United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 09-2148**
	)	**Issued: August 4, 2010**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Philadelphia, PA, Employer	)	

Appearances:
Aaron B. Aumiller, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 25, 2009 appellant filed a timely appeal of a May 6, 2009 merit 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 this case.

ISSUE

The issue is whether appellant sustained a recurrence of disability commencing April 18, 2008 causally related to his May 20, 2007 employment injury.

Appellant contends on appeal that no intervening injury occurred and he continues to have residuals of his May 20, 2007 injury.

FACTUAL HISTORY

On May 20, 2007 appellant, then a 34-year-old transportation security screener, injured his back while lifting baggage at work. The Office accepted the claim for a lumbar strain. Appellant stopped work on May 23, 2007 and returned to full duty on June 11, 2007. On June 14, 2007 he claimed a recurrence of total disability which the Office accepted. Appellant stopped work and received wage-loss benefits.[1]

Appellant submitted reports from his treating physician, Dr. Thomas J. Mercora, an osteopath. In a July 13, 2007 report, Dr. Mercora noted that appellant had difficulty walking over 100 feet and diagnosed lumbar sprain and strain, somatic dysfunction, lumbar radiculopathy and lumbar annular tear. He submitted additional reports indicating that appellant was unable to work and that his low back condition was work related.

In a December 5, 2007 letter, the employing establishment advised the Office that appellant had been out of work since May 20, 2007 and that, on August 31, 2007, a nurse case manager contacted appellant's attending physician to advise him that sedentary work was available. The employer requested that the Office assign a rehabilitation nurse to the case or that appellant be referred for a second opinion to determine if he could perform limited duty at a sedentary position. It advised that light duty was available.

On January 4, 2008 the employing establishment advised the Office that on January 2, 2008 appellant advised that he was resigning effective January 1, 2008. Appellant's physician stated that appellant could no longer work at the employing establishment due to his injury. Appellant noted that he started a new job for a private employer on January 2, 2008.[2] He continued to seek medical treatment for his back condition.

On February 25, 2008 appellant underwent a second opinion evaluation with Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, who reviewed the history of injury and medical treatment. Dr. Hanley noted that appellant currently worked in nonphysical job for a warehouse security firm. He noted findings on examination and diagnosed lumbar sprain/strain and a tear of the annulus at L5-S1. Dr. Hanley opined that appellant had low grade residuals from the May 20, 2007 injury with continued pain in the presence of objective findings on both electromyography (EMG) and magnetic resonance imaging (MRI) scan tests. Based on his examination, Dr. Hanley found that appellant was able to work full duty with restrictions on lifting over 50 pounds. In a February 26, 2008 work capacity evaluation, he stated that the lifting restriction should only apply for six months.

On May 24, 2008 appellant filed a notice of recurrence of disability, alleging disability beginning April 18, 2008 was causally related to his May 20, 2007 work injury. He stated that

[1] Appellant received wage-loss compensation pursuant to CA-7 forms that he filed from July 6 to December 8, 2007.

[2] A January 29, 2008 Standard Form 52 Request for Personnel Action noted the proposed effective date of appellant's resignation was January 1, 2008.

his back condition never improved and that his medical treatment had been continuous. Appellant stated that he tried to perform light duty but could not.

In an August 11, 2008 letter, the Office informed appellant of the factual and medical evidence needed to establish his recurrence claim.

In response, appellant submitted an illegible prescription note and an August 15, 2008 note from Dr. Mercora, an osteopath, who provided an assessment of a lumbar herniated nucleus pulposus/annular tear with lumbar radiculopathy.

By decision dated September 11, 2008, the Office denied the recurrence of disability claim.

On September 18, 2008 appellant's attorney requested an oral hearing, which was held on January 16, 2009. Appellant testified that he did not return to his original position due to his lifting restriction of 25 pounds and that he was told that light duty was not available. He started working for a security company in a warehouse on January 1, 2008 and it was there he sustained his recurrence of disability. Appellant was counting incoming and outgoing boxes and shipments, but after 30 days his employer wanted him to lift overhead doors and gates which he advised he could not do. He attempted to perform these duties and experienced pain in his back. Appellant stated that "there was one incident where one of the warehouse workers literally had to carry me to my desk because I fell." He was then moved to another post, where he was required to walk around on hard concrete or sit down for extended periods of time, which were both restricted by his doctor. Appellant advised that he was claiming a recurrence based on a change in his work duties. An MRI scan performed in June 2007 demonstrated a herniated disc and bulging disc and an EMG was positive for L5 radiculopathy.

In an October 13, 2008 report, Dr. Mercora indicated that he treated appellant since May 23, 2007 for a May 20, 2007 work-related injury. As a result of the May 20, 2007 accident, appellant was diagnosed with a lumbar herniated nucleus pulpous, lumbar radiculopathy and a lumbar annular tear. Dr. Mercora stated that appellant underwent an extensive course of physical therapy but opined that appellant remained extremely restricted as to his physical activities and had not been released to his former employment. In a January 27, 2009 report, Dr. Mercora reiterated that appellant's diagnosed conditions were a result of his May 20, 2007 injury.

Dr. Mercora referred appellant to Dr. Ashok S. Thanki, a Board-certified neurosurgeon. In a December 15, 2008 report, Dr. Thanki reviewed the history of injury and appellant's medical treatment. He noted that appellant did not work from May 20, 2007 until January 1, 2008, at which time he went to work for a private security company. Appellant worked until March 31, 2008, when he could not work due to the requirements that he lift gates. On that examination, Dr. Thanki noted intractable post-traumatic pain in the low back and left and right lower extremity; lumbar disc bulge and posterolateral annular tear, left L5-S1; rule out herniated lumbar disc; left L5 radiculopathy and failure to improve despite conservative therapy. On January 22, 2009 Dr. Thanki noted that appellant underwent new x-ray and MRI scan films of the lumbar spine on January 5, 2009. He diagnosed herniated lumbar disc, left L5-S1 with an associated annular tear; lumbar spondylosis and degenerative disc disease, L5-S1; mild lumbar disc bulge, left L4-5; post-traumatic pain in the low back, left more than the right lower

extremity; bilateral sacroiliac joint pain; and left lumbar radiculopathy. Treatment options were discussed.

In a February 26, 2009 letter, the employing establishment noted that appellant had voluntarily resigned and was never told that light-duty work was not available. A nurse had been assigned to his case and she had advised both appellant and his physician that the employer could accommodate almost any restriction and sedentary work was available. It contended that appellant experienced an intervening incident in his private-sector employment.

In a March 2, 2009 letter, appellant's attorney contended that no new or intervening injury occurred in appellant's private employment. Rather, appellant's job duties changed and were outside his physical restrictions. He noted that the employing establishment never offered him a limited-duty assignment or provided a written job offer.

By decision dated May 6, 2009, an Office hearing representative denied appellant's claim, finding that the medical evidence was insufficient to establish that his disability was causally related to the accepted injury. The hearing representative found that appellant attempted to lift a gate in his private-sector employment which represented an intervening incident and not a recurrence of disability.

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]

A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which he claims compensation is causally related to the accepted employment injury.[4] Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability and her employment injury.[5] This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally

[3] 20 C.F.R. § 10.5(x).

[4] *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

[5] *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139 (1993).

related to the employment injury.[6] Moreover, the physician's conclusion must be supported by sound medical reasoning.[7]

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[8] In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship.[9] 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.[10]

ANALYSIS

The Office accepted that appellant sustained a lumbar strain as a result of the May 20, 2007 employment injury. It paid wage-loss compensation from July 6 to December 8, 2007. Appellant stopped work on June 14, 2007 and never returned. Instead, he resigned from the employing establishment effective January 1, 2008 and started work in the private sector on January 2, 2008. Appellant subsequently claimed a recurrence of disability commencing April 18, 2008. The Board finds that he failed to submit sufficient medical evidence to establish that his disability commencing April 18, 2008 is attributable to his accepted condition.

The hearing representative properly found that appellant experienced an intervening incident in his private-sector job which triggered his disabling symptoms. Appellant testified that he experienced back pain after attempting to lift a gate in his private-sector employment. He had to be assisted to his desk by a warehouse worker. While appellant tried to complete the task of lifting a gate, he was unable to do so because of massive back pain. The Board finds that this is an intervening incident unrelated to appellant's accepted injury of May 20, 2007. Appellant testified that his work duties in the private sector were within his physical restrictions until his job duties were changed some 30 days later to include lifting of gates. Appellant's testimony regarding his back pain while trying to lift a gate is sufficient to establish an intervening cause rather than a spontaneous change of his accepted back sprain. Furthermore, his testimony is inconsistent with the attorney's argument on appeal that appellant had not sustained a new injury or an intervening accident. Accordingly, the Board finds that appellant's claim does not meet the definition of a recurrence of disability as appellant's circumstances do not involve a spontaneous change in his accepted condition.[11]

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[6] *Ricky S. Storms*, 52 ECAB 349 (2001); *see also* 20 C.F.R. § 10.104(a)-(b).

[7] *Alfredo Rodriguez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

[8] *See Ricky S. Storms*, *supra* note 6; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

[9] For the importance of bridging information in establishing a claim for a recurrence of disability, *see Richard McBride*, 37 ECAB 748 at 753 (1986).

[10] *See Ricky S. Storms*, *supra* note 6; *Morris Scanlon*, 11 ECAB 384, 385 (1960).

[11] *See Bryant F. Blackmon*, 56 ECAB 752, 764 (2005).

The Board also finds that the medical evidence does not establish appellant's claim for a recurrence of disability. Appellant submitted treatment records from Dr. Mercora and Dr. Thanki. Neither physician addressed appellant's job duties in his private-sector employment or obtained a history that he attempted to lift a gate. While Dr. Mercora attributed appellant's current back conditions to the May 20, 2007 work injury, he did not provide a history of injury that precipitated the claimed recurrence of disability or explain how appellant's current disability and back conditions beginning April 18, 2008 were causally related to the May 20, 2007 employment injury and not to the lifting of a gate in appellant's private employment.[12] Furthermore, a claim for a recurrence of disability cannot be considered for medical conditions that have not been accepted as work related. While Dr. Mercora diagnosed a lumbar herniated nucleus pulposus, lumbar radiculopathy and a lumbar annular tear, the Office only accepted a lumbar sprain/strain.[13] Dr. Mercora's reports are insufficient to establish appellant's claim as a recurrence of disability due to his accepted condition.

Dr. Thanki diagnosed several back conditions, but did not explain how appellant's current back condition and disability beginning April 18, 2008 was causally related to the May 20, 2007 employment injury. Medical evidence which does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[14] Dr. Thanki's reports are of limited probative value.

Appellant did not submit sufficient medical evidence that established a spontaneous change in his medical condition resulting from the accepted injury, he did not meet his burden of proof to establish that he sustained a recurrence of disability.

Appellant also asserts that he resigned from the employing establishment as it did not have light-duty work available for him. However, the record supports that the employing establishment made light-duty work available and sought to find an appropriate position for appellant but that appellant's physician did not provide any work restrictions to the employing establishment. Appellant did not submit any evidence supporting his assertion that light duty was not available. The record supports that the Office paid claims for wage-loss compensation made by appellant until he voluntarily resigned to take other employment and that, at the time he resigned, the employing establishment had light-duty work available. Thus, this is not a case where a light-duty assignment was not available.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a recurrence of disability on April 18, 2008 causally related to his May 20, 2007 employment injury.

[12] *See Cowan Mullins*, 8 ECAB 155, 158 (1955) (where the Board held that a medical opinion based on an incomplete history was insufficient to establish causal relationship).

[13] *See T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009) (where a claimant claims that a condition not accepted or approved by the Office was due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence).

[14] *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 6, 2009 is affirmed.

Issued: August 4, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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