

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

D.C., Appellant)

and)

U.S. POSTAL SERVICE, MACKENZIE)
POINTE BRANCH, Saint Louis, MO, Employer)

**Docket No. 07-2410
Issued: June 11, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 26, 2007 appellant filed a timely appeal of an August 28, 2007 merit decision of the Office of Workers' Compensation Programs, finding that she did not sustain a recurrence of total 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 she sustained a recurrence of total disability on August 15, 2006 and beginning on March 29, 2007 causally related to her December 11, 2002 employment injuries.

FACTUAL HISTORY

On December 11, 2002 appellant, then a 42-year-old part-time flexible letter carrier, filed a traumatic injury claim alleging that on that date she hurt her left ankle and hip when she stepped off a porch onto an uneven concrete seam which caused her to fall. She stopped work on the date of injury. By letter dated March 26, 2003, the Office accepted the claim for left thigh

contusion and ankle sprain. Subsequently, it accepted the claim for a herniated disc and lumbar radiculopathy at L4-5 and sciatica. On May 3, 2004 the Office authorized a laminectomy at L4-5 and microdissection with removal of a herniated disc which was performed on June 8, 2004 by Dr. David S. Raskas, an attending Board-certified orthopedic surgeon.

Appellant returned to work in a modified position on March 16, 2006. On March 24, 2006 the employing establishment amended the duties of the position based on restrictions set forth by Dr. Raskas in a March 13, 2006 medical report.

On April 20, 2007 appellant filed a claim alleging that she sustained a recurrence of total disability on August 15, 2006. On May 17, 2007 she informed the Office that she had been off work since March 25, 2007.

By letter dated May 18, 2007, the Office informed appellant about the factual and medical evidence she needed to submit to establish her recurrence of total disability claim.

Appellant submitted reports dated May 1, 8 and 15, 2007 of Dr. Faisal J. Albanna, a Board-certified neurosurgeon, who administered lumbar epidural steroid injections. In a May 29, 2007 report, Dr. Albanna noted appellant's complaint of back pain radiating down to her calves. On physical examination, he reported stiffness and tenderness in the back and left buttocks, decreased range of motion of the back, a moderate antalgic gait, limping on the left leg and slow movement and lower back pain that prevented appellant from standing straight. Dr. Albanna further reported difficulty walking, sitting and standing. Appellant's movement was guarded, she demonstrated abnormal posture and moderate pathology was observed. A heel/toe walking test indicated that she was unable to walk on her heels and toes due to low back pain. A straight-leg raise test was positive 60 degrees on the left and negative on the right. Dr. Albanna reported normal findings on neurological examination. He diagnosed lumbago and sciatica. Dr. Albanna ordered appellant off work until June 25, 2007 pending further evaluation. He opined that she had not recovered from her December 11, 2002 employment injuries and that she could not return to her regular employment. Dr. Albanna stated that appellant had lingering low back pain and severe sciatic pain in the left lower extremity. Appellant was unable to sit at all on the left buttock. Dr. Albanna stated that the significant factors that caused appellant's recurrent symptoms included her workload, repetitive movements and employment injuries. He related that her condition was prone to recurrence and that she could not work at any job due to the severity of her condition. Dr. Albanna concluded that appellant's condition and disability were caused by the December 11, 2002 employment injuries, noting that her symptoms never stopped despite undergoing surgery in 2004.

On May 29, 2007 Dr. Albanna performed an electromyogram/nerve conduction velocity (EMG/NCV) study and myelogram with computerized tomography post myelogram of the lumbosacral spine. He stated that appellant had lumbago and unspecified thoracic, lumbosacral neuritis or radiculitis.

On June 15, 2007 the Office received appellant's June 5, 2007 statement which described her work duties, a nonwork-related injury and her continuing back pain.

On June 14, 2007 appellant filed a claim for compensation (Form CA-7) for the period March 29 through June 8, 2007. She submitted a June 14, 2007 EMG/NCV report of Dr. Alexander D. Beyzer, a Board-certified physiatrist, who stated that there was no electrodiagnostic evidence of lumbosacral radiculopathy on the left side.

The June 26, 2007 reports of Dr. James D. Schoen, a Board-certified radiologist, stated that appellant was status post L4-5 anterior plate. Appellant had a screw fixation with an interbody spacing device that was in appropriate alignment. There was no lateralizing herniation or focal defect to suggest central canal or foraminal stenosis. Also on June 26, 2007 Dr. Albanna reported that appellant had lumbar radiculopathy and postlaminectomy syndrome.

By letter dated July 5, 2007, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Jack C. Tippet, a Board-certified orthopedic surgeon, for a second opinion medical examination.

On July 10, 2007 appellant filed another CA-7 form for the period June 9 through July 9, 2007. She submitted Dr. Albanna's June 27, 2007 report, which reiterated his prior diagnoses of unspecified thoracic, lumbosacral neuritis or radiculitis. Dr. Albanna ordered appellant off work for six weeks pending further evaluation or progress.

In a July 25, 2007 report, Dr. Tippet reviewed a history of appellant's December 11, 2002 employment injuries and medical treatment. On physical examination, he reported essentially normal findings with the exception of pain in the left knee and mild tenderness in the lower lumbar region. On neurological examination, Dr. Tippet also reported essentially normal findings with the exception of diminished deep tendon reflexes at the knees and ankles, numbness along the lateral aspect of the left foot and linear distribution along the lateral aspect of the left calf and a positive straight leg raise test on the left. He stated that there were no recent changes in appellant's accepted employment-related conditions. The left thigh contusion and ankle sprain were no longer symptomatic. The herniated disc had been excised but, appellant's current symptoms were the same as they were one year ago. Dr. Tippet stated that no material changes prevented appellant from performing any type of work or restricted her to total bed rest. He opined that she was able to perform the duties assigned to her on March 24, 2006 with the restrictions established at that time and should be allowed to alternate sitting and standing based on her pain and discomfort. Dr. Tippet concluded that her restrictions were permanent.

On August 9, 2007 the Office requested that Dr. Tippet provide a supplemental report which included the objective findings that supported his opinion. It also requested him to address whether appellant was able to perform the duties of her modified position on March 24, 2006 and thereafter, noting that this position allowed her to change her position every 15 minutes.

In an August 16, 2007 supplemental report, Dr. Tippet stated that he did not know of any specific objective findings that would alter his prior opinion. He believed that his description of appellant's complaints and physical examination findings had not changed substantially since the most recent examination by an attending surgeon. Dr. Tippet opined that the restrictions under which appellant worked on March 24, 2006 were reasonable and should be continued. He

agreed with her that there would be times when she needed to change her position. Dr. Tippett concluded that, if appellant could be accommodated in this regard, she could continue to work.

By decision dated August 28, 2007, the Office denied appellant's recurrence of total disability claim. It found that Dr. Tippett's opinion constituted the weight of the medical evidence in finding that appellant did not sustain a recurrence of total disability on August 15, 2006 and beginning on March 29, 2007 causally related to her December 11, 2002 employment injuries.

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.¹ 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 (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.²

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she 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 she 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.³

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.⁴

The Federal Employees' Compensation Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁵ The implementing regulations states that, if a conflict exists between the medical opinion of the

¹ 20 C.F.R. § 10.5(x).

² *Id.*

³ *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁴ *James H. Botts*, 50 ECAB 265 (1999).

⁵ 5 U.S.C. §§ 8101-8193, 8123.

employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁶

ANALYSIS

The Office accepted that appellant sustained a left thigh contusion and ankle sprain, a herniated disc and lumbar radiculopathy at L4-5 and sciatica in the performance of duty on December 11, 2002. Appellant returned to work in a modified position on March 16, 2006. The position was amended by the employing establishment on March 24, 2006 to accommodate the restrictions set forth by Dr. Raskas, an attending physician. Appellant claimed a recurrence of total disability on August 15, 2006 and beginning March 29, 2007 causally related to her accepted employment injuries.

In a May 29, 2007 report, Dr. Raskas opined that appellant's back and left leg conditions and disability were caused by her December 11, 2002 employment injuries. He reported his findings on physical examination and stated that she sustained lumbago and sciatica. Dr. Raskas explained that appellant suffered from lingering low back pain and severe sciatic pain in the left lower extremity and she was unable to sit at all on the left buttock despite undergoing surgery in 2004. He stated that her workload, repetitive movements and employment injuries were significant factors that caused her recurrent symptoms.

On July 25, 2007 Dr. Tippett, an Office referral physician, reviewed a history of appellant's December 11, 2002 employment injuries and medical treatment and statement of accepted facts. He reported essentially normal findings on physical and neurological examination. Dr. Tippett opined that appellant's accepted employment-related conditions had either resolved or were unchanged. He stated that the left thigh contusion and ankle sprain were no longer symptomatic. Dr. Tippett further stated that the herniated disc had been excised but that appellant's current symptoms were the same as one year ago. He opined that no material changes prevented her from performing any type of work or restricted her to total bed rest. Dr. Tippett further opined that on March 24, 2006 appellant was able to perform the work duties under the restrictions at that time and that she should be allowed to alternate sitting and standing based on her pain and discomfort. In a supplemental report dated August 16, 2007, he stated that he could not identify any objective findings that would alter his prior opinion as his description of appellant's complaints and his findings on physical examination had not changed substantially since Dr. Raskas' recent examination. He concluded that her restrictions on March 24, 2006 were reasonable and should be continued.

The Board finds a conflict in the medical opinion between Dr. Raskas and Dr. Tippett.⁷ Dr. Raskas found that appellant sustained a recurrence of total disability causally related to her December 11, 2002 employment injuries. Dr. Tippett opined that appellant did not sustain a recurrence of total disability due to her accepted employment-related conditions and was capable

⁶ 20 C.F.R. § 10.321.

⁷ *Bryan O. Crane*, 56 ECAB 713 (2005).

of working with limitations. The Board will remand the case to the Office for appropriate development of the medical record to determine whether appellant sustained a recurrence of disability causally related to her employment-related left thigh contusion and ankle sprain, herniated disc and lumbar radiculopathy at L4-5 and sciatica. On remand, the Office should prepare a statement of accepted facts and a list of questions and refer appellant to an appropriate Board-certified physician for an impartial medical opinion. Following this and any other further development as deemed necessary, the Office shall issue an appropriate decision on appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceeding consistent with the above opinion.

Issued: June 11, 2008
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