

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

P.F., Appellant)

and)

**U.S. POSTAL SERVICE, PRIORITY MAIL
CENTER, Romulus, MI, Employer**)

**Docket No. 09-2237
Issued: June 28, 2010**

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
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 8, 2009 appellant filed a timely appeal from an August 13, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established entitlement to wage-loss compensation from November 21, 2006 to January 16, 2007.

FACTUAL HISTORY

On November 3, 2006 appellant, then a 59-year-old mail sorter, filed a recurrence of disability claim (Form CA-2a), reporting the date of injury as November 1, 2003, the date of recurrence as September 28, 2006 and the date she stopped working as October 13, 2006.¹ On

¹ The record indicates that appellant has an accepted lumbar strain causally related to a November 1, 2003 employment incident, under the Office File No. xxxxxx820.

the claim form she stated that her back pain never went away and became worse after Christmas. She listed incidents at work on September 28 and 29 and October 4, 2006, when she experienced back pain.

By letter dated December 7, 2006, the Office advised appellant that, since she had reported new employment factors, her claim would be developed as an occupational disease claim. With respect to the medical evidence, appellant submitted an undated Form CA-20 (attending physician's report) from Dr. Donald Seyfried, a neurosurgeon, who diagnosed lumbar spondylolisthesis and indicated that she underwent an L4-5 laminectomy with pedicle screw fusion on October 16, 2006. Dr. Seyfried reported that she was disabled from October 16, 2006 to January 16, 2007. In response to a question as to causal relationship between the diagnosed condition and employment, he stated, "unknown." In a report dated December 18, 2006, Dr. Seyfried advised that appellant was recovering well from surgery. He stated that the L4-5 spondylolisthesis was a degenerative condition, but her occupation "could have exacerbated the symptoms and pain."

In a narrative statement dated January 3, 2007, appellant stated that her back pain had increased in December 2005, noting that she had to move heavy containers. She noted that mail weighed up to 20 pounds and described her job duties. Appellant indicated that there was significant bending, turning, lifting and raising above the head.

By decision dated February 26, 2007, the Office denied the claim for compensation. It found that the medical evidence did not include a well-reasoned medical opinion on the causal relationship between the diagnosed back condition and her employment-related duties as a mail sorter.

Appellant requested a telephonic hearing before an Office hearing representative, which was held on August 13, 2007. In an August 27, 2007 report, Dr. Richard Dryer, an internist, stated that her specific symptoms started on September 27, 2006. Appellant developed back pain at work when she lifted her right leg up. Dr. Dryer noted pain the next day and an episode five days later at work when she picked up her leg to step. He stated, "It is my feeling that [appellant] had a work-related condition leading to eventual operation and leading to her disability for a 12-week period of time."

By decision dated November 6, 2007, an Office hearing representative remanded the case for further development of the medical evidence on the issue of causal relationship. The Office referred appellant, together with a statement of accepted facts and medical records, to Dr. Bruce Abrams, an orthopedic surgeon. In a report dated February 8, 2008, Dr. Abrams provided a history and results on examination. He diagnosed status post L5 laminectomy. Dr. Abrams stated appellant's "symptoms when she bent, twisted, et-cetera," caused a temporary aggravation of her preexisting degenerative arthritic condition of the lumbar spine, which was resolved when she returned to work in January 2007.²

² Appellant retired in October 2007.

In a letter dated March 5, 2008, the Office advised appellant that the claim was accepted for a temporary aggravation of preexisting arthritis. Appellant filed a claim for compensation (Form CA-7) for the period November 21, 2006 to January 16, 2007.

By letter dated March 21, 2008, the Office asked Dr. Abrams for a supplemental report addressing the issue of whether the surgery was medically necessary for treatment of the accepted condition. In a report dated March 27, 2008, Dr. Abrams noted that a July 13, 2006 electrodiagnostic study showed inactive L5, possibly S1 radiculopathies with no ongoing denervation. He stated that this would mean there was nothing causing compression of the L4-5 nerve root and he questioned whether the disc surgery and fusion was appropriate or necessary for this condition. In response to a question as to what condition the surgery did treat if not the accepted condition, Dr. Abrams stated that the surgery probably treated the ongoing degenerative condition.

The Office referred the medical records to an Office medical adviser for an opinion regarding the necessity of surgery. In an April 30, 2008 report, the Office medical adviser stated that Dr. Abrams provided an excellent report and suggested the Office accept his opinion.

By decision dated January 20, 2009, the Office denied appellant's claim for compensation from November 21, 2006 to January 16, 2007. It determined that the October 16, 2006 surgery and her subsequent disability was not employment related.

Appellant requested a telephonic hearing, which was held on May 11, 2009. In a CA-20 form dated May 5, 2008, Dr. Dryer indicated that she was disabled from October 10, 2007.

By decision dated August 13, 2009, the hearing representative affirmed the January 20, 2009 decision.

LEGAL PRECEDENT

Section 8103(a) of the Federal Employees' Compensation Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.³ The Office has the general objective of ensuring that an employee recovers from her injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness.⁴

While the Office is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for the treatment of the effects of an employment-related injury or condition.⁵ To prove that, a surgical procedure is

³ 5 U.S.C. § 8103(a).

⁴ *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁵ *See Debra S. King*, 44 ECAB 203, 209 (1992).

warranted, she must submit evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted.⁶

With respect to a claimed period of disability, an employee has the burden of establishing that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁷ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁸

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁹ The medical evidence required to establish a period of employment-related disability is rationalized medical evidence.¹⁰ Rationalized medical evidence is medical evidence based on a complete factual and medical background of the claimant, of reasonable medical certainty, with an opinion supported by medical rationale.¹¹

ANALYSIS

The Office accepted a temporary aggravation of an underlying degenerative lumbar arthritis condition. As to the employment factors alleged to have caused the condition, appellant initially noted three episodes at work commencing September 28, 2006. In her January 3, 2007 statement, appellant implicated a range of employment activities over several years, including bending, pushing containers and lifting parcels. The Office has primarily focused on the employment incidents since September 28, 2006 but it does not appear to dispute that she performed the identified work duties.¹²

Appellant underwent back surgery on October 16, 2006 and she filed a claim for wage-loss compensation from November 21, 2006 to January 16, 2007. It is her burden of proof to establish that the surgery and period of disability claimed were due to the accepted aggravation of degenerative lumber disease and medically necessary for treatment of that condition.

None of the attending physicians of record offered a rationalized medical opinion on the issue. Dr. Dryer briefly stated that he believed appellant had a work-related condition leading up to surgery, without providing medical rationale. He did not provide a complete medical history

⁶ *R.L.*, 60 ECAB ___ (Docket No. 08-855, issued October 6, 2008).

⁷ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

⁹ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹¹ *Leslie C. Moore*, 52 ECAB 132 (2000).

¹² For example, the March 21, 2008 letter to Dr. Abrams refers to the accepted condition “which resulted from the work events beginning [September 28, 2006].”

of appellant's back condition or treatment, describe the employment-related condition or explain why he felt the October 16, 2006 surgery was appropriate to treat the employment-related condition.

Dr. Abrams questioned whether the October 16, 2006 surgery was appropriate to treat appellant's back condition. He stated that the surgery was performed to treat the underlying degenerative condition, not the accepted aggravation. As noted, the only limitation on the Office's authority in authorizing surgery is reasonableness. Based on the evidence, the Office did not abuse its discretion by relying on Dr. Abrams opinion that the October 16, 2006 surgery was not causally related to employment or medically necessary.

With respect to the claimed period of disability following the surgery, the Board finds no rationalized medical opinion from an attending physician supporting an employment-related disability. Dr. Seyfried referred to disability from October 16, 2006 to January 16, 2007, without further explanation on causal relationship. He noted in response to a question on causal relationship that it was "unknown." Appellant did not meet her burden of proof to establish employment-related disability for the period following surgery on October 16, 2006 to January 16, 2007, when she returned to work.

The Board notes that appellant argued before the Office hearing representative that her referral to Dr. Abrams was inappropriate as he had previously been involved in the case. Appellant did not identify any specific deficiency in the reports or opinion of the physician. Dr. Abrams served as a second opinion physician and there is no evidence that requesting a report on a different issue in a case he had previously reviewed was inappropriate.¹³

CONCLUSION

The Board finds that appellant has not established entitlement to wage-loss compensation from November 21, 2006 to January 16, 2007.

¹³ Contrast *Wallace B. Page*, 46 ECAB 227 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 13, 2009 is affirmed.

Issued: June 28, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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