

FACTUAL HISTORY

This is the seventh appeal in this case. Pursuant to the fourth appeal, by decision and order issued November 23, 2004,¹ the Board affirmed the Office's March 14, 2004 decision finding that appellant failed to establish that she sustained a recurrence of disability commencing June 17, 2003 causally related to an accepted September 13, 1984 lumbar strain. The Board dismissed appellant's fifth and sixth appeals at her request.² The law and the facts of the case as set forth in the Board's prior opinions are hereby incorporated by reference.

On April 5, 2005 appellant filed a claim alleging that she sustained a recurrence of disability commencing October 31, 1998 causally related to the September 13, 1984 lumbar strain. She also attributed her back pain and a right hip replacement to financial worries, a union grievance, frustration regarding her removal from the employing establishment, consulting with union representatives, difficulties searching for employment and not being called back after interviews. The employing establishment stated that appellant returned to work for four hours a day beginning June 8, 1998 and was subsequently removed for failing to disclose health conditions on her application. Appellant then worked in the private sector.

In a May 9, 2005 letter, the Office advised appellant of the additional evidence needed to establish her claim for a recurrence of disability. It explained that appellant must show that the accepted conditions changed such that she became unable to perform her light-duty job. Alternatively, she must prove that her light-duty job requirements changed such that she was no longer able to perform the job.

Appellant submitted medical evidence in support of her claims. In a March 3, 2004 report, Dr. Matthew Zmurko, an attending Board-certified orthopedic surgeon, related appellant's account of a 20-year history of low back pain after the 1984 injury. He diagnosed degenerative joint disease of the right hip and chronic low back pain. Dr. Zmurko referred appellant to Dr. Richard Katz, a Board-certified orthopedic surgeon. In a June 21, 2004 report, Dr. Katz noted that appellant was 5 feet 5½ inches tall and weighed 245 pounds. He diagnosed severe arthritis of the right hip and both knees unrelated to the September 1984 injury. Dr. Katz performed a total right hip arthroplasty on February 11, 2005. Appellant and Dr. Katz requested reimbursement for the surgery and hospitalization from February 11 to 15, 2005.

¹ Docket No. 04-1184 (issued November 23, 2004).

² By order issued January 10, 2006 under Docket No. 06-188, the Board granted appellant's request to dismiss her appeal of the Office's October 24, 2005 decision as her claim was then pending before the Office's Branch of Hearings and Review. By order issued April 7, 2006 under Docket No. 06-791, the Board granted appellant's request to dismiss her appeal of the Office's October 24, 2005 decision as her claim was then pending before the Office's Branch of Hearings and Review.

In an April 15, 2005 form report, Dr. Zmurko checked a box “yes” indicating that appellant’s chronic lumbar pain, spinal stenosis and degenerative spondylolisthesis at L4-5 and L5-S1 were causally related to the September 13, 1984 lumbar strain.³ He noted that appellant recalled that her back pain began on September 13, 1984. Dr. Zmurko submitted periodic reports through November 16, 2005 recommending an L4-5 and L5-S1 decompressive laminectomy.

In a December 9, 2004 report, Dr. Gary Kronick, an attending Board-certified internist, opined that appellant’s lumbar pain remained causally related to the accepted September 13, 1984 lumbar strain. He also diagnosed significant degenerative osteoarthritis of the lumbar spine, hips and knees. Dr. Kronick supported a causal relationship between the accepted lumbar strain and appellant’s current condition. However, he could not “determine to what degree [appellant’s] current symptomatology and ... progressive arthritic changes [were] directly related to her prior injury.” In April 5, May 3 and 26, 2005 reports, Dr. Kronick stated that appellant developed chronic, progressive lumbar and right hip degenerative disease and significant spinal stenosis after the September 13, 1984 injury. He noted that prolonged sitting at a computer while at work in June 2003 exacerbated her symptoms. Dr. Kronick found appellant totally disabled for work.

On July 13, 2005 the Office referred appellant to Dr. George W. Ousler, a Board-certified orthopedic surgeon, for a second opinion examination. A copy of the medical record and a statement of accepted facts were provided for his review. Dr. Ousler submitted an August 13, 2005 report noting that his examination was limited by appellant’s refusal to remove her lumbar brace and voluntarily controlling motion during the neurologic examination. Appellant “demonstrated glove and stocking type of anesthesia to her lower extremities, although she demonstrated full extension of both lower extremities, without report of low back discomfort.” Dr. Ousler opined that appellant’s disability for work was caused by nonoccupational lumbar pathologies. He explained that following her initial lumbar injury on February 27, 1975, appellant’s condition “progressed to moderate degenerative arthritis at L4-5 [and] L5-S1” by May 2005. Dr. Ousler stated that appellant’s lumbar condition persisted primarily due to her weight, “general muscle deconditioning and functional overlay, as well as progressive spondylosis of the lumbar spine.” He opined that appellant could perform sedentary, restricted duty for four hours a day.

Appellant submitted October 3 and 14, 2005 letters alleging that Dr. Ousler did not examine her thoroughly and lied about her symptoms. Keith Wilson, who drove appellant to the appointment, stated in an October 13, 2005 letter that appellant saw Dr. Ousler for “no more than [8] to [10] minutes.”

By decision dated October 24, 2005, the Office denied appellant’s recurrence claim on the grounds that causal relationship was not established. It found that appellant attributed the claimed recurrence to intervening factors, including her job search.

³ A December 10, 2004 lumbar magnetic resonance imaging scan showed a disc protrusion at L2-3, degenerative spondylolisthesis with facet arthritis at L4-5 and L5-S1, L4-5 stenosis and a minimal L5-S1 disc protrusion.

By letter decision dated October 26, 2005, the Office denied reimbursement for the February 2005 hip replacement and hospitalization from February 11 to 15, 2005 as her request was “not accompanied by an explanation as to why the need for hospitalization resulted from the” accepted September 13, 1984 lumbar injury.⁴

In an October 28, 2005 letter, appellant requested a review of the written record regarding the October 24, 2005 decision.

In an October 31, 2005 letter to her elected representative, appellant requested a “third opinion” regarding her back condition. In a November 14, 2005 letter, the Office advised appellant that she would not be referred for another examination. It acknowledged “a conflict in medical opinion between Dr. Kronick, [her] treating physician and Dr. Ousler, the second opinion medical examiner.” The Office stated that as the conflict was irrelevant to her work-related condition, there was no cause to refer her for an impartial medical examination.

By decision dated and finalized April 14, 2006, an Office hearing representative affirmed the Office’s October 24, 2005 decision. The hearing representative found that appellant did not establish a recurrence of disability commencing October 31, 1998. She submitted insufficient medical evidence demonstrating a worsening of the employment-related condition such that she could not longer perform her light-duty job. Also, appellant “was fit for and performed work” after October 31, 1998. The hearing representative further found that appellant did not meet her burden of proof to modify the August 11, 1998 loss of wage-earning capacity determination effective October 31, 1998. Appellant performed the limited-duty job on which the determination was based from June to September 1998, longer than 60 days. There was no indication that the job was temporary or makeshift.

LEGAL PRECEDENT -- ISSUE 1

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.⁵

The Office’s procedure manual provides that a recurrence of disability includes a work stoppage caused by an objective, spontaneous, material change in the accepted condition, a recurrence or worsening of disability due to an accepted consequential injury; or withdrawal of a light-duty assignment made to accommodate the work-related condition, for reasons other than

⁴ The Board notes that the Office’s October 26, 2005 decision was not accompanied by appeal rights. However, it denies a compensation benefit and explains the basis for that denial. Also, the record indicates that the Office intended the letter to function as a final decision on the reimbursement issue.

⁵ *Carl C. Graci*, 50 ECAB 557 (1999); *Mary G. Allen*, 50 ECAB 103 (1998); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

misconduct or nonperformance.⁶ Termination for cause, unrelated to a work injury, does not constitute a change in the nature and extent of light work and is not a basis for payment of compensation.⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbar strains on February 27, 1975 and September 13, 1984. She claimed a recurrence of disability commencing October 31, 1998, with lumbar pain and degenerative disc disease. Dr. Kronick, an attending Board-certified internist, generally supported causal relationship in reports from December 2004 to May 2005. He emphasized that appellant's degenerative lumbar disease developed only after the September 13, 1984 injury. However, Dr. Kronick stated that he could not determine to what degree appellant's progressive arthritic changes were related to the accepted injury. He found appellant totally disabled for work.

Dr. Ousler, a Board-certified orthopedic surgeon and second opinion physician, noted in an August 13, 2005 report that after the February 27, 1975 injury, appellant's lumbar condition "progressed to moderate degenerative arthritis" by May 2005. He opined that appellant was disabled for work primarily due to nonoccupational lumbar conditions. Dr. Ousler opined that appellant could perform part-time sedentary work.

The Board finds that there is a conflict of medical opinion between Dr. Kronick, for appellant and Dr. Ousler, for the employing establishment. While both physicians opined that appellant's degenerative disc disease developed after the accepted injuries, Dr. Kronick generally supports a causal relationship while Dr. Ousler negates such a connection. Also, Dr. Kronick found appellant totally disabled for work while Dr. Ousler found appellant able to work part time.

The Board notes that, in a November 14, 2005 letter, the Office acknowledged this conflict of opinion but refused to refer appellant for an impartial medical examination. This refusal was improper. Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁸ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.⁹ Therefore, the case must be remanded for appointment of an impartial

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997). *See also Steven A. Andersen*, 53 ECAB 367 (2002).

⁷ *John W. Normand*, 39 ECAB 1378 (1988). The implementing regulations of the Federal Employees' Compensation Act define disability as "the incapacity, because of employment injury, to earn the wages the employee was receiving at the time of injury." 20 C.F.R. § 10.5(f) (1999). *See also Lester Covington*, 47 ECAB 539 (1996).

⁸ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

⁹ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

medical examiner. On remand of the case, the Office shall refer appellant, the medical record and a statement of accepted facts to an appropriate specialist or specialists to ascertain the relationship between the accepted lumbar injuries and appellant's condition on and after October 31, 1998. Following this and all other development deemed necessary, the Office shall issue an appropriate decision in the case.

LEGAL PRECEDENT -- ISSUE 2

The case must be remanded for further development regarding appellant's claim for a recurrence of disability commencing October 31, 1998. Thus, the case is not in posture for a decision regarding whether the Office properly denied modification of the August 11, 1998 wage-earning capacity determination. The second issue in the case is, therefore, moot.

LEGAL PRECEDENT -- ISSUE 3

Section 8103 of the Act¹⁰ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.¹¹ In interpreting section 8103, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The only limitation on the Office's authority is that of reasonableness.¹² Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.¹³

In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.¹⁴ This burden of proof includes providing supporting rationalized medical evidence. Thus, in order for surgery to be authorized, appellant must submit evidence to show that these are for a condition causally related to the employment injury and that these were medically warranted. Both of these criteria must be met in order for the Office to authorize payment.¹⁵

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

¹² *Mira R. Adams*, 48 ECAB 504 (1997).

¹³ *Daniel J. Perea*, 42 ECAB 214 (1990).

¹⁴ *Cathy B. Mullin*, 51 ECAB 331 (2000).

¹⁵ *Id.*

ANALYSIS -- ISSUE 3

The Office accepted that appellant sustained lumbar strains on February 27, 1975 and September 13, 1984. She underwent a right hip replacement on February 11, 2005. Appellant and Dr. Katz, an attending Board-certified orthopedic surgeon, requested reimbursement for the surgery and hospitalization.

Appellant submitted medical reports in support of her request for reimbursement. In a March 3, 2004 report, Dr. Zmurko, an attending Board-certified orthopedic surgeon, diagnosed degenerative joint disease of the right hip. However, he did not attribute this condition to work factors. In a June 21, 2004 report, Dr. Katz diagnosed severe arthritis of the right hip unrelated to the September 1984 injury. He did not indicate that the right hip arthroplasty surgery was pathophysiologically connected to the accepted lumbar strains. Dr. Kronick, an attending Board-certified orthopedic surgeon, noted that appellant's degenerative right hip degenerative disease developed after the September 13, 1984 lumbar injury. However, he did not opine that the accepted injury caused, aggravated or precipitated the right hip condition. The Board has held that a physician's opinion supporting causal relationship only because a claimant was asymptomatic before the injury is insufficient to establish causal relationship without supporting rationale.¹⁶ As Dr. Kronick did not provide such rationale, his opinion is insufficient to meet appellant's burden of proof.

Appellant's physicians did not provide medical rationale explaining how and why the accepted lumbar strains caused right hip osteoarthritis leading to arthroplasty. Therefore, the Office did not abuse its discretion in denying reimbursement for the February 2005 right hip replacement and hospitalization.

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability commencing October 31, 1998. The Board further finds that the second issue regarding modification of the August 11, 1998 wage-earning capacity determination is moot. The Board further finds that the Office properly denied appellant's request for reimbursement for a right hip replacement and hospitalization.

¹⁶ *Jaja K. Asaramo*, 55 ECAB 2000 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 14, 2006 and October 24, 2005 are hereby set aside and the case remanded for further development consistent with this decision. The Office's October 26, 2005 decision is affirmed.

Issued: January 22, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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