



disability on August 23, 1993 and returned to part-time, limited duty a year later on August 23, 1994. The Office also accepted that she sustained recurrences of total disability on September 23 and October 12 and November 1 and 15 and December 20, 1994 and January 27, 1995

Appellant resumed part-time, limited-duty work on July 20, 1998. However, she claimed recurrences of disability on July 23, August 3 and 26 and September 28, 1998. The Office denied all four claimed recurrences from July to September 1998.

On June 3, 1999 appellant accepted another part-time, limited-duty assignment and she returned to work on July 19, 1999. She claimed a recurrence of disability on September 16, 1999. Appellant resumed her part-time, limited-duty assignment on October 5, 1999. The Office denied the September 16, 1999 recurrence of disability claim.

Appellant stopped work on April 22, 2003 and she filed a claim for recurrence of disability on September 5, 2003. The relevant medical evidence included medical reports and treatment notes from her treating physician, Dr. Richard E. Memoli, an orthopedic surgeon.

In a report dated March 4, 2003, Dr. Memoli diagnosed cervical spine sprain, cervical myofascitis, cervical radiculopathy, lumbar spine sprain and lumbar radiculopathy. He reported restricted range of motion of the cervical and lumbar spines with paravertebral spasms. Dr. Memoli explained that appellant was to continue limited-duty, 4 hours per day with no pushing, pulling or lifting over 10 pounds. He also restricted above the shoulder work and precluded prolonged standing and stair climbing prior to and following appellant's work assignments.

Dr. Memoli's treatment notes for April 22, 2003, the date of appellant's alleged recurrence, indicated that she returned with persistent complaints and positive physical findings. She continued to have persistent neck and low back pain with radiating pain. Physical examination revealed restricted range of motion of the neck and low back with tenderness and spasm. Dr. Memoli stated that appellant was "to continue limited-duty four hours a day five days a week." He also recommended physical therapy twice weekly as well as medication.

Appellant returned to Dr. Memoli on May 27, 2003 and he noted that her condition was essentially unchanged. He characterized her low back pain as "severe" and noted that she experienced numbness down both legs. Dr. Memoli recommended increasing physical therapy to three times weekly, obtaining a lumbar magnetic resonance imaging (MRI) scan and a trial of epidural steroid injections, as well as continued medication.

When Dr. Memoli examined appellant on June 24, 2003 he noted no change in her complaints and physical findings. He continued to recommend medication and physical therapy and reported that she should "continue off duty."

On July 25, 2003 Dr. Memoli noted that appellant continued to have persistent neck pain and severe low back pain and numbness down both legs. Her physical examination continued to reveal restricted range of motion of the neck and marked restricted range of motion of the low back with paravertebral tenderness and spasm. Dr. Memoli indicated that appellant should continue medication and continue off duty.

An August 1, 2003 MRI scan of the lumbosacral spine revealed lumbar lordosis, scoliosis and a bulging disc with degenerative changes at L3-4, including mild disc space shortening. The MRI scan also showed a central protrusion effacing the ventral convexity of the thecal sac and no canal or foraminal stenosis.

In a report dated September 5, 2003, Dr. Memoli noted that appellant was under his care for cervical spine sprain, cervical myofascitis, cervical radiculopathy, lumbar spine sprain, lumbar radiculopathy and lumbar disc bulge at L3-4, impinging on the thecal sac. He stated that she sustained her injuries while on the job December 12, 1991, when she fell off a chair injuring her neck and low back. Since Dr. Memoli's last report on March 4, 2003, appellant continued to have complaints of persistent pain in the neck and low back. Appellant's physical examination remained unchanged with restricted range of motion of the cervical and lumbar spines and paravertebral spasms. Dr. Memoli referenced her May 27, 2003 visit, but made no mention of the April 22, 2003 examination. He noted that, when he examined appellant on September 5, 2003, her complaints persisted and there were positive physical findings. Dr. Memoli also noted that the recent MRI scan was positive for a disc bulge at L3-4, impinging on the thecal sac. He explained that appellant was scheduled to begin epidural injections and was to remain off duty. At the conclusion of the report, Dr. Memoli reiterated that her injuries were "causally related to the accident of December 12, 1991."

Dr. Memoli referred appellant to Dr. Robert A. Marini, Board-certified physiatrist, who examined her on September 15, 2003. In a September 17, 2003 report, he noted that she originally injured herself on December 12, 1991 and she had returned to work; however, appellant stopped working in April 2003 due to progressive lower back pain. Dr. Marini diagnosed lumbosacral radiculopathy secondary to a herniated disc and he scheduled her for a series of epidural injections.<sup>1</sup>

Appellant saw Dr. Memoli again on October 17, 2003. She stated that she experienced increased low back pain and spasms on April 22, 2003 while at work and as the day went on her pain became too great and she had to leave work. Dr. Memoli noted that appellant was unable to sit, stand or ambulate without increased severe pain. He also indicated that, when he saw her on May 27, 2003, she presented with severe low back pain and numbness down both legs with a marked restricted range of motion and paravertebral spasms. When appellant returned June 24, 2003 there was no change and she was continued on medication and off duty. Dr. Memoli saw her again on July 25, 2003 with persistent complaints and she remained totally disabled. He referenced his September 5, 2003 examination results and the recent MRI scan that was positive for a disc bulge at L3-4 impinging on the thecal sac. The October 17, 2003 physical examination was unchanged and Dr. Memoli reported that appellant remained totally disabled. Dr. Memoli stated that her current condition was causally related to the April 22, 2003 recurrence. Appellant was unable to return to work because she could not sit, stand or ambulate for any prolonged period of time without increased low back pain as well as spasms. Dr. Memoli also stated that she could not bend to lift, nor could she carry without pain and she was unable to push or pull.

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<sup>1</sup> Dr. Memoli subsequently administered the epidural injections on October 8 and November 5, 2003 and January 21, 2004.

In a decision dated December 9, 2003, the Office denied appellant's April 22, 2003 recurrence of disability.

On February 17, 2004 appellant requested reconsideration. She submitted additional treatment records from Dr. Memoli dated November 14, 2003, January 12 and April 5, 2004.<sup>2</sup> Appellant also submitted a February 5, 2004 report from Dr. Memoli, who noted that, when he saw her on April 22, 2003, he advised her to "continue off duty" and to return for follow-up care. He also stated that because of appellant's increased low back pain she had been unable to work since the recurrence on April 22, 2003.

By decision dated May 11, 2004, the Office vacated the December 9, 2003 decision and accepted that appellant sustained a recurrence of disability as of August 1, 2003 causally related to her December 12, 1991 employment injury. Although she claimed a recurrence of disability beginning April 22, 2003, the Office found that the record did not include any objective evidence of a change in her condition until the August 1, 2003 MRI scan, which revealed a disc bulge at L3-4.

### **LEGAL PRECEDENT**

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 that resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>3</sup> This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>4</sup>

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 of establishing 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 employment-related condition or a change in the nature and extent of the light-duty job requirements.<sup>5</sup>

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<sup>2</sup> Dr. Memoli's treatment records revealed that appellant did not receive much, if any, relief from the series of epidural injections Dr. Marini administered from October 2003 to January 2004.

<sup>3</sup> 20 C.F.R. § 10.5(x) (1999).

<sup>4</sup> *Id.*

<sup>5</sup> *Barry C. Peterson*, 52 ECAB 120, 125 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

## ANALYSIS

At the time of her claimed recurrence of disability on April 22, 2003, appellant had been working part-time, limited duty as a modified personnel clerk. She has not alleged that her recurrence was due to a change in the nature and extent of her light-duty job requirements and the record does not support such a finding. Appellant has the burden of proof to establish a recurrence of disability by demonstrating a change in the nature and extent of the employment-related condition.<sup>6</sup>

The Office found that appellant demonstrated a change in her condition as of August 1, 2003 based on the lumbar MRI scan obtained that date that revealed a disc bulge at L3-4 with impingement on the thecal sac. However, she contends that she became totally disabled as of April 22, 2003. The Board finds that the medical evidence does not demonstrate a change in the nature and extent of appellant's condition on April 22, 2003 the date of her alleged recurrence of disability.

When Dr. Memoli examined appellant on April 22, 2003 he reported that she continued to have persistent neck and low back pain with radiating pain. Physical examination revealed restricted range of motion of the neck and low back with tenderness and spasms. Dr. Memoli stated that appellant was "to continue limited[-]duty four hours a day five days a week." Appellant contends that Dr. Memoli advised her not to work on April 22, 2003. In his February 5, 2004 report, Dr. Memoli clarified that, when he saw her on April 22, 2003, he advised her to "continue off duty."

While Dr. Memoli may have told appellant something different than what he originally reported in his April 22, 2003 treatment notes, this does not overcome the absence of objective evidence to support her claimed recurrence of disability on April 22, 2003. The April 22, 2003 physical examination findings are consistent with Dr. Memoli's March 4, 2003 findings, when appellant was reportedly capable of performing her duties as a modified personnel clerk. On both occasions he reported restricted range of motion of the cervical and lumbar spines with paravertebral spasms. Thus, while Dr. Memoli may have instructed appellant to stop working on April 22, 2003 his treatment notes on that date do not reveal any change in her condition since her last examination on March 4, 2003.

Dr. Memoli next saw appellant on May 27, 2003. He characterized her low back pain as "severe" and noted that she experienced numbness down both legs. Dr. Memoli did not comment on appellant's ability to work. The June 24, 2003 treatment notes were the first documentation from Dr. Memoli that appellant should "continue off duty." He imposed similar restrictions when he examined her on July 25, 2003. However, neither the June 24, 2003 nor the July 25, 2003 treatment records provide a clear indication of the objective basis for Dr. Memoli's decision to prohibit appellant from performing her part-time, limited-duty position as a modified personnel clerk.

It was not until September 5, 2003 that Dr. Memoli referenced any objective evidence indicating a change in appellant's condition. At that time, he noted that her August 1, 2003 MRI

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<sup>6</sup> *Terry R. Hedman, supra* note 5.

scan revealed a disc bulge at L3-4 impinging on the thecal sac.<sup>7</sup> Although Dr. Memoli may have told appellant to stop working as early as April 22, 2003, the medical evidence of record did not establish total disability until August 1, 2003. Accordingly, the record does not establish that she sustained a recurrence of disability as of April 22, 2003.

**CONCLUSION**

The Board finds that appellant failed to establish that she sustained a recurrence of disability on April 22, 2003 causally related to her December 12, 1991 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 11, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 25, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>7</sup> A prior lumbar MRI scan dated September 17, 1999 showed a mild to moderate degree of degenerative disc changes of the L3-4 disc with decreased height.