



The Office accepted lumbosacral strain and contusion and her claim for a recurrence of disability beginning October 25, 2006.<sup>1</sup>

Appellant stopped work on October 25, 2006 and returned to work in a limited-duty job on April 4, 2007. On April 4, 2007 she accepted a light-duty job. The job was classified as sedentary and included a 1/2-hour lunch break and a 5-minute break every 30 minutes. Restrictions included intermittent sitting and walking and no lifting, carrying, grasping or manipulation of more than five pounds. Appellant stopped work shortly thereafter.

On April 9, 2007 appellant again returned to work in the light-duty job but stopped work that same day. She filed a claim for a recurrence of disability for the period April 6 and 7, 2007 and another claim for recurrence of disability beginning April 9, 2007. The Office received medical reports in support of appellant's claim of disability.

In an April 11, 2007 report, Dr. Robert Lanter, a treating Board-certified physiatrist, diagnosed low back pain, lumbosacral radiculopathy, local reactive myofascial pain, paravertebral tenderness and spasm, which he attributed to a May 14, 2005 employment injury. A physical examination revealed appellant was unable to perform toe or heel walk due to back pain and decreased active range of motion in the thoracolumbar spine. Range of motion included 60 degrees extension and 20 degrees flexion. Dr. Lanter opined that appellant was disabled "from activities consistent with gainful employment" due to this injury.

On May 2, 2007 the Office received an April 10, 2007 disability note from Dr. Lanter stating that he had seen appellant that day and she was "advised not to return to work until further testing is done."

On May 15, 2007 the Office received a May 1, 2007 report from Dr. Lawrence J. Marino, a treating physician, and an April 23, 2007 progress note from Dr. Michael Shapiro, a treating Board-certified orthopedic surgeon. Dr. Marino stated that he had treated appellant since 1996 and that prior to her May 14, 2005 employment injury she had no orthopedic problems. Dr. Shapiro diagnosed lumbago, a herniated nucleus pulposus and radiculitis and stated that she was disabled from work until further notice. He opined that appellant's disability was a result of her injury and that she would be reevaluated on May 21, 2007.

By letter dated May 23, 2007, the Office requested additional factual and medical information from appellant and enclosed a recurrence development checklist for her completion.

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<sup>1</sup> There was an appeal before the Board for appellant's claim of recurrence for a different period of time. In a June 24, 2008 decision, the Board affirmed the Office's December 14, 2007 decision, finding that appellant did not sustain a recurrence of disability commencing September 25, 2007 causally related to her May 15, 2006 employment injury. The Board found that she failed to establish that there had been a change in her light-duty assignment or that her condition had changed. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference only as relevant to the facts of this appeal. Docket No. 08-703 (issued June 24, 2008). In the Board's previous decision, it noted: "The record contains a July 10, 2007 decision of the Office which denied her claim for a recurrence of disability on April 6 and 9, 2007. In her application to the Board, appellant did not seek review of this decision and it is not an issue in the present appeal." The appeal in this case refers only to appellant's claims for recurrence of disability on April 7 and 9, 2007.

Subsequent to the Office's request, it received additional factual and medical evidence. In an April 6, 2007 report, Dr. Carlisle Saint Martin, a treating physician, reported seeing appellant on that day. He diagnosed a lumbar herniated nucleus pulposus and reported that she had been working light duty.

In a May 4, 2007 form, Dr. Howard R. Adelglass, a treating Board-certified physiatrist checked that appellant was "not fit for duty."

A magnetic resonance imaging scan was obtained on May 9, 2007, which revealed multilevel degenerative disc disease of the lumbar spine with convexity of the lower thoracic and upper lumbar spine and asymmetric disc bulging at L3-4 and L4-5, with neural foraminal narrowing most severe at L4-5.

Appellant was referred by the Office for examination by Dr. Frank M. Hudak, an orthopedic surgeon. In a May 15, 2007 report, Dr. Hudak reviewed a history of her May 2005 lifting injury and the May 2006 slip and fall injury and subsequent medical treatment. Appellant described symptoms of constant low back pain, worse on bending, with numbness radiating down both lower extremities. Examination of the low back revealed tenderness in the midline of the lumbosacral spine, extending into the L3 to S1 region. Dr. Hudak noted her range of back motion, indicating that no spasm was palpated in either the right or left paraspinal muscle groups. A positive left straight leg raising test was obtained in the upright position. Dr. Hudak diagnosed a sprain of the lumbosacral spine causally related to the May 15, 2006 injury, superimposed on a previous sprain and left lumbosacral radiculopathy that was a result of the 2005 work accident. He advised that she had objective findings upon examination and that she was disabled from her work as a baggage screener. Dr. Hudak advised, however, that appellant could return to light-duty work with no repetitive bending at the waist and no lifting in excess of 10 pounds. He recommended that she be referred for pain management or epidural steroid injections to treat her left radiculopathy. Dr. Hudak submitted work restrictions, releasing appellant to full-time work with limitations on sitting, lifting, twisting and bending.

On June 13, 2007 the employing establishment advised that it had limited duty available that complied with the restrictions set by Dr. Hudak. Appellant accepted the limited duty and returned to work on July 16, 2007 as an exit lane monitor and at the welcome tables.

Dr. Adelglass in a May 18, 2007 form, checked that appellant was "not fit for duty" and noted surgery was scheduled for May 21, 2007.

On May 25, 2007 Dr. Shapiro reported that appellant was seen for back and left lower extremity pain.

In her June 7, 2007 statement, appellant related that she had severe shooting muscle spasms while attempting to perform the limited-duty job she had accepted and that she was unable to sit due to lower body and leg stiffness.

In forms dated June 8 and 22, 2007, Dr. Adelglass checked that appellant was "not fit for duty."

By decision dated July 10, 2007, the Office denied the claim for a recurrence of disability beginning April 6, 2007. It found that the factual and medical evidence did not establish the claimed recurrences resulted from the accepted work injury.

On July 12, 2007 the Office received a June 29, 2007 report from Dr. Shapiro who noted that he had seen appellant for back and left lower extremity pain. Dr. Shapiro reported that her motor sensory and range of motion remained unchanged.

On July 16, 2007 appellant accepted a limited-duty job with restrictions consistent with those approved by Dr. Hudak.

On July 23, 2007 the Office received forms dated June 22 and July 6, 2007 from Dr. Adelglass who checked that appellant was “not fit for duty” and a June 29, 2007 disability report from Dr. Shapiro, who diagnosed lumbago, a herniated nucleus pulposus and radiculitis and stated that she was disabled from working until further notice due to her injury.

In an August 31, 2007 form, Dr. Adelglass released appellant to limited-duty work that day.

The record reflects again that appellant stopped work following her tour of duty on September 26, 2007. On October 12, 2007 she submitted a claim for a recurrence of disability, noting that she stopped work as of September 26, 2007.<sup>2</sup> Appellant indicated that a chair was changed that did not provide adequate back support. In support of her claim, she submitted several prescription notes from Dr. Irfan A. Alladin with his recommendation that she undergo physical therapy and for medication.

On October 5, 2007 appellant was examined by Dr. Renato Battisti, a chiropractor, who found limitations of movement and diagnosed lumbar myofasciitis with lumbosacral strain, noting that appellant had begun chiropractic treatment.

On October 9, 2007 Dr. John Goutos, an internist, noted that appellant had been out of work for approximately a week due to an exacerbation of back pain. He advised that she had received seven epidurals and was scheduled for additional injections. Dr. Goutos listed findings on examination, noting tenderness on palpation and spasm at the L4 to S1 region and positive straight leg raising. He diagnosed a herniated lumbar disc and back pain and advised that she should be placed on light duty as of October 11, 2007.

In an October 12, 2007 report, Dr. Shapiro, an orthopedic surgeon, treated appellant for back and left lower extremity pain. He noted tenderness to palpation and percussion about the lumbar spine with a reduction of straight leg raising, bilaterally. Dr. Shapiro advised that appellant would be continuing with conservative care, undergoing epidural injections and facet block treatments. He stated that she remained disabled for work.

On December 14, 2007 the Office denied appellant’s claim for recurrence on September 25, 2007. It found that she did not establish that her injury-related condition had

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<sup>2</sup> This recurrence claim has already been addressed by the Board. *Supra* note 1.

changed or that her light-duty work assignment had changed. The medical evidence submitted in support of her claim was found deficient as her physicians did not explain how her condition had changed such that she was no longer able to perform her light-duty assignment as of September 25, 2007.

This decision was appealed to the Board and a decision was issued by the Board on June 24, 2008.<sup>3</sup>

On July 1 2008 appellant's counsel requested reconsideration of the July 10, 2007 decision, denying appellant's April 2007 claims for recurrence and submitted a June 7, 2007 report from Dr. Shapiro in support of her request. Appellant contended that as her disability at that time occurred within 90 days after she returned to duty, the medical evidence of file clearly satisfied the reduced burden of proof articulated in the Office's procedure manual where a recurrence for disability is claimed within 90 days from the first return to duty after disability. Appellant's counsel noted particularly the procedure manual's language relating to employees who return to duty within 90 days of a prior disability: "The CE [claims examiner] may accept the attending physician's statement supporting causal relationship between the claimant's current condition and the accepted condition, even if the statement contains no rationale."

Dr. Shapiro, in his report of June 7, 2007, noted that he had seen appellant on April 23, 2007 for her May 15, 2006 employment injury. He noted that she returned to limited-duty work on April 2, 2007 and that she worked two days before stopping. Dr. Shapiro stated that appellant "was unable to complete her light[-]duty assignment due to radiating and shooting pain with stiffness while working." He opined that she was currently disabled from working due to "severe radiating pain her left leg and lower back." In concluding, Dr. Shapiro opined that appellant's "recent reexacerbation is [causally related] to a prior injury of May 15, 2005."

By decision dated September 29, 2008, the Office acknowledged that it had discretion in recurrence claims filed within 90 days after returning to duty after disability, but nonetheless found the evidence insufficient to modify the denial of appellant's claim for a recurrence of disability for the period April 6 to 7, 2007 or further disability beginning April 9, 2007. It found that her recurrence claims had not been denied on the basis of causal relationship, but on the basis that the medical evidence did not establish how her work-related condition had worsened or change or explained why she was unable to perform her light-duty work. In conclusion, the Office stated: "Modification of the prior decision is unwarranted as there has been no demonstration of 'clear evidence of error,' on the part of the Office, no new point of law has been advanced and the evidence submitted has insufficient probative value to warrant modification of the prior decision."

### **LEGAL PRECEDENT**

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability

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<sup>3</sup> *Supra* note 1.

and show that she cannot perform such light duty. 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 light-duty requirements.<sup>4</sup>

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.<sup>5</sup>

Office procedures state that a recurrence of disability includes a work stoppage caused by a spontaneous material change, demonstrated by objective findings, in the medical condition that resulted from a previous injury or occupational illness without an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>6</sup>

Office procedures, regarding recurrent disability within 90 days of a return to employment, provides as follows:

“a. *Burden of Proof.* The claimant is not required to provide the same evidence as for a recurrence claimed long after apparent recovery and return to work. Therefore, in cases where recurring disability for work is claimed within 90 days or less from the first return to duty, the focus is on disability rather than causal relationship.

“b. *Disability for Work.* Assuming the requirements described in paragraph 5 above concerning causal relationship are met, the CE [claims examiner] should ask the employee to submit a Form OWCP-5 and/or narrative statement from the attending physician which describes the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for renewed disability for work....”<sup>7</sup>

Paragraph five of the Office’s procedures, which is applicable to a recurrence of a medical condition within 90 days of release from medical care, provides that the claims examiner “may accept the attending physician’s statement supporting causal relationship between the claimant’s current condition and the accepted condition, even if the statement contains no rationale unless” there is evidence of an intervening injury, an intervening decision, the claim was accepted for a temporary aggravation of a preexisting condition or the “renewed claim involves a different diagnosis” from the accepted condition.<sup>8</sup>

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<sup>4</sup> K.S., 60 ECAB \_\_\_ (Docket No. 08-2105, issued February 11, 2009); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>5</sup> 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB \_\_\_ (Docket No. 07-2287, issued May 16, 2008).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997).

<sup>7</sup> *Id.* at Chapter 2.1500.6(a) and (b) (January 1995).

<sup>8</sup> *Id.* at Chapter 2.1500.5(a) (May 2003).

## ANALYSIS

Appellant filed a Form CA-2a on April 9, 2007 indicating disability for April 6 and 7, 2007. She filed a second CA-2a form on April 20, 2007 indicating disability beginning April 9, 2007. The record indicates that appellant accepted limited-duty work from the employing establishment on April 4 and 9, 2007. The September 28, 2008 decision on appeal addressed the disability claim for April 6 and 7, 2007 and also addressed the claim for a recurrence of disability beginning April 9, 2007.

The Board finds that appellant failed to submit sufficient medical evidence to establish that she was disabled from her limited-duty position on or after April 6, 2007 due to her accepted employment injury. Dr. Lanter, in a report dated April 11, 2007, diagnosed low back pain lumbosacral radiculopathy, local reactive myofascial pain, paravertebral tenderness and spasm which he attributed to a May 14, 2005 employment injury. He provided physical findings and concluded that she was disabled from working due to this injury. Dr. Lanter's report is insufficient to support disability for this period as he does not attribute appellant's disability to her accepted May 15, 2006 employment injury.

The record also contains disability notes/forms from Drs. Lanter and Adelglass. In an April 10, 2007 disability note, Dr. Lanter indicated that appellant was totally disabled. Dr. Adelglass, in form reports dated May 4, 18 and June 8 and 22, 2007, also indicated that she was totally disabled. However, neither Dr. Lanter nor Dr. Adelglass addressed the cause of appellant's diagnosed conditions and therefore these disability notes/forms are insufficient to establish that she sustained a recurrence of disability beginning April 6, 2007. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>9</sup> Further, neither Dr. Lanter nor Dr. Adelglass provided findings on examination in the disability notes/forms. Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled from work.<sup>10</sup>

In an April 6, 2007 report, Dr. Saint Martin diagnosed a herniated nucleus pulposus and noted that appellant was working light duty. He does not discuss her light-duty job or provide a history of the May 14, 2006 employment injury. This report is insufficient to support her claim for a recurrence of disability as Dr. Saint Martin does not address the relevant issue of whether appellant sustained a recurrence of disability beginning April 6, 2007.<sup>11</sup>

Appellant also submitted reports dated May 25 and June 29, 2007 from Dr. Shapiro in which he noted that he had seen her for left lower extremity and back pain. In the June 29, 2007 report Dr. Shapiro noted that her motor sensory and range of motion remained unchanged. As he did not provide a diagnosis or opinion regarding causation or address the relevant issue of

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<sup>9</sup> *Willie M. Miller*, 53 ECAB 697 (2002).

<sup>10</sup> *Laurie S. Swanson*, 53 ECAB 517 (2002).

<sup>11</sup> *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

whether appellant sustained a recurrence of disability beginning April 6, 2007, his reports are insufficient to meet her burden of proof.<sup>12</sup>

In a June 7, 2007 report, Dr. Shapiro noted that appellant returned to limited-duty work on April 2, 2007 for an injury she sustained while working on May 16, 2006 to the lower back and that she worked two days before stopping. He stated that she “was unable to complete her light-duty assignment due to radiating and shooting pain with stiffness while working.” Dr. Shapiro opined that appellant was currently disabled from working due to “severe radiating pain her left leg and lower back.” In concluding, he attributed her current disability to an exacerbation of a May 15, 2005 injury.<sup>13</sup> While Dr. Shapiro opined that appellant’s recurrence of disability was due to her employment, he did not provide any rationale or explanation supporting his conclusion and thus his opinion is of little probative value.<sup>14</sup> The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background.<sup>15</sup> This report is insufficient to support appellant’s burden of proof.

Appellant submitted several prescription notes and form reports from Dr. Alladin, who noted her complaints of low back pain, but did not provide any narrative report explaining how her disability for continuing in her light-duty work was caused or contributed to by her May 15, 2006 injury. There are numerous form records from various attending physicians; however, many are not clearly legible and do not provide a rationalized opinion on the relevant issue of causal relation. The Board has held that prescription notes or form reports that provide a check mark in support of causal relation are of diminished probative value.<sup>16</sup>

Dr. Goutos advised on October 9, 2007 that appellant had been out of work for a week due to an exacerbation of back pain. He noted medical treatment which had been administered and listed findings on examination. Dr. Goutos diagnosed a herniated disc and advised that appellant should be placed on light duty as of October 11, 2007. The Board notes that the brief report of the physician fails to provide any explanation of how her medical condition had changed such that she became disabled for light-duty work in April 2007, six months earlier. Dr. Goutos did not provide a full history of the injury accepted by the Office or address the nature of appellant’s preexisting degenerative back disease and herniated disc conditions. He did not address how the accepted lumbosacral strain and contusion would cause or contribute to her inability to continue light-duty work. Dr. Goutos advised that appellant should return to

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<sup>12</sup> *Donald R. Pippin*, 54 ECAB 631 (2003).

<sup>13</sup> Although Dr. Shapiro refers to a 2005 injury, the Board will assume that this date is a typographical error as it is correctly noted in the first paragraph of the report.

<sup>14</sup> *Albert C. Brown*, 52 ECAB 152 (2000).

<sup>15</sup> *Conard Hightower*, 54 ECAB 796 (2003).

<sup>16</sup> See *Cecelia M. Corley*, 56 ECAB 662 (2005); *Donald W. Long*, 41 ECAB 142 (1989).

light-duty work as of October 11, 2007. This report is not sufficient to establish her current recurrence claims for April 2007.

On October 12, 2007 Dr. Shapiro treated appellant for low back and left lower extremity pain. He advised that she was undergoing conservative treatment and that she remained disabled for work. Dr. Shapiro did not, however, address the lumbosacral strain and contusion conditions accepted by the Office or how these conditions would cause disability for work in April 2007. He did not provide any opinion relating to appellant's disability for work to the May 15, 2006 injury. Therefore, Dr. Shapiro's opinion is of reduced probative value.

Dr. Battisti, a chiropractor, examined appellant on October 5, 2007 and diagnosed lumbar myofasciitis and lumbosacral strain. Section 8101(2) of the Federal Employees' Compensation Act defines the term physician to include chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a spinal subluxation as demonstrated by x-ray to exist.<sup>17</sup> Dr. Battisti did not provide a diagnosis of subluxation as based on x-ray. For this reason, his medical report does not constitute competent medical evidence in support of appellant's claim.

On appeal, appellant's attorney contends that as appellant's disability occurred within 90 days after she returned to duty, the burden of proof for appellant is less than it would have been had appellant been back to work for more than 90 days. The Office's procedure manual provides that an appellant's burden of proof to establish a recurrence of disability within 90 days of a return to work is not the same as that "for a recurrence claimed long after apparent recovery and return to work" and that the "focus is on disability rather than causal relationship."<sup>18</sup> Further, the manual reads: "the claims examiner **may** accept the attending physician's statement supporting causal relationship between the claimant's current condition and the accepted condition, even if the statement contains no rationale..." (Emphasis added.) This cited section relates to the Office's discretion on what evidence to require, it does not change appellant's burden to establish his claim for recurrence.<sup>19</sup> The Office exercised its discretion in this case and found the medical evidence lacking. In accordance with Board case law, in order to establish a recurrence of disability due to a worsening of her condition, appellant must establish a change in the light-duty position (which has not been alleged) or a change in the nature and extent of her accepted injury-related condition such that she can no longer perform her light-duty employment.<sup>20</sup> Appellant failed to provide evidence establishing a change in her accepted conditions of lumbosacral strain and contusion such that she was disabled from her employment and, consequently, did not meet her burden of proof.

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<sup>17</sup> 5 U.S.C. § 8101(2). See *Paul Foster*, 56 ECAB 208 (2004); *Linda Thompson*, 51 ECAB 694 (2000).

<sup>18</sup> See *supra* note 6.

<sup>19</sup> See *e.g.*, *Maria Addis*, Docket No. 97-2748 (issued September 22, 1997).

<sup>20</sup> See *supra* note 13; *Sherry A. Hunt*, 49 ECAB 467 (1998); *Glenn Robertson*, 48 ECAB 344 (1997).

**CONCLUSION**

Appellant did not establish her claims for recurrences of disability on or after April 6, 2007, causally related to her May 15, 2006 employment injury.<sup>21</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 29, 2008 is affirmed.<sup>22</sup>

Issued: December 29, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>21</sup> Appellant would be entitled to wage-loss compensation for medical appointments if appellant could establish the medical appointments or treatments were for her accepted May 15, 2006 employment injury.

<sup>22</sup> The Board notes that the Office referenced three different standards of review in its September 29, 2008 decision. The Office did, nonetheless, utilize the proper standard of review under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2) when it analyzed the evidence. It considered the evidence new and relevant and conducted a merit review. In that regard, the Office's decision is affirmed.