



for postlaminectomy syndrome. Following intermittent periods of total disability, she returned to limited-duty work on February 3, 2006 as a part-time flexible modified mail handler.

On August 13, 2007 appellant filed a claim for wage-loss compensation (Form CA-7) for the period August 2 to 17, 2007.

An August 1, 2007 magnetic resonance imaging (MRI) lumbar scan report of Dr. Michele M. Keys, a Board-certified osteopath, found degenerative disc disease with postoperative changes, facet degenerative changes and a degree of biforaminal encroachment, left side greater than right side at L4-5. Dr. Keys also found fibroid-type tumors. He noted that a small amount of fluid within the pelvis/posterior cul-de-sac region with differential diagnosis including, but not limited to benign ruptured ovarian cyst versus infectious/inflammatory process could not be excluded.

In an August 2, 2007 medical report, Dr. Fernando G. Diaz, an attending Board-certified neurosurgeon, reviewed a history of appellant's employment-related injuries and medical treatment. He reported normal findings on physical and neurological examination. Dr. Diaz noted that a July 2007 MRI scan of the lumbar spine revealed degenerative disc disease with disc space narrowing, lateral bilateral foraminal stenosis and nerve root compression at L4-5 with a subtle remaining pseudomeningocele. He also noted an August 2007 electromyogram (EMG) revealed chronic left L5 radiculopathy. Dr. Diaz opined that the diagnosed conditions were causally related to the accepted April 13, 2000 employment injuries. He recommended a decompressive laminectomy, radical discectomy, posterolateral arthrodesis with posterior instrumentation and anterior arthrodesis with anterior instrumentation at L4-5 on the left.

On August 14, 2007 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of total disability beginning on August 1, 2007. She stopped work on July 20, 2007. In an August 13, 2007 form report, Dr. Diaz stated that appellant sustained a displaced lumbar disc without myelopathy due to her April 13, 2000 employment injuries. He opined that she was totally disabled commencing August 2, 2007.

In an August 7, 2007 report, Dr. John H. Dooley, Ph.D., a clinical psychologist, reviewed a history of appellant's April 13, 2000 employment injuries and medical treatment. He diagnosed a pain disorder associated with both psychological factors and general medical conditions. Dr. Dooley stated that appellant experienced a severe single episode of major depression. His assessment revealed a markedly depressed, frustrated and angry individual. Dr. Dooley opined that, while appellant's emotional disruption appeared to be directly related to her pain and resulting disability, her condition was complicated by a history of developmental abuse and ingrained feelings of rejection. Appellant had a history of remote and more recent suicide attempts. Dr. Dooley found no evidence of somatization, secondary gain, environmental reinforcement, or manipulation of her pain complaints.

By letter dated August 30, 2007, the Office advised appellant that the evidence submitted was insufficient to establish a recurrence of total disability claim. It requested additional factual and medical evidence.

In a July 10, 2007 report, Dr. Diaz stated that appellant sustained lumbar radiculopathy as a direct result of her accepted April 13, 2000 employment injuries.

On August 31 and September 14, 2007 appellant filed CA-7 forms for the period August 18 to 31, 2007 and August 31 to September 14, 2007, respectively. By letters dated September 11 and October 3, 2007, the Office requested additional medical evidence.<sup>1</sup>

In an October 1, 2007 report, Dr. Diaz opined appellant's degenerative disc disease at the L4-5 level as a direct result of her April 13, 2000 employment-related injuries.

A September 20, 2007 report of Dr. Peter Goodman, Board-certified in emergency medicine, stated that appellant suffered from acute exacerbation of chronic radicular back pain.

In an October 9, 2007 disability certificate, Dr. Diaz stated that appellant sustained a lumbar disc. He released her to return to work on October 8, 2007 with restrictions.

On October 27, 2007 Dr. Anthony F. Skalak, an Office medical adviser, reviewed a history of appellant's April 13, 2000 employment injuries and medical treatment. He opined that she sustained degenerative disc disease at L4-5 and bilateral foraminal stenosis which was causally related to her accepted employment-related injury. Dr. Skalak opined that the requested decompressive laminectomy with instrumental fusion was medically necessary. He found that appellant was capable of working in her limited-duty position because it was sedentary in nature with minimal weight requirements and adequate allowance made for breaks as she required. Dr. Skalak noted that the symptoms related to her lower extremity and lumbar spine should not be exacerbated by the performance of her work duties.

On November 7, 2007 the Office accepted appellant's claim for degenerative disc disease at L4-5 and bilateral foraminal stenosis.

By decision dated November 8, 2007, the Office denied appellant's recurrence of disability claim. It found the medical evidence of record insufficient to establish that she was totally disabled from July 20 to October 7, 2007 causally related to her accepted employment-related injuries. By letter dated November 13, 2007, appellant, through counsel, requested a telephonic hearing before an Office hearing representative.

In a January 7, 2008 report, Dr. Diaz recommended an MRI scan of the lumbar spine in preparation for surgery. On January 14, 2008 Dr. Michael J. Paley, a Board-certified radiologist, performed an MRI scan of the lumbar spine which demonstrated normal discs at T11-12 through L3-4, an adequate canal diameter and a foramina which appeared patent.

In a January 14, 2008 report, Dr. Diaz stated that appellant suffered from residual herniated disc lateral into the foramen at L4-5 with the natural progression of degenerative disc disease at L4-5 following her accepted employment injuries and surgery.

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<sup>1</sup> Reports covering the period February 2 to December 14, 2007, from physicians whose signatures are illegible, stated that appellant was status post lumbar surgery and she had depression and insomnia. Appellant received sacroiliac joint injections. A September 20, 2007 report of a nurse whose signature is illegible stated that appellant experienced back pain.

On February 11, 2008 Dr. James E. Selis, a Board-certified radiologist, performed a computerized tomography (CT) scan of the lumbar spine. He stated that it demonstrated levoconvex scoliosis. Dr. Selis found no evidence of disc abnormality, spinal stenosis or narrowing of the neural foramina at L1-2, L2-3, L3-4 and L5-S1. He noted a previous left-sided laminectomy at L4-5. Dr. Selis stated that a mild diffuse bulge of the disc and a small protrusion of the disc on the left that caused some mild effacement of the thecal sac. He further stated that the neural foramina were normally patent. Dr. Selis concluded that there had been no significant change based on a September 4, 2007 CT scan.

Hospital records indicate that appellant underwent lumbar surgery on February 21, 2008 which was performed by Dr. Diaz.

Following the March 10, 2008 telephonic hearing, appellant submitted hospital records and discharge instructions dated February 26, 2008. X-rays of the lumbar spine which were performed by Dr. Paley on March 10 and 26, 2008 revealed that appellant was status post fusion at L4-5 and that she sustained levoscoliosis. On March 26, 2008, Dr. Henry C. Tong, a Board-certified physiatrist, listed appellant's pain medication. A February 26, 2008 lumbar x-ray report of Dr. Hugh H. Kerr, a Board-certified radiologist, found no acute process. A February 22, 2008 lumbar x-ray report of Dr. Burton I. Ellis, a Board-certified radiologist, demonstrated five nonrib-bearing type vertebral bodies. There were transverse fixation screws through the anterior body of L4 to the superior body of L5 with a fixation plate along the left lateral aspect. There was also intervertebral spacer at L4-5. In an April 21, 2008 x-ray report, Dr. Paley stated that appellant was status post fusion at L4-5.

In an undated report, Dr. Diaz stated that appellant sustained a displacement lumbar disc without myelopathy. In a March 3, 2008 report, he prescribed physical therapy treatment for appellant's disc degeneration at L4-5 during the period March 3 to April 9, 2008.

By decision dated May 6, 2008, an Office hearing representative affirmed the November 8, 2007 decision. The hearing representative found that appellant failed to establish that she sustained a recurrence of disability during the period July 20 to October 7, 2007.

### **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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>2</sup> This 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.<sup>3</sup>

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<sup>2</sup> 20 C.F.R. § 10.5(x).

<sup>3</sup> *Id.*

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that she cannot perform such limited-duty work. 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 limited-duty job requirements.<sup>4</sup>

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.<sup>5</sup>

### ANALYSIS

The Office accepted that appellant sustained lumbar sprain, lumbosacral neuritis with lumbar decompression surgery at L4-5, postlaminectomy syndrome, degenerative disc disease at L4-5 and bilateral foraminal stenosis on April 13, 2000. Following these injuries, appellant returned to limited light-duty work. She claimed a recurrence of total disability from July 20 to October 7, 2007 causally related to her accepted employment injuries. Appellant must demonstrate either that her condition changed such that she could not perform the light-duty activities required by her modified job or that the requirements of the limited light-duty jobs changed or were withdrawn. The Board finds that the record contains no evidence that the limited light-duty job requirements were changed or withdrawn or that appellant's employment-related condition changed to the point that she was precluded from engaging in limited light-duty work.

The diagnostic reports of Dr. Keys, Dr. Selis, Dr. Paley, Dr. Kerr and Dr. Ellis, and hospital surgical and discharge reports regarding appellant's lumbar conditions are insufficient to establish her claim for a recurrence of total disability. These records do not address the issue of her disability for work from July 20 to October 7, 2007 or how any disability was causally related to the accepted April 13, 2000 employment injuries.

Dr. Diaz's July 10, 2007 report stated that appellant sustained lumbar radiculopathy as a direct result of her accepted April 13, 2000 employment injuries. He addressed the initial injury accepted in this case and not the alleged recurrence of total disability from July 20 to October 7, 2007. This report is not relevant to the issue of whether appellant's disability during the claimed period was causally related to the April 13, 2000 employment injuries.

Dr. Diaz's August 2 and October 1, 2007 reports stated that appellant's degenerative disc disease at L4-5 with disc space narrowing, lateral bilateral foraminal stenosis, nerve root compression at L4-5 with a subtle remaining pseudomeningocele and chronic left L5 radiculopathy were causally related to the accepted April 13, 2000 employment injuries. In a

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<sup>4</sup> *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>5</sup> *James H. Botts*, 50 ECAB 265 (1999).

January 14, 2008 report, he stated that appellant had a residual herniated disc lateral into the foramen at L4-5 with the natural progression of degenerative disc disease at L4-5 following her accepted employment injuries and surgery. Although Dr. Diaz stated that the diagnosed lumbar conditions were causally related to appellant's accepted employment injuries, he did not provide any opinion addressing her disability for work from July 20 to October 7, 2007. He did not address the issue of disability or explain how her condition had changed such that she could not perform light duty. The Board finds that his reports are insufficient to establish appellant's claim.

Dr. Diaz's January 7, 2008 report stated that appellant required an MRI scan of the lumbar spine in preparation for surgery. In an undated report, he stated that she sustained a displacement lumbar disc without myelopathy. On March 3, 2008 Dr. Diaz prescribed physical therapy. Again, he did not provide any opinion addressing appellant's disability for work from July 20 to October 7, 2007. The Board finds that Dr. Diaz's reports are insufficient to establish appellant's claim.

Dr. Diaz's August 13, 2007 report reiterated that appellant sustained a displacement lumbar disc without myelopathy due to the April 13, 2000 employment injuries. He opined that she was totally disabled from August 2, 2007 through postoperation. Dr. Diaz's October 9, 2007 disability certificate stated that appellant sustained a lumbar disc; however, he released her to return to work on October 8, 2007 with restrictions. He did not provide any medical rationale explaining why appellant was disabled as of August 2, 2007 and then released for work as of October 8, 2007. The Board notes that surgery was not performed until February 21, 2008. These reports do not adequately explain how appellant's condition had changed such that she was incapable of light duty.

Reports covering the period February 2 to December 14, 2007, from physicians whose signatures are illegible, diagnosed depression and insomnia. Dr. Tong's reports dated March 26, 2008 listed appellant's pain medication. Dr. Goodman's September 20, 2007 report found that appellant had an acute exacerbation of chronic radicular back pain. This evidence does not provide any opinion addressing appellant's disability for work from July 20 to October 7, 2007. The Board finds that the reports from these physicians are insufficient to establish appellant's claim.

Dr. Dooley's August 7, 2007 report reviewed a history of appellant's April 13, 2000 employment injuries and medical treatment. He stated that she suffered from pain disorder associated with both psychological factors and general medical conditions. Dr. Dooley stated that appellant also experienced a severe single episode of major depression. He opined that, while her emotional disruption appeared to be directly related to her pain and resulting disability, her condition was complicated by a history of developmental abuse and ingrained feelings of rejection. Dr. Dooley noted a history of remote and more recent suicide attempts. He found no indications of somatization, secondary gain, environmental reinforcement or manipulation of her pain complaint. Dr. Dooley did not address the issue of how the accepted April 13, 2000 employment injuries caused or aggravated the diagnosed conditions or caused disability for the

period claimed.<sup>6</sup> Moreover, his report was speculative in nature, stating that it appeared that appellant's emotional condition was related to the accepted employment injuries.<sup>7</sup> The Board finds that Dr. Dooley's report is insufficient to establish appellant's claim.

The September 20, 2007 report of a nurse whose signature is illegible and the reports of appellant's physical therapists have no probative value in establishing appellant's claim. Neither a nurse<sup>8</sup> nor a physical therapist<sup>9</sup> is considered to be a "physician" as defined under the Federal Employees' Compensation Act.

Appellant has not met her burden of proof in establishing that there was a change in the nature or extent of the injury-related conditions or a change in the nature and extent of the limited light-duty requirements which would prohibit her from performing the limited light-duty positions she assumed after she returned to work.

### **CONCLUSION**

The Board finds that appellant has failed to establish that she sustained a recurrence of total disability during the period July 20 to October 7, 2007 causally related to her accepted employment-related injuries.

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<sup>6</sup> See *Gloria J. McPherson*, 51 ECAB 441 (2000) (the opinion of the physician 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).

<sup>7</sup> *L.R. (E.R.)*, 58 ECAB \_\_\_\_ (Docket No. 06-1942, issued February 20, 2007); *D.D.*, 57 ECAB 734 (2006); *Cecelia M. Corley*, 56 ECAB 662 (2005).

<sup>8</sup> See 5 U.S.C. § 8101(2); *G.G.*, 58 ECAB \_\_\_\_ (Docket No. 06-1564, issued February 27, 2007).

<sup>9</sup> See *David P. Sawchuk*, 57 ECAB 316 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 6, 2008 and November 8, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 14, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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