United States Department of Labor
Employees' Compensation Appeals Board

V.W., Appellant	)	
and	)	**Docket No. 08-569**
	)	**Issued: June 23, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Buffalo, NY, Employer	)	

Appearances:
Alan J. Shapiro, 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 December 18, 2007 appellant timely appealed the November 16, 2007 merit decision of the Office of Workers' Compensation Programs, which affirmed the denial of her claim for recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.[1]

ISSUE

The issue is whether appellant experienced a recurrence of disability on November 15, 2006, causally related to her June 9, 2006 employment injury.

[1] The record on appeal includes evidence received after the Office issued its November 16, 2007 decision. The Board cannot consider evidence for the first time on appeal. The review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 10.501.2(c) (2007).

FACTUAL HISTORY

Appellant, a 46-year-old canteen sales clerk, injured her lower back, right knee and right ankle in the performance of duty on June 9, 2006. She was retrieving merchandise from a vault when she stepped and landed awkwardly on her right foot. The Office accepted the claim for right knee sprain, right ankle sprain and lumbago. Appellant was off work from June 10 to July 17, 2006. She returned to work in a limited-duty capacity on July 18, 2006. Appellant's restrictions included minimal stooping, twisting and bending, no pushing or pulling, no squatting or kneeling, minimal walking, no prolonged standing and no lifting in excess of 10 pounds. She continued to work in a limited-duty capacity until November 16, 2006, when she stopped work.

On November 24, 2006 appellant filed a claim for recurrence of disability beginning November 15, 2006. She stated that since her June 9, 2006 injury she continued to experience low back pain. Some days were worse than others. Appellant indicated that a sale started at work on Wednesday the 15th and she was very busy that day. Later that same evening, she experienced back pain and could not stand up. Appellant claimed she had not sustained any new injuries since her June 9, 2006 employment injury.

On November 16, 2006 appellant was treated by Betsy Dechert, a family nurse practitioner, who noted that appellant was being seen for a new episode of pain related to her low back. Appellant reportedly was "sitting on the floor last night helping her daughter with her homework" and when she "tried to get up," she "had unbearable pain in her left lower back." Although it was difficult to lie in bed, appellant eventually fell asleep. However, appellant was later awakened by an asthma-related "coughing attack." This seemed to cause her pain to flare-up again. The pain was worse in appellant's left buttocks and it radiated into her upper thigh. Ms. Dechert also reported that appellant "was at work yesterday and remember[ed] doing some type of lifting." Her medical assessment was "worsening left lower back pain aggravated by sitting on the floor and coughing spell...." Ms. Dechert excused appellant from work through November 30, 2006, which she later extended. Appellant also submitted medical records for treatment she received from another nurse practitioner, Stacy Dean, and from Anna Mychaskiw, a physician assistant.

Dr. Leonard Kaplan, a pain management specialist, examined appellant on December 14, 2006. He noted that appellant was a sales clerk who injured herself at work on June 9, 2006 when she was stepping over a step and tripped, twisting her right ankle and hurting her low back. Dr. Kaplan further reported that, since her injury, appellant had complained of significant discomfort in the right lower back into the buttocks, which was worse with standing. He also noted continued stiffness in the right ankle. According to Dr. Kaplan, appellant had already undergone two months of physical therapy, without significant improvement of her symptoms. He diagnosed sacroiliac joint dysfunction with pain and right ankle sprain with dysfunction. Dr. Kaplan related appellant's current condition to her workers' compensation injury. He released appellant to return to work effective December 15, 2006 with restrictions of no repetitive bending, lifting, and twisting, no lifting greater than 15 pounds, no prolonged standing greater than 30 minutes and no prolonged sitting greater than 20 minutes. Dr. Kaplan also recommended that appellant switch to a different department. The work restrictions were to remain in effect until January 18, 2007.

Dr. Kaplan next saw appellant on January 19, 2007. Her symptoms reportedly had not changed since her last visit. His treatment notes indicated that appellant was not working because there was no light-duty work available. Dr. Kaplan's diagnoses included sacroiliac joint dysfunction, right ankle sprain and dysfunction and possible lumbar discogenic pain. Appellant's disability status remained the same.

In a decision dated April 4, 2007, the Office denied appellant's claim for recurrence of disability.

Appellant requested an oral hearing, which was held on September 20, 2007. The Office received March 28 and May 1, 2007 treatment records from Ms. Dean, the nurse practitioner who previously treated appellant for her back condition.

By decision dated November 16, 2007, the hearing representative affirmed the April 4, 2007 decision.

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 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 when a light-duty assignment made specifically to accommodate an employee's physical limitations due to 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 her established physical limitations.[3] Moreover, when the claimed recurrence of disability follows a return to light-duty work, the employee may satisfy her burden of proof by showing a change in the nature and extent of the injury-related condition such that she was no longer able to perform the light-duty assignment.[4]

Where an employee claims a recurrence of disability due to an accepted employment-related injury, she has the burden of establishing that the recurrence of disability is causally related to the original injury.[5] This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury.[6] The medical evidence

[2] 20 C.F.R. § 10.5(x).

[3] *Id.*

[4] *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

[5] 20 C.F.R. § 10.104(b); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Carmen Gould*, 50 ECAB 504 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[6] *See Helen K. Holt, supra* note 5.

must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[7]

Appellant's claim was accepted by the Office for right knee and ankle sprains and lumbago. She returned to limited-duty work on July 18, 2006 and worked until November 15, 2006.

ANALYSIS

The Board notes that the opinions expressed by the two nurse practitioners and the physician's assistant are not sufficient to establish that her disability commencing November 15, 2006 is related to her June 9, 2006 injury. A physician's assistant and nurse practitioners are not physicians as defined under the Federal Employees' Compensation Act.[8]

Ms. Dechert, although not a physician, was the first medical professional to examine appellant following her claimed recurrence of disability beginning November 15, 2006. While her diagnosis and disability assessment are not probative, the history she reported is noteworthy. A "recurrence" by definition is caused by a "spontaneous change" in a medical condition.[9] However, Ms. Dechert's November 16, 2006 treatment notes referenced three potential causative factors for appellant's current back condition that would not be considered spontaneous. First, she reported that appellant experienced unbearable pain when she "tried to get up" after sitting on the floor at home with her daughter. Ms. Dechert also noted that a subsequent "coughing attack" seemed to cause a flare-up of appellant's back pain. She also mentioned that appellant recalled doing some "type of lifting" at work the previous day. All three references suggest something other than a spontaneous change in appellant's medical condition.

Dr. Kaplan was the only physician to examine appellant for her claimed recurrence of disability. However, his initial examination occurred almost a month after the alleged November 15, 2006 recurrence. Dr. Kaplan's two reports do not include any reference to the work-related lifting appellant reportedly performed on November 15, 2006 or the pain she experienced when getting up from the floor later that evening or her subsequent coughing attack. He also did not express any knowledge of the limited-duty work appellant had been performing prior to her November 15, 2006 work stoppage. Dr. Kaplan's only reference to appellant's work was that she was employed as a "sales clerk." Thus, his opinion on causal relationship cannot be considered properly rationalized.[10] Accordingly, the medical evidence does not demonstrate a spontaneous change in the nature and extent of the injury-related condition such that appellant was no longer able to perform her light-duty assignment. The work restrictions Dr. Kaplan imposed beginning December 15, 2006 are similar to the limitations in effect when appellant initially returned to work July 18, 2006. The record also does not establish that appellant's

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

[8] A physician's assistant or nurse practitioner is not considered a "physician," as that term is defined under 5 U.S.C. § 8101(2). *See e.g.*, *Roy L. Humphrey*, 57 ECAB 238, 242 (2005).

[9] 20 C.F.R. § 10.5(x).

[10] *See Helen K. Holt, supra* note 5; *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

limited-duty assignment was either withdrawn or altered to the extent that her assigned duties were no longer compatible with her physical limitations. Appellant has failed to establish her claim.

CONCLUSION

Appellant has not established that she experienced a recurrence of disability on November 15, 2006, causally related to her June 9, 2006 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2008
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