United States Department of Labor
Employees' Compensation Appeals Board

M.P., Executrix of the Estate of M.P., Appellant	)	
and	)	**Docket No. 08-1698**
	)	**Issued: April 15, 2009**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, San Francisco, CA, Employer	)	

Appearances:
Michael Crahan, 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 23, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 15, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the employee has established a recurrence of disability on or after June 15, 2005.

FACTUAL HISTORY

The record indicates that the employee had three claims: a December 13, 1999 claim accepted for sacroiliac sprain from bending over to pick up a 20 foot length of wood, a January 17, 2001 claim accepted for lumbar sprain and aggravation of intervertebral degenerative disc disease, and a May 8, 2001 occupational claim accepted for bilateral carpal

tunnel syndrome. The employee returned to work in a modified position as a visitor use assistant in 2002.

On June 16, 2005 the employee stopped working. In a form report dated June 16, 2005, Michael Mason, a family practitioner, stated the employee had "chronic [low back pain] (industrial) with [degenerative disc disease]." Dr. Mason indicated that on June 1, 2005 the employee developed increasing low back pain with radiation into the legs. He diagnosed exacerbation of chronic industrial low back pain and indicated the employee should be off work from June 16 to July 7, 2005.

The employee remained off work and continued to receive treatment from Dr. Mason and Dr. Scott Levy, a family practitioner, who returned to work at three hours per day, two days a week on October 18, 2005. Dr. Levy indicated in a December 15, 2005 form report that the employee reported severe back pain and he was placed off work.[1] The employee completed a Form CA-7 (claim for compensation) indicating that he was claiming compensation from June 16, 2005.

The Office referred the employee to Dr. Aubrey Swartz, an orthopedic surgeon, for a second opinion examination. Dr. Swartz was requested to provide an opinion regarding any continuing disability causally related to an employment injury. By report dated March 6, 2006, he provided a history and results on examination. Dr. Swartz stated that the employee may have sustained a minor soft tissue strain on December 13, 1999, and that he had degenerative disc disease and chronic depression. He opined that appellant no longer had residuals of the December 13, 1999 employment injury. Dr. Swartz stated that appellant had temporary aggravations of his back condition from time to time, noting that appellant had last worked in December 2005. He stated, "The fact that [the employee] is not working would have no industrial relevance," and there were no valid objective findings.

By decision dated April 14, 2006, the Office denied compensation commencing June 16, 2005. It found that Dr. Swartz represented the weight of the medical evidence.

The record indicates that the employee died on December 13, 2006 with a diagnosis of pancreatic cancer. By decision dated February 21, 2007, an Office hearing representative remanded the case for further development. The hearing representative found that Dr. Swartz should submit a supplemental report discussing the January 17, 2001 injury and provide an opinion of whether the employee suffered an aggravation of degenerative disc disease in December 2005.

In a report dated April 9, 2007, Dr. Swartz opined that there was no evidence of residuals of the January 17, 2001 employment injury. He noted the medical record and found that the January 17, 2001 injury had caused a temporary exacerbation of a preexisting low back condition that had resolved by April 15, 2001. With respect to a work stoppage in December 2005, Dr. Swartz noted that the orthopedic examination at that time revealed no objective findings, and that pancreatic cancer can cause progressively severe back pain. He opined that the pain the employee reported in December 2005 would bear no relationship to a January 17, 2001 injury.

[1] The record indicates that the employee stopped work on December 6, 2005.

By decision dated June 22, 2007, the Office denied the employee's claim for compensation commencing June 16, 2005. The employee's representative requested a hearing before an Office hearing representative, which was held on December 12, 2007. In a report dated July 8, 2007, Dr. Levy stated that appellant's modified job as a visitor use assistant was a very light job as far as work demands. He noted the employee was a difficult patient to examine because he complained of pain essentially to his entire body and the employee suffered from anger issues. Dr. Levy stated that appellant required a significant amount of narcotics, which would make driving a danger, and this was one of the duties of the modified job. He concluded, "I do not believe that a strained muscle was the cause of his symptoms, but instead, degenerative disc disease as a result of cumulative trauma and finally aggravated by his accepted claim which was the result of jumping out of the way of a moving truck."

In a decision dated February 15, 2008, the Office hearing representative affirmed the June 22, 2007 Office decision.

LEGAL PRECEDENT

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[2]

ANALYSIS

The employee had been working a modified job until June 15, 2005, when he stopped working. It appears that he worked intermittently on a part-time basis from October 18 to December 6, 2005, when he again stopped working. As noted above, the employee has the burden to prove a specific period of disability and he must show a change in the employment-related condition or a change in the light-duty job.

As to the period commencing June 16, 2005, the employee did not submit probative medical evidence sufficient to establish his claim. Dr. Mason placed the employee off work as of June 16, 2005, but he noted only that the employee was having chronic low back pain with degenerative disc disease. While he used the term "industrial," he did not provide any medical rationale on causal relationship with employment.[3] Dr. Mason did not discuss the employee's history and explain why he felt the employee's continuing condition was employment related, and how it had changed such that the employee could not perform the light-duty position. There was no probative evidence establishing a change in the nature and extent of an employment-related condition as of June 16, 2005.

[2] *Terry R. Hedman*, 38 ECAB 222 (1986).

[3] Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty and supported by medical rationale explaining the medical opinion. *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

The second opinion physician, Dr. Swartz, indicated in his reports that the employment-related injuries had resolved by April 15, 2001. The Board notes that Dr. Swartz was neither asked nor offered a specific opinion regarding disability commencing June 16, 2005. The Office did develop the issue of disability commencing in December 2005 and Dr. Swartz addressed that issue. Dr. Swartz found that the employment injuries from December 13, 1999 and January 17, 2001 had resolved, and found that appellant's symptoms were related to his preexisting back condition, chronic depression and to the pancreatic cancer. He found no causal relationship between the December 2005 work stoppage and the employment injuries. The Board finds that Dr. Swartz provided a rationalized opinion on the issue.

The attending physician, Dr. Levy, did not provide a rationalized medical opinion with respect to an employment-related disability on or after June 16, 2005. He referred to the employee taking narcotics, although he did not note a specific time period. The December 14, 2005 report indicated that the employee was angry and a morphine pump trial was proposed. To the extent that Dr. Levy opined that the employee was disabled due to medication, he did not provide a rationalized opinion that the medication was necessary for an employment-related condition. Dr. Levy referred to an aggravation of the degenerative disc disease without discussing the medical background and explaining why he felt there was a continuing employment-related aggravation.

The Board accordingly finds that the evidence does not establish an employment-related disability commencing on June 16, 2005 or in December 2005. The record does not contain a rationalized medical opinion showing a change in an employment-related condition resulting in disability as of June 16, 2005. The second opinion physician, Dr. Swartz, represents the weight of the medical evidence regarding disability commencing in December 2005.

CONCLUSION

The Board finds the medical evidence does not establish an employment-related disability commencing on or after June 16, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 15, 2008 and June 22, 2007 are affirmed.

Issued: April 15, 2009
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