

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

D.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Keyport, NJ, Employer**

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**Docket No. 11-565
Issued: December 12, 2011**

Appearances:
Thomas R. Uliase, 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 January 4, 2011 appellant, through her attorney, filed a timely appeal of the September 28, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying a recurrence claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that she sustained a recurrence of disability beginning May 10, 2008 causally related to her October 20, 2007 employment injury; and (2) whether appellant has established the causal relationship between her lumbar condition and the October 20, 2007 employment injury.

On appeal counsel contends that OWCP erred in failing to expand her claim to include a lumbar condition and to accept her recurrence claim.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 22, 2007 appellant, then a 41-year-old part-time regular mail processing clerk, filed a traumatic injury claim alleging that on October 20, 2007 she injured her neck, shoulders and back while sweeping mail.² She stopped work on October 20, 2007 and returned to an eight-hour limited-duty position on October 25, 2007. OWCP accepted the claim for aggravation of cervical radiculitis.³

In a November 5, 2007 progress note, Dr. Cary D. Glastein, a treating Board-certified orthopedic surgeon, related performing an anterior cervical fusion and decompression. Appellant returned to work with restrictions and was doing well until she sustained an exacerbation of severe lower back pain while doing overhead lifting. Dr. Glastein noted that appellant was not supposed to perform any overhead lifting. A review of an x-ray interpretation revealed Grade 2, L5-S1 spondylolisthesis.

On June 2, 2008 appellant filed a claim for a recurrence of total disability beginning May 10, 2008 causally related to her accepted October 20, 2007 employment injury. OWCP received a May 15, 2008 disability note from Dr. Gordon D. Donald, a treating Board-certified orthopedic surgeon, indicating that appellant was totally disabled until further notice.⁴

In a June 9, 2008 report, OWCP provided appellant with information to support her claim for a recurrence of disability. It noted that she had been performing light-duty work.

In a June 13, 2008 report, Dr. David I. Rubinfeld, a second opinion Board-certified orthopedic surgeon, reviewed the medical evidence, a statement of accepted facts and conducted a physical examination. He diagnosed status post shoulder and neck surgeries and lumbosacral spine degenerative disease with spondylolisthesis. Based upon Dr. Rubinfeld's review of the medical reports, statement of accepted facts and physical findings, he concluded that appellant no longer had any residuals of her accepted aggravation of cervical radiculitis. He opined that her current disability was due to her nonemployment-related lumbar condition.

In a June 13, 2008 statement, appellant related that her last day of work was May 10, 2008 and that she saw her physician for back problems. She contended that her back problems were due to the October 20, 2007 employment injury and that she was totally disabled from working.

² This was assigned claim number xxxxxx238.

³ On February 14, 2008 OWCP combined claim numbers xxxxxx368 and xxxxxx238 with xxxxxx238 as the master file number. Under claim number xxxxxx368, appellant filed an occupational disease claim in which she alleged that on October 23, 2000 she first realized that her right scapular costal syndrome, cervical strain and chronic repetitive stress syndrome were employment related. OWCP accepted the claim for cervical radiculopathy and right shoulder strain. On November 10, 2004 it accepted her August 26, 2004 and July 24, 2007 recurrence claims due to her accepted October 23, 2000 employment injury. On August 18, 2006 OWCP granted appellant a schedule award for a 38 percent permanent impairment of her bilateral upper extremities.

⁴ The diagnosis is undecipherable.

In a July 2, 2008 progress note, Dr. Bruce Coplin, a treating Board-certified physiatrist, diagnosed chronic neck pain, chronic cervical radiculopathy and status post cervical laminectomy. He indicated that appellant was currently temporarily disabled from working.

In a July 21, 2008 letter, appellant's counsel requested that OWCP accept a lumbar condition and submitted evidence in support of her claim.

In a February 1, 2008 report, Dr. Scott C. Woska, a Board-certified physiatrist, noted that appellant sustained overuse injuries which required a cervical fusion. On October 20, 2007 appellant felt a pop in her lower back while doing overhead lifting. Since this injury she experienced back pain which had not been present prior to the October 20, 2007 employment injury. A review of a magnetic resonance imaging (MRI) scan revealed a Grade 2, L5-S1 spondylolisthesis with bilateral L5 spondylolisthesis defects. Dr. Woska noted that the spondylolisthesis was preexisting with an acute superimposed sprain.

In a July 30, 2008 progress note, Dr. Coplin diagnosed chronic neck and back pain, underlying cervical laminectomy history with recurrent disc problems and right upper trapezius muscle myofascial pain syndrome. He indicated that appellant was currently temporarily disabled from working.

By decision dated September 26, 2008, OWCP denied a lumbar condition and her claim for a recurrence of disability beginning May 10, 2008. Regarding the recurrence claim, it found that the evidence of record neither established a change in the nature and extent of the employment-related condition or in the light-duty position. OWCP also denied authorization for back surgery on the grounds that causal relationship was not established.

Subsequently, OWCP received a May 15, 2008 report from Dr. Donald who found appellant to be temporarily totally disabled. He provided physical findings and diagnosed degenerative lumbosacral intervertebra disc, lumbar spinal stenosis, thoracic/lumbosacral radiculitis and acquired spondylolisthesis.

On October 2, 2008 appellant's counsel requested an oral hearing before an OWCP hearing representative, which was held on February 25, 2009.

In an October 17, 2008 report, Dr. Arthur H. Phair, a treating Board-certified orthopedic surgeon, reported that appellant injured her back at work. He reported that appellant reported pain in her thoracic and low lumbar area while removing parcels of mail of an elevated conveyor or shelf, which was called a sweep maneuver. A physical examination revealed tenderness on palpation of the lumbar spine and flexion causing discomfort. A review of an x-ray interpretation revealed minor L4-5 degenerative changes, evidence of an L5-S1, Grade 1 to 2 isthmic spondylolisthesis and a very small L4-5 central disc bulge or herniation. In an October 24, 2008 report, Dr. Donald provided physical findings, diagnosed degenerative lumbosacral intervertebra disc, lumbar spinal stenosis, thoracic/lumbosacral radiculitis and acquired spondylolisthesis and opined that appellant continued to be temporarily totally disabled.

In a February 18, 2009 report, Dr. Donald reported seeing appellant for her low back pain following her October 20, 2007 employment and opined that her current disability was due to the

low back injury she sustained that day. He attributed appellant's L4-5 internal disc disruption, right lumbar radiculitis and resulting symptoms to the October 20, 2007 employment injury.

By decision dated May 19, 2009, an OWCP hearing representative affirmed the denial of appellant's recurrence claim. She also found the evidence of record insufficient to expand appellant's claim to include a lumbar condition.

In a letter dated September 25, 2009, appellant's counsel requested reconsideration and provided argument and medical evidence in support of her request. Dr. Donald contended that the medical evidence established that appellant's lumbar condition and resulting disability was due to her October 20, 2007 employment injury. In reports dated July 15 and August 27, 2009, He diagnosed lumbar radiculitis and lumbar disc displacement without myelopathy. Dr. Donald attributed appellant's lumbar internal disc disruption superimposed on adjacent isthmic spondylolisthesis to her October 20, 2007 employment injury.

In an October 22, 2009 report, Dr. Donald provided physical findings and opined that appellant continued to suffer from debilitation L4-5 discogenic injury and pain above her spondylolisthesis. Diagnoses included lumbar disc displacement without myelopathy, lumbar spinal stenosis, lumbosacral and thoracic radiculitis and acquired spondylolisthesis.

In an October 27, 2009 report, Dr. Glastein reported treating appellant since May 14, 2004 for cervical radiculopathy and the resulting surgery. He related that appellant reported lower back pain as a result of lifting at the employing establishment on October 20, 2007. A review of x-ray interpretations taken at that time revealed L5-S1, Grade 1 spondylolisthesis. Subsequently, an MRI scan was performed which revealed an L4-5 disc desiccation without herniation along with the L5-S1 spondylolisthesis. Dr. Glastein opined that, while it is clear that appellant had preexisting lumbar spine pathology of Grade 2, L5-S1 spondylolisthesis, some disc desiccation and Grade 3, L4-5 annular tear, he opined that the October 20, 2007 lifting injury exacerbated this condition.

By decision dated December 17, 2009, OWCP denied modification, finding that appellant did not establish an employment-related back injury or establish a worsening of her accepted condition to support acceptance of a recurrence.

In a January 5, 2010 report, Dr. Donald diagnosed persistent debilitation internal disc disruption superimposed on spondylolisthesis, which he attributed to her work injury. He provided physical findings and reported that appellant continued to have low back pain which radiates into her legs.

In a February 25, 2010 report, Dr. Donald noted a history of a low back injury sustained as a result of the October 20, 2007 employment injury. Physical findings included lumbosacral paraspinal tenderness with low back pain and radiating pain into the right leg. Dr. Donald diagnosed persistent debilitating low back pain due to appellant's L4-5 internal disc disruption/herniated disc, which was causally related to her October 20, 2007 employment injury. Diagnoses included lumbar disc displacement without myelopathy, lumbosacral degenerative disc disease, lumbar spinal stenosis, lumbosacral/thoracic radiculitis and acquired spondylolisthesis.

In a June 30, 2010 letter, appellant's counsel requested reconsideration.

By decision dated September 28, 2010, OWCP denied modification. It found the evidence of record insufficient to either establish appellant's claim for a recurrence of disability beginning May 10, 2008 or that her claim should be expanded to include a lumbar condition.

LEGAL PRECEDENT -- ISSUES 1 & 2

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 to establish, by the weight of the reliable, probative and substantial evidence, a recurrence of disability and to show that she cannot perform such light duty.⁵ 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 requirements.⁶

A recurrence of disability is defined as 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 that caused the illness.⁷ The Board has held that whether a particular injury causes an employee to be disabled for work is a medical question that must be resolved by competent and probative medical evidence.⁸ The weight of medical opinion is determined on the report of a physician, who provides a complete and accurate factual and medical history, explains how the claimed disability is related to the employee's work and supports that conclusion with sound medical reasoning.⁹

For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.¹⁰

Section 8123(a) of FECA 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.¹¹ When there are

⁵ *Richard A. Neidert*, 57 ECAB 474 (2006); *K.C.*, Docket No. 08-2222 (issued July 23, 2009).

⁶ *Joseph D. Duncan*, 54 ECAB 471 (2003); *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986); *C.S.*, Docket No. 08-2218 (issued August 7, 2009).

⁷ 20 C.F.R. § 10.5(x). *See S.F.*, 59 ECAB 525 (2008); *Albert C. Brown*, 52 ECAB 152 (2000); *Terry R. Hedman*, *supra* note 5.

⁸ *See R.C.*, 59 ECAB 546 (2008); *Carol A. Lyles*, 57 ECAB 265 (2005); *Donald E. Ewals*, 51 ECAB 428 (2000).

⁹ *See Sandra D. Pruitt*, 57 ECAB 126 (2005); *C.S.*, *supra* note 5.

¹⁰ *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000); *G.A.*, Docket No. 09-2153 (issued June 10, 2010).

¹¹ 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹²

ANALYSIS -- ISSUES 1 & 2

The Board finds that the case is not in posture for a decision as to whether appellant sustained a recurrence of disability. The case will be remanded to OWCP for further development.

Appellant returned to a light-duty position on October 24, 2007. On June 2, 2008 she claimed that her condition had worsened such that she was no longer able to perform the light-duty position beginning May 10, 2008. Appellant did not allege a change in her light-duty job requirements. Therefore, she has the burden to establish that she cannot perform such light duty. As part of this burden, appellant must show a change in the nature and extent of the injury-related condition.¹³

In support of her claim for her May 10, 2008 recurrence and the expansion of her claim to include a lumbar condition, appellant submitted reports from various physicians.

Appellant submitted reports from Drs. Donald and Glastein who each opined that she was disabled due to her lumbar condition which had been caused or aggravated by her October 20, 2007 employment injury. Dr. Glastein opined that appellant sustained an exacerbation of severe lower back pain and aggravation of her preexisting lumbar spine pathology of Grade 2, L5-S1 spondylolisthesis, some disc desiccation and Grade 3, L4-5 annular tear while doing overhead lifting on October 20, 2007. As a result of this aggravation, appellant became totally disabled from performing her light-duty job on May 10, 2008. Dr. Donald also opined that appellant became temporarily totally disabled as a result of the lumbar injury she sustained on October 20, 2007. He provided physical findings and concluded that she sustained a lumbar injury as a result of the October 20, 2007 employment injury.

In a June 13, 2008 report, Dr. Rubinfeld concluded that appellant had no residuals from her accepted cervical radiculitis which had resolved. He attributed her current disability due to her preexisting lumbosacral spine degenerative disease with spondylolisthesis which he opined was not employment related.

Drs. Donald and Glastein opined that appellant sustained a lumbar condition as a result of the October 20, 2007 employment injury and that she was currently disabled. The Board finds a conflict between Drs. Donald and Glastein, with Dr. Rubinstein in regard to the issue of whether appellant sustained a lumbar condition as a result of the October 20, 2007 employment injury or any resulting disability beginning May 10, 2008.

¹² *M.S.*, 58 ECAB 328 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹³ *Joseph D. Duncan*, *supra* note 5; *Jackie D. West*, 54 ECAB 158 (2002); *Roberta L. Kaaumoana*, *supra* note 5; *Terry R. Hedman*, *supra* note 5.

CONCLUSION

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence as to whether appellant's claim should be expanded to include a lumbar condition and whether she sustained a recurrence of disability beginning May 10, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 28, 2010 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: December 12, 2011
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