

pulling a motor assembly on April 16, 1999. On June 10, 1999 the Office accepted appellant's claim for sprain of neck.¹ It entered appellant on the periodic rolls. Appellant returned to a light-duty position on September 21, 2000. In a letter dated September 27, 2000, the Office informed appellant that his compensation benefits would be reduced effective September 21, 2000 based on his reemployment as a modified maintenance mechanic with wages of \$764.38 per week. By decision dated December 7, 2000, it reduced appellant's compensation benefits to zero on the grounds that his employment as a modified maintenance mechanic fairly and reasonable represented his wage-earning capacity and that as his actual wages meet or exceeded the wages of the job he held when injured he had no loss of wages. Appellant requested an oral hearing on this decision on January 4, 2001. The hearing representative affirmed the Office's December 7, 2000 decision on July 30, 2001. The Board adopted this decision of the hearing representative in a decision dated August 21, 2002. Appellant continued to claim intermittent periods of wage-loss compensation due to medical treatment. The Office authorized compensation payments.

Appellant filed a recurrence of disability claim on November 3, 2004 and alleged that on November 2, 2004 he was pushing a dust mop and experienced severe muscle spasms in the back, neck and shoulders. He also filed a claim for compensation on November 5, 2004 requesting compensation for leave without pay from November 4 to 5, 2004.

In a note dated November 3, 2004, appellant's attending physician, Dr. Martin A. Langston, a physician specializing in physical medicine and rehabilitation, indicated that appellant was unable to work for five days and would return to work on November 8, 2004. Appellant provided a note to his supervisor, Tim Lacombe, dated November 3, 2004 which stated that while dust mopping in the performance of duty on November 2, 2004 he experienced a severe muscle spasm in his back, neck and right shoulder. He stated that his pain increased and that he sought medical treatment resulting in prescriptions for an additional muscle relaxer and pain reliever. In a letter dated November 17, 2004, the Office requested additional medical evidence in support of the alleged recurrence of disability.

Appellant filed an additional claim for compensation for the period November 15 through 26, 2004. In a note dated November 12, 2004, Dr. Langston indicated that appellant was unable to work for two weeks. In a letter dated November 23, 2004, the Office requested that appellant provide "the evidence requested below." However, this letter did not include a request for additional evidence. The Office allowed appellant 30 days for a response.

Dr. Langston completed a note on November 17, 2004 and listed appellant's complaints of ongoing posterior cervical pain. He stated that appellant's magnetic resonance imaging (MRI) scan showed a disc bulge at C6-7. Dr. Langston stated, "This certainly can account for his acute cervical pain." He found appellant totally disabled for 7 to 10 days. In a note dated November 24, 2004, Dr. Langston indicated that appellant could return to work on November 29, 2004. In a separate note of the same date, he recommended cervical epidural steroid injections and released appellant to return to work on November 29, 2004 with additional work restrictions. Appellant accepted a new light-duty position on December 6, 2004.

¹ The hearing representative stated that the Office accepted appellant's claim for aggravation of cervical strain at C1-2 and C3-4.

By decision dated February 1, 2005, the Office denied appellant's claim for a recurrence of disability beginning November 4, 2004. It found that appellant failed to submit the necessary medical evidence to establish his claim. Appellant requested an oral hearing on February 22, 2005.

Appellant underwent a cervical and thoracic MRI scan on February 28, 2007. The report included documentation of appellant's prior operative intervention, reversal of cervical lordosis, prominent bulging or protrusion of the C4-5 intervertebral disc, bulging of the C3-4 disc and C6-7 disc as well as cervical facet arthrosis. Dr. Langston examined appellant on March 2, 2007 and stated that appellant's MRI scan demonstrated postsurgical changes of the cervical spine as well as degenerative disc disease at C4-5 and C3-4. In a report dated March 8, 2007, Dr. Kevin P. McCarthy, a Board-certified orthopedic surgeon, examined appellant's February 28, 2007 MRI scan and found a right-sided posterolateral disc protrusion at C4-5 and bulging at C3-4 and C6-7.

Appellant testified at his oral hearing on April 2, 2007. He stated that since November 19, 2004 he had worked in a sedentary position monitoring a computer terminal and performing visual checks on the tray management system. Appellant stated that his initial disability on November 4 and 5, 2004 was due to medication-related problems. He then underwent an MRI scan which demonstrated a new disc bulge at C6-7. Appellant stated that his symptoms had resolved by his return to work on November 29, 2004.

By decision dated May 8, 2007, the hearing representative affirmed the Office's February 1, 2005 decision denying appellant's claimed recurrence of disability beginning November 4, 2004. The hearing representative found that the record did not contain the necessary medical opinion evidence to establish that appellant was totally disabled beginning November 4, 2004 due to his accepted employment injury.²

LEGAL PRECEDENT

A recurrence of disability is the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment which caused the illness. The term also means an 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 when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.³

² Following the Office's May 8, 2007 decision, appellant submitted additional new evidence. As it did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

³ 20 C.F.R. § 10.5(x).

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. The burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concluded that the condition is causally related to the employment injury. Moreover, sound medical reasoning must support the physician's conclusion.⁴

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury. In this regard, medical evidence of bridging symptoms between the recurrence of disability and the accepted injury must support the physician's conclusion of a causal relationship. While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.⁵

The Office's procedure manual notes that the submission of an incorrect form, such as a notice of traumatic injury⁶ rather than a notice of occupational disease is a technical error and states:

"It is improper to deny a case on the basis that the claimant failed to submit the correct form. The [claims examiner] must obtain the appropriate notice of injury or disease if it does not already appear in file."⁷

ANALYSIS

Appellant sustained an accepted cervical injury on April 21, 1999. He returned to light-duty work as a modified maintenance mechanic on September 21, 2000. Appellant filed a recurrence of disability claim on November 3, 2004 alleging on November 2, 2004 he experienced severe muscle spasms in the back, neck and shoulders while using a dust mop in the performance of duty. He then claimed compensation for total disability beginning November 4, 2004.

In support of his claim for a recurrence of disability, appellant submitted several medical reports from Dr. Langston, a physician specializing in physical medicine and rehabilitation, supporting appellant's claim for disability for work due to cervical pain and cervical degenerative disc disease. He did not discuss the origin of appellant's cervical conditions or

⁴ *Ricky S. Storms*, 52 ECAB 349, 351-52 (2001).

⁵ *Id.*

⁶ The Office's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁷ Federal FECA Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.4(b) (January 2003).

attribute this condition to appellant's accepted employment injury in 1999. Dr. Langston did not provide an opinion on the causal relationship between appellant's current cervical condition and his accepted April 16, 1999 neck sprain. As he failed to provide the necessary medical opinion evidence on the causal relationship between appellant's current cervical degenerative disc and his April 16, 1999 neck strain, his reports do not meet appellant's burden of proof and are not sufficient to establish that appellant has sustained a recurrence of disability.

Appellant also submitted a report dated March 8, 2007 from Dr. McCarthy, a Board-certified orthopedic surgeon, diagnosing a disc protrusion at C4-5. Dr. McCarthy failed to provide a history including appellant's April 16, 1999 employment injury, did not discuss the cause of appellant's disc protrusion and did not provide any medical evidence supporting appellant's claim for a recurrence of disability due to his April 16, 1999 cervical strain.

Appellant has not submitted the necessary medical evidence to establish that his current cervical conditions and alleged recurrence of total disability are due to his accepted 1999 employment injury. The Board finds that he failed to meet his burden of proof.

The Office adjudicated the issue of whether appellant had established a recurrence of disability from November 4 through 28, 2004. However, the Board notes that appellant's claim does not fall within the definition of a recurrence of disability. Appellant did not experience a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment which caused the illness. He had new exposure to his work, pushing a dust mop on November 2, 2004, which he felt resulted in muscle spasms in his neck, back and shoulder. This claim should more appropriately be developed as a claim for a traumatic injury as appellant sustained a condition of the body, muscle spasms, caused by a specific event or incident, pushing a dust mop, within a single workday or shift, on November 2, 2004. Proceedings under the Act are not adversarial in nature; the Office is not a disinterested arbiter and shares responsibility in the development of the evidence.⁸ It is the duty of the claims examiner to develop a claim based on the facts at hand and not solely on the basis of the type of claim filed.⁹ Appellant has consistently described the current onset of neck pain as arising on November 2, 2004 while pushing a dust mop. On remand, the Office should provide appellant with a notice of traumatic injury claim form to complete if he believes that his condition could have resulted from his November 2, 2004 employment activities.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of total disability on November 4, 2004 due to his accepted 1999 neck strain, as alleged. However, the Board further finds that appellant's November 2, 2004 injury should have been developed as a new traumatic injury and that the Office should provide appellant with the opportunity to develop this claim in accordance with his factual statements and the Office's procedures.

⁸ *Walter A. Fundringer, Jr.*, 37 ECAB 200, 204 (1985).

⁹ *Ronald D. Gustafson*, Docket No. 04-1076 (issued August 9, 2004).

ORDER

IT IS HEREBY ORDERED THAT the May 8, 2007 decision of the Office of Workers' Compensation Programs' is affirmed in part and remanded in part for additional development consistent with this decision of the Board.

Issued: January 12, 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