United States Department of Labor
Employees' Compensation Appeals Board

B.L., Appellant	)	
and	)	**Docket No. 10-1646**
	)	**Issued: May 9, 2011**
DEPARTMENT OF VETERANS AFFAIRS, SEPULVEDA VETERANS ADMINISTRATION MEDICAL CENTER, Sepulveda, CA, Employer	)	

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, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 8, 2010 appellant filed a timely appeal from December 17, 2009 and May 17, 2010 merit decisions of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] 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 established a recurrence of total disability July 6, 2009 causally related to his December 17, 2008 employment injury.

On appeal, appellant contends that the Office's decision was contrary to fact and law.

FACTUAL HISTORY

On December 26, 2008 appellant, then a 61-year-old licensed vocational nurse (LVN), filed a traumatic injury claim (Form CA-1) alleging that he injured his back after lifting,

[1] 5 U.S.C. § 8101 *et seq.*

showering and dressing a patient in the performance of duty on December 17, 2008. An incident report dated January 7, 2009 noted that she was injured at work on December 17, 2008. By decision dated August 14, 2009, the Office accepted appellant's claim for a lumbosacral sprain.

Appellant submitted an August 19, 2009 letter by Dr. Sam Elias, Board-certified in internal medicine, who diagnosed chronic lumbar sprain. Dr. Elias reported that appellant returned to work as an LVN in July 2008 and injured himself again on July 6, 2009.

On August 26, 2009 the employer offered appellant a temporary limited-duty job offer as an LVN to work in a recovery room taking vital signs starting on August 31, 2009. The work was subject to the following restrictions: "no lifting more than 25 pounds, no pushing more than 50 pounds" and "avoid bending, stooping and transferring patients."

On September 18, 2009 appellant filed a claim for compensation (Form CA-7) for the period July 7 to August 30, 2009. The employing establishment indicated on the reverse of the claim form that it paid continuation of pay (COP) for that period under Office File No. xxxxxx933, which was denied on August 2, 2009 and that it was in the process of recovering the COP.

Appellant submitted a report of emergency treatment dated January 21, 2009 from the employing establishment with the recommendation to return to full duty with no restrictions.

In a September 9, 2009 hospital discharge prescription note, Dr. Michael Hollander, a Board-certified orthopedic surgeon, indicated that appellant was on off-duty status with temporary total disability.

On October 2, 2009 the Office requested evidence that limited-duty work was not available to appellant or medical opinion evidence explaining why he was totally disabled and incapable of modified duty from July 7 to August 30, 2009. It allotted 30 days for appellant to respond to its inquiries.

On October 7, 2009 appellant filed a notice of recurrence or disability (Form CA-2a) commencing on July 6, 2009 due to the employment injury of December 17, 2008. He stopped work on July 6, 2009, was taken to the emergency room on July 7, 2009 and returned to work on August 31, 2009. Appellant reported that, after returning to work, following the employment injury of December 17, 2008, he was unable to perform his usual work duties of bedside nursing. He transferred to an administrative desk job which required "no lifting or transferring of patients." On July 6, 2009 appellant sustained a recurrence because the pain was in the same location of his back and worsened "after continued lifting and transferring of a patient."

In discharge instructions dated July 7, 2009, Dr. Eric Carlisle, Board-certified in emergency medicine, indicated that appellant could return to work on July 14, 2009 with the following restrictions: no lifting over zero pounds and no prolonged standing. He advised that these restrictions applied through July 21, 2009, after which appellant should be able to participate fully in all work duties.

In a letter dated October 6, 2009, the employing establishment controverted appellant's recurrence claim on the basis that he filed a Form CA-1 for a traumatic injury on July 6, 2009 (Office File No. xxxxxx933) which was denied on September 2, 2009. The employing

establishment reported that appellant accepted a light-duty assignment on September 2, 2009, worked on August 31 and September 1, 2009, and then stopped work claiming total disability. The employer submitted five reports of contact, including one by Donna S. Green for July 2, 2009. Ms. Green reported that she told appellant he needed to perform his duties as an LVN and "went on to tell him he was employed as an LVN and he needed to work in the capacity of an LVN including patient care and medication administration."

A September 16, 2009 magnetic resonance imaging (MRI) scan report of appellant's lumbar spine, by Dr. Andre P. Sanii, a Board-certified radiologist, diagnosed multilevel degenerative disc disease with small annular tears and subtle abnormalities of alignment.

Appellant submitted a September 30, 2009 report by Dr. Jeffrey B. Glaser, a Board-certified anesthesiologist, who diagnosed lumbar spondylosis, spondylolisthesis, back pain, lumbar degenerative disc disease and lumbar disc disorder without myelopathy. Dr. Glaser advised that he spent a significant amount of time discussing the underlying etiology of appellant's left-sided low back pain and stated that it "has been caused by facet arthropathy" and not "discogenically mediated."

In an October 9, 2009 letter, Dr. Elias reported that appellant remained symptomatic since his injury on December 17, 2008 had several exacerbations of his injury since December 17, 2008.

Appellant submitted a narrative statement attached to the July 20, 2009 note of Dr. Elias who contended that his work assignment required him to repeatedly bend over patients in recliners in order to take vital signs.

By letter dated October 6, 2009, the employing establishment discharged appellant during his probationary period for being absent without leave (AWOL).

Appellant submitted an October 23, 2009 electromyography and nerve conduction study report by Dr. Sylvia A. De La Llana, a physiatrist, who diagnosed lumbosacral radiculopathy at L5-S1.

On January 21, 2009 Michael Steinberg, a physician's assistant, reported that appellant had degenerative disc narrowing at L5-S1 with a seven-millimeter retrolisthesis of L5 on S1. He advised appellant to return to full duty, without restrictions.

In an October 17, 2009 report, Dr. Lauren M. Papa, a chiropractor, diagnosed severe lumbosacral strain, bilateral sacroilitis and ruled out lumbar disc herniations. She stated that it was "entirely plausible that causation of [appellant's] low back pain lies entirely as a result of lifting and caring for his patients." Under radiographical review, Dr. Papa recommended appellant undergo an MRI scan of the lumbar spine.

By decision dated December 17, 2009, the Office denied appellant's claim for disability from July 7 to August 30, 2009. It found that he did not submit sufficient medical evidence to establish that he was totally disabled from work as a result of his December 17, 2008 employment injury.

On January 11, 2010 appellant requested an oral hearing, by telephone, before an Office hearing representative.

In a medical report dated October 20, 2009, Dr. Randy S. Rosen, a Board-certified anesthesiologist, reported that a September 16, 2009 MRI scan of appellant's lumbar spine revealed: (1) mild retrolisthesis at L2-L3, (2) a mild retrolisthesis at L3-L4, (3) annular tear at L4-L5 and (4) severe-to-moderate loss of intervertebral disc space height at L5-S1. In a November 16, 2009 progress note, he reported that appellant's nerve conduction studies demonstrated L5-S1 radiculopathy bilaterally with evidence of diffuse peripheral polyneuropathy and a demyelinating process of the tibial and peroneal nerves. On January 27, 2010 Dr. Rosen diagnosed intractable low back pain and multilevel lumbar disc disease and requested authorization of a medial branch block from L3 through S1 bilaterally, synovial cyst aspiration at the left L4-L5 and interferential unit.

On March 16, 2010 appellant stated that his limited-duty assignment required repetitive bending. He informed his supervisors of his back pain and requested information regarding medical leave without pay, which he never received. After calling in sick for several days, appellant was terminated from employment.

On April 6, 2010 a telephonic hearing was held. The hearing representative granted appellant's request to hold the record open for 30 days to submit additional medical evidence or establish his inability to perform his light-duty assignment. Appellant did not submit any additional evidence.

By decision dated May 17, 2010, the Office hearing representative affirmed the December 17, 2009 decision. She found that the record and hearing testimony established that appellant was claiming a new injury on July 6, 2009 due to new exposure in the work environment and not a spontaneous recurrence.

LEGAL PRECEDENT

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.[2] 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.[3]

A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which he claims compensation is causally related to the accepted

[2] A recurrence of disability is defined as the inability to work, caused by a spontaneous change in a medical condition which resulted from a previous injury without an intervening injury or new exposure to the work environment. *See* 20 C.F.R. § 10.5(x).

[3] *A.M.*, Docket No. 09-1895 (issued April 23, 2010). *See Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[4]

ANALYSIS

Appellant returned to work in a limited-duty assignment as an LVN on August 31, 2009. He claimed a recurrence of total disability as of July 6, 2009 due to his December 17, 2008 employment injury. Appellant has the burden of proof to establish a change in the nature and extent of his injury-related condition or a change in the nature and extent of his limited-duty job requirements.

The Board finds that this is not a claim for a new injury, but a recurrence based on a change in the nature of appellant's limited-duty job requirements. On August 26, 2009 the employing establishment offered appellant a temporary limited-duty job offer as an LVN to work in a recovery room taking vital signs with the following restrictions: no lifting more than 25 pounds, no pushing more than 50 pounds and avoid bending, stooping and transferring patients. In a July 2, 2009 report of contact, Ms. Green told appellant that "he needed to perform his duties as an LVN" and acknowledged that she told he was employed as an LVN and he needed to work in such capacity including patient care and medication administration. In his October 7, 2009 notice of recurrence, appellant stated that his work assignment required him to repeatedly bend over patients in recliners in order to take vital signs. He reported that he lifted and transferred a patient on July 6, 2009. The Board has carefully reviewed the factual evidence bearing on the duties appellant performed and finds that he has established a change in the nature and extent of his limited-duty job requirements.

Although appellant has established a change in the nature of his limited-duty job requirements, he has the burden to establish disability for causally related to the accepted lumbosacral sprain. On September 9, 2009 Dr. Hollander indicated that appellant was on off-duty status with a temporary total disability. In a September 30, 2009 medical report, Dr. Glaser opined that appellant's back pain was caused by facet arthropathy. On October 9, 2009 Dr. Elias reported that appellant remained symptomatic since his original injury and had several exacerbations since December 17, 2008. None of the physicians addressed whether appellant's disability on July 6, 2009 was causally related to the accepted employment injury of December 17, 2008. They did not mention the July 6, 2009 incident as a recurrence of the original injury. The physicians did not explain how appellant's condition or disability at that time was due to the December 17, 2008 employment injury or to any other employment factors. Therefore, appellant did not meet his burden of proof to establish causal relationship.

The October 17, 2009 medical report of Dr. Papa, a chiropractor, is of no probative value. The Board has noted that a chiropractor is a physician as defined under the Act to the extent that the reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[5] Dr. Papa's recommended appellant

[4] *B.B.*, Docket No. 09-1858 (issued April 16, 2010). *See Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

[5] 20 C.F.R. § 10.311(a). *Cf., D.S.*, Docket No. 09-860 (issued November 2, 2009).

undergo an MRI scan. There is no evidence to establish that she diagnosed a subluxation as demonstrated by x-ray to exist. Therefore, Dr. Papa is not a physician and her report does not constitute competent medical opinion.

The Board finds that the evidence submitted by appellant lacks adequate rationale to establish a causal connection between appellant's current medical condition and his December 17, 2008 employment injury. Therefore, appellant did not meet his burden of proof to establish disability as a result of a recurrence.

CONCLUSION

The Board finds that appellant failed to establish that he sustained a recurrence of disability commencing July 6, 2009 causally related to his December 17, 2008 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2010 and December 17, 2009 decisions of the Office of Workers' Compensation Programs are affirmed, as modified.

Issued: May 9, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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