

On August 23, 2004 appellant filed a claim (Form CA-7) for wage-loss compensation for the period beginning August 23, 2004. She submitted an emergency room treatment note and a report dated July 11, 2004 from a nurse whose signature is illegible regarding her back pain. Appellant also submitted a January 14, 2004 prescription from Dr. Howard J. Hassell, an attending orthopedic surgeon, which diagnosed lumbar disc displacement and lumbago. He stated that her prognosis was good.

By letter dated September 14, 2004, the Office advised appellant to submit rationalized medical evidence establishing her disability for work during the claimed period. She also submitted Dr. Hassell's prescription and reports covering intermittent dates from September 5, 2003 through September 21, 2004 which indicated that she continued to experience back problems and required medical treatment. Unsigned treatment notes covering the period April 20 through August 11, 2004, contained the typed name of Cecilia Noriega¹ and addressed a discogram that Dr. Hassell performed on July 9, 2004 and appellant's post surgery status. In a July 9, 2004 report, Dr. Jorge A. Velez, a Board-certified radiologist, reviewed x-ray images from Dr. Hassell's discogram and found, among other things, degenerative changes at L5-S1. His July 9, 2004 computerized tomography (CT) scan report regarding appellant's lumbar spine revealed abnormal L4-5 and L5 disc levels. On September 19, 2004 Dr. David B. Riepe, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan of appellant's lumbar spine, which found small disc protrusions at L4-5 and L5-S1 without central stenosis. There were degenerative facet changes at L5-S1.

Appellant submitted Dr. Hassell's September 9, 2004 treatment note which indicated that she was status post multiple level lumbar discogram and she had degenerative joint disease at L4-5 and L5-S1, positive provocation with concordant pain at L4-5 and L5-S1 and normal L3-4 lumbar discs. He recommended physical therapy and a functional capacity evaluation (FCE) test. In a September 28, 2004 treatment note, Dr. Hassell indicated that following bilateral bi-level epidural injections at L4-5 and L5-S1 appellant's left side pain cleared up but she still experienced discomfort on the right side. Ms. Noriega provided an August 11, 2004 addendum to Dr. Hassell's August 3, 2004 dictation, which noted his recommendation that appellant undergo physical therapy and an FCE.

Richard J. Merta, appellant's physical therapist, submitted an FCE report dated September 14, 2004, which noted her inability to perform certain tests due to increased symptom responses to the physical activities. She tested at the sedentary category level in the restricted and unrestricted work plan. In treatment notes dated September 28 and 29, 2004, Mr. Merta provided his examination findings and treatment plan.

On November 18, 2003 Dr. Hassell prescribed an interferential and muscle stimulator and monitoring product for appellant to increase her function and decrease her pain.

By decision dated October 21, 2004, the Office denied appellant's claim for wage-loss compensation. It found that she failed to submit any medical evidence establishing that she was totally disabled on or after August 23, 2004 due to her May 30, 2003 employment injuries.

¹ The Board notes that Ms. Noriega's professional qualifications are not contained in the case record.

On October 22, 2004 appellant submitted an October 8, 2004 report from Mr. Merta, which revealed that her back pain had decreased. Mr. Merta's October 13, 15 and 18, 2004 treatment notes received by the Office on October 28, 2004, found that appellant had decreased pain and increased mobility. Dr. Hassell's October 26, 2004 treatment note reiterated his prior diagnoses and found that appellant's back condition had improved.

By letter dated November 8, 2004 letter, the Office referred appellant, along with the case record, a statement of accepted facts and a list of questions to be addressed, to Dr. Govindasamy Durairaj, a Board-certified orthopedic surgeon, for a second opinion medical examination.

On November 15, 2004 the Office received additional treatment notes from Mr. Merta dated October 8, 12, 13, 15, 18, 25 and 29 and November 1, 5, 9 and 11, 2004 regarding appellant's back condition. It also received Dr. Hassell's November 9, 2004 treatment note, which found that, although appellant still complained of discomfort in her back, her degenerative disc disease condition was stable.

In a November 22, 2004 report, Dr. Durairaj reviewed the statement of accepted facts and appellant's medical history. He reported her complaints of pain in the lower back and left leg and his essentially normal findings on physical and x-ray examination. Dr. Durairaj diagnosed mild disc degeneration at L3-4 and L5-S1 and disc degeneration with a central disc protrusion at L4-5. He opined that, based on a September 7, 2003 MRI scan, discogram and post-discogram computerized axial tomography scan, appellant's multi-level degenerative disc disease could be preexisting and probably was aggravated by the May 30, 2003 employment injury. Dr. Durairaj further opined that this condition caused appellant's disability for work since May 30, 2003. He indicated that it was not unusual for this condition to last 12 to 18 months. Dr. Durairaj stated that the proper diagnosis was aggravation of the preexisting degenerative disc disease with central disc protrusion at L4-5 and further stated that the condition was permanent. In an accompanying work capacity evaluation dated November 22, 2004, he related that appellant was unable to perform her regular work duties and set forth her permanent physical limitations.

On December 3, 2004 appellant submitted Dr. Hassell's October 19 and 26, 2004 treatment notes which indicated that appellant's back condition was stable.

By letter dated November 4, 2004, received by the Office on December 20, 2004, appellant requested an oral hearing before an Office hearing representative regarding the Office's October 21, 2004 decision. She submitted Dr. Hassell's December 21, 2004 treatment note which indicated that he reviewed Dr. Durairaj November 22, 2004 report and stated that Dr. Durairaj essentially concurred with his treatment plan. In a November 9, 2004 disability certificate, Dr. Hassell stated that appellant was able to return to work on that date. His January 28, 2005 duty status report found that appellant suffered from low back pain and revealed her physical limitations. Dr. Hassell's treatment notes dated September 11, 2004 through April 15, 2005, indicated that appellant's back conditions were not improving and that she needed a laminectomy, discectomy and interbody fusions certainly at L4-5 and probably at L5-S1 and her continuing back problems following an April 4, 2005 lumbar myelogram. His February 28 and March 8, 2005 prescriptions for an ergonomic chair indicated that appellant had degenerative disc disease with a bulging disc and low back pain. In duty status reports dated

March 8 and 28, 2005, Dr. Hassell diagnosed low back pain and noted appellant's physical limitations.

Appellant submitted an August 1, 2004 report from a nurse whose signature is illegible. An April 4, 2005 CT scan was performed by Dr. Andrew E. Auber, a Board-certified radiologist, following the lumbar myelogram. He diagnosed severe degenerative disc disease at L4-5. Dr. Auber was unable to exclude chronic discitis although he felt that it was less likely. He concluded that the remainder of the study was normal.

Appellant submitted several CA-7 forms claims for wage-loss compensation for the period April 21 through August 22, 2005.²

By letter dated May 26, 2005, the Office requested that Dr. Hassell review Dr. Durairaj's May 30, 2003 report and provide comments about it.

On May 27, 2005 the Office received Dr. Hassell's May 13, 2005 treatment note, which diagnosed status post degenerative disc disease at L4-5, status post intradiscal electrotherapy (IDET) at L4-5 and discitis at L3-4. He found a definite improvement in appellant's conditions.

In a decision dated June 3, 2005, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing. It found that she did not timely request a hearing. The Branch of Hearings and Review exercised its discretion and denied her hearing request on the basis that the issue in the case could be resolved by requesting reconsideration and submitting additional medical evidence establishing that she sustained a recurrence of disability on or after August 23, 2004 causally related to the May 30, 2003 employment injuries.

In a June 16, 2005 letter, appellant contended that her oral hearing request was timely filed as an accompanying copy of a registered mail receipt from the U.S. Postal Service indicated that it was received by the Office on November 12, 2004.

Appellant submitted Dr. Hassell's July 5, 2005 treatment note which reiterated the diagnoses of status post degenerative disc disease at L4-5, status post IDET at L4-5 and discitis at L3-4. He stated that appellant was tolerating working four hours a day.

By letter dated July 22, 2005, the Office indicated that appellant had accepted a hearing date of July 25, 2005.

On August 3, 2005 the Office received Dr. Hassell's July 3, 2005 disability certificate releasing appellant to return to sedentary work due to her back injury, four hours a day. In an April 4, 2005 postoperative note, he stated that appellant's conditions were stable following a lumbar myelogram. Dr. Hassell's undated report diagnosed lumbar degenerative disease with radiculopathy. In treatment notes dated April 4, 2005, he indicated that appellant underwent a lumbar myelogram on that date. In an August 15, 2005 report, Dr. Hassell stated that appellant could not return to work following her May 30, 2003 employment injuries because she had not

² The employing establishment's June 21, 2005 letter indicated that appellant was placed in a nonduty status as of that date and that she was going to be called back to work on approximately August 15, 2005.

reached maximum medical improvement based on MRI scan and x-ray findings, a discogram and September 14, 2004 FCE. He noted that Dr. Durairaj reached the same conclusion. Dr. Hassell further noted that appellant was released to return to work on November 9, 2004 although she did not return to work until February 22, 2005. His August 16, 2005 treatment note reiterated his prior diagnoses. Dr. Hassell stated that his findings were essentially unchanged with the exception of a new finding that appellant had radiation in her hips that was intermittent. He recommended continued medical treatment.

Based on Dr. Hassell's July 5, 2005 comments regarding Dr. Durairaj's November 22, 2004 report, the Office, in a September 14, 2005 letter, expanded the acceptance of appellant's claim to include permanent aggravation of lumbar degenerative disc disease at L3-4 and L5-S1 and a lumbar herniated disc at L4-5.

In an October 20, 2005 decision, a hearing representative affirmed the Office's October 21, 2004 decision. She found that appellant failed to submit rationalized medical evidence establishing that she was totally disabled on or after August 23, 2004 due to her May 30, 2003 employment injuries.

LEGAL PRECEDENT

As used in the Federal Employees' Compensation Act,³ the term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁴

Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she was disabled for work as the result of an employment injury.⁵ To meet this burden appellant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor(s). The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

⁵ *Thomas M. Petroski*, 53 ECAB 484 (2002).

⁶ *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

It is well established that, when the Office refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, the Office should secure an appropriate report on the relevant issues.⁷

ANALYSIS

In this case, the Office accepted appellant's claim for lower back muscle spasm and sciatica. She submitted several CA-7 claim forms contending that her accepted employment-related conditions rendered her totally disabled for work on intermittent dates from August 23, 2004 through August 22, 2005. The Office denied these claims. The Board, however, finds that this case is not in posture for decision regarding whether appellant is entitled to wage-loss compensation for the period claimed.

The Office referred appellant to a second opinion examination by Dr. Durairaj. In a November 22, 2004 medical report, he diagnosed mild disc degeneration at L3-4 and L5-S1 and disc degeneration with a central disc protrusion at L4-5. Dr. Durairaj further diagnosed aggravation of the preexisting degenerative disc disease with central disc protrusion at L4-5 and opined that this condition was permanent based on a September 7, 2003 MRI scan. He also opined that this condition caused appellant's disability for work since May 30, 2003 and that it was not unusual for the condition to last 12 to 18 months. In a November 22, 2004 work capacity evaluation, Dr. Durairaj stated that appellant was unable to perform her regular work duties and set forth her permanent physical limitations. Based on his report, the Office expanded the acceptance of appellant's claim to include a permanent aggravation of lumbar degenerative disc disease at L3-4 and L5-S1 and a lumbar herniated disc at L4-5. Dr. Durairaj attributes appellant's disability to degenerative disc disease since May 30, 2003, the date of injury and did not offer a date when the employment effects on the condition resolved, although he noted that it was not unusual for the condition to last 12 to 18 months. Moreover, on the FCE, he opined that appellant remained disabled due to the degenerative disc disease without further explanation. While Dr. Hassell, appellant's attending physician, agreed with Dr. Durairaj's opinion regarding her disability for work beginning May 30, 2003, the Board finds that Dr. Durairaj's opinion is insufficient to establish appellant's claim for disability on or after August 23, 2004 as he did not provide sufficient medical rationale explaining the causal relationship between the claimed disability and the May 30, 2003 employment injuries. As such, the issue of whether appellant had disability on or after August 23, 2004 causally related to her May 30, 2003 employment injuries remains unresolved. Therefore, the Office should seek clarification from Dr. Durairaj as to why appellant's claimed disability was caused by the accepted employment injuries. Following this and any other further development as deemed necessary, the Office should issue an appropriate merit decision on appellant's claim.

⁷ See *Robert Kirby*, 51 ECAB 474, 476 (2000); *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant has established entitlement to wage-loss compensation for total disability on or after August 23, 2004 due to her accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2005 decision of the Office of Workers' Compensation Programs be vacated and the case remanded to the Office for proceedings consistent with this decision.

Issued: July 27, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board