

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

S.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Coppell, TX, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-1533
Issued: February 17, 2009**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 6, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 11, 2008 merit decision denying his recurrence of total disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of total disability between November 2 and December 1, 2007 due to his June 8, 2004 employment injury.

FACTUAL HISTORY

The Office accepted that on June 8, 2004 appellant, then a 41-year-old mail carrier, sustained a concussion, cervical sprain/strain and degeneration of his C7 disc when the left side of his head collided with a turn stall bar that suddenly stopped. Appellant stopped work on June 8, 2004 and returned to light-duty work for the employing establishment on

November 15, 2004. He received appropriate compensation from the Office for periods of disability. On March 15, 2006 appellant underwent anterior cervical discectomy and fusion surgery at C5-7 which was authorized by the Office. He returned to limited-duty work for the employing establishment on November 24, 2006 and regular-duty work on January 20, 2007.

In a January 22, 2007 report, Dr. Teig Port, an attending Board-certified orthopedic surgeon, stated that appellant had no pain radiating down his arms and had relatively good range of motion. On March 13, 2007 he stated that appellant reported periodic pain flare-ups after lifting which kept him off work for short periods, but he indicated that his condition remained relatively stable.

On November 2, 2007 appellant stopped work and on November 30, 2007 he filed a claim alleging that he sustained a recurrence of total disability on November 2, 2007 due to his June 8, 2004 employment injury. He later indicated that his claimed period of disability was from November 2 to December 1, 2007.¹

On November 20, 2007 Dr. Port indicated that appellant reported that he had a flare-up of the neck pain over the last couple of weeks without a new injury. He indicated that on examination appellant exhibited a mild loss of rotation range of motion and stated that most of his pain appeared to be in the central neck where there was some tightness in the lower paracervical muscles. Appellant reported occasional numbness in his arms, but did not have any on examination. Dr. Port diagnosed “flare-up of the neck symptoms,” made note of appellant’s fusion surgery and stated:

“I have told [appellant] he is going to have some flare-up from time to time having had this sort of major surgery and major metal implant in the neck. I have not given him Vicodin Extra Strength prescription in many months. I did give him prescription for 40 today to take just about one a day at home [as needed] for more severe pain. [Appellant] can take over-the-counter analgesics at work. I think [he] just has temporary flare-up of symptoms and I have given him approval to go back to regular[-]duty work at this time. Since he still takes occasional prescription medication for the work injury to the neck, he should follow up with [me] in three months.”

In a November 20, 2007 note, Dr. Port stated that appellant was out of work from November 8 to 23, 2007 “due to neck pain.” In a November 22, 2007 form report, he indicated that appellant could perform his regular work. On November 27, 2007 Dr. Port noted that appellant could not work from November 26 to December 2, 2007 because he was “incapacitated due to neck injury.” On November 29, 2007 he stated that appellant was out of work from November 2 to 23, 2007 “due to flare-up of cervical spine condition.”

In a November 29, 2007 note, Dr. Port stated that appellant reported he had some flare-up of neck pain recently after moving some containers at work about five days ago. He indicated

¹ It appears that appellant might have returned to work on November 24 or 25, 2007 and stopped work again after a day or two. He was not scheduled to work on December 2, 2007 and returned to his regular work on December 3, 2007.

that he exhibited some tenderness about the paracervical muscles and that range of motion was relatively good. Dr. Port diagnosed “cervical strain in the patient with a prior II level cervical fusion surgery from the June 8, 2004 work injury” and recommended that he be given an out of work note for about the prior week. He indicated that appellant should be able to return to light/medium-duty work in a couple of days. In another November 29, 2007 note, Dr. Port provided a similar account of appellant’s reported activities and symptoms and findings on examination. He stated that he had given appellant a temporary out of work note and indicated that he should be able to return to work the next week.

On December 13, 2007 the Office requested that appellant submit additional factual and medical evidence in support of his claim. Appellant submitted a March 3, 2008 form report in which Dr. Port listed the date of injury as June 8, 2004 and indicated that he had discectomy and fusion surgery in March 2006. Dr. Port checked a “yes” box indicating that appellant’s condition was caused or aggravated by the reported employment incident and stated that he was totally disabled from November 2 to December 2, 2007. He noted that he had “occasional episodes of incapacitation due to neck pain.” Appellant also submitted a November 20, 2007 form report in which Dr. Port indicated that appellant could perform his regular work.

In a March 11, 2008 decision, the Office denied appellant’s claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of total disability between November 2 and December 1, 2007 due to his June 8, 2004 employment injury. It indicated that appellant did not submit a report which contained a rationalized medical opinion relating his disability to his June 8, 2004 employment injury.²

LEGAL PRECEDENT

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.³ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.⁴ Where no such rationale is present, medical evidence is of diminished probative value.⁵

ANALYSIS

The Office accepted that on June 8, 2004 appellant sustained a concussion, cervical sprain/strain and degeneration of his C7 disc when the left side of his head collided with a turn

² Appellant submitted additional evidence after the Office’s March 11, 2008 decision, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

³ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

⁴ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁵ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

stall bar that suddenly stopped. On March 15, 2006 appellant underwent anterior cervical discectomy and fusion surgery at C5-7 which was authorized by the Office. He returned to regular-duty work for the employing establishment on January 20, 2007. Appellant stopped work between November 2 and December 1, 2007 and claimed that he sustained a recurrence of total disability during this period due to his June 8, 2004 employment injury.⁶ The Board finds that appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of total disability between November 2 and December 1, 2007 due to his June 8, 2004 employment injury.

Appellant submitted a March 3, 2008 form report in which Dr. Port, an attending Board-certified orthopedic surgeon, listed the date of injury as June 8, 2004 and indicated that he had discectomy and fusion surgery in March 2006. Dr. Port checked a “yes” box indicating that appellant’s condition was caused or aggravated by the reported employment incident and stated that he was totally disabled from November 2 to December 2, 2007. He noted that he had “occasional episodes of incapacitation due to neck pain.” The Board has held, however, that when a physician’s opinion on causal relationship consists only of checking “yes” to a form question, that opinion has little probative value and is insufficient to establish causal relationship.⁷ Appellant’s burden includes the necessity of furnishing an affirmative opinion from a physician who supports his conclusion with sound medical reasoning. Dr. Port did not describe appellant’s employment injury in any detail or explain how it could have caused total disability more than nine months after he returned to regular work. He did not report objective examination findings which showed a notable worsening of appellant’s employment-related condition and did not explain why his condition prevented him from performing any work.⁸ As Dr. Port did no more than check “yes” to a form question, his opinion on causal relationship is of little probative value and is insufficient to discharge appellant’s burden of proof.

In a November 20, 2007 report, Dr. Port indicated that appellant reported that he had a flare-up of the neck pain over the last couple of weeks without a new injury. He indicated that on examination appellant exhibited a mild loss of rotation range of motion and stated that he had a temporary flare-up of symptoms. Dr. Port noted that he had given appellant approval to go back to regular-duty work at this time. In November 20 and 22, 2007 form reports, he indicated that appellant could perform his regular work. Therefore, these reports do not contain an opinion that appellant sustained an employment-related recurrence of total disability.⁹

In notes dated November 20, 27 and 29, 2007, Dr. Port stated that appellant was totally disabled for periods between November 2 and December 2, 2007. He variously indicated that

⁶ It appears that appellant might have returned to work on November 24 or 25, 2007 and stopped work again after a day or two.

⁷ *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

⁸ Dr. Port appeared to base his disability opinion on appellant’s self-reporting of increased pain.

⁹ The Board notes that these reports contain a disability opinion that conflicts with that contained in Dr. Port’s March 3, 2008 report. The Board has found that an opinion which is equivocal is of limited probative value regarding the issue of causal relationship. See *Leonard J. O’Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956).

this disability was due to a neck injury, neck pain or “flare-up of cervical spine condition.” Dr. Port did not provide any opinion that this disability was due to appellant’s June 8, 2004 employment injury. In November 29, 2007 notes, he stated that appellant reported he had some flare-up of neck pain recently after moving some containers at work about five days ago. Dr. Port recommended that appellant be given an out of work note for about the prior week and indicated that he should be able to return to light/medium-duty work in a couple of days. He did not, however, indicate that appellant had sustained an employment-related recurrence of total disability.¹⁰

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant’s claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.¹¹ Appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability is causally related to the accepted employment injury and, therefore, the Office properly denied his claim for compensation.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability between November 2 and December 1, 2007 due to his June 8, 2004 employment injury.

¹⁰ It does not appear that appellant filed a claim for a new injury and the record does not contain a final decision of the Office regarding such a matter.

¹¹ See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 11, 2008 merit decision is affirmed.

Issued: February 17, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board