultation to review the need for more invasive chronic pain management. An accompanying clinical report noted that appellant's medications had been increased without relief of pain. He noted less guarding on transitions and ambulation.

In a March 10, 2003 report, Dr. Bishop responded to the Office, noting he had reviewed the modified job description forwarded to him. He opined that appellant should be able to perform the physical demands of the mail sorting job as described. Dr. Bishop noted that he did not foresee any further surgical treatment. He recommended that appellant return to work, starting three hours a day and progress over several weeks to eight hours a day.

On March 18, 2003 the Office paid compensation to appellant for the period February 9 to March 8, 2003 for four hours of wage loss a day.

By decision dated March 24, 2003, the Office denied modification of the December 20, 2002 decision denying the recurrence of disability claim.⁴ The Office noted that appellant had not established a change in the nature and extent of his injury-related condition.

⁴ On March 28, 2003 the Office issued compensation to appellant for the period September 8 to October 29, 2002.

The Office authorized treatment by Dr. Richard A. DuBose, a Board-certified anesthesiologist and director of an area pain clinic. In a March 31, 2003 report, he reviewed appellant's history of back surgery and treatment for chronic pain by Dr. Bates. Physical examination revealed tenderness over the lumbosacral spine, primarily over the facet joints, worse on the right and worse at the inferior aspect of the low back. It was noted that appellant could not do straight leg raises. Sensory examination was reported as slightly abnormal on the right with some numbness of the quadriceps. Dr. DuBose diagnosed postlaminectomy syndrome with low back pain, probable facet arthropathy and myofascial pain. He recommended further diagnostic testing and an MRI scan was authorized by the Office. The April 10, 2003 MRI scan revealed a shallow disc protrusion at L3-4 with high signal strength at the dorsal disc margin, more prominent than on prior examination and extending slightly caudal to the disc space. At L4-5, postsurgical changes were seen in the dorsal soft tissues with disc desiccation present. A shallow disc bulge was seen extending into the subarticular recesses. No significant spinal compromise was noted; however foraminal narrowing was seen secondary to a combination of facet hypertrophy and bulging disc. At L5-S1 the disc height was diminished, with narrowing of the posterior aspect of the disc and a shallow bulge which did not compromise the spinal canal.

On April 16, 2003 a nurse case manager reported to the Office that she met with appellant at the employing establishment on April 8, 2003 for a return to work meeting. A job description of appellant's limited duty was discussed and his workstation was inspected. On April 10, 2003 appellant signed the limited-duty job offer. The record reflects that he returned to work as of April 9, 2003 starting for three hours a day. It appears that he attempted work for five hours a day but had to return to the three-hour workday schedule. Appellant filed claims for compensation for intermittent wage loss.⁵ On May 7, 2003 appellant underwent a facet block injection for treatment of continued lumbar pain. On May 21, 2003 Dr. DuBose cleared appellant for five hours work a day for a month and then an increase to eight hours a day. On June 20, 2003 Dr. DuBose noted that appellant experienced increased muscle spasms in his back and leg that usually occurred at the end of his work shift.

On August 19, 2003 appellant filed a notice of recurrence of disability, as of July 26, 2003 noting that he stopped work on an intermittent basis for treatment of his back condition.

By decision dated August 26, 2003, the Office terminated appellant's wage-loss compensation benefits under section 8106, finding that he had abandoned suitable work as of September 9, 2002. The Office noted that an off work slip was signed by Dr. Bates on that date, but found that it was not based on examination and that the physician's subsequent reports did not provide objective evidence of a material worsening of appellant's condition. It was noted that this decision did not alter the denial of appellant's recurrence of disability claim.⁶

In an August 30, 2003 letter, appellant contended that his compensation had been terminated without notice. In a September 12, 2003 response, the Office referred back to the

⁵ The Office paid compensation for intermittent disability for the period April 9 to August 7, 2003.

⁶ On August 29, 2003 appellant was advised that he would receive compensation for wage loss through August 27, 2003. It was noted that his claim for a recurrence of disability would be developed but, if accepted, he would not be entitled to compensation because he abandoned suitable work on September 8, 2003.

October 7 and December 4, 2002 letters advising him of his abandonment of suitable work. On September 28, 2003 appellant requested reconsideration and submitted additional medical evidence in support of his claim.

By decision dated December 24, 2003, the Office denied modification of the August 26, 2003 decision terminating benefits. The Office also denied modification of the December 10, 2002 and March 24, 2003 decisions denying his claim for a recurrence of disability as of September 9, 2002.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.⁷ Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.⁸ The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.⁹ To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.¹⁰ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence of record.¹¹

ANALYSIS

The Board finds that the Office did not meet its burden of proof to establish that appellant abandoned suitable work on September 9, 2002. Appellant's claim was accepted for injury resulting in herniated discs at L4-5 and L5-S1 for which he underwent surgery by Dr. Bishop in 1999. He was referred by Dr. Bishop to Dr. Bates for postsurgical care, pertaining primarily to chronic pain in his lumbar spine radiating to the left buttock and hip and right knee. Appellant was treated conservatively with medication, physical therapy and pain management. In 2002 Dr. Bates advised that appellant could return to work in a limited-duty capacity and on July 17, 2002 the employing establishment prepared a limited-duty job offer which the physician reviewed and approved. He advised that appellant could return to work for four hours a day, within specified physical limitations, and gradually increase the hours worked to eight hours a day.

⁷ 5 U.S.C. § 8106(c)(2).

⁸ See *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁹ See *H. Adrian Osborne*, 48 ECAB 556 (1997).

¹⁰ See *Wayne E. Boyd*, 49 ECAB 202 (1997).

¹¹ See *John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

Appellant returned to work on September 4, 2002. There is no dispute that he worked in the limited-duty capacity over the next several days, during which period he experienced pain and stiffness in his low back. On September 9, 2002 he contacted Dr. Bates, who recommended that he stop work. On September 12, 2002 Dr. Bates examined appellant and noted that he experienced a sharp shooting pain in the left gluteal area when he walked and that his movement was guarded when transitioning from sitting to standing. He took appellant off work until further evaluation could be obtained. Beginning September 20, 2002, the physician recommended either further treatment with a local rehabilitation program or assessment by a panel of specialists to determine the necessity for more invasive management techniques.

The Office found that appellant elected to stop work, thereby abandoning the limited-duty position, and did not submit sufficient medical evidence to support that he experienced a worsening of his accepted low back condition. Specifically, it noted that the reports of Dr. Bates were not based on examination of appellant on September 9, 2002 merely mentioned pain and did not provide any objective findings to support disability. The Board does not agree with this characterization of the medical evidence. The reports of Dr. Bates were relied upon by the Office in developing the limited-duty position offered to and accepted by appellant. His examination of appellant on September 12, 2002 was reasonably commensurate to the date of claimed disability commencing September 9, 2002, three days prior. Dr. Bates medical reports submitted after the date appellant stopped work support that there were objective findings beyond a general complaint of pain. In a November 20, 2002 report, he contrasted appellant's ability to walk and change positions prior to returning to work with findings on examination which revealed that appellant's general mobility had significantly decreased, with guarding on range of motion evaluation and generalized muscle stiffness and tenderness over the lumbosacral spine. The restriction in range of motion was confirmed by Dr. Bishop, who indicated that active extension caused tingling to the left hip and straight leg raising on left caused a sharp shock sensation running down the left leg. This confirms the positive straight leg raising findings of Dr. Bates, for which he took appellant off work and instituted a medication regimen for treatment of his complaints. Both Dr. Bates and Dr. Bishop advised against further surgical intervention and recommended that appellant be evaluated for other methodologies to treat his chronic low back pain.

The record reflects that appellant received compensation for partial disability, or four hours a day. Although the Office stated that it had rejected the claim for a recurrence of total disability commencing September 9, 2002, it paid compensation from that date through April 9, 2003, when he again returned to work in a modified limited-duty position for three hours a day.¹²

The Office procedure manual provides that in situations in which a claimant stops work after reemployment, further action is required depending on whether a wage-earning capacity determination has been made.¹³ Where no wage-earning capacity decision has been issued, the

¹² The Board notes that appellant has filed several claims for recurrences of disability related to periods of disability after his return to work in 2003. As there are no final decisions as to this aspect of the claim, it is not before the Board on the present appeal. See 20 C.F.R. § 501.2(c) which provides that there shall be no appeal as to any interlocutory matter.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9 (December 1995).

claims examiner is to inquire as to the employee's reasons for stopping work and make a suitability determination.¹⁴ If the reasons stated by the employee amount to an argument for a recurrence of disability, the claims examiner is to develop and evaluate the evidence upon receipt of a Form CA-2a under the standards of *Terry R. Hedman*.¹⁵ When no claim for a recurrence of disability is filed and a retroactive wage-earning capacity determination is not appropriate, the claims examiner should consider the application of the penalty provision of section 8106(c)(2).¹⁶ It appears that the claims examiner erred in this case by proceeding with an adjudication of the suitable work issue although appellant filed a Form CA-2a and argued that there had been a change in the nature of his injury-related condition.

The Board finds that the Office did not properly terminate appellant's wage-loss compensation benefits under section 8106(c)(2) and will reverse the December 23, 2003 decision.

LEGAL PRECEDENT -- ISSUE 2

When an employee who is disabled from the job due to residuals of an accepted employment-related injury returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, he or she has the burden of proof to establish a recurrence of total disability by the weight of the reliable and probative medical opinion evidence.¹⁷ 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.¹⁸

ANALYSIS -- ISSUE 2

The Office denied appellant's claim of a recurrence of disability on September 9, 2002, finding that he failed to submit sufficient medical evidence to establish a change in the nature and extent of his injury-related condition. The specific defects it found in the reports of Dr. Bates are noted above in the discussion of the medical evidence under the suitable work issue, primarily that the physician merely noted pain as appellant's reason for stopping work. The Office erred in its adjudication of the recurrence of disability claim by stating that subjective complaints of pain are not compensable under the Act. The Board has held that pain due to an employment-related condition can be the basis for the payment of compensation for disability provided there is a proven basis for such pain.¹⁹ In this case, appellant underwent surgery of the lumbosacral spine for herniated discs at two levels. Dr. Bates expressed the opinion that appellant's low back symptoms of pain, stiffness and tenderness were exacerbated following his

¹⁴ *Id.* at subsection b.

¹⁵ 38 ECAB 222 (1986).

¹⁶ Federal (FECA) Procedure Manual, *supra* note 13 at subsection b(2).

¹⁷ *See Terry R. Hedman*, *supra* note 15.

¹⁸ *Id.* *See also Barry C. Peterson*, 52 ECAB 120 (2000).

¹⁹ *See id.* at 126; *Thomas N. Martinez*, 41 ECAB 1006 at 1011 (1990); *Sylvia Lucas (Richard Lucas)*, 32 ECAB 1582, 1586-87 (1981).

return to work on September 4, 2002. The record shows that Dr. Bates was familiar with the factors of appellant's limited-duty work as the physician had reviewed the job description and provided the work limitations relied upon by the employing establishment and Office. His medical opinion was based on a contemporaneous examination of appellant on September 12, 2002 and he subsequently submitted medical reports in which he set forth objective findings to support his conclusion that appellant should stop work. Dr. Bates' November 20, 2002 report reviewed appellant's attempt at performing the limited-duty job, noted difficulties encountered with ambulation and on range of motion, and set forth objective findings on physical examination. The reports of Dr. Bates had noted prior to appellant's return to work that he experienced chronic pain in the lumbosacral region for which various methodologies attempted in order to bring relief. He confirmed that these symptoms were exacerbated after appellant commenced limited-duty work and he recommended that appellant stop work. Dr. Bates stated his conclusion, as follows: "I would definitely consider this instance to be a recurrence of pain or an exacerbation of pain, not as a new injury." The findings and conclusion of Dr. Bates were substantially reiterated by Dr. Bishop, appellant's surgeon.

The Board finds that appellant has submitted probative and substantial evidence from his attending physicians that he sustained a recurrence of total disability as of September 9, 2002 due to residuals of his injury-related condition. The record documents that he experienced a change in the nature and extent of his lumbosacral condition following his return to limited-duty work, described by Dr. Bates as a recurrence of symptoms which could not be attributed to a new injury. The December 24, 2003 decision will be set aside with regard to finding that appellant did not establish a recurrence of total disability. On return of the case record, the Office should pay appropriate compensation for the period September 9, 2002 to April 9, 2003.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to establish that appellant abandoned suitable work on September 9, 2002 and improperly terminated his wage-loss compensation. The Board also finds that appellant has established his claim of a recurrence of total disability commencing September 9, 2002, and is entitled compensation for the four hours of wage loss not paid from that date until his return to limited duty on April 9, 2003.

ORDER

IT IS HEREBY ORDERED THAT the December 24, 2003 decision of the Office of Workers' Compensation Programs be reversed.

Issued: February 17, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member