



partial and total disability. On October 7, 2003 appellant underwent decompression and fusion surgery between L3 and L5 with hardware and on December 7, 2003 she had additional discectomy and fusion surgery between L4 and S1.<sup>1</sup> The surgeries were authorized by the Office.

On June 28, 2007 Dr. Arlen K. Snyder, a Board-certified orthopedic surgeon who served as an Office referral physician, stated that appellant had some mild-to-moderate subjective complaints related to her employment injury but did not have objective physical examination findings to support her complaint of severe disabling pain. She indicated that the only real positive finding was some decreased range of flexion, which in part was secondary to her exogenous obesity. The rest of her examination was completely normal including straight leg raising, lateral bends, hyperextension, muscle strength testing, pin prick sensation and ability to ambulate without difficulty. Dr. Snyder stated that appellant could not return to her preinjury job but was able to return to light-duty work that allowed her to sit and stand as necessary and did not require her to lift more than 20 pounds. She indicated that since appellant had not been back to work in some time it was appropriate for her to start out working four hours per day and gradually increase to eight hours a day. Dr. Snyder completed a form with more detailed work restrictions.

On February 4, 2008 appellant returned to work for the employing establishment as a modified nurse for four hours per day. The job duties were within the work restrictions recommended by Dr. Snyder. Appellant stopped work on February 21, 2008 and on March 6, 2008 she filed a claim alleging that she sustained a recurrence of total disability on February 21, 2008 due to her December 26, 2000 employment injury. She indicated that her back pain had increased and asserted that she had pain in her right sciatic nerve and foot, which was related to the surgery necessitated by her employment injury.

On March 31, 2008 Dr. James G. Egnatchik, an attending Board-certified neurosurgeon, stated that appellant reported leaving her work due to severe pain in the lower back radiating down the right leg. He stated that she was taken out of work by Ellen Battista, her pain management physician.<sup>2</sup> Dr. Egnatchik indicated that on examination appellant ambulated with a forward-bent gait while using a cane and could not stand for any length of time, but noted that straight leg raising was negative and motor strength was 5/5 in her lower extremities. He stated, "I am going to keep [appellant] out of work until her next appointment, which will be [in] three months. Once again, I highly doubt that [she] will ever be able to return to her work as a registered nurse."

On March 28, 2008 Dr. Robert J. Plunkett, an attending Board-certified neurosurgeon, stated that appellant was an appropriate candidate for a spinal cord stimulator. On March 21, 2008 Dr. Susan S. Krasner, an attending clinical psychologist, discussed her interview and

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<sup>1</sup> Appellant's surgical hardware was removed in February 2007.

<sup>2</sup> Dr. Egnatchik asserted that appellant was taken off work by Ms. Battista, an attending medical physician, but she actually was a nurse. Appellant received pain management services from Ms. Battista and other nurses. The Board has held that a nurse is not a "physician" as defined under the Federal Employees' Compensation Act and cannot render a medical opinion on the causal relationship between a given physical condition and implicated employment factors. See 5 U.S.C. § 8101(2); *Bertha L. Arnold*, 38 ECAB 282, 285 (1986).

psychological testing sessions with appellant and indicated that she would be a good candidate for a spinal cord stimulator.

In an April 28, 2008 decision, the Office denied appellant's recurrence of disability claim. It found that she did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability on or after February 21, 2008 due to her December 26, 2000 employment injury.

On July 2, 2008 Dr. Egnatchik stated that appellant reported back pain and right foot pain and numbness. On examination of her right foot appellant exhibited tenderness on palpation and hypersensitivity but she did not have any significant demonstrable weakness of her right foot. Dr. Egnatchik stated that she remained temporarily totally disabled.<sup>3</sup> In reports dated between August and October 2008, Dr. Krasner addressed appellant's pain complaints and noted that she reported that appellant was not able to work.

Appellant requested a hearing before an Office hearing representative. At the August 12, 2008 hearing, she testified that she continued to have disabling residuals of her December 26, 2000 employment injury and related surgeries. In an October 14, 2008 decision, the Office hearing representative affirmed the Office's April 28, 2008 decision.<sup>4</sup>

### **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 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 job requirements.<sup>5</sup>

### **ANALYSIS**

The Office accepted that on December 26, 2000 appellant sustained a lumbosacral sprain and herniated lumbar disc due to lifting a patient at work. It approved surgery at the L3 through S1 disc levels. On February 4, 2008 appellant returned to work for the employing establishment as a modified nurse for four hours per day. The job restricted activities such as lifting and walking. Appellant stopped work on February 21, 2008 and on March 6, 2008 she filed a claim alleging that she sustained a recurrence of total disability on February 21, 2008 due to her December 26, 2000 employment injury.

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<sup>3</sup> Appellant submitted additional reports of attending nurses.

<sup>4</sup> Appellant submitted additional evidence after the Office's October 14, 2008 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

<sup>5</sup> *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability on or after February 21, 2008 due to her December 26, 2000 employment injury.

Appellant submitted a March 31, 2008 report in which Dr. Egnatchik, stated that she reported leaving her work due to severe pain in the lower back radiating down the right leg. He indicated that on examination appellant ambulated with a forward-bent gait while using a cane and could not stand for any length of time, but noted that straight leg raising was negative and motor strength was 5/5 in her lower extremities. Dr. Egnatchik stated that appellant should stay off work until her next appointment in three months. On July 2, 2008 he noted that appellant reported back pain and right foot pain and numbness. On examination of her right foot appellant exhibited tenderness on palpation and hypersensitivity but she did not have any significant demonstrable weakness of her right foot. Dr. Egnatchik stated that she remained temporarily totally disabled.

The reports of Dr. Egnatchik do not establish appellant's claim because he provided no indication that she sustained a recurrence of total disability on or after February 21, 2008 due to her December 26, 2000 employment injury.<sup>6</sup> Although he found total disability, he did not discuss the cause of this disability. Dr. Egnatchik did not provide any notable discussion of appellant's December 26, 2000 employment injury and related surgeries and did not explain how they would have caused total disability from appellant's light-duty work on or after February 21, 2008.

On March 28, 2008 Dr. Plunkett, an attending Board-certified neurosurgeon, stated that appellant was an appropriate candidate for a spinal cord stimulator. However, he did not indicate that she was disabled due her December 26, 2000 employment injury. In several reports dated between March and October 2008, Dr. Krasner, an attending clinical psychologist, discussed her interview and psychological testing sessions with appellant and detailed her reported pain complaints. She did not provide any opinion that appellant had employment-related disability.<sup>7</sup>

### CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after February 21, 2008 due to her December 26, 2000 employment injury.

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<sup>6</sup> See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which 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>7</sup> Dr. Krasner also recommended a spinal cord stimulator. It should be noted that it has not been accepted that appellant has any employment-related emotional condition. Appellant submitted reports of attending nurses, but these would not constitute probative medical evidence. See *supra* note 2.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' October 14 and April 28, 2008 decisions are affirmed.

Issued: July 24, 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