

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

C.D., Appellant)

and)

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Philadelphia, PA,
Employer**)

**Docket No. 09-1675
Issued: April 20, 2010**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 22, 2009 appellant filed a timely appeal from an April 3, 2009 decision of the Office of Workers' Compensation Programs denying his recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that he sustained recurrences of disability commencing on September 30, 2004 causally related to an accepted thoracic strain.

On appeal, counsel asserts that appellant's physicians provided sufficient rationalized medical evidence to establish the claimed recurrence of disability. He also contends that the opinion the impartial medical specialist, is too speculative to represent the weight of the medical evidence.

FACTUAL HISTORY

The Office accepted that on or before July 14, 2002 appellant, then a 54-year-old blacksmith/welder, sustained lumbar radiculopathy and aggravation of degenerative disc disease due to repetitive heavy lifting in the performance of duty.¹ On April 29, 2003 Dr. Lawrence B. Axelrod, an employing establishment physician performing a fitness-for-duty examination, permanently restricted appellant from lifting more than 20 pounds, climbing ladders, repetitive bending and twisting. He advised that appellant be allowed to sit for a minimum of four hours a day. Appellant returned to light duty in July 2002 as a modified custodian, within Dr. Axelrod's restrictions. He continued under treatment for his lumbar conditions.²

On October 14, 2004 appellant claimed a recurrence of disability commencing September 30, 2004 while on light duty. He attributed the recurrence to new work factors, including walking from the parking lot, sitting in "uncomfortable chairs" and prolonged standing. Appellant stopped work on October 1, 2004 and did not return. On October 29, 2004 the Office advised him of the additional evidence needed to establish his claim.

Appellant submitted reports dated from July 12 to November 10, 2004 from Dr. Richard H. Kaplan, an attending Board-certified physiatrist. In an October 25, 2004 report, Dr. Kaplan mentioned a September 30, 2004 incident but did not provide further details. He diagnosed L5 plexopathy, L4 nerve root compression, L5-S1 radiculopathy and peripheral neuropathy, all attributable to the accepted conditions. Dr. Kaplan found appellant totally disabled for work. Dr. Steven Mandel, an attending Board-certified neurologist, submitted reports from November 18, 2004 to June 15, 2005 finding diminished ankle jerk reflexes and distal sensory loss due to lumbar radiculopathy and diabetic neuropathy.

On March 17, 2005 the Office obtained a second opinion from Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, who diagnosed an occupationally-related L4-5 disc herniation. Dr. Draper opined that appellant could perform full-time modified duty with lifting limited to 50 pounds.

Dr. Kaplan provided additional reports through April 18, 2005. He disagreed with Dr. Draper's opinion that appellant could return to work or lift up to 50 pounds. Dr. Kaplan emphasized that appellant was totally disabled for work due to degenerative disc disease and a herniated lumbar disc.

The Office found a conflict of medical opinion between Dr. Kaplan, for appellant, and Dr. Draper, for the government. It selected Dr. David R. Pashman, a Board-certified orthopedic

¹ The Office initially denied the claim by February 11, 2003 decision, vacated on April 22, 2004. Appellant sustained a prior occupational back injury on November 18, 1998, accepted as a thoracic strain under File No. xxxxx185. This claim is not before the Board on the present appeal.

² In a May 1 2003 report, Dr. Richard Wender, an attending Board-certified family practitioner, opined that heavy lifting and repetitive bending at work aggravated and accelerated underlying L5 lumbar stenosis with nerve root compression and neuropathic pain. Dr. Alexander Vaccaro, an attending Board-certified orthopedic surgeon, stated in a February 10, 2004 report that heavy lifting, repetitive bending and twisting at work aggravated and accelerated underlying degenerative disc disease.

surgeon, to resolve the conflict. A copy of the medical record and a statement of accepted facts were provided for his review. Dr. Pashman provided an August 30, 2005 report noting a history of injury and treatment and reviewing the statement of accepted facts. On examination, he noted hypesthesia in the left thigh possibly related to diabetic neuropathy, limited lumbar motion, positive straight leg raising tests and a right knee effusion. Dr. Pashman diagnosed preexisting, progressive degenerative disc disease, aggravated by the accepted condition. He opined that, if retrained, appellant could perform sedentary work with lifting limited to 25 pounds.

Dr. Kaplan submitted additional reports through March 27, 2006 noting increasing left lower extremity symptoms.

By decision dated December 19, 2006, the Office denied appellant's recurrence claim on the grounds that the medical evidence did not support a worsening of the accepted conditions as of September 30, 2004 such that he became disabled from his light-duty job. It accorded the weight of the medical evidence to Dr. Pashman.

In a November 6, 2007 letter, appellant requested reconsideration. He submitted reports dated from May 22, 2002 to June 15, 2005 from Dr. Mandel, finding appellant totally disabled from June 27, 2004 onward due to left femoral neuropathy, diabetic neuropathy, degenerative disc disease and bilateral lumbar radiculopathy.³ Appellant submitted June 14, 2006, July 11 and September 24, 2007 reports from Dr. Kaplan finding him totally disabled for work due to lumbar pain.⁴

By decision dated January 16, 2008 and reissued February 4, 2008, the Office denied modification of the December 19, 2006 decision on the grounds that the new medical evidence submitted did not explain how and why the accepted conditions would disable appellant for work on and after September 30, 2004.

In a September 8, 2008 letter, appellant requested reconsideration. He submitted periodic reports from Dr. Kaplan dated from June 20, 2005 through January 19, 2009, finding appellant totally disabled for work due to progressive disc herniations from L2 through 5 and continued lumbar pain and spasms. In a June 12, 2008 report, Dr. Kaplan stated that appellant was totally disabled for work since September 30, 2004 "due to his work[-]related conditions alone." He based this opinion on his treatment of appellant for several years and a review of his light-duty job description.

By decision dated April 3, 2009, the Office denied modification of its prior decision. It found that the medical evidence did not support that the accepted conditions worsened as of September 30, 2004 such that appellant could no longer perform his light-duty job. The Office found that appellant did not allege or establish a change in his light-duty position. It accorded Dr. Pashman the weight of the medical evidence.

³ July 21, 2003 and February 12, 2004 electromyography and nerve conduction velocity studies showed left L4-5 radiculopathy and diabetic neuropathy.

⁴ A July 26, 2007 magnetic resonance imaging scan showed disc herniations at each level from T10 to S1.

LEGAL PRECEDENT

The Office's implementing regulations define a recurrence of disability as "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."⁵ When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or 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.⁶ An award of compensation may not be based on surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.⁷

ANALYSIS

The Office accepted that appellant sustained lumbar radiculopathy and an aggravation of degenerative disc disease on or before July 14, 2002. Appellant remained on light duty. On October 14, 2004 he filed a claim for recurrences of disability commencing September 30, 2004. Appellant attributed the claimed recurrence to new work factors including sitting, walking and prolonged standing.

To meet his burden of proof, appellant must demonstrate either a spontaneous change in the accepted lumbar conditions or in his assigned light duties such that he could no longer perform his job requirements.⁸ He thus has the burden of providing sufficient evidence, including rationalized medical evidence, to establish the causal relationship asserted.⁹

The Board finds, however, that intervening incidents negated the causal relationship between the accepted lumbar conditions and appellant's condition as of September 30, 2004. Appellant attributed his back pain to sitting in uncomfortable chairs, prolonged standing and walking to his duty station. The exposure to new work factors after he returned to light-duty broke the chain of causation stemming from the accepted conditions. The circumstances did not involve a spontaneous change in the accepted lumbar conditions.¹⁰

⁵ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

⁶ *Carl C. Graci*, 50 ECAB 557 (1999); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

⁷ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

⁸ *Carl G. Graci*, *supra* note 6.

⁹ *Ricky S. Storms*, 52 ECAB 349 (2001).

¹⁰ *Bryant F. Blackmon*, 56 ECAB 752 (2005).

On appeal, counsel asserts that appellant's physicians provided sufficient rationalized medical evidence to establish the claimed recurrence of disability. The Board finds, however, that appellant's physicians did not support a spontaneous change in the accepted lumbar radiculopathy and aggravation of degenerative disc disease as of September 30, 2004. Dr. Mandel, an attending Board-certified neurologist, found appellant totally disabled for work from June 27, 2004 onward due to degenerative disc disease, lumbar radiculopathy and nonoccupational diabetic neuropathy. He did not mention a worsening of the accepted conditions on or about September 30, 2004 or find appellant medically incapable of performing the modified custodian position as of that date. Dr. Kaplan, an attending Board-certified physiatrist, held appellant off work from September 8, 2004 through January 2009 "due to his work[-]related conditions alone." Although he mentioned a September 30, 2004 incident, he did not describe what happened or indicate that appellant's condition had spontaneously worsened that day. As neither Dr. Kaplan nor Dr. Mandel provided medical rationale explaining how and why the accepted conditions would cause a total disability for work on and after September 30, 2004, their opinions are of insufficient probative value to establish the claimed causal relationship.¹¹

Counsel also contends that the opinion of Dr. Pashman, a Board-certified orthopedic surgeon and impartial medical specialist, was too speculative to represent the weight of the medical evidence. The Office selected Dr. Pashman to resolve a conflict of medical opinion between Dr. Kaplan, who found appellant totally disabled for work, and Dr. Draper, a Board-certified orthopedic surgeon and second opinion specialist, who opined that appellant could perform full-time modified duty. In an August 30, 2005 report, Dr. Pashman provided detailed physical findings, reviewed the medical record and statement of accepted facts. He opined that appellant was physically able to work full-time sedentary duty with lifting limited to 25 pounds. While Dr. Pashman did not specifically address the claimed recurrence of disability commencing September 30, 2004, he clearly opined that appellant could perform the modified custodial position. As his opinion was based on a thorough physical examination, review of the medical record and statement of accepted facts, it is entitled to special weight.¹²

Appellant did not establish a change in the nature and extent of his accepted condition or in his light-duty position such that he could no longer perform his assigned duties. Therefore, the Office's denial of the claimed recurrence of disability was proper under the law and facts of the case.

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of disability commencing September 30, 2004.

¹¹ *Beverly A, Spencer*, 55 ECAB 501 (2004).

¹² *Solomon Polen*, 51 ECAB 341 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 3, 2009 is affirmed.

Issued: April 20, 2010
Washington, DC

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

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

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