

FACTUAL HISTORY

On September 15, 1999 appellant, then a 33-year-old accountant, claimed injury to her knees, right elbow, neck and back when she slipped and fell on a wet floor. The Office accepted the conditions of lumbar sprain and bilateral knee contusion. It authorized left knee arthroscopic surgery that appellant underwent on February 9, 2000. Appellant stopped work on September 15, 1999. She returned to work for four hours per day with restrictions on December 28, 2003. The Office paid wage-loss compensation for the hours that appellant did not work. Appellant stopped work completely on May 4, 2005 and did not return.

In a May 9, 2005 note, Dr. Randall Smith, a Board-certified orthopedic surgeon, advised that appellant was unable to work. A May 9, 2005 magnetic resonance imaging (MRI) scan showed disc degeneration at L5-S1 and disc protrusions and a small focal midline nuclear herniation at L4-5. In a May 10, 2005 report, Dr. Donald D. Abraham, a Board-certified physiatrist, noted the history of injury, physical findings and diagnostic tests results. He noted that appellant was currently working limited hours within her tolerance. Dr. Abraham opined that she had evidence of acute trauma chronic permanent injuries from the September 15, 1999 accident with ongoing knee pain, low back pain, lumbar disc abnormalities at L4-5 and L5-S1 and bilateral left greater than right L5 chronic radiculopathy. He discharged appellant from his care and referred her to Dr. Smith for long-term management.

On June 15, 2005 appellant filed a notice of recurrence of disability alleging that her disability from work beginning May 4, 2005 was causally related to her September 15, 1999 work injury.

In a September 7, 2005 report, Dr. Smith stated that he advised appellant to stop working in May 2005 due to an increase in spasms, pain and paresthesias and buckling in her lower extremities. He opined, after reviewing the diagnostic studies, that her degenerative disc disease, protrusions, herniations, sciatica, internal derangement of the knees and a gait dysfunction all resulted from the September 15, 1999 work injury. Dr. Smith opined that appellant could not return to her job.

In a December 5, 2005 decision, the Office denied the recurrence claim and stopped payment of all wage-loss benefits. In a February 7, 2006 decision, an Office hearing representative reversed the December 5, 2005 decision and remanded the case for reinstatement of compensation for partial wage-loss retroactive to the date compensation was stopped and for further development of the May 4, 2005 recurrence claim. The record indicates that the Office reinstated wage-loss compensation for four hours daily.

In a June 19, 2006 report, Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon and second opinion physician, reviewed the statement of accepted facts, the medical record and presented his examination findings. He diagnosed disc herniation at L4-5 left with radiculopathy; and internal derangement left knee, surgically treated with residual difficulties. Dr. Hanley opined that appellant's disc herniation at L4-5 was not related to the work injury; that her lumbar strain had resolved; and that she continued to be symptomatic from her knee condition. He related her May 2005 disability to the nonwork-related herniated discs. In a July 20, 2006 supplemental report, Dr. Hanley advised appellant's knee condition would not

have disabled her in May 2005. He stated that she became disabled in May 2005 because of a “nonindustrial herniation of disc material.”

The Office determined a conflict in medical evidence arose between Dr. Smith and Dr. Hanley regarding whether appellant’s workplace fall caused a herniated disc and whether her work-related condition worsened to the point where she could no longer work beginning May 4, 2005. It referred appellant to Dr. Evelyn Witkin, a Board-certified orthopedic surgeon, for an impartial medical opinion. Dr. Witkin examined appellant on September 28, 2006. In a December 15, 2006 report, she opined that appellant’s low back pain was caused by her herniated disc, which was not related to the September 15, 1999 work injury. Dr. Witkin recommended a return to sedentary or light-duty work for four hours a day after appellant delivered her child. In a February 1, 2007 supplemental report, she advised that, based on her review of the medical records and examination, appellant’s work stoppage effective May 4, 2005 was not medically necessary due to a worsening of her work-related condition.

Dr. Smith continued to submit treatment reports advising that appellant should not work and that her herniated lumbar disc, degeneration and protrusion at the L5-S1 level, protrusion and herniation at the L4-5 level, torn medial meniscus and a Baker’s cyst in the right knee were a direct result of the September 15, 1999 work injury and the incomplete treatment she has received.

By decision dated March 7, 2007, the Office denied appellant’s recurrence claim based on the reports of Drs. Hanley and Witkin.

On March 12, 2007 appellant, through her attorney, requested a hearing. Following a June 5, 2007 hearing, by decision dated June 17, 2007, an Office hearing representative vacated the March 7, 2007 Office decision on the grounds Dr. Witkin was not properly selected as an impartial specialist as she had an association with a treating physician who had performed appellant’s surgery. The case was remanded for the Office to arrange for another impartial medical examination.

In a June 12, 2007 report, Dr. Smith continued to opine that appellant did not fully recover from her work injury and had fluctuating symptoms. He advised that the symptoms started after the fall and that the fall aggravated structural problems leading to her ongoing symptoms. Dr. Smith stated an annular ligament tear sometimes occurs during a fall and it is not until a certain period of time passes that the disc protrudes out enough or the joint becomes swollen enough to cause nerve root pressure and sciatic symptoms. He stated that the medical records contained objective evidence to support her subjective complaints. On July 9, 2007 Dr. Smith opined that appellant’s current symptoms and diagnoses were a result of the September 15, 1999 work injury and her return to work in 2004 and 2005. He opined that she was totally disabled and could not return to work.

Following the hearing representative’s decision, the Office referred appellant, along with a statement of accepted facts, the medical record and a list of questions, to Dr. Gene Levin, a Board-certified orthopedic surgeon, for an impartial medical examination. In an August 2, 2007 report, Dr. Levin discussed her history, physical findings and review of diagnostic tests. He advised that appellant’s current diagnoses were bilateral chondromalacia patella, chronic low

back pain and left sciatica associated with progression of preexistent lumbar disc degeneration. Dr. Levin opined that although she may require treatment for her symptoms related to those diagnoses, neither the treatment nor the diagnoses were causally related to the September 15, 1999 work injury. He opined that the September 15, 1999 fall did not cause a herniated disc, but that the disc herniations developed much later as a result of progression of the preexistent lumbar disc degeneration. Dr. Levin also opined that the work stoppage of May 4, 2005 was not medically necessary due to a material worsening of appellant's work-related conditions of bilateral knee contusions and lumbar strain. Instead, it was caused by degenerative arthritis (chondromalacia) and left sciatica resulting from degenerative spondylosis. Dr. Levin opined, based on the available medical records, that appellant's period of total disability related to the work injury ceased on July 25, 2000 when her arthroscopic surgeon released her to return to a full week of work.

By decision dated August 20, 2007, the Office denied appellant's recurrence claim.² Appellant disagreed with the decision and requested an oral hearing, which was held December 11, 2007.

In a December 10, 2007 report, Dr. Smith advised that he had treated appellant since May 2002 for the 1999 left knee injury. He reported that the left knee condition was ongoing, had never resolved and was directly related to the September 1999 work incident. Dr. Smith stated that objective evidence supported appellant's subjective complaints. He advised that she needed ongoing medical care and was unable to return to work as a result of residuals from the work injury. Dr. Smith reported that the work incident injured appellant's knees and her lower back such that she was unable to stand or walk for any length of time and had difficulty squatting, kneeling, climbing and driving. He also reported that the work injury caused an altered gait and a progression of her back problem due to her bilateral knee problem.

On February 8, 2008 the Office received a January 4, 2008 report from Dr. David R. Pashman, a Board-certified orthopedic surgeon, who served as an impartial medical specialist with regard to whether appellant had continued residuals of the September 15, 1999 work injury.³ Dr. Pashman diagnosed bilateral knee contusions and lumbar strain, status post work-related injury in September 1999; preexisting degenerative disc disease of the lumbar spine; possible left lumbar radiculopathy; flap tear of the anterior horn of the left medial meniscus and medial femoral condylar defect; and right medial meniscal tear. He noted that there was an electromyogram (EMG) study done in September 2002 he would like to review. Dr. Pashman explained that the MRI scan studies of February 28, 2007 showed degenerative joint disease and a herniated disc, but stated that those conditions were not related to the work injury as documented by Dr. Levin. He further stated that the 2005 work stoppage was unrelated to appellant's work-related injuries of September 15, 1999. Dr. Pashman completed a form noting

² On August 20, 2007 the Office proposed to terminate appellant's entitlement to medical and wage-loss benefits on the basis of Dr. Levin's opinion.

³ The Office determined that, while Dr. Levin was as an impartial specialist on the recurrence issue, he was considered to be a second opinion physician with regard to whether appellant had continued residuals of the accepted injury.

her work restrictions and opined that she was able to return to her sedentary work-related duties as a systems analyst.

By decision dated February 25, 2008, an Office hearing representative found the case not in posture for a decision as the report from Dr. Pashman was not previously part of the case record.

On April 2, 2008 the Office requested Dr. Pashman to state whether any of appellant's current diagnoses were caused by the effects of the September 15, 1999 work injury and to provide his medical rationale. In a supplemental report of April 7, 2008, Dr. Pashman reviewed several diagnostic reports, including the EMG of September 27, 2002. He concluded that appellant's L5 lumbar radiculopathy may be causally related to the September 1999 work injury but the additional disc pathologies were related to her underlying degenerative disc disease. Dr. Pashman stated that the MRI scan of 2002 revealed a left knee ligament strain, but opined that such condition was not related to the work injury, as a ligamentous injury would have been noted at the time of the February 2000 debridement. He stated that the right knee MRI scan of December 3, 1999 showed a right medial meniscus tear and advised that it was work related. In a May 27, 2008 supplemental report, Dr. Pashman stated that the L5 radiculopathy was causally related to the work injury. He additionally advised that appellant's bilateral knee contusions and lumbar strain had resolved.

On the basis of Dr. Pashman's reports, the Office accepted the additional conditions of torn right medial meniscus and L5 radiculopathy.

By decision dated June 9, 2008, the Office denied appellant's recurrence claim on the basis of Dr. Levin's opinion. It considered Dr. Pashman's reports.

On June 17, 2008 appellant's attorney requested a hearing which was held on November 20, 2008. In a February 17, 2009 decision, an Office hearing representative affirmed the June 9, 2008 Office decision denying the recurrence claim.

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 of establishing by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and of showing 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.⁴

The Board notes that the term disability, as used in the Federal Employees' Compensation Act, means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁵ Whether a particular injury caused an

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

⁵ *Patricia A. Keller*, 45 ECAB 278 (1993).

employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁶ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁷ 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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁸

Section 8123(a) of the Act provides in pertinent part: 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.⁹ This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁰ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹

ANALYSIS

The Board finds that this case is not in posture for a decision.

The Office initially accepted appellant's claim for lumbar strain and bilateral knee contusions and authorized a left knee surgery. Appellant returned to part-time work in December 2003 receiving wage-loss compensation for four hours daily that she did not work. She stopped work on May 4, 2005 alleging that she sustained a recurrence of total disability on that date due to her accepted September 15, 1999 employment injury. Appellant did not allege a change in the nature and extent of the light-duty job requirements.

A conflict in medical opinion arose between Dr. Smith, appellant's attending physician, and Dr. Hanley, an Office referral physician, on the issue of whether appellant sustained a recurrence of total disability on or after May 4, 2005. Accordingly, the Office referred appellant to Dr. Witkin for an impartial medical opinion, who opined that her work stoppage of May 4, 2005 was not due to her work-related condition. However, as Dr. Witkin had once been associated with appellant's treating physician, an Office hearing representative properly

⁶ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

⁷ *Clement Jay After Buffalo*, 45 ECAB 707 (1994).

⁸ 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB ____ (Docket No. 07-2287, issued May 16, 2008).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *R.H.*, 59 ECAB ____ (Docket No. 07-2124, issued March 7, 2008); *see supra* note 9; 20 C.F.R. § 10.321.

¹¹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

remanded the claim back to the Office for selection of another impartial medical examiner.¹² Appellant was referred to Dr. Levin, for an impartial medical opinion.

Dr. Levin reviewed and discussed appellant's history, physical findings and diagnostic tests in his August 2, 2007 report. He opined that her current diagnoses of bilateral chondromalacia patella, chronic low back pain and left sciatica associated with progression of preexistent lumbar disc degeneration were not causally related to the September 15, 1999 work injury. Dr. Levin opined that the September 15, 1999 fall did not cause a herniated disc, but that the disc herniations developed much later as a result of progression of the preexistent lumbar disc degeneration. He also opined that the work stoppage of May 4, 2005 was not due to a worsening of appellant's work-related conditions of bilateral knee contusions and lumbar strain. Dr. Levin explained that the cause of her disability was her underlying degenerative arthritis (chondromalacia) and left sciatica resulting from degenerative spondylosis.

As the Office was developing appellant's recurrence claim, it also developed the issue of whether she had any residuals of the September 15, 1999 work injury and referred her to Dr. Pashman to resolve a conflict on that separate issue. In a January 4, 2008 report, Dr. Pashman opined that her work stoppage in 2005 was unrelated to her work-related injuries of September 15, 1999. However, in April 7 and May 27, 2008 reports, he opined that appellant's L5 radiculopathy and torn right medial meniscus were residuals of the September 15, 1999 work injury. Dr. Pashman also opined that her additional disc pathologies were related to her underlying degenerative disc disease and the left knee ligament sprain noted that the 2002 MRI scan was not related to the work injury. On June 9, 2008 the Office expanded the claim to include the conditions of torn right medial meniscus and L5 radiculopathy as caused by the September 15, 1999 work injury.

In expanding the claim and accepting the additional conditions of torn right medial meniscus and L5 radiculopathy, the Office should have further considered whether these additional accepted conditions and those previously accepted resulted in appellant's total disability on or after May 4, 2005.¹³ The Office's subsequent decisions denying the claimed recurrence of disability relied on medical evidence, Dr. Levin's impartial report, which did not consider these additional accepted conditions. It accorded determinative weight to Dr. Levin's impartial opinion in denying the claim for a recurrence of disability. However, Dr. Levin obviously had no knowledge of the expanded acceptance since he rendered his opinion on August 2, 2007 and the Office expanded the accepted conditions almost a year later on June 9, 2008. Because it did not seek a supplemental opinion from Dr. Levin regarding the expanded claim acceptance, his opinion was not based on a current and accurate factual and medical background and cannot be entitled to special weight. Consequently, the medical conflict regarding appellant's claimed recurrence of disability remains unresolved.

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the

¹² See *Frank Matkins*, 43 ECAB 1072 (1992).

¹³ See *D.V.*, Docket No. 09-1109 (issued March 3, 2010).

defect in his original report.¹⁴ On remand, it should provide Dr. Levin with an updated statement of accepted facts and secure a supplemental report from him as to whether the additional conditions of torn right medial meniscus and L5 radiculopathy and those previously accepted conditions resulted in appellant's total disability beginning May 4, 2005. After this and such other development as the Office deems necessary, it should issue a *de novo* decision.¹⁵

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation decisions dated February 17, 2009 and June 9, 2008 are set aside and the case remanded to the Office for further development in accordance with this decision.

Issued: June 10, 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

¹⁴ *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

¹⁵ On appeal, appellant's attorney asserts that Dr. Pashman did not discuss appellant's recurrence of disability claim. However, as noted, Dr. Pashman was not selected to resolve a conflict regarding the recurrence of disability issue. Dr. Levin was selected as an impartial medical specialist regarding the recurrence of disability claim. As indicated in this decision, his opinion is currently insufficient to resolve the medical conflict on this issue.