

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

V.L., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Buffalo, NY, Employer**)

**Docket No. 11-747
Issued: October 17, 2011**

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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 3, 2011 appellant filed a timely appeal from the November 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for a recurrence of total disability. 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 met her burden of proof to establish that she sustained a recurrence of total disability commencing July 6, 2009 due to her May 23, 2007 employment injury.

¹ 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on May 23, 2007 appellant, then 54-year-old nurse, sustained a tear of the lateral meniscus of her right knee and broken teeth due to a fall at work caused by tripping on computer wires. She stopped work for various periods and received disability compensation. Appellant performed light-duty work for a period and OWCP accepted that she sustained a recurrence of total disability on January 7, 2008.

Appellant received medical treatment from several physicians, including Dr. Johanna Handley, a Board-certified family practitioner. In early to mid 2009, Dr. Handley noted that appellant reported pain in her right knee, hip and back and tingling in her left leg and physical examination showed mild effusion and decreased range of motion in her right knee. She recommended conservative treatment with pain medication.² On March 26, 2009 Dr. Paul Schwach, an attending Board-certified orthopedic surgeon, advised that appellant had a torn meniscus in her right knee, trochanteric bursitis in her right hip, persistent dysesthesias in her left leg and an unspecified back condition. He recommended that she engage in sedentary work with restrictions.

On July 6, 2009 appellant returned to full-time work at the employing establishment in a modified nurse position. The position was sedentary in nature and mostly required duties to be performed while sitting at a desk. Appellant was allowed to elevate her legs as needed and to have 15-minute rest periods every one or two hours. She was not required to walk or stand for extended periods or to engage in kneeling, climbing, stooping or twisting. Appellant could drive an automobile for up to 15 minutes at a time.³ These work restrictions were in accordance with recommendations made by Dr. Handley on February 24, 2009.

Appellant complained of experiencing back and leg pain after she returned to the modified nurse position on July 6, 2009. She worked for eight hours on July 6, 2009 but did not return to work. Appellant filed a claim alleging that she sustained a recurrence of total disability on July 6, 2009 due to her May 23, 2007 employment injury.

In July 2, 2009 reports, Dr. Handley stated that changes in the most recent examination of appellant included right hip pain, bilateral thumb pain, pain in her finger joints and burning sensation in her left thumb. Appellant also reported low back and right knee pain. Dr. Handley noted that appellant reported first having hand problems after her 2007 fall but stated that she was now reporting these complaints for the first time. She noted that appellant was 100 percent disabled due to multiple pains.⁴ On July 7, 2009 Dr. Handley stated that examination changes included increased low back pain with paresthesias, increased right hip pain and right knee pain.

² Right knee surgery had been recommended but no surgery was performed due to appellant's prior allergic reactions to anesthetic agents.

³ Appellant's home was an estimated nine-minute drive from work.

⁴ On July 17, 2009 Dr. Schwach diagnosed carpal tunnel syndrome of the right wrist, dyesthesia in the right ulnar nerve and basilar joint arthritis. Appellant's physicians did not indicate that her upper extremity conditions were work related.

Appellant was 100 percent disabled due to an increased amount of pain.⁵ On July 24, 2009 Dr. Handley stated that appellant was unable to go back to work due to severe pain on her right knee, right hip and lower back. She noted that appellant had tried working an office job but was unable to tolerate the long periods sitting and the need to stand up once in a while.

On August 27, 2009 OWCP requested that appellant submit additional factual and medical evidence in support of her claim.

In a statement submitted on September 17, 2009, appellant alleged that the modified nurse position she returned to on July 6, 2009 was outside her work restrictions. She claimed that the position did not allow her to elevate her legs and that she had to engage in excessive walking, including being required to make an extended tour of the workplace. In a September 1, 2009 letter, a human resources official at the employing establishment stated that the modified nurse position was within appellant's work restrictions as the sedentary position allowed her to elevate her legs and to take a 15-minute break every one or two hours. A supervisor indicated that, when she returned to work on July 6, 2009, she sat in her office with her right leg elevated and took a 15-minute break every one or two hours.

In August 31, 2009 reports, Dr. Handley noted that appellant was unable to work due to pain in knee, right hip and right lower back pain.⁶ She indicated that appellant's knee pain made it difficult for her to walk and made her right lower back pain worse. Dr. Handley stated, "[Appellant] injured her knees, right hip and right lower back since her accident in May 23, 2007. I believe that [appellant's] back pain and right hip are related from her injury in May 23, 2007."

In an October 8, 2009 decision, OWCP denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability on or after July 6, 2009 due to her May 23, 2007 employment injury. It found that the medical evidence did not establish that a work-related condition had worsened such that appellant could not perform her light-duty work.

In an October 12, 2009 report, Dr. Handley stated that appellant reported that the pain in her back, right hip and knees was the same and that she had shooting pain in her right leg for a few months. Appellant reported on her initial medical visit that her back and right hip pain started immediately after her May 23, 2007 fall, but that in the following appointments her severe knee pain took precedence over her back and right hip pain. Recently, her back and right hip pain had worsened to the point of debilitation. Dr. Handley indicated that the physical examination showed tenderness in appellant's right lumbar muscles, right sacroiliac joint and right sciatic notch. There were positive findings on straight leg testing of appellant's right leg and decreased range of motion in both knees due to pain. Dr. Handley diagnosed pain in the

⁵ In a July 7, 2009 disability note, Dr. Handley stated, "off work July 7, 2009 until further notice due to injuries, current illness."

⁶ Physical examination showed tenderness in appellant's right lumbar muscle, right sacroiliac joint and right sciatic notch. Pain was elicited in her right buttock and lower back during straight leg raising. No examination was performed on appellant's knees.

finger joints and thumbs, lower back pain, history of diffuse disc bulging, hip joint pain, knee joint pain and right meniscal tear, tingling in the left leg, left carpal tunnel syndrome, basilar joint arthritis and dyesthesia of the ulnar nerves. In another October 12, 2009 report, she stated that physical examination revealed no change in appellant's condition and that she remained 100 percent disabled from work. On November 30, 2009 Dr. Handley reported the same pain complaints.

In a November 5, 2009 letter, appellant, through her attorney, contended that her medical condition worsened such that she was unable to perform any work in July 2009. She asserted that, when she returned to work on July 6, 2009, she was not allowed to elevate her legs, had to walk up stairs and was forced to take a walking tour of the workplace. Appellant claimed that her back and right hip problems were work related.

In a December 11, 2009 letter, a human resources official at the employing establishment stated that when appellant was taken on a tour of her workplace on July 6, 2009 she was allowed to take breaks as needed. Appellant was observed elevating her legs while at work on July 6, 2009 and stated that she was not required to walk up stairs when she entered the building as she had a ramp with a slight incline available for her use.

Appellant requested a review of the written record by an OWCP hearing representative. In a February 22, 2010 decision, the hearing representative affirmed the February 22, 2010 decision. She found that appellant had not shown that a work-related condition prevented her from working in her light-duty position or that her work restrictions had been violated.

In a July 27, 2010 letter, appellant, through her husband, argued that she had work-related right knee, right hip and back problems, which prevented her from working. She also claimed that she had disabling emotional problems related to pain from her work injuries.

In a March 4, 2010 report, Dr. Umeer Ashraf, an attending Board-certified internist, stated that appellant complained of pain in her low back, right hip and right knee. Physical examination revealed tenderness in the medial aspect of appellant's right knee without effusion and tenderness in the L5-S1 area. Dr. Ashraf diagnosed lower back pain with history of diffuse disc bulging, right hip joint pain and right knee joint pain. He recommended treatment with medication and directed appellant to return in three months.⁷ On July 2, 2010 Dr. Ashraf advised that appellant continued to report back pain, occasionally radiating into her leg, which was relieved by medication. Appellant exhibited tenderness in her spinal and paraspinal areas upon examination. Dr. Ashraf reported similar examination findings on October 6, 2010.

In an April 8, 2010 report, Dr. Schwach indicated that he examined appellant on that date and that she continued with symptoms of numbness in her left leg and numbness and pain in her right hip, knee and back. Appellant reported that she developed leg and back problems after performing cardiopulmonary resuscitation at work in September 2006 and that she injured her hip, right knee and teeth at work on May 23, 2007. Dr. Schwach stated, "She continues with symptoms of quite a bit of pain, a nodular swelling over her hip and a torn meniscus in her knee.

⁷ In a February 5, 2010 report, Dr. Ashraf stated that there were no changes in appellant's examination findings and posited that she was 100 percent disabled from work.

[Appellant] has great difficulty walking, sitting and standing. It would be my impression that her condition has been progressing and it is now rendering her permanently disabled.”

In an April 26, 2010 report, Dr. Schwach stated that appellant presented with a history of increasing problems with lumbar spine, right knee and right hip pain and numbness, tingling and burning sensation in her left leg following a May 2007 work injury. He noted that her diagnoses included torn lateral meniscus of the right knee, multiple fractures of the teeth, lumbar disc bulging with an annular tear, trochanteric bursitis of the right hip, paresthesias of the left leg and significant potentially life-threatening allergic reactions to multiple medications. Dr. Schwach indicated that appellant had impaired mobility for walking and had to get up and move after sitting for long periods. Appellant was unable to perform “competitive work” on a part-time or full-time basis.⁸

In a November 22, 2010 decision, OWCP affirmed its February 22, 2010 decision finding that the evidence of record did not show that a work-related recurrence of total disability occurred on or after July 6, 2009.

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 job requirements.⁹

ANALYSIS

OWCP accepted that on May 23, 2007 appellant sustained a tear of the lateral meniscus of her right knee and broken teeth due to a fall at work. Appellant stopped work and received compensation for total disability. On July 6, 2009 she returned to full-time work for the employing establishment in a modified nurse position. The position involved duties which were mostly performed while sitting at a desk.¹⁰ Appellant stopped work after working one day in the modified nurse position and filed a claim alleging that she sustained a recurrence of total disability due to her May 23, 2007 employment injury.

⁸ Appellant submitted a May 26, 2010 report, in which Dr. Alan Dubro, an attending clinical psychologist, diagnosed major depression and a pain disorder associated with her medical condition. Dr. Dubro indicated that she reported experiencing significant physical discomfort and difficulty in performing the activities of daily living.

⁹ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986). See 20 C.F.R. § 10.5(x).

¹⁰ Appellant was allowed to elevate her legs as needed and to have 15-minute rest periods every one or two hours. She was not required to walk or stand for extended periods or to engage in kneeling, climbing, stooping or twisting.

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability on or after July 6, 2009 due to her May 23, 2007 employment injury.

In several reports dated in July and August 2009, Dr. Handley, an attending Board-certified family practitioner, indicated that appellant was 100 percent disabled from work due to increased right knee, right hip and low back pain.¹¹ She asserted that appellant's right knee, right hip and low back pain were all related to her May 23, 2007 employment injury. In October and November 2009 reports, Dr. Handley continued to find that appellant was totally disabled from work.¹²

The Board finds that these reports do not establish appellant's claim because they do not contain a rationalized medical opinion showing that she sustained a recurrence of total disability on or after July 6, 2009 due to her May 23, 2007 employment injury. The reports do not clearly show a change in the nature and extent of appellant's work-related condition, which prevented her from performing the light-duty work she returned to on July 6, 2009. Appellant's claim was accepted for a tear of the lateral meniscus of her right knee and broken teeth and Dr. Handley indicated that, beginning in July 2009, appellant reported increased pain in her right knee. However, Dr. Handley did not describe what objective findings showed that appellant's right knee condition actually worsened to the extent that she could no longer work. Her reports from July 2009 onwards contain very few actual findings concerning appellant's right knee and the findings that are contained in the reports, such as limited right knee motion, are similar to the findings contained in the reports she produced prior to appellant's claimed period of recurrence of total disability. In addition, Dr. Handley did not explain how appellant's medical condition prevented her from performing the extremely limited and mostly sedentary duties of the modified nurse position which she returned to for only one day. She also asserted that appellant's work stoppage after July 6, 2009 was due to right hip and low back pain which she believed was related to the May 23, 2007 accident. However, OWCP did not accept that appellant sustained a hip or back injury on May 23, 2007 and no physician of record has provided a rationalized medical showing that appellant sustained a work-related back or hip injury on May 23, 2007.

Appellant also submitted reports from April 2010 reports in which Dr. Schwach, an attending Board-certified orthopedic surgeon, indicated that she was totally disabled from all work. Dr. Schwach noted that she presented with a history of increasing problems with lumbar spine, right knee and right hip pain and numbness, tingling and burning sensation in her left leg following a May 2007 work injury. He did not, however, provide a rationalized medical opinion that appellant had total disability on or after July 6, 2009 due to her accepted employment injuries, a tear of the lateral meniscus of her right knee and broken teeth. Dr. Schwach provided limited findings on examination and, as previously noted, it has not been accepted that her hip and back problems were work related. He indicated that appellant had problems with walking,

¹¹ Dr. Handley also indicated that appellant had bilateral thumb pain, pain in her finger joints, burning sensation in her left thumb and tingling in her left leg.

¹² In an October 12, 2009 report, Dr. Handley stated that on examination appellant had positive findings on straight leg testing of her right leg and decreased range of motion in both knees due to pain.

standing and sitting, but he did not adequately explain how her accepted medical condition prevented her from performing the extremely limited duties of the modified nurse position.

In reports dated between April and November 2010, Dr. Ashraf, an attending Board-certified internist, discussed appellant's reported symptoms, including pain in her low back, right hip and right knee. However, he did not provide a clear opinion that she sustained a recurrence of total disability on or after July 6, 2009 due to her May 23, 2007 employment injury. In a February 5, 2010 report, Dr. Ashraf stated that appellant was 100 percent disabled from work, but he did not explain the cause of this disability. Appellant also submitted a May 26, 2010 report in which Dr. Dubro, an attending clinical psychologist, diagnosed major depression and a pain disorder associated with her medical condition. However, OWCP has not accepted that she sustained a work-related emotional condition and the medical record does not otherwise show the existence of such a condition.

The medical record does not show a change in the nature and extent of appellant's work-related condition, which prevented her from performing the light-duty work she returned to on July 6, 2009.

Appellant also has not shown that she sustained a recurrence of total disability due to a change in the nature and extent of her light-duty job requirements. She alleged that the modified nurse position she returned to on July 6, 2009 was outside her work restrictions in that she could not elevate her legs while working, was required to walk up stairs and had to engage in excessive walking, including being required to make an extended tour of the workplace. The Board finds that appellant has not submitted sufficient evidence to establish this claim. The record contains statements of employing establishment officials, including a supervisor who directly observed appellant on July 6, 2009, indicating that she was seen elevating her legs at work, that she was allowed to take breaks while taking a tour of the workplace and that she was not required to walk up stairs to enter the workplace as she had a ramp with a slight incline available for her use.

For these reasons, appellant has not shown that she sustained a recurrence of total disability on or after July 6, 2009 due to her May 23, 2007 employment injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after July 6, 2009 due to her May 23, 2007 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 17, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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