

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

C.O., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
O'HARE AIRPORT, Chicago, IL, Employer)

Docket No. 08-1557
Issued: December 4, 2008

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 7, 2008 appellant, through his representative, filed a timely appeal of the August 27, 2007 and March 27, 2008 merit decisions of the Office of Workers' Compensation Programs, denying his claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether appellant has established that he sustained a recurrence of disability during the period April 29 through June 18, 2007 due to his accepted November 9, 2006 employment-related injuries.

FACTUAL HISTORY

On November 9, 2006 appellant, then a 36-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) assigned file number xxxxxx968 alleging that

on that date he experienced low back pain as a result of a chair falling out from under him.¹ By letter dated June 18, 2007, the Office accepted the claim for lumbar sprain.

In May and June 2007, appellant filed claims for compensation for leave without pay and wage loss from April 29 to June 18, 2007. He submitted a June 26, 2007 treatment note of Dr. Bryon W. Thomas, an attending Board-certified family practitioner, excused appellant from work commencing June 19, 2007 due to low back pain with lower extremity radiculopathy. Dr. Thomas related that he was unable to safely drive long distances due to his radiculopathy. He opined that appellant could return to work after he began receiving treatment for his condition. In a June 29, 2007 medical report, Dr. Satish Dasari, a Board-certified anesthesiologist, with a subspecialty in pain medicine, stated that appellant sustained right lumbar radicular pain and spinal stenosis and a herniated disc at L4-5.

By letter dated July 16, 2007, the Office requested that Dr. Thomas provide a rationalized medical opinion, which explained why appellant's disability from work for the claimed period was caused by his accepted lumbar condition.

A May 14, 2007 treatment note and report of Dr. Jamie E. Gottlieb, a Board-certified orthopedic surgeon, stated that appellant sustained degenerative disc disease and herniated nucleus pulposus and stenosis at L4-5. In a July 24, 2007 report, Dr. Thomas stated that, based on his initial evaluation and Dr. Gottlieb's findings and recommendations, appellant had difficulty sitting for prolonged periods of time and he required frequent changes of position to avoid significant pain and to some degree, he had decreased function of his lower extremities. He further stated that an 80-mile commute was not only unpleasant, but also unsafe. Dr. Thomas opined that if an employee such as appellant, could not commute safely to and from work, then he could not safely work. In a November 20, 2006 report, he stated that appellant suffered from lumbar pain. On July 27, 2007 Dr. Dasari administered a right L4-5 transforaminal epidural steroid injection under fluoroscopy.

On August 9, 2007 appellant described his symptoms and disability and the medical treatment he received related to the November 9, 2006 employment injury. He experienced immediate pain after a stool slipped out from under him. Appellant took a couple of days off work and returned to work because he was a probationary employee. He sought medical treatment in late April 2007 because he could no longer stand the pain. Appellants attending physician put him off work until he received a steroid injection, which was recently performed and physical therapy, which had not yet been approved by the Office.

In a letter dated August 21, 2007, the Office expanded the acceptance of appellant's claim to include aggravation of degenerative disc disease. Also on August 21, 2007, it requested

¹ Prior to the instant claim, appellant, on April 2, 2004 filed a CA-1 form assigned file number xxxxxx014 alleging that he sustained a back injury on that date as a result of loading a golf bag onto a conveyor belt while working for the employing establishment's Transportation Security Administration (TSA). He returned to work on April 3, 2004. The Office accepted the claim for a lumbar strain. On October 26 2005 appellant filed a CA-1 form assigned file number xxxxxx339 alleging that on that date he hurt his back while placing a bag on a table while working at the TSA. He stopped work on the date of injury and returned to work on October 30, 2005. The Office accepted the claim for lumbosacral strain. Appellant stopped work in November 2005. He resigned from the TSA effective December 2, 2005.

that Dr. Gottlieb determine whether appellant's employment-related lumbar sprain had resolved and whether his employment-related degenerative disc disease had returned to the baseline condition prior to the November 9, 2006 work-related injury. The Office further requested that Dr. Gottlieb state whether the restrictions he set forth were based on the accepted work-related conditions or based on nonwork-related conditions, whether the restrictions were temporary or permanent in nature based only on the accepted employment-related conditions and if temporary, state when appellant could return to his date-of-injury position.

In an August 14, 2007 report, Dr. Dasari reiterated his prior diagnoses of right lumbar radicular pain and herniated disc and spinal stenosis at L4-5.

On August 20, 2007 the Office combined appellant's claims assigned file numbers xxxxxx339, xxxxxx968 and xxxxxx0914 into a master claim assigned file number xxxxxx339.

By decision dated August 27, 2007, the Office denied appellant's claims for compensation for leave without pay and wage loss from April 29 to June 18, 2007 on the grounds that the evidence of record failed to establish that he was totally disabled during the claimed period due to his accepted employment-related injuries.

In an August 29, 2007 report, Dr. Thomas noted that he had previously documented appellant's inability to stay in one position for more than 10 minutes. He stated that this included his commute to work. Dr. Thomas indicated that appellant's type of work required him to be in a constant upright seated position for hours at a time. He released him to return to work due to financial constraints. Dr. Thomas opined that appellant was deserving of disability during his time off work commencing April 25, 2007. He stated that, had his physical therapy been approved in a timely fashion, his absence from work may have been shortened by several months. Dr. Thomas further stated that if the employing establishment would allow appellant to change positions frequently including, sitting, standing and walking, then he would likely be able to return to work at his current level of pain.

In a September 15, 2007 work capacity evaluation (Form OWCP-5c), Dr. Thomas stated that appellant could work eight hours per day with restrictions. The restrictions applied until appellant was pain-free or cleared by a specialist.

By letter dated September 13, 2007, appellant, through counsel, requested an oral hearing before an Office hearing representative regarding the Office's August 27, 2007 decision.

On September 17, 2007 Dr. Thomas prescribed physical therapy for appellant three times per week for six weeks. In a September 24, 2007 report, Dr. Dasari stated that appellant underwent physical therapy for his back condition.

Reports of Donna Persin, Douglas Post and Jenny Pearson, appellant's physical therapists, addressed the treatment he received for his back condition from September 24 through October 8, 2007.

In a September 21, 2007 report, Dr. Gottlieb stated that appellant's aggravation of degenerative disc disease had returned to baseline prior to the November 9, 2006 employment injury as he was working for the employing establishment and completed training without any

issue. He could not address the issue of whether his work restrictions were due to the accepted employment-related injuries and whether they were temporary or permanent in nature because he only saw him once on May 14, 2007. Dr. Gottlieb stated that appellant did not follow up. He anticipated exacerbation of the sprain and degenerative disc disease to require a short stint of physical therapy and possible injection treatment. Dr. Gottlieb hoped that appellant could return to work within eight weeks of a follow-up visit.

In a November 21, 2007 report, Dr. Thomas referred to his April 25, 2007 treatment note, which stated that appellant experienced back pain that had been waxing and waning but had never completely resolved. On April 25, 2007 he excused him from work for three days to get relief from his back pain. Dr. Thomas stated that appellant was unable to return to work on April 29, 2007. He provided him with additional time off work and referred him to Dr. Gottlieb for evaluation. Due to the postponement of appellant's appointment with Dr. Gottlieb, Dr. Thomas extended his time off work from May 8 to 14, 2007. He noted Dr. Gottlieb's finding that appellant sustained degenerative disc disease and his recommendation for physical therapy and epidural injections to ensure a satisfactory recovery and return to work. Dr. Thomas evaluated appellant on June 18, 2007 and stated that he had not yet returned to work due to his continued worsening symptoms. He stated that any findings subsequent to June 18, 2007 should be considered part of appellant's medical problem as he did not sustain any further injuries that exacerbated his condition other than unsuccessfully trying to return to work on May 7, 2007 due to wearing a utility belt that caused his pain to worsen. Dr. Thomas further stated that his continued symptoms, by definition, were subjective and limiting his ability to perform his work duties. He related that appellant was unable to sit for more than 10 minutes without experiencing significant discomfort, wear a belt typically worn by a customs border patrol agent and sit in a booth for a prolonged period of time without an opportunity to ambulate on a frequent basis. Dr. Thomas opined that appellant was unable to perform his work duties during this period of time until he was able to receive physical therapy that rather quickly improved his condition.

By decision dated March 27, 2008, an Office hearing representative affirmed the August 27, 2007 decision. He found the evidence of record insufficient to establish that appellant sustained a recurrence of disability during the claimed period causally related to his November 9, 2006 employment injuries. The hearing representative advised appellant that, as he had identified work factors that he performed upon his return to work following the November 9, 2006 employment injury, *e.g.*, back discomfort wearing a service belt and traveling to and from work, he may wish to file a new claim for occupational disease and provided the necessary information on which to do so.

LEGAL PRECEDENT

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 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

² 20 C.F.R. § 10.5(x).

or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.³

A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which he claims compensation is causally related to the accepted employment injury.⁴ Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and his employment injury.⁵ This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury.⁶ Moreover, the physician's conclusion must be supported by sound medical reasoning.⁷

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.⁸ In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship.⁹ While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.¹⁰

ANALYSIS

The Office accepted that appellant sustained a lumbar sprain and aggravation of degenerative disc disease while in the performance of duty on November 9, 2006. In May and June 2007 appellant filed claims for wage-loss compensation for the period April 29 through June 18, 2007, which the Office treated as claims for a recurrence of disability. The Board finds that appellant has failed to submit rationalized medical evidence establishing that his claimed recurrence of back problems and disability were caused or aggravated by his accepted employment-related lumbar sprain and aggravation of degenerative disc disease.

³ *Id.*

⁴ *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

⁵ *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139 (1993).

⁶ *Ricky S. Storms*, 52 ECAB 349 (2001); *see also* 20 C.F.R. § 10.104(a)-(b).

⁷ *Alfredo Rodriguez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

⁸ *See Ricky S. Storms*, *supra* note 6; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

⁹ For the importance of bridging information in establishing a claim for a recurrence of disability, *see Richard McBride*, 37 ECAB 748 at 753 (1986).

¹⁰ *See Ricky S. Storms*, *supra* note 6; *Morris Scanlon*, 11 ECAB 384, 385 (1960).

Appellant submitted a treatment note and reports from Dr. Thomas. In a June 26, 2007 treatment note, Dr. Thomas excused appellant from work commencing June 19, 2007 due to low back pain with lower extremity radiculopathy. He stated that appellant was unable to safely drive long distances due to his radiculopathy. Dr. Thomas opined that he could return to work after he began receiving treatment for his condition. This evidence is insufficient to establish appellant's claim as Dr. Thomas failed to opine that his disability for work was caused by the November 9, 2006 employment-related injuries. The Board has held that medical reports not supported by medical rationale are of limited probative value.¹¹

Similarly, Dr. Thomas' July 24 and August 29, 2007 reports are of diminished probative value. In the July 24, 2007 report, he stated that, based on appellant's difficulty with sitting for prolonged periods of time, his need to frequently change position to avoid significant pain and his decreased function of the lower extremities, an 80-mile commute was not only unpleasant, but also unsafe. Dr. Thomas opined that if appellant could not commute safely to and from work, then he could not safely work. In the August 29, 2007 report, he released appellant to return to work due to financial constraints despite his finding that his work duties did not allow him to change his position frequently. Dr. Thomas opined that he was deserving of disability during his time off work commencing April 25, 2007 and that this period of disability would have been shortened by several months if physical therapy had been approved in a timely manner. He stated that if the employing establishment would allow appellant to change positions frequently including, sitting, standing and walking, then he would likely be able to return to work at his current level of pain. Dr. Thomas, however, did not opine that appellant's disability for work was causally related to the accepted employment-related injuries. Therefore, the Board finds that his July 24 and August 29, 2007 reports are insufficient to establish appellant's claim.¹²

Moreover, Dr. Thomas' November 21, 2007 report is of diminished probative value. He noted his prior finding that appellant experienced back pain that had been waxing and waning but had never completely resolved. Although Dr. Thomas excused appellant from work for three days due to his back pain and later extended his time off work from May 8 to 14, 2007, he noted that by June 18, 2007, appellant had not yet returned to work due to his continued worsening symptoms. He stated that appellant did not sustain any further injuries that exacerbated his condition other than unsuccessfully trying to return to work on May 7, 2007 due to wearing a utility belt that caused his pain to worsen. Although relating to the time frame in the claim, Dr. Thomas' reports did not relate that appellant's disability to the November 9, 2006 employment-related injuries; rather he stated that it was due to an intervening event or unrelated condition such as wearing a utility belt. Therefore, the Board finds that Dr. Thomas' report is insufficient to pay compensation for the claimed period of disability.¹³

Dr. Thomas' September 15, 2007 OWCP-5c form stated that appellant could work eight hours per day with restrictions that applied until he was pain-free or cleared by a specialist. His

¹¹ *Lucrecia M. Nielson*, 42 ECAB 583 (1991).

¹² *Id.*

¹³ *Michael E. Smith*, 50 ECAB 313 (1999).

September 17, 2007 prescription ordered physical therapy for appellant three times per week for six weeks. As Dr. Thomas did not address the issue of whether appellant sustained a recurrence of disability during the claimed period, his OWCP-5c form and prescription are insufficient to establish appellant's claim.

Dr. Thomas' November 20, 2006 report found that appellant experienced lumbar pain. This evidence predates the alleged recurrence of disability from April 29 through June 18, 2007 and, thus, is not relevant to the issue of whether his disability during the claimed period was causally related to the November 9, 2006 employment-related injuries.

Dr. Dasari's June 29 and August 14, 2007 reports stated that appellant sustained right lumbar radicular pain and spinal stenosis and a herniated disc at L4-5, for which he received a right L4-5 transforaminal epidural steroid injection under fluoroscopy on July 27, 2007. His September 24, 2007 report stated that appellant received physical therapy for his back condition. This evidence is insufficient to establish appellant's claim because Dr. Dasari did not opine that appellant's current back conditions and treatment were caused or aggravated by the November 9, 2006 employment-related injuries. Moreover, Dr. Dasari did not opine that appellant was disabled for work during the period April 29 through June 18, 2007, due to the accepted employment-related injuries. His reports are insufficient to establish that appellant sustained a recurrence of disability due to the accepted employment-related injuries during the claimed period.

Similarly, Dr. Gottlieb's May 14, 2007 treatment note and report are of limited probative value. He stated that appellant sustained degenerative disc disease and a herniated nucleus pulposus and stenosis at L4-5. Dr. Gottlieb failed to address whether appellant's diagnosed conditions were caused by the accepted employment-related injuries and he did not opine that he was disabled for work during the claimed period.

Dr. Gottlieb's September 21, 2007 report stated that appellant's aggravation of degenerative disc disease had returned to baseline prior to the November 9, 2006 employment injury as he was working for the employing establishment and completed training without any issue. He could not address whether his work restrictions were due to the accepted employment-related injuries and whether they were temporary or permanent in nature because he only saw him once on May 14, 2007. Dr. Gottlieb did not relate appellant's restrictions to the accepted employment-related injuries; nor did he opine that his disability for work was caused by the accepted employment-related injuries.¹⁴ The Board, therefore, finds that his report does not establish appellant's claim.

The reports of appellant's physical therapists do not constitute probative medical evidence. A physical therapist is not defined as a physician under the Federal Employees' Compensation Act.¹⁵ Therefore, the physical therapists reports do not constitute competent medical evidence to support appellant's claim.

¹⁴ *Lucrecia M. Nielson, supra* note 11.

¹⁵ *See* 5 U.S.C. § 8102(2); *David P. Sawchuk*, 57 ECAB 316 (2006).

Appellant failed to submit rationalized medical evidence establishing that his disability from April 29 through June 18, 2007 resulted from the effects of his employment-related lumbar sprain and aggravation of degenerative disc disease. The Board finds that he has not met his burden of proof.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a recurrence of total disability during the period April 29 through June 18, 2007 causally related to his accepted November 9, 2006 employment-related injuries.

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2008 and August 27, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 4, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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