United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 08-1774**
	)	**Issued: April 9, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Carol Stream, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 10, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative's decision dated May 15, 2008, which affirmed the denial of his recurrence of disability claim. 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 appellant met his burden of proof to establish a recurrence of disability for the period October 4 to November 17, 2007, causally related to his accepted November 15, 2002 employment injury.

FACTUAL HISTORY

On November 15, 2002 appellant, then a 75-year-old maintenance mechanic, injured his back and legs as a result of being struck by a bulk mail container at work. He stopped work on November 16, 2002. Appellant was released to limited duty on November 15, 2002 by his treating physician, Dr. John T. Giardi, an internal medicine specialist. On March 17, 2003 the

Office accepted the claim for lumbar strain and authorized physical therapy. On July 22 and 28, 2004 it accepted neck strain, left knee strain and radiculopathy.

On October 22, 2007 appellant filed a notice of recurrence of disability claiming that he stopped work from October 4 to November 17, 2007 due to his 2002 injury. He performed light duty after the injury. The employing establishment noted that appellant returned to modified duty after his injury and was currently working on small parts repair. In a separate letter, also dated October 22, 2007, appellant alleged that his injury "was never resolved, so I have been under continuous Dr's care since injury date November 15, 2002."

In a report dated October 2, 2007, Dr. Andrew Gordon a Board-certified neurologist, noted that appellant had complaints of "significant" back and leg pain which "at this point seems slightly worse." He examined appellant and determined that appellant did not have any new findings on examination. Dr. Gordon opined that appellant had relatively severe lumbosacral radiculopathy, probable underlying polyneuropathy, carpal tunnel and cervical spondylosis, with significant chronic pain. He recommended that appellant undergo an electromyography (EMG) scan of all four extremities to further evaluate the relative contribution of neuropathy vs. radiculopathy. Dr. Gordon advised that appellant try another pain clinic despite his lack of success. In a disability certificate dated October 2, 2007, he diagnosed lumbosacral radiculopathy and neuropathy and advised that appellant remain off work until October 19, 2007. On October 2, 2007 Dr. Gordon diagnosed radiculopathy and opined that appellant could not return to regular duty. However, he noted restrictions for light duty, which included sitting for no more than 1 hour, standing for no more than 30 minutes and climbing, kneeling, bending, stooping, twisting, pulling or pushing for no more than 30 minutes, twist pull or push for no more than 1½ hours per day, grasping, fine manipulation and reaching above the shoulder for no more than a ½ hour per day. The employing establishment filled out the requirements for the position, which indicated that appellant would be required to stand and walk for two hours per day, bend or stoop for one hour per day, twist for five hours per day, pull and push for three hours per day and grasp for two hours per day, do fine manipulation for five hours per day and reach above the shoulder for five hours per day.

In an October 30, 2007 report, Dr. Gordon reevaluated appellant and advised that he was "doing about the same." He made no new findings on examination. Dr. Gordon diagnosed severe lumbosacral radiculopathy and stenosis. He noted that appellant's computed tomography (CT) scan revealed a T12 compression fracture of indeterminate age, underlying polyneuropathy, carpal tunnel syndrome and cervical spondylosis. Dr. Gordon repeated his recommendation that appellant undergo an evaluation at a pain clinic.

By letter dated November 5, 2007, the Office advised appellant that it had received his claim for a recurrence of disability on October 4, 2007. It informed him of the evidence needed to support his claim and requested that he submit further medical opinion within 30 days.

On November 23, 2007 the Office received a statement from appellant, who continued to perform his light-duty assignment but contended that the work exceeded the limits set by his physician. Appellant attached a copy of his current restrictions, his modified work assignment and a copy of Dr. Gordon's October 2, 2007 light-duty restrictions. He noted that his work as a scrapper required hours of standing, reaching, scooping and kneeling.

The modified-duty assignment, which appellant accepted on October 30, 2007, specified that as a small parts repairer he would spend seven hours per day, repairing small parts and one hour per day relaying trouble calls. The job offer from the employing establishment noted that it was made in relation to appellant's November 15, 2002 work injury. The physical requirements were listed as lifting small parts not to exceed five pounds and answering telephones and using "walkie[-]talkies."[1]

By decision dated January 17, 2008, the Office denied appellant's claim for a recurrence of disability. It found that the factual and medical evidence did not establish that the recurrence resulted from the accepted work injury.

On January 22, 2008 appellant requested a review of the written record. In a diagnostic report dated October 10, 2007, Dr. Thomas J. Figler, a Board-certified diagnostic radiologist, determined that appellant did not have deep vein thrombosis. An October 10, 2007 CT scan of the lumbar spine without contrast, by Dr. William Keenan, a Board-certified diagnostic radiologist, found diagnosed multilevel disc bulging, severe spinal stenosis at L3-4 and L4-5 and neural foraminal narrowing. The Office also received laboratory reports dated October 10, 2007.

In a January 22, 2008 report, Dr. Gordon noted that appellant continued to have significant painful paresthesias of both lower extremities and the right arm. He indicated that appellant did not have lumbar stenosis and cervical stenosis. Dr. Gordon advised that epidural injections for the back helped to some extent but appellant continued to experience symptoms of pain in his feet, paresthesias and gait disorder. He completed a duty status report for appellant and prescribed light-duty restrictions.

The Office also received a January 2, 2007 radiology report from Dr. Nicholas Kinnas, a Board-certified diagnostic radiologist, who noted significant narrowing of the C6-7 interspaces associated with anterior and posterior osteophytes and mild narrowing of C5 and C6 and degenerative changes involving C6-7. It also received hip x-rays.

In an April 16, 2008 report, Dr. Gordon repeated his diagnoses that appellant had relatively severe lumbosacral radiculopathy and stenosis, as well as underlying cervical stenosis. He requested a rolling walker and physical therapy.

By decision dated May 15, 2008, an Office hearing representative affirmed the January 17, 2008 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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[2] The term "disability" means incapacity, because of an employment

[1] The record also contains a small parts modified assignment offer signed by appellant on May 18, 2007.

[2] 20 C.F.R. § 10.5(x).

injury, to earn the wages the employee was receiving at the time of injury.[3] The term also means the 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 for when such withdrawal occurs for reasons of misconduct, nonperformance of the job duties or a reduction-in-force.[4]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantive evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, 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.[5]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.[6] This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.[7] The physician's opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[8]

ANALYSIS

Appellant's claim was accepted for lumbar strain, neck strain, left knee strain and radiculopathy. He alleged a recurrence of total disability from October 4 to November 17, 2007. Appellant contended that his light-duty assignment exceeded the limits set by his physician. He alleged that his current work as a scrapper required hours of standing, reaching, scooping and kneeling. Accompanying the claim was an October 20, 2007 modified job offer as a small parts repairer, which appellant accepted on October 30, 2007. The offer provided that appellant would spend seven hours per day repairing small parts and one hour per day relaying trouble calls. The physical requirements were listed as lifting small parts not to exceed five pounds and answering telephones and using "walkie[-]talkies."[9] Appellant submitted the October 2, 2007 duty status

[3] *Id*. at § 10.5(f).

[4] *See supra* note 2.

[5] *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[6] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[7] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[8] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[9] The modified offer small parts modified assignment offer signed by appellant on May 18, 2007 appears to have similar duties to the one he signed on October 30, 2007. However, the copy of the offer accepted on May 18, 2007 is partially illegible.

report of Dr. Gordon, who reviewed the restrictions listed by the employing establishment, which included that he would be required to stand and walk for two hours per day, bend or stoop for one hour per day, twist for five hours per day, pull and push for three hours per day and grasp for two hours per day, do fine manipulation for five hours per day and reach above the shoulder for five hours per day. Dr. Gordon indicated that appellant could perform light duty; however, he limited sitting for no more than 1 hour, standing for no more than 30 minutes and climbing, kneeling, bending, stooping, twisting, pulling or pushing for no more than 30 minutes, twist, pull or push for no more than 1½ hours per day, grasping, fine manipulation and reaching above the shoulder for no more than a ½ hour per day

The restrictions prescribed by Dr. Gordon, limited appellant to stand, climb, kneel, bend, stoop, twist, pull, push, reach above the shoulder or do fine manipulation for no more than 30 minutes per day. This was clearly more restrictive on appellant's activities than the requirements specified by the employing establishment. The Office did not make any further inquiries to ascertain whether the modified-duty position had changed or to otherwise define the precise duties and job requirements relevant to the period October 4 to November 17, 2007. For this reason, the case is not in posture for decision.

The case will be remanded to the Office for further development of the factual evidence as it did not adequately consider appellant's claim that he sustained disability because he was required to perform duties beyond his work restrictions. As above, a change in the nature and extent of light-duty job requirements may serve as a basis for establishing an employment-related recurrence of disability.[10] The Office did not have the employing establishment respond to this allegation. It, as part of its responsibility in the development of the evidence, had an obligation to make further attempts to obtain such a response.[11] After such development as it deems necessary, the Office should issue an appropriate merit decision regarding appellant's claim for a recurrence of disability beginning October 4, 2007.

CONCLUSION

The Board finds that the case is not in posture for decision. The case will be remanded to the Office for further development of the evidence.

[10] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[11] *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

ORDER

IT IS HEREBY ORDERD THAT the Office of Workers' Compensation Programs' hearing representative's decision dated May 15, 2008 be set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: April 9, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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