

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

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**J.A., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Ventura, CA, Employer**

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**Docket No. 08-2152  
Issued: August 7, 2009**

*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 July 31, 2008 appellant timely appealed the August 14, 2007 merit decision of the Office of Workers' Compensation Programs, which denied wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant was disabled from February 24 until July 27, 2005 as a result of her November 15, 2004 employment injury.

**FACTUAL HISTORY**

Appellant, a 60-year-old former letter carrier, has an accepted occupational disease claim file number xxxxxx042 for degenerative disc disease of the cervical (C5-7), thoracic (T4-T8) and lumbar (L5-S1) spine, which arose on or about December 5, 1990. Additional accepted conditions include lumbar disc displacement (L2-3 and L5-S1) and right trochanteric bursitis. Due to her accepted injuries, appellant was no longer able to perform her regular duties as a letter

carrier.<sup>1</sup> Dating back to September 18, 1993, the employing establishment has provided her limited-duty work.

Following May 10, 2004 surgery for a right upper extremity condition, appellant resumed her previous limited-duty assignment effective November 1, 2004. After approximately four months, she stopped working due to low back and left lower extremity complaints. On March 25, 2005 appellant filed a claim for recurrence of disability beginning February 24, 2005. She believed that the recurrence was causally related to her December 5, 1990 employment injury. The Office, however, advised appellant that her claim would be treated as a new occupational disease claim because she had indicated that her current complaints were the result of additional employment exposure on or after November 1, 2004. After initially denying the claim, it accepted aggravation of lumbar degenerative disc disease, with a date of injury of November 15, 2004 file number xxxxxx015.<sup>2</sup> On March 13, 2006 appellant filed a claim for compensation (Form CA-7) for the period February 24 through July 27, 2005.

Relevant evidence for the period of disability claimed included various treatment records and reports from appellant's orthopedist, Dr. Small, who examined her on February 14, 2005 and diagnosed low back pain secondary to mechanical instability and radiculopathy with trochanteric bursitis. Dr. Small noted that appellant's x-rays revealed severe degenerative changes throughout the lumbar spine. He ordered physical therapy and also prescribed Celebrex, Soma, Darvocet and Medrol Dosepak. Dr. Small advised appellant to return for a follow-up visit after completing physical therapy. On a preprinted form report he checked the appropriate boxes indicating that her work status had changed and that she was temporarily totally disabled until her next visit.

Appellant did not see Dr. Small again until May 2, 2005. In the interim, she had undergone gallbladder surgery on March 4, 2005 and subsequently developed a portal vein blood clot. Pursuant to Dr. Small's earlier recommendation, appellant began a five-week course of physical therapy on March 28, 2005.<sup>3</sup>

When appellant returned on May 2, 2005, Dr. Small noted continued complaints of mostly severe back pain with radiation into the left leg. He explained that because of this pain, she had been off work since he last saw her on February 24, 2005.<sup>4</sup> Dr. Small also noted that appellant had undergone physical therapy, but it did not really help her. He indicated that she had not suffered a new injury, but merely a recurrence of her original injury. Dr. Small further explained that appellant had not recovered from her original disability and although she returned

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<sup>1</sup> Appellant also sustained an employment-related lumbosacral sprain on May 13, 1991, file number xxxxxx236.

<sup>2</sup> The Office's March 10, 2006 acceptance was based on the July 8, 2005 report of Dr. Samuel D. Small, an orthopedic surgeon who had been treating appellant since June 23, 2000.

<sup>3</sup> The Office authorized the physical therapy under appellant's December 5, 1990 injury claim.

<sup>4</sup> The record includes a preprinted disability assessment signed by Dr. Small on February 28, 2005. The top of the preprinted form identifies the date as February 24, 2005. However, there are no corresponding treatment records indicating that Dr. Small examined appellant during the latter part of February 2005 and appellant specifically indicated that she did not see Dr. Small between February 14 and May 2, 2005.

to a light-duty position, he had recommended in October 2003 that she take a medical retirement. He stated that she continued to experience back pain, which he never expected to go away. Dr. Small diagnosed lumbar disc disease with instability and an altered gait. He indicated that it was not unusual for there to be recurrence and, in fact, it would be surprising if there were not a recurrence. Dr. Small advised that appellant's current diagnosis was the same as her original injury, plus she had since developed trochanteric bursitis. He explained that the latter condition was not unusual because she had an altered gait. Although the bursitis was originally on the right side, it was now bilateral. Appellant's main complaint, however, was back pain with radicular symptoms. Dr. Small stated that she was certainly not improved at that point. He recommended an updated magnetic resonance imaging (MRI) scan and electrodiagnostic (EMG) and nerve conduction velocity studies. Dr. Small also indicated that appellant was temporarily totally disabled until her next visit.<sup>5</sup>

A June 10, 2005 lumbar MRI scan revealed levoscoliosis, degenerative disc changes throughout the lumbar spine, greatest at L1-2, L2-3 and L5-S1 and retrolisthesis throughout. These latest findings represented an increase in comparison to appellant's December 17, 2002 MRI scan.

In a July 8, 2005 letter to the Office, Dr. Small indicated that he had found appellant permanent and stationary as of October 30, 2003. He further indicated that she was apparently sent back to what was referred to as light duty, but it was his understanding that when she returned to work on November 1, 2004, her duties included various and sundry lifting, pushing, pulling and bending at the waist repetitively. Dr. Small explained that this certainly would not be light duty in his opinion. Assuming he had received accurate information about appellant's workload, Dr. Small stated that her work had certainly contributed to the further deterioration of her spine. Dr. Small also discussed the June 10, 2005 lumbar MRI scan, noting that the radiologist had reported increased findings since appellant's prior MRI scan. In summary, he explained that there was physical evidence that appellant's condition had worsened in the intervening years and she did not become symptomatic until returning to work on November 1, 2004, thus indicating that was indeed when the changes occurred. Dr. Small believed that this information confirmed that there was a causal relationship between her condition and the employment duties she performed on or after November 1, 2004.<sup>6</sup>

In a May 2, 2006 report, Dr. Small noted that it had come to his attention that appellant had not been paid for the period of time when she was temporarily totally disabled last year. He explained that, during the period of February 24 to July 21, 2005, she was disabled from significant pain from exacerbation of her lumbar spine problem and severe bilateral trochanteric bursitis. Dr. Small noted that appellant was refractory to treatment for this and because she was on Coumadin, intertrochanteric injection therapy was not performed. He further noted that she also had significant mobility problems at that time and was unable to perform her usual and customary duties. In closing, Dr. Small stated that he hoped his letter was enough to substantiate the fact that appellant was temporarily totally disabled from February 24 to July 21, 2005

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<sup>5</sup> Dr. Small utilized the same preprinted form as he had on February 14, 2005.

<sup>6</sup> As previously indicated, *supra* note 2, Dr. Small's July 8, 2005 report was the basis for the Office's acceptance of the claim for aggravation of lumbar degenerative disc disease.

secondary to not only lumbar spine pathology but bilateral trochanteric bursitis, pain and decreased mobility.

By decision dated May 19, 2006, the Office denied appellant's claim for wage-loss compensation for the period February 24 through July 27, 2005. It noted, among other things, that Dr. Small's May 2, 2006 medical opinion was not "contemporaneous" to the period of February 24 through July 27, 2005 and, therefore, it was of "no value in establishing disability for the five[-]month period in question."

On March 4, 2007 appellant requested reconsideration. Additional evidence included a June 16, 2005 EMG that was consistent with a chronic left L4 radiculopathy. The Office also received treatment notes from Dr. Small dated July 7 and 25, 2005 and an amended copy of the physician's May 2, 2006 report.<sup>7</sup>

The July 7, 2005 treatment notes indicated that appellant was seen for follow up regarding her low back pain. She reported that her back was unchanged, but the pain in her legs was somewhat improved. Appellant's chief complaint was severe left hip pain. Dr. Small noted that recent objective studies were positive for L4 radiculopathy and a new lumbar MRI scan was significantly worse than her prior MRI scan. He diagnosed left hip bursitis and low back pain secondary to severe discogenic changes with radiculopathy. Dr. Small explained that appellant recently had gallbladder removal, which was complicated by a blood clot in the portal vein. Because she was currently taking Coumadin, Dr. Small indicated that he was concerned about giving appellant an injection in the trochanteric bursa. Instead, he prescribed Lidocaine and advised appellant to return in about six weeks. Appellant returned on July 25, 2005, at which time Dr. Small released her to resume work. He imposed a 10-pound lifting restriction and precluded any bending or twisting. Dr. Small also indicated that appellant should be permitted to stand and sit at will. Additionally, he prescribed an ergonomically correct chair. Lastly, Dr. Small instructed appellant to return on an as needed basis.

In a decision dated August 14, 2007, the Office denied modification of its May 19, 2006 decision. The senior claims examiner speculated that appellant's advancing age was perhaps responsible for the recent changes in her accepted condition of degenerative disc disease. She also noted that there was some "indication" that appellant's March 2005 gallbladder surgery immobilized her for a period of time. In denying modification, the Office found that the evidence was still insufficient to establish that appellant was unable to work from February 24 to July 27, 2005.

### **LEGAL PRECEDENT**

A claimant has the burden of establishing the essential elements of her claim, including that the medical condition for which compensation is claimed is causally related to the claimed employment injury.<sup>8</sup> For wage-loss benefits, the claimant must submit medical evidence

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<sup>7</sup> Dr. Small's May 2, 2006 report was amended to reflect a period of disability from February 24 through July 27, 2005, rather than an end date of July 21, 2005 as previously reported.

<sup>8</sup> 20 C.F.R. § 10.115(e) (2008); see *Tammy L. Medley*, 55 ECAB 182, 184 (2003).

showing that the condition claimed is disabling.<sup>9</sup> The evidence submitted must be reliable, probative and substantial.<sup>10</sup>

### ANALYSIS

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>11</sup> Appellant's long-time orthopedist, Dr. Small, provided a patchwork of treatment records and reports that when viewed in their entirety arguably support her claim for employment-related disability during the period February 24 through July 27, 2005.<sup>12</sup> However, Dr. Small has not provided a single comprehensive narrative report explaining how and why her accepted condition precluded her from working during the claimed five-month period in 2005. Although his various reports and treatment records are insufficient to discharge appellant's burden of proving that the claimed period of disability is employment related, the evidence is sufficient to require further development of the case record by the Office.<sup>13</sup> On remand, the Office should refer her to an appropriate orthopedic specialist for an evaluation and a rationalized medical opinion on whether she was totally disabled from February 24 through July 27, 2005 due to her accepted employment-related injury. After such further development of the case record as it deems necessary, a *de novo* decision shall be issued.

### CONCLUSION

The Board finds that the case is not in posture for decision.

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<sup>9</sup> *Id.* at § 10.115(f).

<sup>10</sup> *Id.* at § 10.115.

<sup>11</sup> *Horace L. Fuller*, 53 ECAB 775, 777 (2002); *James P. Bailey*, 53 ECAB 484, 496 (2002); *William J. Cantrell*, 34 ECAB 1223 (1983).

<sup>12</sup> The Office's speculation that the recent changes in appellant's degenerative condition were age related is inconsistent with its earlier acceptance of the claim for aggravation of degenerative disc disease based on Dr. Small's July 8, 2005 report. Also, it is unclear what medical evidence the Office considered an "indication" that appellant's gallbladder surgery immobilized her for a period of time. This surgery occurred in early March 2005 and she was undergoing physical therapy for her back within a few weeks' time. Furthermore, the Office's initial rejection of Dr. Small's May 2, 2006 report merely because it was not "contemporaneous" to the period of disability claimed is baseless. On that theory, any physician's retrospective view of a claimant's case record would similarly be of "no value."

<sup>13</sup> *See John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 14, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: August 7, 2009  
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