United States Department of Labor
Employees' Compensation Appeals Board

P.E., Appellant	)	
and	)	**Docket No. 10-884**
	)	**Issued: December 1, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Sheridan, WY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 17, 2010 appellant timely appealed the January 8, 2010 merit decision of the Office of Workers' Compensation Programs. 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 is entitled to wage-loss compensation from April 13, 2009.

FACTUAL HISTORY

Appellant, a 40-year-old nurse, has an accepted claim for lumbosacral strain, L4-5 disc herniation and displaced lumbar intervertebral disc at L5-S1, which arose on September 24, 2004.[1] He underwent Office-approved surgery on June 28 and September 27, 2005 and January 8, 2007. Appellant's latest surgery involved placement of an artificial disc at

[1] Appellant injured his low back while transferring a patient.

L5-S1. The Office paid appellant appropriate wage-loss compensation. Effective April 14, 2007, it terminated his wage-loss compensation because his orthopedic surgeon, Dr. John D. Miles, a Board-certified orthopedic surgeon, released him to return to work without restrictions.[2] In September 2007, appellant transferred to the employing establishment's medical center in Columbia, MO, where he worked full-time, regular duty as a staff nurse. The Office accepted that he sustained a recurrence of disability beginning November 6, 2008. In a December 9, 2008 report, Dr. Miles advised that appellant could continue with full unrestricted duty at work.

On April 9, 2009 appellant was seen by Dr. Jack F. Fennel, an employing establishment staff physician and family practitioner.[3] Dr. Fennel removed appellant from duty until he could be evaluated by a physiatrist and neurosurgeon. His April 9, 2009 progress notes indicated that appellant walked into the office that day requesting additional osteopathic manipulative therapy (OMT), which Dr. Fennel had performed less than a week ago. Dr. Fennel noted that appellant had chronic low back pain and an artificial disc in his lumbar spine. He had provided OMT for appellant's upper back and ribs with good relief, but occasionally the relief would last less than a day and appellant would return for more treatment. Because of this recurring pattern, Dr. Fennel thought perhaps there was something more than degenerative disc disease and somatic dysfunction. He noted that an earlier report indicated a displacement of appellant's artificial disc. Dr. Fennel thought it was important to get a neurosurgery consultation and referred appellant to physical medicine and rehabilitation to determine the cause of his recent flare-up and the acute chronic problems he experienced over the past eight months. As to work restrictions, he noted "absolutely NO lifting" until appellant was seen by a neurosurgeon and the report was reviewed. Appellant also required light duty, four hours per day due to frequent position changes required for pain management. When not on light duty, Dr. Fennel recommended absolute bed rest. He further indicated that, if appellant could not tolerate light duty or if he reported a worsening of his pain prior to the recommended consultation, then he should be on complete bed rest. Dr. Fennel also expressed concern about appellant driving while on his current medications. He advised appellant not to drive until one and a half hours after taking his prescribed medications.

On April 15, 2009 the employing establishment offered appellant a temporary part-time, light-duty assignment based on Dr. Fennel's work restrictions.

On April 16, 2009 appellant was seen by Dr. Marshall Cress, a neurosurgery resident, who indicated that further surgical intervention would not likely provide significant relief. Dr. Cress recommended medical management and released appellant to return to work "as tolerated." Later that same day appellant was treated in the MRMC emergency room for low back pain.

In a follow-up note dated April 17, 2009, Dr. Fennel indicated that the neurosurgery consult was "totally unhelpful." He took appellant "completely off work" and put him on bed

[2] Effective February 17, 2007, appellant resigned from his position at the VA Medical Center in Sheridan, WY. He resumed work on March 17, 2007 at the Moberly Regional Medical Center (MRMC), in Moberly, MO.

[3] Although Dr. Fennel worked for the employing establishment, appellant identified him as his primary care physician.

rest for the next 96 hours. Dr. Fennel stated that appellant needed a complete and thorough evaluation to determine if his artificial disc was out of place and putting pressure on the neural foramen. He also administered three trigger point injections.

Appellant was next seen on April 21, 2009 by Dr. Randall D. Smith, a Board-certified physiatrist,[4] who indicated that appellant had a medical condition that would worsen with work. Dr. Smith relieved appellant of all work for a two-week period beginning April 22, 2009.[5]

On April 22, 2009 appellant filed a claim for compensation for the period April 12 to 25, 2009. The Office paid wage-loss compensation for April 15 to 25, 2009.[6] In a June 2, 2009 letter, it advised appellant that the evidence did not support that he was completely unable to work from April 12 to 14, 2009. The Office explained that appellant was not scheduled to work April 12 or April 14, 2009 and there was no medical evidence to support an increase in disability beginning April 13, 2009. Appellant was afforded 30 days to submit additional evidence.

In a decision dated July 9, 2009, the Office denied wage-loss compensation for April 12 to 14, 2009. By decision dated January 8, 2010, the Branch of Hearings & Review affirmed the Office's July 9, 2009 decision.[7]

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[8] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his 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 established physical limitations.[9] Moreover, when the claimed recurrence of disability follows a return to light-duty work, the employee may

[4] Like Dr. Fennel, Dr. Smith is an employee of the VA Medical Center in Columbia, MO, the same facility where appellant is currently employed.

[5] Dr. Smith extended appellant's work restrictions on May 4, 2009, and extended them for another three weeks on May 27, 2009.

[6] The Office continued to pay wage-loss compensation through June 28, 2009. Appellant returned to work in a full-time, limited-duty capacity on June 29, 2009.

[7] At the November 5, 2009 hearing appellant's counsel advised the hearing representative that his client was only seeking compensation for April 13, 2009. Appellant was not scheduled to work on either Sunday, April 12, 2009 or Tuesday, April 14, 2009.

[8] 20 C.F.R. § 10.5(x)(2009).

[9] *Id.*

satisfy his burden of proof by showing a change in the nature and extent of the injury-related condition such that he was no longer able to perform the light-duty assignment.[10]

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing that the recurrence of disability is causally related to the original injury.[11] This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury.[12] The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[13]

ANALYSIS

The Office paid wage-loss compensation beginning April 15, 2009, but did not compensate appellant for his absence from work on April 13, 2009. Dr. Fennel examined appellant on April 9, 2009 and imposed restrictions of "absolutely NO lifting" and four hours of light duty. He imposed these restrictions because of appellant's recent flare-up of back pain, which Dr. Fennel suspected might be due to displacement of the artificial disc at L5-S1. Because Dr. Fennel was a family practitioner, he recommended further consultation with a neurosurgeon and a physiatrist in order to determine the exact cause of appellant's ongoing back complaints. On April 15, 2009 the employing establishment offered appellant a part-time, light-duty assignment based on Dr. Fennel's restrictions. However, there is no indication that a similar offer was extended to appellant on or before April 13, 2009.

The Board finds that Dr. Fennel's April 9, 2009 progress notes are sufficient to establish that appellant was disabled from performing his regular duties as a staff nurse on April 13, 2009; and the disability was causally related to appellant's October 24, 2004 employment injury and subsequent surgeries. What appears to have prevented an earlier finding of entitlement was a misinterpretation of the date of Dr. Fennel's report. Although his findings were based on an April 9, 2009 examination, Dr. Fennel did not transcribe and electronically sign his progress notes until April 14, 2009. One version of the computer-generated report begins with "NOTE DATED: 04/14/2009." However, three lines down the report is the notation "VISIT: 04/09/2009." Thus, it appears at first blush that the report was based on an April 14, 2009 examination, rather than April 9, 2009. The Board finds that appellant is entitled to wage-loss compensation for April 13, 2009. Accordingly, the hearing representative's January 8, 2009 decision will be reversed.

[10] *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

[11] 20 C.F.R. § 10.104(b); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Carmen Gould*, 50 ECAB 504 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[12] *See Helen K. Holt, supra* note 11.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

CONCLUSION

Appellant established that he was disabled from performing his regular nursing duties on April 13, 2009.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 1, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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