United States Department of Labor
Employees' Compensation Appeals Board

K.O., Appellant	)	
and	)	**Docket No. 10-1759**
	)	**Issued: May 3, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Cincinnati, OH, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 22, 2010 appellant, through her representative, filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 26, 2010. 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 the case.

ISSUE

The issue is whether appellant met her burden of proof that she sustained a recurrence of disability commencing July 2, 2009 causally related to her accepted condition.

FACTUAL HISTORY

On February 11, 2008 appellant, then a 30-year-old registered nurse, injured her lower back and left leg while lifting a patient at work. The Office accepted her claim for displacement

[1] 5 U.S.C. § 8101 *et seq.*

of lumbar intervertebral disc without myelopathy. Appellant stopped work on February 11, 2008 and returned full-time limited duty on June 11, 2009. She stopped work on July 2, 2009 and resigned from her position on August 17, 2009.

Appellant began treatment with Dr. Steve Choi, an orthopedist, on February 25, 2008 for low back pain due to a work-related lifting incident at work. Dr. Choi noted a magnetic resonance imaging (MRI) scan of the low back revealed multiple disc protrusions at T11-12, L4-5 and L5-S1. He noted appellant's history was significant for bariatric surgery for obesity. Dr. Choi diagnosed lumbar strain, sciatica and radiculitis and opined that she was totally disabled. In reports dated November 4, 2008 to January 16, 2009, he noted that appellant was currently hospitalized due to a high risk pregnancy and would be disabled through January 15, 2009. Appellant was also treated by Dr. Aaron Schrickel, a chiropractor, from June 26 to October 13, 2008, for mid and low back pain and left leg pain.

Appellant was also treated by Dr. Hungchih Lee, a Board-certified anesthesiologist, from March 11 to April 9, 2009, who diagnosed lumbar disc displacement and myofascial pain syndrome. Dr. Lee noted limited spine range of motion and moderate tenderness on the left side of the paraspinal muscles. He noted that appellant could not work or undergo physical therapy in January 2009. An April 8, 2009 MRI scan of the lumbar spine revealed central disc herniation at L5-S1, central spondylotic protrusion at T11-12 with cord flattening and underlying discogenic spondylosis of mild severity. An MRI scan of the thoracic spine revealed central disc protrusion at T11-12 with cord effacement, central disc herniation at T7-8, paracentral disc herniation at T10-11 and noncompressive disc protrusion at T8-9.

On March 24, 2009 the Office referred appellant for a second opinion to Dr. E. Gregory Fisher, a Board-certified orthopedist. In an April 10, 2009, Dr. Fisher diagnosed L4-5, and L5-S1 disc bulging/protrusion by MRI scan. He noted that appellant had residuals of the accepted displacement of lumbar intervertebral disc without myelopathy. Dr. Fisher stated that her nonwork-related obesity affected her accepted condition. He opined that appellant was not able to perform her date-of-injury position but could return to work in a full time, sedentary, light-duty position, with temporary restrictions. Dr. Fisher recommended weight loss and physical therapy.

In a May 28, 2009 work capacity evaluation, Dr. Lee returned appellant to work light duty, eight hours a day. He prescribed no lifting over 20 pounds, sitting, walking, standing, reaching, twisting, bending and stooping for one to four hours daily, and pushing, pulling, lifting, squatting, kneeling and climbing for one to four hours a day with breaks.

On June 11, 2009 the employing establishment offered appellant a position as a full-time, registered nurse, case management at the eye clinic, subject to the restrictions set forth by Dr. Lee effective June 11, 2009. Appellant accepted the position and returned to work.

In an August 11, 2009 memorandum, the employing establishment noted that appellant accepted an alternative job assignment based on her medical restrictions on June 11, 2009. The employing establishment noted that she had been absent without leave from her job continuously since July 6, 2009 and missed work on June 18, 22, 26 and 29 and July 2 to 3, 2009. It was noted that appellant provided excuses for the absent days; however, the notes did not indicate a

disability relating to her accepted work condition, rather, the excuses related to her as caregiver for her child. The employing establishment noted that the job assignment was available to appellant and remained available.

Appellant submitted notes from her child's physician dated July 2 to August 3, 2009 which indicated that her child was treated and she would be off work from July 6 to 10, 2009. Also submitted were nursing notes dated July 13 and 21, 2009 which indicated that she was treated and was unable to work from July 13 to 21, 2009 and from July 17 to 24, 2009. Appellant submitted a July 23, 2009 report from D. Marvin H. Rorick, a Board-certified neurologist, who noted that she was seen and was unable to work from July 23 to 31, 2009.

On August 24, 2009 the Office advised appellant that the employing establishment notified it that she stopped work on July 6, 2009. It indicated that her physician opined that she was capable of performing the full-time limited-duty position and that it appeared that she was off work due to factors unrelated to her February 11, 2008 work injury. The Office provided appellant with 30 days to submit medical evidence establishing she was totally disabled from work or that she was unable to perform the limited-duty assignment.

In correspondence dated September 14, 2009, counsel requested compensation for temporary total disability. Appellant submitted an August 17, 2009 letter of resignation noting that she did not have reliable care for her disabled child. On July 29, 2009 she was treated by Dr. Lee for low back pain, who noted that she missed therapy from October 2008 to January 2009 because of pregnancy complications and that her lower back pain intensified without therapy. Dr. Lee diagnosed multiple disc protrusions by MRI scan, lumbar strain, sciatica and radiculitis and noted that appellant would be off work for one month.

In a decision dated September 28, 2009, the Office denied appellant's claim for a recurrence of disability beginning July 6, 2009.

On September 30, 2009 appellant, through her attorney, requested a telephone hearing which was held on January 7, 2010. She submitted an October 1, 2009 report from Dr. Lee who treated her for low back pain radiating to the left thigh laterally with numbness and tingling in the toes. Dr. Lee noted appellant's pain increased when lifting her son, twisting and bending. He diagnosed thoracic and lumbar displacement and myofascial pain syndrome. On January 11, 2010 Dr. Lee indicated that appellant requested an epidural steroid injection due to pain. He treated appellant on January 12, 2010, and she reported not being able to work since November 2009 because of pain. Appellant reported low back pain radiating into the legs. Dr. Lee diagnosed thoracic and lumbar disc displacement, myofascial pain syndrome and status post gastric bypass. Appellant was treated by Dr. Schrickel on January 12, 2010 who noted that she worked from June to July 2009 and stopped due to severe pain. She indicated that her back pain increased since her treatment stopped and she gained 40 pounds since October 2009. Appellant indicated that she had a special needs child and she hurt from taking care of him.

In a decision dated March 26, 2010, an Office hearing representative affirmed the September 28, 2009 Office decision.

LEGAL PRECEDENT

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 total disability and show that she cannot perform such light duty. 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.[2]

The Office regulations define the term recurrence of disability as follows: "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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."[3]

Causal relationship is a medical issue,[4] and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.[5]

ANALYSIS

The Office accepted appellant's claim for displacement of lumbar intervertebral disc without myelopathy. Appellant returned to a full-time light-duty position on June 11, 2009, as a registered nurse. She stopped work on July 6, 2009 and requested temporary total disability compensation. Appellant resigned on August 17, 2009 stating that she did not have reliable care for her disabled child. In the instant case, she has not submitted sufficient evidence to support 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.

Appellant submitted a July 23, 2009 report from Dr. Rorick who noted that appellant was treated and was unable to work from July 23 to 31, 2009. Similarly, a July 29, 2009 report from

[2] *Terry R. Hedman*, 38 ECAB 222 (1986).

[3] 20 C.F.R. § 10. 5(x); *J.F.*, 58 ECAB 124 (2006); *Elaine Sneed*, 56 ECAB 373, 379 (2005); *id.*

[4] *Mary J. Briggs*, 37 ECAB 578 (1986).

[5] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

Dr. Lee noted that she presented with low back pain. He noted that appellant missed therapy from October 2008 to January 2009 because of pregnancy complications and her lower back pain intensified without therapy. Dr. Lee diagnosed multiple disc protrusion, lumbar strain, sciatica and radiculitis and noted that appellant would be off work for one month. However, his most contemporaneous reports with the recurrence of disability did not provide a rationalized opinion explaining why appellant's recurrent condition or any disability were due to the accepted work injury.[6] For instance, they failed to explain how appellant experienced a spontaneous change in her accepted condition of displacement of lumbar intervertebral disc without myelopathy arising from the employment injury. They did not specifically explain why any back pain, multiple disc protrusion, lumbar strain, sciatica and radiculitis were due to the accepted injury and caused disability from appellant's light-duty job beginning July 2, 2009.

Appellant submitted an October 1, 2009 report from Dr. Lee who treated her for low back pain radiating to the left thigh which increased when lifting her son, twisting and bending. In reports dated January 11 and 12, 2010, Dr. Lee noted that she reported not being able to work since November 2009 because of pain. He diagnosed thoracic and lumbar disc displacement, myofascial pain syndrome and status post gastric bypass. However, Dr. Lee's reports are insufficient as he did not specifically address whether appellant's disability beginning July 2, 2009 was due to a spontaneous change in her accepted condition. He did not reference the accepted condition nor explain how it caused total disability beginning that date.

Other medical reports, such as those from Dr. Choi, predate the claimed recurrence and do not otherwise support employment-related disability beginning July 2, 2009. Medical records from the physician of appellant's child, dated July 2 to August 3, 2009, attributed her absence from work to her child's medical treatment and did not purport to address her accepted condition.

On January 12, 2010 Dr. Schrickel, a chiropractor, advised that appellant was unable to work since July 2009 due to severe pain. His report is of no probative medical value, however, as he is not a physician under the Act since he did not diagnose a spinal subluxation demonstrated by x-ray.[7] Also submitted were nursing notes dated July 13 and 21, 2009. These records are also of no probative medical value as the Board has held that nurses are not competent to render a medical opinion under the Act.[8] Therefore, these reports are insufficient to meet appellant's burden of proof.

[6] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[7] 5 U.S.C. § 8101(2) provides that chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulations by the Secretary." *See also* 20 C.F.R. § 10.311(c) (provides that, to be given any weight, the report of a chiropractor must state that x-rays support the finding of spinal subluxation); *A.O.*, Docket No. 08-580 (issued January 28, 2009) (without diagnosing a subluxation from x-ray, a chiropractor is not a "physician" under the Act).

[8] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act). *See also* 5 U.S.C. § 8101(2).

Consequently, the medical evidence is insufficient to show a change in the nature and extent of appellant's physical condition, arising from the employment injury, which prevented her from performing her light-duty position.

The Board also finds that there is no evidence showing that appellant experienced a change in the nature and extent of the light-duty requirements or was required to perform duties which exceeded her medical restrictions. The Office provided appellant light duty in conformance with her work restrictions and the evidence supports that this light duty remained available to her until she stopped work and later resigned due to matters related to care and treatment for her child.

Appellant has not met her 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 light-duty requirements which would prohibit her from performing the light-duty position she assumed after she returned to work.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability on or after July 6, 2009 causally related to her accepted condition.

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 3, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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