

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

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**R.M., Appellant**

**and**

**U.S. POSTAL SERVICE, MORICHES POST  
OFFICE, Moriches, NY, Employer**

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**Docket No. 10-836  
Issued: January 3, 2011**

*Appearances:*  
*Appellant, pro se*  
*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 3, 2010 appellant filed a timely appeal of the December 22, 2009 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 this case.

**ISSUE**

The issue is whether appellant sustained a recurrence of total disability commencing September 18, 2009 causally related to his August 5, 2009 employment-related injury.

**FACTUAL HISTORY**

The Office accepted that on August 5, 2009 appellant, then a 29-year-old clerk, sustained a back sprain as a result of pushing a heavy pallet of newspapers onto a loading dock while in the performance of duty. Appellant stopped work on August 6, 2009. After returning to limited-duty work six hours a day on September 14, 2009, he stopped work on September 18, 2009.

On September 23, 2009 appellant filed a claim alleging that he sustained a recurrence of disability commencing September 18, 2009 due to his accepted employment-related injury. He

stated that, upon his return to limited-duty work, he was restricted from lifting. Appellant experienced numbness in his right leg due to herniated discs for which he underwent physical therapy three times a week. On the date of the claimed recurrence of disability, his right leg became numb and gave out due to his herniated discs. Appellant fell and broke his right ankle and leg for which he underwent surgery.

By letter dated September 29, 2009, the employing establishment controverted appellant's recurrence of disability claim. It contended that there was no medical evidence of record establishing a causal relationship between the August 5, 2009 employment-related injury and his claimed recurrence of disability.

In a September 30, 2009 prescription, Dr. Gregg J. Jarit, an attending orthopedic surgeon, ordered a cam walker boot for appellant's right ankle fracture. In a September 30, 2009 report, he obtained a history that on September 18, 2009 appellant fell at home while going down stairs. Appellant's legs became numb, weak and buckled causing him to twist his right ankle. Dr. Jarit noted that appellant underwent surgery on September 19, 2009 for his right ankle fracture dislocation. He listed his findings on physical examination and diagnosed pain in the ankle and foot joint, lateral malleolus of the ankle and sprain and strain of the ankle deltoid. Dr. Jarit opined that appellant's employment-related back injury was "possibly" related to his ankle injury. In an October 7, 2009 report, he reiterated his right ankle diagnoses.

A September 1, 2009 magnetic resonance imaging (MRI) scan report of appellant's lumbar spine found a large two-centimeter elongated right-sided disc herniation at L2-3 that extended inferiority along the posterior aspect of L3 which compressed the thecal sac in the right L3 nerve root. The report also found disc desiccation and concentric bulging of the disc at L3-4 and L4-5 with no other sites of lumbar disc herniation, conus or cauda equine compression.

In a September 4, 2009 report, Dr. Eric M. Manoff, a Board-certified orthopedic surgeon, noted appellant's back, knee and ankle symptoms. He listed his findings on physical examination and reviewed the September 1, 2009 lumbar MRI scan. Dr. Manoff diagnosed herniated discs at L3-4. He opined that appellant could perform light-duty work with limited work hours and no lifting.

A September 9, 2009 report from Thomas Hare, a physician's assistant, found that appellant had displacement of the lumbar intervertebral disc without myelopathy.

In a September 15, 2009 report, Dr. John J. Labiak, a Board-certified orthopedic surgeon, obtained a history of appellant's August 5, 2009 employment injury and medical treatment. He listed his findings on physical examination and reviewed the September 1, 2009 lumbar MRI scan. Dr. Labiak diagnosed herniated nucleus pulposus.

Notes from appellant's physical therapists indicated that appellant received treatment from August 18 to September 17, 2009 for his employment-related back condition and right lower extremity condition.

In an October 7, 2009 report, from a physician whose signature is illegible found that appellant sustained a right ankle fracture due to his August 5, 2009 employment-related injury.

By letter dated November 4, 2009, the Office requested that appellant submit factual and medical evidence in support of his claim. It also requested that the employing establishment respond to his allegations.

Hospital records dated August 8, 2009 indicated that appellant was treated for lower back pain that radiated down to his leg which commenced on August 5, 2009. Hospital discharge instructions dated September 20, 2009 addressed his treatment plan, diet, equipment, physical restrictions and follow-up medical care related to his right ankle injury and surgery.

Notes from appellant's physical therapists indicated that appellant received treatment from August 8 to December 15, 2009 for his lumbago and right ankle condition.

In prescriptions dated September 20, 2009, Dr. Jarit ordered a wheelchair, set of crutches, commode and walker for appellant's right ankle fracture. In an October 28, 2009 report, he reiterated his diagnoses of pain in the ankle and foot joint and lateral malleolus of the ankle. In a November 9, 2009 report, Dr. Jarit stated that appellant was being treated for a right ankle fracture for which he underwent surgery on September 19, 2009. He stated that appellant would remain out of work until further notice.

In an undated narrative statement, appellant described his alleged recurrence of disability. On September 18, 2009 he felt a sharp pain in his lower back that traveled down his right leg as he walked down the steps in his garage. When appellant continued down the steps, his right leg gave out and he fell down. He broke his right ankle and underwent emergency surgery that was performed by Dr. Jarit. Appellant noted the opinions of Drs. Jarit and Labiak that his employment-related back injury may have contributed to his right ankle injury due to weakness in his right leg.

In a November 17, 2009 letter, the employing establishment contended that there was no rationalized medical evidence of record establishing a causal relationship between appellant's September 18, 2009 right ankle injury and his August 5, 2009 employment-related back injury.

By decision dated December 22, 2009, the Office denied appellant's recurrence of disability claim. The medical evidence was found insufficient to establish that he sustained a recurrence of total disability commencing September 18, 2009 due to his accepted employment-related injury.<sup>1</sup>

### **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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment

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<sup>1</sup> The Office received additional medical evidence following the issuance of its December 22, 2009 decision. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office with a formal written request reconsideration. 5 U.S.C. § 8128(a); 20 C.F.R. § 10.606.

that caused the illness.<sup>2</sup> This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her 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 or her established physical limitations.<sup>3</sup>

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he 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 he 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.<sup>4</sup>

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.<sup>5</sup>

### ANALYSIS

The Office accepted that appellant sustained a back sprain on August 5, 2009. Following this injury, he returned to limited light-duty work. Appellant claimed a recurrence of total disability commencing September 18, 2009 causally related to his accepted employment injury when he stopped working on that date. He must demonstrate either that his condition has changed such that he could not perform the activities required by his modified job or that the requirements of the limited light-duty job changed. The Board finds that the record contains no evidence that the limited light-duty job requirements were changed or withdrawn or that appellant's employment-related condition has changed such that it precluded him from performing limited light-duty work.

Dr. Jarit's September 30 and October 7, 2009 reports revealed that appellant had pain in the ankle and foot joint, lateral malleolus of the ankle, and sprain and strain of the ankle deltoid. His opinion, however, that appellant's employment-related back injury "possibly" caused his ankle injury is speculative in nature. As a matter of law, such terms as suspected, could, may, might be, and possibly indicate that the report is equivocal, speculative or conjectural and, therefore, the reports are of limited probative value.<sup>6</sup> Dr. Jarit's September 20 and 30, 2009

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<sup>2</sup> 20 C.F.R. § 10.5(x).

<sup>3</sup> *Id.*

<sup>4</sup> *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>5</sup> *James H. Botts*, 50 ECAB 265 (1999).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.3(g) (April 1993); see e.g., *T.M.*, 60 ECAB \_\_\_\_ (Docket No. 08-975, issued February 6, 2009).

prescriptions ordered equipment for appellant's right ankle fracture. This evidence does not address the issue of appellant's disability for work commencing September 18, 2009 or how any disability was causally related to the August 5, 2009 employment injury. The Board finds that Dr. Jarit's reports and prescriptions are insufficient to establish appellant's claim.

Dr. Jarit's November 9, 2009 report found that appellant would remain out of work until further notice following surgery on September 19, 2009 to repair his right ankle fracture. As noted, a recurrence of disability is defined as a spontaneous change in the accepted medical condition. Dr. Jarit, however, did not address the issue of how the accepted August 5, 2009 employment injury spontaneously caused or aggravated the diagnosed condition or caused disability for the period claimed.<sup>7</sup> The Board finds that his report is insufficient to establish appellant's claim.

The August 8, 2009 hospital records addressed the treatment of appellant's lower back pain that radiated down to his leg which commenced on August 5, 2009. This evidence addressed the initial injury accepted in this case and not the claimed recurrence of total disability commencing September 18, 2009. This report is not relevant to the issue of whether appellant's disability for the claimed period was causally related to the August 5, 2009 employment injury.

The September 20, 2009 hospital discharge instructions addressed appellant's treatment plan, diet, equipment, physical restrictions and follow-up medical care related to his right ankle injury and surgery. This evidence does not address the issue of his disability for work commencing September 18, 2009 or how any disability was causally related to the August 5, 2009 employment injury.

The September 1, 2009 diagnostic test results regarding appellant's lumbar conditions are similarly insufficient to establish his claim for a recurrence of total disability. This evidence does not contain any opinion addressing his disability for work commencing September 18, 2009.

Dr. Manoff's September 4, 2009 report found that appellant had herniated discs at L3-4 and he could perform light-duty work with limited work hours and a lifting restriction. Dr. Labiak's September 15, 2009 report found that appellant had herniated nucleus pulposus. Neither physician provided any opinion addressing his disability for work commencing September 18, 2009 causally related to the August 5, 2009 employment injury. The Board finds that the reports of Dr. Manoff and Dr. Labiak are insufficient to establish his claim.

The October 7, 2009 report containing an illegible signature is of no probative value as it is not certain that the author is a physician.<sup>8</sup>

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<sup>7</sup> See *Gloria J. McPherson*, 51 ECAB 441 (2000) (the opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant).

<sup>8</sup> *Merton J. Sills*, 39 ECAB 572 (1988).

The medical reports from Mr. Hare, a physician's assistant, and appellant's physical therapists are of no probative value. Neither a physician's assistant<sup>9</sup> nor a physical therapist<sup>10</sup> is a physician as defined under the Federal Employees' Compensation Act and accordingly, these reports do not establish that appellant sustained a recurrence of disability commencing September 18, 2009 causally related to the August 5, 2009 employment injury.

Appellant has not met his burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the limited light-duty requirements which would prohibit him from performing the limited light-duty positions he assumed after he returned to work.

### **CONCLUSION**

The Board finds that appellant failed to establish that he sustained a recurrence of total disability commencing September 18, 2009 causally related to his August 5, 2009 employment-related injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 22, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2011  
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

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<sup>9</sup> See 5 U.S.C. § 8101(2); *George H. Clark*, 56 ECAB 162 (2004).

<sup>10</sup> See *A.C.*, 60 ECAB \_\_\_ (Docket No. 08-1453, issued November 18, 2008).