

**United States Department of Labor
Employees' Compensation Appeals Board**

K.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Stockton, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 06-1192
Issued: November 17, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 3, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 27, 2006 and a nonmerit decision dated July 7, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing a recurrence of total disability on April 28, 2005; and (2) whether the Office properly declined to reopen appellant's schedule award claim for consideration of the merits under section 8128(a) of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On February 12, 1995 appellant, then a 43-year-old mail handler, filed an occupational disease claim alleging that he developed a herniated lumbar disc while driving a motorized postal vehicle in the performance of his federal duties. Appellant underwent a right hemilaminotomy

and discectomy at L4-5 on April 3, 1997. The Office accepted appellant's claim for herniated disc at L4-5 and subsequent surgery on October 10, 1997. The Office authorized compensation for total disability from December 27, 1996 to November 7, 1997. Appellant returned to work four hours a day on February 17, 1998.

Dr. Mark F. Hambly, a Board-certified neurosurgeon, examined appellant on November 24, 1998 and found that the herniated disc at L4-5 had protruded again. Dr. Hambly diagnosed recurrent right L4-5 disc protrusion and chronic low back pain recommended additional surgery which appellant declined. The Office reentered appellant on the periodic rolls for total disability on January 21, 1999. Appellant began working one hour a day at the employing establishment on March 16, 1999. The Office referred appellant to Dr. Kuldeep Sidhu, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated August 13, 2003, Dr. Sidhu diagnosed status post excision of L4-5 disc with recurrent right sided disc herniation. He provided appellant's work restrictions of no repeated bending or lifting more than 15 pounds. Dr. Sidhu stated that appellant could not sit in one position for more than half an hour and could not stand for more than 15 minutes. He also noted appellant's complaints of moderate to severe pain in the lower back.

Appellant returned to work at the employing establishment on December 10, 2003 working four hours a day as a modified mail handler. His duties were to work in the expeditor's office preparing and affixing labels, color coding labels for incoming containers and answering telephones in the expeditor's office. On December 18, 2003 the Office reduced appellant's compensation benefits based on his light-duty employment.

Appellant underwent a functional capacity evaluation on January 5, 2004, which indicated that he could stand for 20 minutes and lift no more than 15 pounds.

Appellant's attending physician, Dr. Moris Senegor, a Board-certified neurosurgeon, restricted appellant to two hours of work a day on January 6, 2004. Appellant accepted a new light-duty position on January 10, 2004 working two hours a day in the expeditor's office answering the telephone, paging calls, filling in labels in accordance with his limitations.

The Office referred appellant for a second opinion evaluation with Dr. Rajeswari Kumar, a physician Board-certified in physical medicine and rehabilitation, to determine the extent of any permanent impairment. In a report dated March 23, 2004, Dr. Kumar found that appellant had sensory changes in the L2, L3 and L4 nerve root distributions. The Office medical adviser reviewed the medical evidence of record on May 7, 2004 and found that appellant had a Grade 2 (70 percent) impairment of the branches of L5 or 4 percent impairment of each lower extremity. By decision dated May 20, 2004, the Office granted appellant a schedule award for four percent impairment to each of his lower extremities.

The Office rejected appellant's claim for an additional two hours of compensation per day by decision dated May 20, 2004. It found that the weight of the medical evidence established that he could work four hours a day.

Dr. Senegor opined that appellant's condition had worsened on September 29, 2004. He recommended a magnetic resonance imaging (MRI) scan. On December 1, 2004 Dr. Senegor

reviewed appellant's test results and found a disproportionately severe amount of degeneration at L4-5 with facet and ligamentous hypertrophy and canal stenosis. He recommended surgical intervention. On February 2, 2005 Dr. Senegor noted that appellant was attempting to obtain full disability from work and was not likely to pursue surgery.

Dr. Senegor completed a report on April 28, 2005 and reviewed appellant's medical history. He stated that appellant's November 9, 2004 MRI scan revealed the presence of severe degenerative disc disease at L4-5 with recurrent disc herniation as well as wide-spread extensive degenerative disc disease in the entire lumbar spine in all the other discs involved. Dr. Senegor stated that appellant should be placed on total disability. He included a copy of the November 9, 2004 MRI scan.

In a report dated May 18, 2005, Dr. Senegor stated that appellant worked two hours a day. He noted that appellant's MRI scan revealed severe degenerative disc disease at L4-5 with recurrent disc herniation as well as widespread and extensive degenerative disc disease in the entire lumbar spine. Dr. Senegor stated: "The patient should be granted total disability at this time to make him continue to work despite his proven structural spine disease is cruel."

Appellant requested reconsideration of his schedule award on May 19, 2005. He stated that his condition had worsened as demonstrated by the MRI scan and that he experienced increased pain, unsteadiness and numbness. Appellant stated that he had not been adequately compensated for his condition. He resubmitted the January 5, 2004 functional capacity evaluation. On June 8, 2005 appellant completed a claim for compensation requesting wage-loss compensation from April 29 through May 27, 2005.

In a letter dated June 15, 2005, the Office requested that appellant submit a notice of recurrence of disability as well as supportive evidence. The Office allowed 30 days for a response.

By decision dated June 30, 2005, the Office denied reopening appellant's schedule award claim for review of the merits finding that he had failed to submit the necessary new and relevant evidence in support of his reconsideration request.

Appellant completed a notice of recurrence on July 15, 2005 and alleged that he had sustained a recurrence on April 28, 2005. He noted that his pain, immobility and unsteadiness gradually worsened from his job duties. Appellant alleged further degeneration of his lumbar spine stenosis and recurrence of his lumbar disc herniation due to his job duties.

Dr. Melford A. Larson, a Board-certified internist, completed a report on July 11, 2005. He stated that appellant noted a recurrence and aggravation of pain radiating down both legs on March 30, 2005 and again on April 28, 2005. He noted that appellant was unstable when he walked due to lower extremity numbness and weakness. Dr. Larson stated that appellant was unable to sit more than 10 minutes at a time and unable to stand or walk in a completely erect posture. He diagnosed degenerative disc disease of lumbar spine at L4-5 with moderate compression of the thecal sac and right L5 nerve pain. Dr. Larson opined: "In my opinion this patient is no longer capable of gainful employment at even any limited time duration until his back problem is resolved."

Dr. Senegor completed a form report on September 23, 2005 and diagnosed degenerative lumbar disc and herniated lumbar disc. He indicated with a checkmark “yes” that appellant’s condition was due to his employment and stated that appellant was on workers’ compensation. Dr. Senegor found that appellant was totally disabled. He further stated that appellant was injured and aggravated due to job duty.

In a letter dated November 17, 2005, the Office requested additional factual and medical evidence from appellant regarding his recurrence of disability. The Office allowed appellant 30 days to respond. Appellant submitted a report from Dr. Senegor dated December 22, 2005, which stated: “[T]here was a progression of the degenerative process in this patient’s lumbar spine over the eight years that ensued after his 1997 operation and that progression reached a critical junction at which time his symptoms became severe enough for him to be unable to work.”

By decision dated January 27, 2006, the Office denied appellant’s claim for recurrence of total disability finding that he had not submitted sufficient evidence to establish either a change in the nature and extent of his injury-related condition or a change in the nature and extent of his light-duty job requirements.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability is defined as 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 that caused the illness. This 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 or when the physical requirement of such an assignment are altered so that they exceed his or her established physical limitations.¹

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-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 to show that he cannot perform such limited-duty work. 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 limited-duty job requirements.²

¹ 20 C.F.R. § 10.5(x).

² *Joseph D. Duncan*, 54 ECAB 471 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

A claimant for each period of disability claimed, has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.³

ANALYSIS -- ISSUE 1

In support of his claim for a change in the nature and extent of his injury-related condition, appellant submitted reports from Dr. Senegor, a Board-certified neurosurgeon, who opined that appellant's condition had worsened beginning September 29, 2004. He reviewed an MRI scan and found a disproportionately severe amount of degeneration at L4-5 with facet and ligamentous hypertrophy and canal stenosis. Dr. Senegor stated that appellant was totally disabled. On December 22, 2005 he stated that appellant's degenerative spine condition had progressed since his 1997 surgery such that appellant was unable to work.

While Dr. Senegor reported that appellant was totally disabled due to his degenerative spine condition, he did not offer sufficient explanation that appellant's current total disability was due to his accepted employment injury of herniated disc at L4-5 and subsequent surgery. Rather, the physician addressed the nonemployment-related condition of degenerative disc disease. In a December 22, 2005 report, Dr. Senegor noted that appellant's condition had worsened, but did not attribute this condition to either appellant's surgery or his accepted herniated disc. The only report discussing causal relationship between appellant's employment and his current condition is the September 23, 2005 form report, which indicates with a checkmark "yes" that appellant's condition was due to his employment. The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's condition was related to the history given is of little probative value. Dr. Senegor further stated that appellant's condition was aggravated due to his job duties. Without any explanation or rationale for the conclusion reached, this report is insufficient to establish causal relationship between the diagnosed condition and the employment activity.⁴

Dr. Larson, a Board-certified internist, completed a report on July 11, 2005 and related that appellant experienced pain radiating down both legs on March 20 and April 28, 2005. He found that appellant was totally disabled and diagnosed degenerative disc disease of the lumbar spine. Dr. Larson attributed appellant's disability to degenerative disc disease rather than to his accepted employment injury. His report does not support appellant's claim for a change in the nature and extent of his injury-related condition. Dr. Larson did not explain how appellant's disability in 2005 was caused or contributed to by the accepted injury.

The Office has not accepted that appellant's diagnosed condition of degenerative disc disease was caused or aggravated by his employment. The only accepted conditions are herniated disc and resulting surgery. Appellant has submitted no rationalized medical opinion

³ *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁴ *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

evidence attributing his current total disability to a worsening of these accepted employment-related conditions. Therefore, he has not established a recurrence of total disability due to a change in the nature and extent of his injury-related condition.

LEGAL PRECEDENT -- ISSUE 2

A claimant may seek an increased schedule award if the evidence establishes that she sustained an increased impairment at a later date causally related to her employment injury.⁵ Office procedure provides that a claim for an increased schedule award may be based on an incorrect calculation of the original award or an increased impairment at a later date which is due to work-related factors. In such a situation, an increased schedule award may be payable if supported by the medical evidence.⁶

ANALYSIS -- ISSUE 2

In its June 30, 2005 decision, the Office treated appellant's claim that he sustained increased permanent impairment of his lower extremities as a request for reconsideration of its May 20, 2004 decision granting him schedule awards for four percent impairment to each of his lower extremities. This was improper as appellant claimed an increased impairment due to work factors which occurred during a period after the original granting of his schedule awards; he did not claim an incorrect calculation of the original award. Although appellant used the term "reconsideration" in his May 19, 2005 letter, he clearly expressed a request for an increased schedule award due to a claimed worsening of his permanent impairment. For example, he indicated that his condition had worsened and referred to the November 4, 2004 MRI scan as support for an additional schedule award.

As appellant has made a claim for an increased schedule award for his lower extremities, he is entitled to a merit decision on the medical evidence. The Office has not determined appellant's entitlement to a schedule award for any increased impairment to his lower extremities. The case will be remanded to the Office for further development to be followed by an appropriate decision.

CONCLUSION

The Board finds that appellant has not submitted the necessary medical evidence to establish a change in the nature and extent of his accepted injury-related condition such that he is totally disabled. The Board further finds that the Office improperly treated appellant's request for an additional schedule award as a request for reconsideration.

⁵ *Linda T. Brown*, 51 ECAB 115, 116 (1999); *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7.b (August 2002). In addition, Office procedure provides that a request for reconsideration of a schedule award based on a disagreement with the percentage awarded must be distinguished from a situation where a claimant who previously received an award is filing for an increased impairment due to a worsening of the claimant's medical condition due to deterioration of his condition or increased exposure. Such a request for increased impairment is not subject to the one-year time limitation for reconsideration. Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsiderations, Chapter 2.1602.5.b (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2006 decision of the Office of Workers' Compensation Programs is affirmed. The June 30, 2005 decision of the Office is set aside and remanded for a merit decision.

Issued: November 17, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board