United States Department of Labor
Employees' Compensation Appeals Board

W.V., Appellant	)	
and	)	**Docket No. 06-1228**
	)	**Issued: November 2, 2006**
U.S. POSTAL SERVICE, FREMONT POST OFFICE, Fremont, MI, Employer	)	

Appearances:
Randall D. Fielston, Esq., for the appellant
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 an April 11, 2006 decision of the Office of Workers' Compensation Programs' decision denying her claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.[1]

ISSUE

The issue is whether appellant has established that she sustained a recurrence of disability.

[1] The record contains a February 10, 2006 decision denying appellant's November 16, 2005 claim for a schedule award related to the accepted spinal injuries. On March 3, 2006 appellant requested an oral hearing. There is no evidence of record that the oral hearing was held or that the Office issued a final decision on the schedule award issue. As the schedule award matter is in an interlocutory posture, it is not before the Board on this appeal. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

The Office accepted that on January 22, 2005 appellant, then a 56-year-old rural carrier, sustained a sprain/strain of the neck, thoracic and lumbar regions with joint derangement when the station wagon she was driving while delivering mail was struck from behind by a car.

Appellant was followed initially by Dr. John Machuta, an attending osteopathic physician. In January and February 2005 reports, Dr. Machuta noted appellant's recovery from cervical, thoracic and lumbar strains related to the January 22, 2005 accident. He discharged appellant from treatment and released her to full duty as of February 11, 2005.[2]

The Office accepted that appellant sustained a recurrence of disability commencing April 9, 2005 while on light duty. She sought emergency room treatment. In an April 12, 2005 report, Dr. Machuta noted appellant's account that delivering mail aggravated her symptoms and that "she tried raking the lawn about five days ago and was somewhat limited with that activity." On examination, Dr. Machuta found slightly diminished strength in the left upper extremity but no sensory changes. He diagnosed an acute flareup of a cervical strain. Dr. Machuta held appellant off work pending further testing.[3]

Beginning in August 2005, appellant was treated by Dr. Randall J. Ceton, an attending Board-certified family practitioner. In reports from August 11 to 17, 2005, Dr. Ceton found extreme tension in the trapezius muscles bilaterally and diagnosed "neck pain." He held appellant off work from August 11 to September 6, 2005 as delivering mail aggravated appellant's symptoms. Dr. Ceton limited appellant to working four hours a day in a sedentary capacity beginning September 7, 2005.[4]

Dr. Ceton submitted periodic reports from September 26 to October 31, 2005 diagnosing persistent neck pain with bilateral trapezial spasm, superimposed on an August 1997 C5-6 discectomy and fusion. He held appellant off work from October 19 to 21, 2005 "secondary to neck strain," then restricted her to working four hours a day for one week, gradually increasing to eight hours. In an October 20, 2005 report, Dr. Ceton noted that appellant had been "more active at home," "carrying things to go upstairs including two baskets of clothes" and attending

[2] Appellant participated in physical therapy from February through August 2005.

[3] In April 18, 2005 form reports, Dr. Maynard Dekryger, an attending family practitioner, held appellant off work from April 9, 2005 onward due to a "cervical spinal injury." An April 19, 2005 cervical magnetic resonance imaging scan showed mild spondylitic changes with straightening of the lordotic curvature "most likely due to muscle spasm or patient positioning." There were no focal disc herniations, central canal stenosis or neural foraminal encroachment.

[4] A September 6, 2005 functional capacity evaluation indicated that appellant was fit for medium capacity work with restrictions due to limited cervical motion.

the theater. He submitted periodic reports through February 21, 2006 noting continued trapezial spasm and neck pain due to the January 22, 2005 injury.[5]

Appellant claimed compensation for intermittent work absences from September 1 to October 31, 2005.[6] She submitted time and attendance records showing that from September 7 to 16, 2005 she used 36 hours of leave without pay. Appellant worked four hours and requested four hours of leave without pay for the following dates: September 19, 20, 21, 22, 23, 26, 27, 28, 29 and 30 and October 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17 and 18, 2005. Appellant was off work on October 19, 20, 21 and 31, 2005.

The record contains a November 5, 2005 benefit statement showing that appellant received 152 hours of wage-loss compensation for the period August 27 to October 14, 2005. A November 18, 2005 benefit statement demonstrates that appellant received eight hours of wage-loss compensation for absences on October 17 and 18, 2005.

On January 9, 2006 appellant filed a claim for a recurrence of disability on intermittent dates in September and October 2005 while on part-time light duty. She stated that it did not "take anything to set off the pain," which "never [went] away" and was "[a]t times … unbearable." She also noted "wiping down windowsills."

In January 20 and February 13, 2006 letters, the Office advised appellant of the additional factual and medical evidence needed to establish her claim for recurrence of disability. It explained that if appellant stopped work due to a worsening of the accepted condition, she must submit a narrative report from her physician describing the objective findings indicating that her condition had worsened such that she could no longer perform her light-duty job. The Office afforded appellant 30 days in which to present such evidence.

In February 9 and 21, 2006 letters, the Office referred appellant, the record and a statement of accepted facts to Dr. Perry W. Greene, Jr., a Board-certified orthopedic surgeon, for a second opinion examination to take place on March 21, 2006. Dr. Greene's report is not of record.

In an April 7, 2006 letter, the Office advised appellant that, after reviewing Dr. Greene's report, it accepted "aggravation of preexisting mechanical neck instability" and would review various claims for payment of additional benefits.

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[5] Appellant also sought treatment from Dr. Scott Ashcraft, an attending osteopathic physician Board-certified in anesthesiology. In reports from November 17, 2005 to February 23, 2006, Dr. Ashcraft opined that the January 22, 2005 whiplash injury superimposed on the August 1999 cervical discectomy and fusion produced intersubluxations at C3-4 and C4-5 with disruption of the facet joints, degenerative changes and myofascial overlap. He explained that these objective findings were competent to cause appellant's persistent neck and trapezial pain and spasm. Dr. Ashcraft administered cervical lower facet capsular injections.

[6] Appellant attended physical therapy on the following dates: September 2, 6, 7, 8, 9, 12 and 14 and October 3, 5, 7, 11, 13, 14, 18, 24, 26 and 27, 2005.

By decision dated April 11, 2006, the Office denied appellant's claim for a September and October 2005 recurrence of disability on the grounds that she attributed the period of disability to a new injury. The Office found that appellant attributed her condition to cleaning windowsills, "new actions which [were] not work related in nature, as washing windowsills [was] not a requirement of [her] mail carrier position." The Office noted that as appellant alleged a nonoccupational cause for the claimed period of disability, it would not further consider the medical evidence. The Office advised appellant to file a new claim for traumatic injury.[7]

LEGAL PRECEDENT -- ISSUE 1

As used in the Federal Employees' Compensation Act,[8] the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[9] A recurrence of disability is defined by Office regulations as an inability to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without an intervening injury or new exposure to the work factors that caused the original injury or illness.[10] If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken, and an appropriate new claim should be filed.[11]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-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 or she cannot perform such light duty. 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 light-duty job requirements.[12] This includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[13] An award of

[7] Appellant submitted additional evidence following issuance of the April 11, 2006 decision. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

[8] 5 U.S.C. §§ 8101-8193.

[9] *Prince E. Wallace*, 52 ECAB 357 (2001).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (May 1997); *Donald T. Pippin*, 54 ECAB 631 (2003).

[11] *Id*.

[12] *Albert C. Brown*, 52 ECAB 152 (2000); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

[13] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

compensation may not be made on the basis of surmise, conjecture, speculation or on appellant's unsupported belief of causal relation.[14]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained cervical, thoracic and lumbar sprains/strains with joint derangement due to a January 22, 2005 motor vehicle accident. On January 9, 2006 appellant filed a claim for a recurrence of disability on intermittent dates in September and October 2005 while on light duty. She explained that her pain occurred spontaneously and was constant and persistent in nature. Appellant also mentioned "wiping down windowsills." In order to prevail, appellant must demonstrate either a change in the nature and extent of the accepted cervical, thoracic and lumbar injuries or in her light-duty job requirements.[15]

In this case, appellant asserts a worsening of the accepted injuries such that she was totally disabled for work on intermittent dates in September and October 2005. The Office denied appellant's claim for recurrence of disability by an April 11, 2006 decision on the grounds that her mention of wiping windowsills established that she sustained a new, nonoccupational injury. The Board finds, however, that there is no evidence of record that appellant sustained a new injury while washing or wiping windowsills that would break the legal chain of causation from the January 22, 2005 injury. Appellant's statement was explaining how a minimal activity such as wiping down windowsills "would set off the pain." The Board notes that appellant's physicians mentioned that appellant was able to perform household duties. Dr. Machuta, an attending osteopathic physician, mentioned in an April 12, 2005 report that appellant recently raked leaves. Dr. Ceton, an attending Board-certified family practitioner, mentioned in his October 20, 2005 report that appellant was able to carry two baskets of clothes upstairs at home. There is no evidence of record that these activities caused any injury.

In her claim form, appellant asserted that she experienced constant neck pain that was not precipitated by any particular action. This account is in harmony with the definition of recurrence as a spontaneous change in a medical condition without intervening factors.[16] The Office denied appellant's claim based on its assumption that appellant sustained an intervening injury while wiping windowsills at home. But there is no evidence to support that assumption. Therefore, the case must be remanded to the Office for further development on this issue. The Office should request that appellant describe in detail why she mentioned wiping windowsills.

The Board notes that the Office paid appellant wage-loss compensation for intermittent dates from September 1 to October 18, 2005, a period encompassed by appellant's claim for a recurrence of disability in September and October 2005. The Office's denial of a recurrence of disability for a period for which it already paid compensation is somewhat problematic. However, the Office did not declare an overpayment for the period September 1 to October 18, 2005. Therefore, it appears that the Office has already accepted appellant's

[14] *Patricia J. Glenn*, 53 ECAB 159 (2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

[15] *Supra* note 12.

[16] *Donald T. Pippin*, *supra* note10.

disability for this period. But it is not clear whether the payment of compensation reflects an acceptance of the claimed recurrence of disability. On remand of the case, the Office shall conduct appropriate development to determine the interplay between its payment of compensation for the period September 1 to October 18, 2005 and its denial of appellant's claim for a recurrence of disability for that period.

The Board further finds that, although the Office mentioned a report from Dr. Greene, a second opinion physician, in its April 7, 2006 letter, there is no report from Dr. Greene of record. On remand of the case, the Office shall obtain a complete copy of any reports submitted by Dr. Greene and all relevant correspondence related to those reports. The Office shall then associate these documents with the case record. Following this, the development set forth above and any other actions deemed necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the case is not in posture for a decision as the case must be remanded for further development and reconstruction of the record.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 11, 2006 is set aside and the case remanded for further development consistent with this decision.

Issued: November 2, 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