

sacral and coccyx injuries and left knee injury on June 29, 1999. Appellant returned to work in a modified-duty position on April 14, 2000.¹ The Office accepted that she stained recurrences of total disability on June 19, April 18 to 28, 2000 and August 3 to 17, 2001.

On February 26, 2003 Dr. Don R. Jardine, a Board-certified orthopedic surgeon and attending physician, completed a note stating that she was disabled for work due to increased inflammation and spasm in her lumbar spine and both buttocks. He indicated that she could return to work on March 5, 2003. Dr. Jardine continued to find that appellant was totally disabled on March 5 and 12, 2003 noting that she could return to work in six to eight weeks.

The Office referred appellant for a second opinion evaluation with Dr. Otto W. Wickstrom, a Board-certified orthopedic surgeon, on April 7, 2003.

Appellant filed a notice of recurrence of disability on April 12, 2003 alleging that on February 26, 2003 she sustained a recurrence of total disability due to her May 18, 1999 employment injuries. She described her condition as inflammation, spasms and increased pain in the lower back, hips and right leg.

In a treatment note dated April 16, 2003, Dr. Jardine stated that appellant reported increased pain into her right calf throughout the day. She had difficulty sitting, standing and walking as well as numbness in her anterior thighs. Dr. Jardine found right lower back pain, a slow and cautious gait pattern with a limp favoring the right lower extremity. He noted that appellant had limited lumbar flexion and extension, but that strength and reflexes were normal.

In a form report on April 28, 2003, Dr. Jardine indicated that appellant's current condition was "residual disabling pain from original injury." He diagnosed thoracic, lumbar and cervical sprain, Grade 1 spondylolisthesis and trochanteric bursitis. Dr. Jardine indicated with a checkmark "yes" that these conditions were caused by an employment activity, recurrent residual pain. He found that appellant was totally disabled.

By letter dated May 19, 2003, the Office requested additional factual and medical evidence in support of appellant's claimed recurrence of total disability.

Dr. Wickstrom, the second opinion physician, completed a report on May 5, 2003 and reported that appellant had no lower extremity atrophy, equal and reactive deep tendon reflexes, normal knees with good range of motion with moderate crepitation bilaterally with no effusion. He stated that appellant's bilateral hip range of motion was 120 degrees of flexion and extension to 0 degrees. Dr. Wickstrom noted that appellant had 180 degrees of spine extension and flexion of only 40 degrees with moderate lumbar lordosis and dorsal kyphosis, but no deformity or spasm. He stated that appellant's neck range of motion was normal with no spasm or deformity.

In response to the Office's questions, Dr. Wickstrom stated that there was no evidence to suggest that appellant's accepted employment injuries were present and active. He found that she had no residuals of the accepted conditions. Dr. Wickstrom found that appellant could not

¹ The Office issued a decision on April 17, 2000 terminating appellant compensation benefits on the grounds that she refused suitable work. The Office vacated this decision on July 11, 2000.

perform the duties of her date-of-injury position due to her age, osteoporosis, spondylolisthesis, increased lumbar lordosis, medications, heart condition, panic attacks and her husband's illness. He concluded, "I have stated that her inability to perform her date-of-injury job is not due to her work-related injuries which have ceased to exist."

On July 1, 2003 the Office provided Dr. Jardine with a copy of Dr. Wickstrom's report and requested a response.

By decision dated July 24, 2003, the Office denied appellant's claim for a recurrence of total disability beginning February 26, 2003.

The Office proposed to terminate appellant's compensation benefits by letter dated August 1, 2003.

Appellant requested reconsideration on August 8, 2003 and disputed Dr. Wickstrom's report.

By decision dated September 4, 2003, the Office terminated appellant's compensation and medical benefits effective that date.

In a report dated September 3, 2003, Dr. Jardine noted appellant's history of injury and stated that she continued to work with residual pain and was generally able to work with periods of increased pain in the same areas as her 1999 employment injuries occasionally rendering her totally disabled. He stated that appellant experienced a period of increased pain in the lumbar spine and right buttock with sciatica beginning on February 26, 2003. Dr. Jardine reviewed his treatment notes and Dr. Wickstrom's report and concluded that appellant had not fully recovered from her employment injuries sustained in 1999. He found that on February 25, 2003 while at work she was sitting in her chair, rotating right and left frequently to move materials and was frequently semi-standing and leaning across her work table to reach her work. Dr. Wickstrom noted that these activities resulted in increased pain in the low back, buttocks and right lateral thigh. He opined that this was a recurrence and an aggravation of a continuous injury dating back to May 18, 1999. Dr. Jardine stated that appellant was totally disabled due to her injury-related condition and continued to experience residuals of the accepted conditions.

By decision dated September 9, 2003, the Office reviewed appellant's recurrence claim on the merits and denied modification of the July 24, 2003 decision.

Appellant requested reconsideration on September 9, 2003 of the September 4, 2003 termination decision.² On October 14, 2003 she again requested reconsideration of the denial of recurrence.

In a report dated October 17, 2003, Dr. Jardine stated that appellant experienced some improvement following her initial employment injury, but that she never fully recovered. He

² The Office did not respond to this request for reconsideration. As the most recent decision addressing the termination of appellant's compensation and medical benefits was dated September 4, 2003 more than one year before the date of appellant's appeal to the Board on January 6, 2005 the Board will not consider this issue on appeal. 20 C.F.R. § 501.3(d)(2).

stated that she sustained an exacerbation and recurrence on February 26, 2003. Dr. Jardine stated:

“[W]hen patients have falls such as [appellant] sustained in the original injury with the breakage of the unstable chair, she sustained serious injury including injuries of soft tissue, bone and connective tissue. When this occurs there is bleeding and tearing of tissue and the patient develops nociceptive injuries in addition to somatic pain. The nociceptors are small nerve endings that are microscopic but very sensitive to any trauma and once they have been injured they remain injured on a permanent basis. This sensitivity is of such a nature that increased loads accepted on those injured areas will produce nociceptive pain responses following such trauma. Unfortunately these tissues do not recover and the injured nerve endings sensitivity is producing an abnormal amount of pain after having been bathed in a number of chemicals that are extruded at the time the tissues are injured.”

Dr. Jardine opined that appellant’s activities at work were sufficient to increase her pain levels due to the injuries of the sensitive nerve endings at the time of her initial injury.

By decision dated November 19, 2003, the Office denied modification of the September 9, 2003 recurrence decision.

On July 2, 2004 appellant requested reconsideration of the November 19, 2004 decision, denying her claim for recurrence of disability. By decision dated October 12, 2004, the Office denied modification of that decision.

LEGAL PRECEDENT

A recurrence of disability is the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment which caused the illness. The term also means an inability to work that takes place 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.³

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-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 to show that she cannot perform such limited-duty work. As part of this burden,

³ 20 C.F.R. § 10.5(x).

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 limited-duty job requirements.⁴

The Federal Employees' Compensation Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁵ The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁶

ANALYSIS

Appellant's attending physician, Dr. Jardine, a Board-certified orthopedic surgeon, opined that she had sustained a recurrence of total disability causally related to her accepted employment injuries beginning on February 26, 2003. The Office referral physician, Dr. Wickstrom, a Board-certified orthopedic surgeon, found on May 5, 2003 that she had no disability or residuals due to her accepted employment injuries. Both physician's provided findings on physical examination and offered explanations for their various opinions. Dr. Wickstrom attributed appellant's current complaints and disability for work due to several nonemployment-related conditions and stated that her work-related injuries had ceased to exist. In reports dated September 3 and October 27, 2003, Dr. Jardine disagreed with Dr. Wickstrom's conclusions and stated that appellant had never fully recovered from her accepted employment injuries and was rendered susceptible to disability due to pain from these injuries which included nociceptive injuries.

As there is an unresolved difference of opinion between appellant's attending physician and the Office referral physician regarding the nature and extent of her employment-related disability and medical residuals, the Board finds that this case must be remanded to the Office for referral to an appropriate Board-certified physician to resolve the conflict of medical opinion. The Office should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate physician, to determine whether she has sustained a recurrence of disability on February 26, 2003, whether she has any disability as a result of her accepted employment injuries and whether she has any medical residuals as a result of these conditions. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

⁴ *Joseph D. Duncan*, 54 ECAB ____ (Docket No. 02-1115, issued March 4, 2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁵ 5 U.S.C. §§ 8101-8193, 8123.

⁶ 20 C.F.R. § 10.321.

CONCLUSION

The Board finds that there is an unresolved conflict of medical opinion evidence in the record regarding the nature and extent of appellant's injury-related condition.

ORDER

IT IS HEREBY ORDERED THAT the October 12, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: October 20, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board