

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

K.S., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 12-497
Issued: July 10, 2012**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 6, 2010 appellant, through her attorney, filed a timely appeal of the December 1, 2011 merit decision of the Office of Workers' Compensation Programs. 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 sustained a recurrence of total disability commencing May 27, 2010 causally related to her accepted employment injuries.

On appeal, appellant's attorney contends that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on January 14, 2010 appellant, then a 40-year-old mail handler sustained cervical, thoracic and lumbosacral sprains, strains and contusions and disc herniation at T6-T7 as a result of being hit by a bulk mail container (BMC) that was pushed by an employee. He was smashed between a jack and the BMC. Appellant stopped work on January 16, 2010.

Effective January 20, 2010, appellant returned to full-time work as a modified mail handler.

On June 4 and 21, 2010 appellant filed claims for wage-loss compensation (Form CA-7) for the period May 27 through June 18, 2010. On the CA-7 forms, the employing establishment indicated that appellant was on leave without pay (LWOP) during the claimed period. Time analysis forms (Form CA-7a) indicated that she did not work and was on LWOP from May 27 through June 4, 2010 based on a physician's note.

In a May 18, 2010 prescription, Dr. Michael R. Magoline, an attending Board-certified orthopedic surgeon, ordered physical therapy to treat appellant's right elbow lateral epicondylitis. In a June 15, 2010 work slip, Dr. Magoline advised that she was being treated for a back condition and was unable to work. He estimated that appellant could return to work on July 21, 2010.

By letters dated June 14 and 29, 2010, OWCP advised appellant that the medical evidence submitted was insufficient to establish her claims. It addressed the medical evidence she need to submit.

On July 5 and 17 and August 2, 2010 appellant filed CA-7 and CA7a forms claiming compensation for LWOP due to disability for work from June 19 through July 30, 2010.

In progress notes dated May 25, June 15 and July 13, 2010, Dr. Magoline noted appellant's complaints of ongoing pain, tension and muscle spasm in her low back. He obtained a history of her medical, social and family background. Dr. Magoline listed findings on physical examination and diagnosed cervical and lumbar strains and thoracic disc herniation. He placed appellant off work and addressed her treatment plan. In prescriptions dated May 25 and July 15, 2010, Dr. Magoline ordered physical therapy to treat appellant's cervical and lumbar strains and thoracic disc herniation. In a June 23, 2010 work capacity evaluation (Form OWCP-5c), he advised that she was unable to perform her regular work duties due to continuing pain. Appellant could return to full-time work on December 31, 2010 with physical restrictions for an indefinite period. In a July 13, 2010 work slip, Dr. Magoline stated that she was unable to work. He estimated that appellant could return to work on August 22, 2010. In a July 27, 2010 report, Dr. Magoline stated that appellant was unable to return to work due to her ongoing low back problems. He advised that she was actively involved in therapy and her pain was such that it would be unreasonable to expect her to return to work at that time.

In a prescription dated January 26, 2010, Dr. David H. Goff, a family practitioner, ordered physical therapy to treat appellant's cervical, thoracic and lumbosacral sprains, strains and contusions.

Reports from Kara Morris, a physical therapist, addressed the treatment of appellant's thoracic spine and neck conditions from January 27 through June 14, 2010.

In an August 27, 2010 decision, OWCP found the medical evidence insufficient to establish that appellant was totally disabled commencing May 27, 2010 due to her accepted January 14, 2010 employment injuries.

On August 27 and 30 and September 13, 2010 appellant filed CA-7 and CA7a forms claiming compensation for LWOP due to disability for work from July 31 through September 10, 2010.

Reports from Ms. Morris addressed appellant's treatment for her cervical and lumbar conditions on intermittent dates from August 23 through September 20, 2010.

In an August 24, 2010 progress note, Dr. Magoline noted that appellant still experienced discomfort along the mid back. He listed findings on physical examination and diagnosed thoracic strain. Also, on August 24, 2010 Dr. Magoline advised, in a work slip, that appellant was unable to work. He estimated that she could return to work on October 8, 2010. On August 27, 2010 Dr. Magoline prescribed physical therapy to treat appellant's thoracic disc herniation. In a September 17, 2010 report, he advised that she was off work due to a thoracic strain. Dr. Magoline noted that appellant was undergoing physical therapy and she took narcotic pain medicine to control her discomfort. He kept her off work to rehabilitate her back.

A report dated January 15, 2010 from Mercy Medical Center contained the typed name of Leonard Dyko, a physician's assistant, and obtained a history of appellant's January 14, 2010 employment injuries, listed findings on physical examination and diagnosed a contusion in multiple sites. She was placed off work until she followed up with work, safety and health.

By letter dated September 24, 2010, appellant, through counsel, requested a telephone hearing regarding OWCP's August 27, 2010 decision.

On intermittent dates from September 27, 2010 through April 11, 2011 appellant filed CA-7 and CA-7a forms claiming compensation for LWOP due to disability for work from September 11, 2010 through April 8, 2011.

In progress notes dated March 16, 2010 through April 5, 2011, Dr. Magoline noted appellant's complaints of pain in her right elbow and back. He listed findings on physical examination and advised that she had possible loose bodies and lateral epicondylitis of the right elbow. Appellant also had tenderness and mild paraspinal muscle spasm in the lower thoracic spine and pain with full extension and flexion. She had difficulty with standing for a prolonged period of time secondary to pain and thoracic disc herniation. In a November 16, 2010 progress note, Dr. Magoline advised that appellant's significant pain most likely kept her disabled for work. In work slips dated October 5 and November 16, 2010 and February 15, 2011, he advised that she was totally disabled for work. Dr. Magoline estimated that appellant could return to work on April 6, 2011. In prescriptions dated October 6, 2010 and January 4, 2011, he ordered physical therapy to treat her accepted thoracic and cervical conditions.

In a November 10, 2010 report, Dr. Harlan R. Ullman, a Board-certified radiologist, advised that a magnetic resonance imaging (MRI) scan of appellant's thoracic spine showed degenerative disc disease at T6-T7 with midline disc protrusion indenting the ventral aspect of the spinal cord. The protrusion and flattening of the spinal cord were more evident than on a prior examination.

In a November 1, 2010 report, Ms. Morris addressed the treatment of appellant's thoracic spine condition.

Appellant submitted discharge instructions dated January 22, 2010 for a muscle strain.

In a March 18, 2010 report, Dr. Richard S. Brower, a Board-certified orthopedic surgeon, obtained a history of the January 14, 2010 employment injuries and appellant's medical treatment. Dr. Brower noted her complaint of pain about the bra line. He listed findings on physical examination and reviewed thoracic MRI scan test results. Dr. Brower advised that appellant had multiple signs of nonorganic disease with pain on superficial touch and thoracic pain with internal/external rotation of the hips that was quite over demonstrative. Neurologically she was fine. Dr. Brower did not think that surgical indications were necessary.

In a March 21, 2011 report, Dr. Georges Z. Markarian, a Board-certified neurosurgeon, obtained a history of the January 14, 2010 employment injuries and appellant's medical treatment. He noted her complaint of pain in the bra strap area and lower scapular pain isolated to the spine. Dr. Markarian listed findings on physical examination and reviewed a thoracic MRI scan which showed a T6-T7 herniation into the thecal sac. There were no abnormal signals into the spinal cord or signs of myelopathy. Dr. Markarian stated that given the location of the herniation and appellant's morbid obesity, he was not inclined to offer surgical intervention at that time.

In an April 15, 2011 decision, an OWCP hearing representative affirmed the August 27, 2010 decision. The medical evidence submitted by appellant was to be insufficient to establish that she sustained a recurrence of disability commencing May 27, 2010 causally related to her accepted January 14, 2010 employment injuries.

On intermittent dates from April 25 through August 30, 2011 appellant filed CA-7 and CA-7a forms claiming compensation for LWOP due to disability for work from April 9 through August 26, 2011.

In work slips dated April 5, June 7 and August 9, 2011, Dr. Magoline advised that appellant was totally disabled for work. He estimated that she could return to work on November 9, 2011. In progress notes dated June 7 and 8 and August 9, 2011, Dr. Magoline stated that appellant complained about significant pain in her mid-thoracic spine and mid back. He listed findings on physical examination and diagnosed symptomatic thoracic disc herniation at T6-T7 and depressive disorder. In an August 9, 2011 report, Dr. Magoline advised that appellant was unable to perform any type of meaningful work due to the amount of narcotics she was taking and pain she experienced and her inability to find a comfortable standing or sitting position.

In reports dated June 2, 2010 through February 14, 2011, Ms. Morris addressed the treatment of appellant's lumbar and cervical conditions.

In a progress note dated June 16, 2011, Dr. James P. Bressi, an anesthesiologist, obtained a history of the January 14, 2010 employment injuries and appellant's medical treatment. He noted her complaints of pain when bending, walking, lifting, twisting, carrying, sitting and due to weather changes. Dr. Bressi listed findings on physical examination diagnosed cervical and lumbosacral strains and sprains and thoracic strain and disc displacement. He advised that appellant remained temporarily totally disabled. In an August 1, 2011 report, Dr. Bressi stated, in support of his opinion that appellant was disabled, that her herniated thoracic disc at T6-T7 was caused by the accepted January 14, 2010 employment injury because she had no complaints of severe thoracic pain prior to the accepted injury. He stated that the thoracic spine was pivotal to a patient being able to sit comfortably and use his or her arms for work since the lever for the shoulders was the thoracic spine where most of the forces of performing arm function tasks occurred. Dr. Bressi related that sitting placed the most pounds per square inch on the spine. He summarized that arm movement and comfortable sitting were dependent on a healthy thoracic spine. Dr. Bressi related that appellant returned to a light-duty job that she could no longer perform, but prior to her accepted injuries she worked without restrictions. He stated that she had not slept more than two to three hours at a time since her accepted injuries culminating into daytime fatigue that only worsened her pain and energy to perform her job. Appellant failed rehabilitation and physical therapy which provided no real significant help for her pain. Thus, Dr. Bressi opined that her injury was debilitating and continued to render her totally disabled. He noted that the employment injury was over one and one-half years old. No strain/sprain should be causing this type of pain because it should have resolved in four to six weeks or less than six months. Dr. Bressi noted that appellant had exquisite tenderness at the sight of the blunt trauma even one and one-half years after the employment injury. He concluded that her pain even precluded her from part-time sedentary work.

The results of a laboratory test performed on June 20, 2011 showed the presence of ethanol in appellant's system.

By letter dated September 6, 2011, appellant, through her attorney, requested reconsideration of OWCP's April 15, 2011 decision.

On intermittent dates from September 12 through November 21, 2011 appellant filed CA-7 and CA-7a forms claiming compensation for LWOP due to disability for work from September 9 through November 18, 2011.

In a November 1, 2011 progress note, Dr. Magoline listed essentially normal findings on physical examination of appellant's back with the exception of tenderness over the thoracic lumbar junction.

In a December 1, 2011 decision, OWCP denied modification of the April 15, 2011 decision. It found that the medical evidence of record was insufficient to establish appellant's recurrence of disability claim.

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.² 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 (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.³

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she 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 she cannot perform such limited-duty work. 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.⁴

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.⁵

ANALYSIS

OWCP accepted that on January 14, 2010 appellant sustained cervical, thoracic and lumbosacral sprains, strains and contusions and disc herniation at T6-T7 while in the performance of duty. Following these injuries, appellant returned to modified-duty work. She claimed a recurrence of disability commencing May 27, 2010. Appellant must demonstrate either that her conditions have changed such that she could not perform the activities required by her modified job or that the requirements of the limited light-duty job changed. The Board finds that the record contains no evidence that the limited light-duty job requirements were changed or withdrawn or that appellant's employment-related conditions have changed such that they precluded her from performing limited light-duty work.

Dr. Magoline's work slips, progress notes, Form OWCP-5c and report found that appellant was totally disabled for work on intermittent dates from May 25, 2010 through

² 20 C.F.R. § 10.5(x).

³ *Id.*

⁴ *Albert C. Brown*, 52 ECAB 152, 154-155 (2000); *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁵ *James H. Botts*, 50 ECAB 265 (1999).

November 9, 2011 due to her pain and thoracic strain and disc herniation. Although Dr. Magoline found that appellant was totally disabled, he did not explain how this total disability was causally related to the accepted injuries. Dr. Magoline's prescriptions ordered physical therapy to treat appellant's right elbow lateral epicondylitis and accepted cervical and lumbar strains and thoracic disc herniation. Medical evidence which does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁶ Dr. Magoline did not provide an opinion addressing whether appellant sustained a recurrence of total disability commencing May 27, 2010 causally related to the January 14, 2010 employment injuries. Further, the Board notes that OWCP has not accepted appellant's claim for right elbow lateral epicondylitis and Dr. Magoline's opinion is insufficiently rationalized to establish that any other condition is employment related.⁷ For the stated reasons, the Board finds that this evidence is insufficient to establish appellant's recurrence claim.

Dr. Bressi's June 1, 2011 progress note found that appellant was temporarily totally disabled and diagnosed cervical and lumbosacral strains and sprains, and thoracic strain and disc displacement. In an August 1, 2011 report, he stated that her total disability was due to the employment-related thoracic herniated disc at T6-T7. Dr. Bressi related that appellant did not have any complaints of severe thoracic pain prior to the January 14, 2010 employment injury. He stated that a healthy thoracic spine was important for arm movement and comfortable sitting. Dr. Bressi stated that appellant's lack of sleep resulted in daytime fatigue which worsened her pain and energy for work. He stated that her unsuccessful physical therapy treatment did not significantly help her pain. Dr. Bressi related that a thoracic sprain/strain should not have caused appellant's ongoing pain and exquisite tenderness at the site of the blunt trauma as it should have resolved within four to six weeks or less than six months. He concluded that she was no longer able to perform her light-duty job or part-time sedentary work although she worked without restrictions prior to the accepted injuries. The Board finds that Dr. Bressi failed to provide sufficient rationale in support of his opinion on causal relationship between the accepted employment-related thoracic injury and the alleged disability.⁸ Although he noted that appellant was asymptomatic prior to the January 14, 2010 employment injuries, the lack of symptoms prior to an employment injury does not in itself provide rationale in support of a causal relationship.⁹ Moreover, Dr. Bressi stated that a healthy spine was pivotal to arm movement and comfortable sitting, but he did not describe the specific employment factors related to appellant's modified mail handler position to which he attributed her disability. Further, he did not adequately explain why the accepted thoracic sprain and strain had not resolved, noting tenderness at the location of the trauma, given his statement that such conditions should have resolved within four to six

⁶ *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Willie M. Miller*, 53 ECAB 697 (2002); *Michael E. Smith*, 50 ECAB 313 (1999).

⁷ See *G.A.*, Docket No. 09-2153 (issued June 10, 2010) (for conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship).

⁸ See cases cited, *supra* note 6.

⁹ See *Walter J. Neumann, Sr.*, 32 ECAB 69 (1980).

weeks or less than six months. The Board finds that Dr. Bressi's reports are insufficient to establish appellant's claim.

Dr. Goff's prescription ordered physical therapy to treat appellant's cervical, thoracic and lumbosacral sprains, strains and contusions. Dr. Ullman's diagnostic test results revealed degenerative disc disease and herniation of the thoracic spine at T6-T7. Dr. Brower's report found that appellant had multiple signs of nonorganic disease with pain with superficial touch and thoracic pain with internal/external rotation of the hips and that she was quite over demonstrative. He stated that surgical indications were not necessary. None of these physicians provided an opinion addressing whether appellant sustained a recurrence of total disability commencing May 27, 2010 due to the accepted employment injuries.¹⁰

Similarly, the laboratory test which revealed ethanol in appellant's system is insufficient to establish her claim for a recurrence of total disability. This evidence does not contain any opinion addressing her disability for work during the claimed period due to the accepted injuries.¹¹

The reports from Ms. Morris, appellant's physical therapist, and Mr. Dyko, a physician's assistant, do not have any probative medical value. Neither a physical therapist nor a physician's assistant is a "physician" as defined under FECA.¹² The Board finds, therefore, that these reports are insufficient to establish appellant's claim.

Appellant has not met her burden of proof in establishing that there was a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the limited light-duty requirements which would prohibit her from performing the limited light-duty position she assumed after she returned to work.

On appeal, appellant's attorney contends that OWCP's decision is contrary to fact and law. For the reasons stated above, the Board finds that appellant did not submit sufficient medical evidence in support of her claim.

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.

¹⁰ See cases cited, *supra* note 6.

¹¹ *Id.*

¹² 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 FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of total disability commencing May 27, 2010 causally related to her accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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