

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

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| T.S., Appellant |) | |
| |) | |
| and |) | Docket No. 10-1961 |
| |) | Issued: June 6, 2011 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Torrance, CA, Employer |) | |

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 27, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 26, 2010 merit decision denying her claim for wage-loss compensation. Pursuant to the Federal Employees' Compensation Act¹ and 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 is entitled to compensation for total disability for the period January 8 through 23, 2008.

FACTUAL HISTORY

On February 2, 2006 appellant, then a 45-year-old mail carrier, filed an occupational disease claim alleging that she sustained a low back and bilateral lower extremity condition due

¹ 5 U.S.C. § 8101 *et seq.*

to duties associated with her federal employment.² On March 1, 2007 the Office accepted her claim for aggravation of a preexisting herniated disc at L5-S1 and informed her that it was unable to determine at that time whether the aggravation was temporary or permanent. Appellant returned to light duty on May 11, 2007.

Appellant submitted a January 8, 2008 report from Dr. John Barchilon, a treating physician. Dr. Barchilon stated that she had a history of disc herniation at L5-S1, for which she underwent a discectomy and laminectomy in March 2005. He diagnosed lumbar radiculopathy, noting that appellant had significant pain radiating down the left leg with burning in the left thigh. Examination revealed one plus lumbar tenderness at S1, but no heat, echymosis, hematoma or deformity of the spine. There was no palpable paravertebral spasm, no tenderness over the entire quadriceps on the left side, no echymoses, swelling or palpable masses. Straight leg raising was not attempted because of pain on the least motion of the left leg. Deep tendon reflexes were three plus and bilaterally at the knees and ankles. Extensor hallucis longus (EHL) strength is 4/5 (was 3/5) on the left and 5/5 on the right. Dr. Barchilon indicated that appellant was temporarily totally disabled from work. An accompanying disability slip reflected that appellant was considered to be totally disabled for 14 days.

In a February 19, 2008 second opinion report, Dr. Ghol Bahman Ha'Eri, a Board-certified orthopedic surgeon, provided examination findings and opined that appellant had no injury-related factors of disability. He stated that her back condition was an aggravation of a preexisting nonindustrial herniated disc at the L5-S1 level, but that the aggravation was temporary. Dr. Ha'Eri indicated that the March 2007 discectomy and laminectomy was performed to treat the claimant's underlying condition, as the aggravation had resolved by the date of the surgery. He provided work restrictions, which he opined were attributable to appellant's preexisting low back condition (L5-S1 disc herniation).

Appellant filed claims for compensation for total disability for the periods February 5 through June 18, 2005 and January 8 through 23, 2008. She submitted periodic reports from Dr. Barchilon, who reiterated his opinion that she was disabled due to her accepted condition.

In a November 28, 2008 development letter, the Office informed appellant that medical evidence did not support her inability to work due to her accepted work-related condition of an aggravation of a preexisting lumbar disc disease for either period claimed. It noted that her 2005 hysterectomy appeared to be related to a nonindustrial condition and was therefore not compensable. A March 17, 2005 microendoscopic discectomy was not authorized by the Office, and the evidence did not establish that this surgery was required to treat the accepted aggravation. The Office advised appellant to submit rationalized medical evidence explaining how her claimed disability from February 5 to June 18, 2005 and from January 8 to 23, 2008 was due to her accepted work-related condition of an aggravation of a preexisting lumbar disc condition.

² Appellant has filed two additional claims with the Office: File No. xxxxx065 (traumatic injury claim for chemical conjunctivitis) was handled as an administrative closure case and was never formally adjudicated. File No. xxxxxx267 (traumatic injury claim for prolapsed uterus) was denied on October 12, 2004.

In a decision dated March 9, 2009, the Office denied appellant's claims for compensation for the periods February 5 to June 18, 2005 and from January 8 to 23, 2008, finding that the medical evidence did not establish that she was disabled due to her accepted condition during the claimed periods. On April 12, 2009 appellant requested reconsideration.

In a March 23, 2009 addendum report, Dr. Barchilon discussed the reasons he placed appellant on temporary total disability from January 8 through 23, 2008. He noted that she had developed intractable pain and weakness in the left leg, which failed to respond to a lumbar epidural steroid injection. Appellant need for opiates to manage the pain compromised her alertness and put her at risk for a fall at work.

By decision dated October 30, 2009, the Office denied modification of the March 9, 2009 decision. It found that the evidence did not establish total disability due to the accepted injury for the claimed periods. On February 11, 2010 appellant requested reconsideration.

The Office found a conflict in medical opinion between Dr. Barchilon and Dr. Ha'Eri as to whether appellant's claimed disability was due to her accepted condition and whether the March 2007 surgery was performed to treat her underlying condition or the accepted condition. It referred appellant, together with a statement of accepted facts and the entire medical record, to Dr. Robert Klapper, a Board-certified orthopedic surgeon, in order to resolve the conflict.

On January 7, 2010 the Office authorized the removal of spinal lamina and low back disc surgery, which occurred on February 25, 2010.

On February 1, 2010 Dr. Barchilon disagreed with Dr. Ha'Eri's opinion that appellant's accepted aggravation of her underlying condition was temporary.

In a March 25, 2010 report, Dr. Klapper provided a history of injury and examination findings. He noted that appellant's condition had improved significantly since the January 25, 2010 surgery. Dr. Klapper did not respond to questions presented by the Office or offer an opinion as to whether appellant's claimed disability was due to her accepted condition and whether the March 2007 surgery was performed to treat her underlying condition or the accepted condition. He indicated that he had not yet reviewed appellant's medical records and that, once he had done so, he would conclude his final opinion.

In a May 26, 2010 decision, the Office found that appellant's claim for compensation for the period February 5 through June 18, 2005 was not in posture for a decision, as Dr. Klapper had not yet provided a final report with an opinion as to whether her March 2005 surgery was work related. It, however, denied modification of its prior decision regarding her claim for compensation for the period January 8 through 23, 2008.

LEGAL PRECEDENT

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or 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 total disability and show that he or she cannot perform such light duty. As part of this burden, the

employee must show either 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.³ To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.⁴

Section 8123(a) of the Act provides that, 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

ANALYSIS

The Office accepted appellant's claim for claim for aggravation of a preexisting herniated disc at L5-S1. Appellant returned to limited duty on May 11, 2007. She filed claims for compensation for the period January 8 through 23, 2008 contending that she was unable to work due to residuals of her accepted injury. The Board finds that this case is not in posture for a decision due to an unresolved conflict in medical opinion.

Dr. Barchilon, appellant's treating physician, opined that appellant was totally disabled due to her accepted injury from January 8 through 23, 2008. Dr. Ha'Eri, a second opinion physician, opined that she had no injury-related factors of disability, stating that her back condition was a temporary aggravation of a preexisting nonindustrial herniated disc. In order to resolve the conflict in medical opinion between the two physicians, the Office properly referred appellant to Dr. Klapper for an impartial medical examination. In a March 25, 2010 report, Dr. Klapper did not respond to questions presented by the Office or offer an opinion as to whether appellant's claimed disability was due to her accepted condition. He indicated that he had not yet reviewed appellant's medical records and that, once he had done so, he would offer his final opinion. Therefore, Dr. Klapper's report did not purport to resolve the conflict in medical opinion.

In its May 26, 2010 decision, the Office found that appellant's claim for compensation for the period February 5 through June 18, 2005 was not in posture for a decision, as Dr. Klapper had not yet provided a final report with an opinion as to whether appellant's March 2005 surgery was work related. It, however, denied modification of its prior decision regarding her claim for compensation for the period January 8 through 23, 2008. As Dr. Klapper's March 25, 2010

³ *Albert C. Brown*, 52 ECAB 152, 154-155 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986); 20 C.F.R. § 10.5(x) provides: "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. 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."

⁴ *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Maurissa Mack*, 50 ECAB 498, 503 (1999).

⁵ 5 U.S.C. §8123(a).

report did not provide an opinion as to whether appellant's claimed disability was due to her accepted condition, there remains an unresolved conflict in medical opinion. While appellant has the responsibility to establish entitlement to compensation, the Office shares responsibility in the development of the evidence and has the obligation to see that justice is done.⁶ Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.⁷ As it undertook development of the medical evidence by referring appellant to Dr. Klapper, it had an obligation to secure a report adequately addressing the relevant issues.⁸ The case will be remanded to the Office to obtain a fully rationalized report from Dr. Klapper, or another qualified referee physician, to resolve this conflict.⁹

On remand, the Office should refer appellant, a statement of accepted facts and a list of specific questions to appropriate Board-certified specialists to determine whether she was disabled during the period claimed. After this and such other development as it deems necessary, the Office should issue an appropriate decision.

CONCLUSION

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

⁶ *Richard E. Simpson*, 55 ECAB 490 (2004).

⁷ *Melvin James*, 55 ECAB 406 (2004).

⁸ *Peter C. Belkind*, 56 ECAB 580 (2005).

⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 26, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further consideration consistent with this opinion.

Issued: June 6, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board