United States Department of Labor
Employees' Compensation Appeals Board

D.P., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Los Angeles, CA, Employer	)	**Docket No. 10-121** **Issued: July 23, 2010**

Appearances:
Appellant, pro se
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 October 16, 2009 appellant filed a timely appeal from the May 1, 2009 merit decision of the Office of Workers' Compensation Programs, which denied her recurrence claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant sustained a recurrence of disability on July 21, 2008 causally related to her May 31, 2006 employment injury.

FACTUAL HISTORY

On May 31, 2006 appellant, then a 35-year-old transportation security screener, filed a claim alleging that she injured her lower back in the performance of duty that day when she tried to keep a big bag "of excessive weight" from falling on her. The Office accepted her claim for lumbar sprain and displacement of the L5-S1 disc without myelopathy and acceleration of L5-S1 degeneration. Appellant received compensation for temporary total disability on the periodic

rolls. On May 19, 2008 she returned to limited duty in a modified position, which required no standing greater than 20 minutes without a sitting break.

Appellant missed work intermittently for physical therapy appointments. On July 21, 2008 she stopped work completely and claimed compensation for total disability. On July 24, 2008 appellant filed a notice of recurrence and explained that she stopped work on July 21, 2008 after prolonged standing for a period of two weeks. Her pain had gradually worsened and was in the same region "except it's worse and shoots down my back into my legs now."

The Office asked appellant for more information to support her claim, including a statement on whether her limited-duty assignment had changed such that it no longer met her medical restrictions. It also asked her to submit a physician's narrative report describing the objective findings that showed her condition had worsened and explaining how she could no longer perform the duties she was performing when she stopped work.

Dr. Artis Woodward, an attending specialist in pain management, reported that he evaluated appellant on July 17, 2008 for complaints of gradually worsening lower back pain. He recommended an increase in her pain medication and to increase her home exercise regimen. Dr. Woodward continued her on modified duties. He saw appellant again on July 21, 2008 with complaints of increasing back pain "over the past two days." Examination demonstrated pain with all arcs of motion, increased muscle guarding and increased pain on palpation. Gait and posture were antalgic. Dr. Woodward initiated physical therapy three times a week, continued appellant's pain medication and prescribed a muscle relaxant. "At this point, it was medically indicated to place the patient on total temporary disability for a period of July 21, 2008 until [August 21, 2008], to allow attenuation of symptoms."

Dr. Woodward saw appellant again on August 21, 2008. He reported findings on examination, including exquisite tenderness at the L5-S1 articulation with continued compromise of range of motion and musculature that remained in a guarded posture. Dr. Woodward recommended additional physical therapy, continued her disability through September 21, 2008 and sought consultation with a pain control specialist. He noted that appellant's May 17, 2007 magnetic resonance imaging (MRI) scan was "somewhat grim" and, coupled with appellant's obese body habitus, provided a poor prognosis for conservative care response.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion. Dr. Ha'Eri evaluated appellant on October 29, 2008. He described her history of injury and medical treatment. Dr. Ha'Eri noted appellant's present complaints and findings on physical examination. He diagnosed L5-S1 disc herniation, industrial and caused by the work injury of May 31, 2006. Dr. Ha'Eri also diagnosed L5-S1 disc degeneration, industrial and consequential to the industrial L5-S1 disc herniation. He advised that the diagnosed L5-S1 herniated disc was a result of appellant's original injury of May 31, 2006 "and her light-duty assignment … has not caused any additional injury." Dr. Ha'Eri found that she was able to work with her limited-duty assignments since he last examined her in 2007. He described the prognosis as guarded. In Dr. Ha'Eri's opinion, appellant's lower back condition would show periodic episodes of exacerbation for the foreseeable future requiring further medical care. He recommended continued conservative care. Dr. Ha'Eri found that appellant had no neurological deficit in her

lower extremity and that her low back pain was intermittent, so she was not a candidate for surgical intervention.

In a decision dated November 20, 2008, the Office denied appellant's recurrence claim. It found that Dr. Ha'Eri's opinion represented the weight of the medical evidence and failed to establish that appellant was totally disabled from her limited-duty assignment beginning July 21, 2008.

On May 1, 2009 an Office hearing representative affirmed the denial of appellant's recurrence claim. He found that appellant's lack of response to the query about her employment duties did not allow the Office to determine whether there was a spontaneous worsening. The hearing representative further found that the weight of the medical evidence failed to support her claim.

On appeal, appellant contends that Dr. Ha'Eri reviewed an MRI scan that was two years old, did not fully examine her and had only asked questions.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[1] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[2]

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.[3] 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.[4]

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[5]

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[1] 5 U.S.C. § 8102(a).

[2] 20 C.F.R. § 10.5(f).

[3] *Id*. at § 10.5(x).

[4] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[5] 5 U.S.C. § 8123(a).

ANALYSIS

When appellant filed her notice of recurrence, she explained that she stopped work on July 21, 2008 after prolonged standing for a period of two weeks. She did not make clear whether there was a change in her limited-duty job requirements such that she was no longer allowed to take a sitting break after standing for 20 minutes. The Office asked appellant to address the issue, but she did not respond. The Board therefore finds that she has not met her burden to establish a change in the nature and extent of her limited-duty job requirements. To establish her recurrence claim, therefore, she must show a change in the nature and extent of the injury-related condition.

Appellant's attending specialist in pain management, Dr. Woodward, examined her on July 17 and 21, 2008. He reported increased complaints and findings. Dr. Woodward prescribed physical therapy and a muscle relaxant, continued her pain medication and took her off work until August 21, 2008. He reported that it was "medically indicated" to place appellant on temporary total disability beginning July 21, 2008.

Dr. Ha'Eri, a Board-certified orthopedic surgeon and Office referral physician, disagreed. He had appellant's medical record and a statement of accepted facts. Although Dr. Ha'Eri reported that appellant's lower back condition would show periodic episodes of exacerbation for the foreseeable future requiring further medical care, it was his opinion that she was able to work in her limited-duty assignment since he last saw her in 2007.

The Board finds a conflict in medical opinion between Dr. Woodward and Dr. Ha'Eri on whether appellant sustained a recurrence of total disability on July 21, 2008 as a result of a change in the nature and extent of the injury-related condition. The Office gave the weight of the medical evidence to Dr. Ha'Eri, but he disagreed with the opinion of Dr. Woodward who found it medically necessary to place appellant on temporary total disability beginning July 21, 2008. Under section 8123(a) of the Act, the Office must resolve this conflict by referring appellant, together with the medical record and a statement of accepted facts, to an impartial medical specialist.

The Board will set aside the Office's May 1, 2009 decision affirming the denial of appellant's recurrence claim and will remand the case for referral to an impartial medical specialist. After such further development of the medical evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to compensation for wage loss beginning July 21, 2008.

Appellant's concerns on appeal with Dr. Ha'Eri's failure to obtain an updated MRI scan, and with his examination of her, are no longer an issue because the Office will refer her to a different physician to settle the matter. An impartial medical specialist may decide whether another MRI scan is necessary or helpful in resolving whether there was a change in the injury-related condition such that appellant became totally disabled beginning July 21, 2008.

CONCLUSION

The Board finds that this case is not in posture for decision. A conflict in medical opinion warrants referral to an impartial medical specialist under section 8123(a) of the Act.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: July 23, 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