United States Department of Labor
Employees' Compensation Appeals Board

M.P., Appellant	)	
and	)	**Docket No. 11-1194**
	)	**Issued: February 23, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
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 April 19, 2011 appellant, through her attorney, filed a timely appeal from the November 24, 2010 decision of the Office of Workers' Compensation Programs' (OWCP) which denied modification of its prior decisions denying her claim for a recurrence. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of disability beginning September 15, 2008 causally related to her July 4, 2006 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP s decision. *See* 20 C.F.R. § 501.3(f)(2). As OWCP's decision was issued on November 24, 2010 the 180-day computation begins on November 25, 2010. One hundred eighty days from November 25, 2010 was April 24, 2011. The appeal was received by the Clerk of the Board on April 19, 2011, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

FACTUAL HISTORY

On July 7, 2006 appellant, then a 47-year-old transfer clerk, filed a traumatic injury claim alleging that, on July 4, 2006, she was lifting bags to transfer them to a mail container when she felt a pull in her back while in the performance of duty. She stopped work on July 5, 2006 and returned to modified duty for eight hours a day on August 19, 2006. On April 24, 2006 OWCP accepted the claim for sprain of back, lumbar region and left shoulder sprain.

Dr Daniel Wilen, a Board-certified orthopedic surgeon, initially treated appellant and indicated that she could work within restrictions.

On October 10, 2008 appellant filed a claim for a recurrence of disability commencing on September 15, 2008. She alleged that after returning to work she was placed on limited duty with restrictions to include no lifting over 10 pounds, sitting in a high back chair and stretching the back every 15 minutes. Appellant indicated that, since the original injury, she felt weak on the left side, her legs felt weak and very tender. She noted that, at times, she stiffened up, she was tender at times, her left side went numb and she felt heat on the left side. The employing establishment confirmed that appellant was working a limited-duty position. The employer also noted that she had not worked since March 21, 2008 "due to personal reasons."

In a September 15, 2008 report, Dr. Paolo Perrone, a Board-certified internist, noted appellant's history of injury and treatment and diagnosed sciatica, low back syndrome, lumbar herniated disc, lumbar myofascitis, lumbar radiculopathy and history of hypertension. He recommended a series of treatments and advised that she had a "partial disability as a result of her work-related injury from her unusual type of work and should avoid any heavy lifting or bending, any prolonged sitting or standing and pushing or pulling of heavy objects that may aggravate her symptoms of pain."

On September 22, 2008 OWCP referred appellant to Dr. Michael J. Katz, a Board-certified orthopedic surgeon, for a second opinion to determine the extent of her disability. In a report dated October 16, 2008, Dr. Katz described her history of injury and treatment. He diagnosed lumbosacral strain with disc herniation at L5-S1, left shoulder contusion, resolved. Dr. Katz opined that there was no further need for formal physical therapy or orthopedic care of the left shoulder. Regarding the back, he recommended physical therapy once a week and orthopedic care every six weeks. Dr. Katz opined that appellant suffered a mild disability from the July 4, 2006 injury. He advised that she was able to work eight hours per day with restrictions to include no lifting over 25 pounds. Dr. Katz recommended that the restrictions remain in place for two months.

In a September 29, 2008 absence note, Dr. Perrone advised that appellant refrain from all work-related duties. He stated that she "had a job[-]related injury to her back."

By letter dated October 22, 2008, OWCP informed appellant of the type of evidence needed to support her claim and requested that she submit such evidence within 30 days.

In a November 15, 2008 statement, appellant stated that she stopped working in May due to a family member's illness. She indicated that her back "locked up" on September 15, 2008.

OWCP received additional evidence that included physical therapy notes and an October 21, 2008 and January 12, 2009 computerized muscle testing examination. In an October 29, 2008 report, Dr Romilla Anwar, a Board-certified physiatrist and associate of Dr. Perrone, noted appellant's history and diagnosed low back syndrome, lumbar myofascitis and report of sciatica. He requested authorization for additional physical therapy and opined that she was totally disabled "as a result of her work-related injuries from her usual type of work and should avoid any heavy lifting or bending, any prolonged sitting or standing and pushing or pulling of heavy objects that might aggravate her symptoms of pain." In a November 5, 2008 attending physician's report, Dr. Anwar checked the box "yes" that appellant's condition was caused or aggravated by an employment activity. He diagnosed lumbosacral myofascitis and clinical evidence of radiculopathy. Dr. Anwar filled in "excessive lifting can cause this condition." He opined that appellant had a total disability which prevented her from performing the duties of her employment.

By decision dated November 25, 2008, OWCP denied appellant's claim for a recurrence of disability on September 15, 2008. If found that the evidence failed to establish a worsening of her condition that resulted in a work stoppage on September 15, 2008.

In a December 8, 2008 report, Dr. Modesto Fontanez, a Board-certified neurosurgeon and associate of Dr. Perrone, noted that appellant injured her lumbar spine while turning on her waist to accommodate mail in a bin. Thereafter, appellant had a "protracted course of persistent stabbing lumbalgia with bouts of severe exacerbation and radicular extension over the posterolateral aspect of the left lower extremity and difficulty in gait. Symptoms are made worse by any prolonged standing, sitting, ambulation and any physical exertion." Dr. Fontanez diagnosed status post torsion and axial injury to the lumbar spine with lumbosacral fibromyositis and left L5-S1 radiculopathy and internal derangement of L4-5 and L5-S1 discs. He recommended electromyography (EMG) and nerve conduction velocity (NCV) studies of the lower extremities, continued physical therapy and computerized muscle range of motion testing for the lumbar spine. Dr. Fontanez advised that appellant avoid heavy lifting, pushing, carrying, stooping, bending, prolonged sitting and prolonged standing since this would aggravate her pain.

On December 19, 2008 appellant requested reconsideration.

In a January 2, 2009 report, Dr. Fontanez noted that appellant's condition had worsened and she now had degenerative joint disease. He advised that she suffered from downward pressure, back spasms and leg spasms, pressure of the bowels and numbness in the legs. Additionally, Dr. Fontanez indicated that appellant could not sit for long periods of time because of the downward pressure which occurred when moving, assuming certain positions, coughing or sneezing, bending forward, flexing her hips, flexing her waist and she also suffers from weakness in her legs.

In a separate January 2, 2009 report, Dr. Anwar noted that appellant had significant limitation of lumbar spine range of motion and lower extremity weakness. He also noted that she had chronic L5-S1 radiculopathy, disc herniation at L5-S1, and evidence of lumbar fibromyositis. Dr. Anwar opined that appellant was totally disabled from her work-related activities. OWCP also received additional physical therapy reports and diagnostic tests.

In a January 29, 2009 report, Dr. Perrone diagnosed L5-S1 disc herniation, left L5-S1 radiculopathy and lumbar myofascitis. He requested authorization for chiropractic, nerve block and laser treatment. Dr. Perrone opined that appellant had a "total disability as a result of her work-related injuries from her usual type of work and should avoid any heavy lifting or bending, any prolonged sitting or standing and pushing or pulling of heavy objects that may aggravate her symptoms of pain."

In a March 26, 2009 decision, OWCP denied modification of the prior decision.[3]

On March 30, 2009 OWCP received a March 14, 2009 report from Dr. Fidel Rodriguez, a Board-certified physiatrist and associate of Dr. Perrone, who diagnosed L5-S1 disc herniation and left chronic lumbar radiculopathy and opined that appellant was totally disabled. OWCP received additional physical therapy notes and diagnostic tests.

In a May 4, 2009 report, Dr. Igor Cohen, a clinical neurologist and neurophysiologist and associate of Dr. Perrone, noted appellant's history of injury and treatment. He opined that her condition was "directly related to the accident described in this report." Dr. Cohen noted that the mechanism of injury was entirely consistent with the clinical presentation. He advised that the July 4, 2006 accident was the direct producing cause of appellant's injuries and pathologies. Dr. Cohen advised that she continued to have "a total 100 percent disability as a result of her work[-]related injury." On June 4, 2009 he provided a lumbar epidural injection.

In a May 18, 2009 report, Dr. David Zelefsky, a Board-certified physiatrist and associate of Dr. Perrone, noted that, on July 4, 2006, appellant indicated that she picked up a 13- to 15-pound bag and felt a pain. He diagnosed a displaced lumbar disc without myelopathy, lumbago, thoracic lumbosacral radiculitis and sciatica. Dr. Zelefsky opined that appellant's symptoms were consistent with the history of injury, that the work injury was the competent medical cause of her injury and that she was temporarily 100 percent disabled.

In letters dated May 19, June 3 and August 15, 2009, appellant requested reconsideration. She reiterated that her condition stemmed from her July 4, 2006 injury and she continued to suffer from her work-related injury.

By decision dated September 3, 2009, OWCP denied modification of its March 26, 2009 decision.

Drs. Cohen, Perrone, Zelefsky continued to treat appellant. They diagnosed disc herniation at L5-S1, left L5 and S1 radiculopathy, lower back syndrome, lumbar myofascitis and depressive disorder secondary to chronic pain. They repeated previous statements that appellant was 100 percent disabled due to her work injury. OWCP received numerous physical therapy and diagnostic reports.

On August 30, 2010 appellant's representative requested reconsideration.

[3] It vacated a February 27, 2009 decision that denied the request for reconsideration without a merit review of the claim.

In a November 24, 2010 decision, OWCP expanded the claim to accept that appellant developed an L5-S1 radiculopathy as a result of the July 6, 2006 injury. However, it declined to otherwise modify the prior decision finding that the medical evidence did not establish a change in the nature and extent of the injury-related conditions beginning September 15, 2008.

LEGAL PRECEDENT

Section 10.5(x) of OWCP's regulations provide that 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. The 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]

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 the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantive evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements.[5]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.[6] This consists of 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.[7] The physician's opinion 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.[8]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.[9]

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[4] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[5] *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[6] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[7] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[8] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[9] *Walter D. Morehead*, 31 ECAB 188 (1986).

ANALYSIS

Appellant's claim was accepted for sprain of the back, lumbar region, left shoulder sprain and, later, L5-S1 radiculopathy. She returned to light-duty work after the injury and she stopped work on March 21, 2008 for personal reasons. Appellant subsequently alleged a recurrence of disability on September 15, 2008.

Appellant has not alleged a change in the nature and extent of her light-duty job requirements. There is no evidence that appropriate light-duty work was not made available. Appellant must thus provide medical evidence establishing that she was disabled due to a worsening of her accepted work-related conditions.[10]

In a September 15, 2008 report, Dr. Perrone advised that appellant had a "partial disability as a result of her work-related injury from her unusual type of work and should avoid any heavy lifting or bending, any prolonged sitting or standing and pushing or pulling of heavy objects that may aggravate her symptoms of pain." He did not indicate that she was totally disabled due to a worsening of her accepted work-related conditions. Furthermore, in an October 16, 2008 report, Dr. Katz, an OWCP referral physician, examined appellant and determined that while she was mildly disabled due to the July 4, 2006 injury but could work eight hours per day with restrictions to include no lifting over 25 pounds.

In a September 29, 2008 absence note, Dr. Perrone directed appellant to refrain from all work-related duties. He stated that she "had a job[-]related injury to her back." The Board notes that Dr. Perrone does not provide any rationale to show how he arrived at this conclusion.[11] This is particularly important in light of his September 15, 2008 report finding that appellant could work with restriction and the fact that she has not worked since March 21, 2008 due to personal reasons. Dr. Perrone did not explain how there was a spontaneous change in appellant's accepted conditions between September 15 and 29, 2008 that rendered her totally disabled. His subsequent reports also do not provide this much needed rationale to explain why there was a spontaneous change in the accepted conditions beginning September 15, 2008. For example, in his January 29, 2009 report, Dr. Perrone noted diagnoses and opined that appellant had a "total disability as a result of her work-related injuries from her usual type of work and should avoid any heavy lifting or bending, any prolonged sitting or standing and pushing or pulling of heavy objects that may aggravate her symptoms of pain." But he did not explain the reasons why the current disability was attributable to the accepted conditions.

In an October 29, 2008 report, Dr Anwar diagnosed low back syndrome, lumbar myofascitis and report of sciatica and opined that appellant was totally disabled "as a result of her work-related injuries from her usual type of work. However, as noted above, appellant had not been performing her usual type of work since March 21, 2008 and her stoppage at that time was for personal reasons. Thus, it is not clear that Dr. Anwar had an accurate or complete

[10] *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[11] *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).

history.[12] In a November 5, 2008 attending physicians report, Dr. Anwar indicated that appellant was 100 percent disabled and checked the box "yes" her condition was caused or aggravated by her work. Although he noted that "excessive lifting can cause this condition," it is unclear how appellant was excessively lifting when she was not working since March 21, 2008. These reports are of little probative value as the Board has held that the checking of a box "yes" on a form report, without additional explanation or rationale, is insufficient to establish causal relationship.[13] Additionally, Dr. Anwar did not explain how appellant's condition had worsened such that she was no longer able to perform her limited-duty work during this time frame. Other reports from him, which address causal relationship, also provide no rationale to support the physician's conclusion that she was totally disabled from her work-related activities.

In a May 4, 2009 report, Dr. Cohen opined that appellant's condition was "directly related" to the work injury and advised that the mechanism of injury was entirely consistent with the clinical presentation and advised that the accident of July 4, 2006 was the direct producing cause of her injuries and pathologies. He stated that she was 100 percent disabled as a result of her work-related injury. However, Dr. Cohen did not state when appellant's work-related disability began and, more importantly, he did not provide medical rationale to explain how he arrived at this conclusion on injury-related disability. Other reports from him also did not provide reasoning to support the physician's opinion on causal relationship.

In a May 18, 2009 report, Dr. Zelefsky noted diagnoses, opined that appellant's symptoms were consistent with her injury and stated that she was totally disabled.[14] However, he did not explain in this report, or in his other reports of record, the reasons why appellant's disability beginning September 15, 2008 was attributable to her accepted conditions. Without further rationale, Dr. Zelefsky's opinion is of limited probative value.

In a December 8, 2008 report, Dr. Fontanez noted the history of the work injury and advised that appellant should avoid certain activities that would aggravate her pain. On January 2, 2009 he noted that appellant's condition had worsened and she had degenerative joint disease. Dr. Fontanez also noted activities that would exacerbate her symptoms. However, he did not find in his reports that appellant was disabled such that she could not perform her light-duty position as of September 15, 2008. Thus, these reports are insufficient to establish any work-related disability beginning September 15, 2008. Similarly, Dr. Rodriguez, in his March 14, 2009 report, noted diagnoses and opined that appellant was totally disabled. However, he did not specifically address how any total disability was the result of her work-related injuries. Other medical reports submitted by appellant are also insufficient to establish

[12] *See Cowan Mullins*, 8 ECAB 155, 158 (1955) (where the Board held that a medical opinion based on an incomplete history was insufficient to establish causal relationship).

[13] *Calvin E. King*, 51 ECAB 394 (2000).

[14] Dr. Zelefsky, as well as other physicians, noted certain diagnoses that OWCP has not accepted. The Board notes that where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

the claim as they do not specifically address the cause of disability beginning September 15, 2008.[15]

Appellant also submitted physical therapy reports. However, health care providers such as physical therapists are not physicians under FECA. As such, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value.[16]

Consequently, appellant has not met her burden of proof in establishing that she sustained a recurrence of disability beginning September 15, 2008.

On appeal, appellant's representative argues that OWCP committed error in its decision by finding that appellant did not meet her burden of proof to establish her disability for work. He alleged that the medical evidence in support of her claim satisfied the criteria to meet her burden of proof. As explained, appellant did not meet 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 did not meet her burden of proof to establish a recurrence of disability beginning September 15, 2008 causally related to her July 4, 2006 employment injury.[17]

[15] *See Charles H. Tomaszewski,* 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[16] *Jane A. White*, 34 ECAB 515, 518 (1983). *See* 5 U.S.C. § 8101(2).

[17] Appellant may submit evidence or argument with a written request for reconsideration 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.

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 23, 2012
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