

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

M.H., Appellant

and

**U.S. POSTAL SERVICE, COLLEGE PARK
STATION, Livernois, MI, Employer**

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**Docket No. 12-642
Issued: August 16, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 30, 2012 appellant, through her attorney, filed an appeal from merit decisions of the Office of Workers' Compensation Programs (OWCP) dated August 15 and December 22, 2011. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 recurrences of disability on May 22, 2010 and June 1, 2011 caused by the accepted employment-related thoracic strain.

FACTUAL HISTORY

On January 19, 2000 appellant, then a 34-year-old letter carrier, sustained an employment-related thoracic strain when she slipped and fell while exiting a postal vehicle. She

¹ 5 U.S.C. §§ 8101-8193.

sustained a second injury on August 2, 2001 when she tripped on concrete while delivering mail.²

On July 27, 2009 appellant accepted a modified position in a call center. In a May 6, 2010 duty status report, Dr. Daniel S. Passerman, an attending osteopath, advised that she could work eight hours a day, five days a week, with no restrictions on sitting; a 10-pound lifting restriction; one to four hours of intermittent standing, walking, climbing and reaching above the shoulder; no bending, stooping or twisting; one to two hours of pushing and pulling; and eight hours of simple grasping and fine manipulation. The employing establishment indicated on the form that appellant was performing sit-down work only. In a disability slip dated May 19, 2010, Dr. Passerman diagnosed thoracic strain and advised that she should limit her work to six hours per day, effective June 3, 2010.

Appellant filed a recurrence claim on July 19, 2010. She indicated that the recurrence occurred on May 22, 2010 and that she returned to work on May 24, 2010. Appellant stated that her physician reduced her hours on May 22, 2010 because her employment-related condition had worsened. By letter dated July 22, 2010, OWCP informed her of the evidence needed to support her recurrence claim. In an August 3, 2010 report, Dr. Passerman advised that he had been appellant's primary care physician since 2007 and she had experienced chronic upper back pain secondary to muscle spasms which had worsened over the last couple of years. He stated that she "noticed that during the course of her workday she starts to get more pain and thought that she would be able to work more hours with a reduced daily schedule" and further indicated that appellant reported that her work hours had actually increased since the daily reduction. Dr. Passerman advised that appellant had degenerative changes in her lumbar and thoracic spine and responded well to pain medications and osteopathic manipulative medicine. He recommended that she continue her current restrictions "as I think it will maximize her work hours and help with her pain problems."

By decision dated August 30, 2010, OWCP denied that appellant sustained a recurrence of disability on May 22, 2010 on the grounds that the medical evidence was insufficient to establish entitlement. On May 11, 2011 appellant requested reconsideration, stating that her health was deteriorating. She indicated that she had arthritis in her left hand and neck pain and spasms.

A March 22, 2010 lumbar spine x-ray demonstrated mild facet arthropathy in the lower lumbar spine and minimal degenerative change at the thoracolumbar junction. In a September 13, 2010 report, Dr. Passerman noted the x-ray findings and diagnosed myalgias from appellant's occupational duties in conjunction with degenerative changes. He advised that she had chronic back pain and that prolonged sitting caused back spasms. In an April 8, 2011 treatment note, Dr. Passerman noted appellant's complaints of neck and midback pain. He

² The 2000 injury was adjudicated by OWCP under file number xxxxxx779 and the 2001 injury, accepted for medical expenses only, was adjudicated under file number xxxxxx023. The claims were doubled on February 25, 2004. Recurrences of disability for the period July 15 through August 2, 2001 and June 27 through 30, 2005 were accepted. By decision dated November 19, 2002, OWCP denied that appellant sustained a recurrence of disability on June 4, 2002. Pursuant to section 8123(d) of FECA, her compensation was suspended for a period in 2004 and her request for leave-buy-back for the period May 22 through December 23, 2005 was denied.

provided physical examination findings and diagnosed left hand tendinitis and neck and back pain. In a May 24, 2011 report, Dr. Passerman advised that physical stressors at work contributed to a recurrence of pain and that appellant struggled with prolonged sitting or standing. He indicated that reducing her schedule to six hours daily was not particularly helpful for the pain and that her low back pain had worsened with chronic thoracic and lumbar paraspinal muscle spasms. On June 21, 2011 Dr. Passerman indicated that appellant could return to work on June 23, 2011 for six hours a day.

In a merit decision dated June 30, 2011, OWCP denied modification of the prior decision.

On July 15, 2011 appellant claimed that she sustained a recurrence of disability on June 1, 2011. She stated that she was in constant back pain that had occurred since the January 19, 2000 employment injury and that she had also developed left hand pain. Appellant stated that her job duties as a customer care agent in the call center, when she sat hunched over a computer answering the telephone and doing a lot of typing and sitting, contributed to her condition. She also filed a (Form CA-7) claim for compensation for the period June 4 to 14 and June 20 to 30, 2011. Appellant submitted a May 6, 2011 x-ray of the left hand that demonstrated a small ossification at the thumb carpometacarpal joint and mild osteoarthritis of the thumb. In a disability slip dated July 15, 2011, Dr. Passerman advised that she could not work on July 6, 2011 and July 15 through 20, 2011. On July 25, 2011 he advised that appellant could return to work for six hours daily on July 27, 2011 working with the right hand only and no lifting in excess of five pounds, with the restriction effective until September 25, 2011.

By decision dated August 15, 2011, OWCP denied appellant's claim that she sustained a recurrence of disability on June 1, 2011 because the medical evidence was insufficient to establish that her time loss from work was due to the accepted employment injury. On September 26, 2011 appellant requested reconsideration of the June 30 and August 15, 2011 decisions. She submitted an August 17, 2011 magnetic resonance imaging (MRI) scan of the thoracic spine that demonstrated mild upper thoracic degenerative changes. In a September 8, 2011 report, Dr. Passerman advised that appellant had been suffering from continual back pain due to her accident in January 2000 when she sustained a thoracic strain and that the recurrences of May through October 2010 and June 2011 were a result of the January 2000 employment injury.

In separate decisions dated December 22, 2011, OWCP denied that appellant sustained a recurrence of disability on May 22, 2010 or June 1, 2011.

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 that caused the illness.³ This term also means an inability to work 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

³ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

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

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 establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, 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.⁵

ANALYSIS

The Board finds that appellant has not established a recurrence of total disability on May 22, 2010 or June 1, 2011 causally related to the accepted thoracic strain because she did not establish that the nature and extent of her injury-related condition changed so as to prevent her from continuing to perform her limited-duty assignment at a call center that she accepted on July 27, 2009.

A partially disabled claimant who returns to a light-duty job has the burden of proving that he or she cannot perform the light duty, if a recurrence of total disability is claimed.⁶ The issue of whether an employee has disability from performing a modified position is primarily a medical question and must be resolved by probative medical evidence.⁷ A claimant's burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale. Where no such rationale is present, the medical evidence is of diminished probative value.⁸

The Board finds the reports of appellant's attending osteopath, Dr. Passerman, insufficient to establish her recurrence claims as he did not provide sufficient medical rationale explaining the mechanics of how the January 19, 2000 thoracic strain caused her complaints of increased pain such that she could not perform the duties of her modified assignment. On May 6, 2010 Dr. Passerman advised that appellant could work eight hours a day with no restrictions on sitting and on May 19, 2010 advised that she should limit her work to six hours a day, without further explanation. On August 3, 2010 he explained that she had worsening chronic upper back pain secondary to muscle spasms. Dr. Passerman stated that appellant "noticed that during the course of her workday she starts to get more pain and thought that she would be able to work more hours with a reduced daily schedule" and indicated that she reported

⁴ *Id.*

⁵ *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *See William M. Bailey*, 51 ECAB 197 (1999).

⁷ *Cecelia M. Corley*, 56 ECAB 662 (2005).

⁸ *Mary A. Ceglia*, 55 ECAB 626 (2004).

that her work hours had actually increased since the daily reduction. He recommended that she continue her current restrictions “as I think it will maximize her work hours and help with her pain problems.” The Board finds this report unclear as to how decreasing work hours could increase appellant’s ability to work more hours and Dr. Passerman later indicated that working a reduced schedule was not particularly helpful for the pain. Dr. Passerman also provided restrictions regarding her left hand, a condition not accepted as work related. Furthermore, an August 17, 2011 MRI scan of the thoracic spine demonstrated mild degenerative changes. While Dr. Passerman reported that prolonged sitting caused back spasms and that physical stressors at work caused pain, he did not demonstrate knowledge of the specific requirements or assignments of the position or provide a rationalized explanation as to why appellant could not perform the modified work. Moreover, pain is a symptom, not a compensable medical diagnosis.⁹ Thus, Dr. Passerman’s opinion is not sufficient to establish a change in appellant’s condition sufficient to indicate that she could no longer perform the limited-duty position.

It is appellant’s burden of proof to submit the necessary medical evidence to establish a claim for a recurrence.¹⁰ The record does not contain a medical report providing a reasoned medical opinion that her claimed recurrences of disability were caused by the January 19, 2000 employment injury.¹¹ Moreover, appellant has not shown a change in her light-duty requirements. She therefore did not meet her burden of proof to establish disability as a result of a recurrence.

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 failed to meet her burden of proof to establish that she sustained a recurrence of disability on May 22, 2010 or June 1, 2011 causally related to her accepted thoracic strain.

⁹ *C.B.*, Docket No. 09-2027 (issued May 12, 2010).

¹⁰ *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹¹ *Cecelia M. Corley*, *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the December 22 and August 15, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 16, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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