

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

L.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Greensboro, NC, Employer**

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**Docket No. 08-635
Issued: December 2, 2008**

Appearances:
Paul E. Marth, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 27, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated January 16, May 11 and November 14, 2007, denying his claim for wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of disability on December 24, 2005 causally related to his accepted condition.

FACTUAL HISTORY

On October 21, 1997 appellant, then a 42-year-old letter carrier, sustained injury to his right shoulder and hip in the performance of duty. The Office accepted his claim for cervical sprain and multiple contusions. Appellant's claim was later accepted for left shoulder impingement syndrome; left rotator cuff tear; right shoulder arthropathy; herniated cervical disc at C6-7 and degenerative disc disease at C5-6 and C6-7. On March 5, 1998 he filed a traumatic

injury claim for injuries sustained to his low back. The claim was accepted for lumbosacral sprain. The Office combined the claims under master case number xxxxxx918.

Appellant received medical and wage-loss benefits for the accepted conditions, as well as a schedule award for permanent impairment of his upper extremities.¹ On October 4, 2004 his treating physician, Dr. Albert K. Bartko, a Board-certified physiatrist, released appellant to return to full duty without restrictions. On February 10, 2006 appellant filed a claim for compensation (leave buy back) for the period December 24, 2005 to January 23, 2006.

Appellant submitted a December 14, 2005 report from Dr. Bartko, who stated that, since June 2005, appellant had noted a gradual return of mechanical back pain associated with activities on the job such as lifting, twisting and position changes. He indicated that the pain was sharp, stabbing and movement-induced. Examination revealed tenderness and some spasticity in the left lower lumbar paraspinals. Noting that appellant could flex forward with minimal discomfort, Dr. Bartko observed that appellant experienced acute stabbing type of pain while attempting to return to neutral from a forward-flexed position. He also stated that appellant's ability to extend was quite limited. Dr. Bartko recommended that appellant stay out of work until the following Monday, when he would return to work four hours per day.

On October 24, 2006 the Office informed appellant that the information submitted was insufficient to establish his claim. It advised him to provide medical evidence establishing disability for work during the period claimed.

Appellant submitted time analysis sheets reflecting that he worked 60.56 hours and took 47.44 hours sick leave from December 24, 2005 through January 23, 2006. In a December 7, 2005 disability note, Dr. Bartko stated that appellant should not engage in carrier duties, but could perform office duties four hours per day. In a November 6, 2006 report, he stated that appellant's right infrascapular pain had insidiously increased over time with upper extremity use. On December 4, 2006 Dr. Bartko related that appellant had been doing a lot of repetitive casing at work, which he believed was contributing to a worsening of his symptoms.

By decision dated January 16, 2007, the Office denied appellant's claim for compensation on the grounds that he did not submit sufficient medical evidence to establish that his disability was causally related to the accepted employment injury.

On February 12, 2007 appellant requested reconsideration.

The record contains forms, letters and physical therapy notes related to an alleged November 2006 recurrence of disability. On January 29, 2007 Dr. Bartko stated that appellant was out of work and was experiencing pain in his right infrascapular region, over the superior trapezius and over the deltoid. On February 8, 2007 he indicated that appellant was to be out of work from November 24, 2005 through January 23, 2006, but noted that he returned to work four

¹ In a January 3, 2005 decision, the Office granted appellant a schedule award for a 30 percent permanent loss of use of her upper extremities (20 percent left arm/10 percent right arm). The period of the award was from August 8, 2004 to May 25, 2006.

hours per day on December 14, 2005 and was approved for full-time duty on January 23, 2006. On February 28, 2007 Dr. Bartko stated that appellant could return to work without restrictions.

By decision dated May 11, 2007, the Office denied modification of the January 16, 2007 decision, finding that the evidence failed to support that appellant's disability from work during the alleged period was causally related to the October 1997 injury. It noted that appellant was prohibited from receiving dual benefits for the same injury. Therefore, as he had received a schedule award during the entire period of alleged disability, he could not receive compensation for the same period.

On August 10, 2007 appellant, through his representative, again requested reconsideration. The representative contended that appellant was entitled to leave buy back as it related to the accepted spinal condition and that the claims examiner had not considered both of his accepted cases in denying his claim for compensation.

In a July 16, 2007 report, Dr. Bartko stated that he had treated appellant since 2000 for complaints stemming from 1997 and 1998 work injuries. He indicated that appellant had never been free of symptoms since the March 5, 1998 exacerbation and that the sorting of mail and handling of packages flared up his symptoms. Dr. Bartko explained that he performed medial branch blocks of the lower lumbar facets for treatment of low pain consistent with his injuries, including a procedure performed on January 12, 2006. The record contains a copy of a January 12, 2006 operative report from Dr. Bartko, reflecting the administration of facet injections for lower back pain. On January 23, 2006 Dr. Bartko stated that appellant's left-sided low back pain had fully resolved.

In a decision dated November 14, 2007, the Office noted that appellant's receipt of a schedule award pursuant to his 1997 shoulder injury did not, by itself, preclude his receipt of compensation for the same period under his 1998 claim for a back injury. However, it found that the medical evidence failed to establish that his disability from work from December 24, 2005 to January 23, 2006 was due to his accepted work injury, rather than to an alleged new injury.

LEGAL PRECEDENT

Section 10.5(x) of the Office's regulations provides that a recurrence of disability means an 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.²

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires 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

² 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

causally related to the employment injury and who supports that conclusion with sound medical reasoning.³

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that a claimant's claimed condition became apparent during a period of employment, nor his or her belief that the condition was aggravated by employment, is sufficient to establish causal relationship.⁴

The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁵

ANALYSIS

The Office accepted appellant's October 21, 1997 claim for cervical sprain, multiple contusions, left shoulder impingement syndrome, left rotator cuff tear, right shoulder arthropathy, herniated cervical disc at C6-7 and degenerative disc disease at C5-6 and C6-7. Appellant's March 5, 1998 injury claim, which was combined with his previous claim, was accepted for lumbosacral sprain. Having returned to full duty in October 2004, he filed a claim for compensation for intermittent disability from December 24, 2005 to January 23, 2006, which the Office adjudicated as a claim for a recurrence of disability. The Board finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability in the performance of duty on December 24, 2005.

Appellant submitted reports from his treating physician, Dr. Bartko, who opined that appellant was unable to work full time due to lumbar pain. On December 14, 2005 Dr. Bartko stated that, since June 2005 appellant had noted a return of sharp, stabbing and movement-induced back pain associated with activities on the job such as lifting, twisting and position changes. On November 6, 2006 he indicated that appellant's right infrascapular pain had insidiously increased over time with upper extremity use. On December 4, 2006 Dr. Bartko related that appellant had been doing a lot of repetitive casing at work, which he believed was contributing to a worsening of his symptoms. In a July 16, 2007 report, he stated that he had treated appellant since the fall of 2000 for complaints stemming from 1997 and 1998 work injuries, noting that appellant had never been free of symptoms since the March 5, 1998 exacerbation and that the sorting of mail and handling of packages flared up his symptoms. Dr. Bartko's reports reflect that appellant's alleged disabling condition was not spontaneous, but rather was due to activities performed after he returned to his regular job. Although he noted in various reports that appellant continued to complain of back pain subsequent to the March 5, 1998 injury, his reports are consistent in indicating that appellant's alleged disability resulted, at least in part, from new work activities, such as twisting, bending, sorting and casing. Therefore,

³ *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.104.

⁴ *Walter D. Morehead*, 31 ECAB 188 (1986).

⁵ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

the change in appellant's medical condition did not, by definition, constitute a recurrence of disability.⁶

Appellant had the burden of providing rationalized medical evidence establishing that his alleged disability was causally related to his accepted injury.⁷ The medical evidence of record does not contain a rationalized opinion explaining how appellant's current disabling condition was causally related to the accepted back condition.⁸ On the contrary Dr. Bartko's reports, the only medical opinion evidence of record, indicate that employment activities which occurred after the accepted injury caused appellant's disability. The Board finds that the Office properly denied his claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability commencing December 24, 2005.

⁶ See *supra* note 2.

⁷ See *supra* note 3.

⁸ The Board notes that the Office properly found that appellant's receipt of a schedule award pursuant to his 1997 shoulder injury would not, by itself, preclude his receipt of compensation for the same period under his 1998 claim for a back injury.

ORDER

IT IS HEREBY ORDERED THAT November 14, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 2, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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