

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

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S.M., Appellant )  
and ) Docket No. 12-407  
U.S. POSTAL SERVICE, RADIO CITY ) Issued: November 19, 2012  
STATION, New York NY, Employer )  
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)

*Appearances:* Oral Argument October 9, 2012  
*Joju J. Thomas, Esq.*, for the appellant  
*No Appearance*, for the Director

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On December 19, 2011 appellant, through her attorney, filed a timely appeal of a November 7, 2011 Office of Workers' Compensation Programs' (OWCP) merit decision denying her claimed recurrence of disability. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUE**

The issue is whether appellant has met her burden of proof in establishing that she sustained recurrence of disability on or after November 26, 2009 due to her accepted employment injury.

**FACTUAL HISTORY**

On March 6, 2010 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim alleging that on November 21, 2009 she injured her lower back and hip while pushing a

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

fully loaded cart of mail. Dr. Michael Cushner, a Board-certified orthopedic surgeon, treated appellant on February 17, 2010 for lumbar strain. He found that she was totally disabled from February 13 through 22, 2010. On March 2, 2010 Dr. Cushner diagnosed lumbosacral strain with intermittent radiculopathy and stated that appellant could not work from March 2 through April 9, 2010. Dr. Stephen Andrus, a physician Board-certified in pain medicine, examined her on March 12, 2010 and diagnosed lumbar radiculopathy. He provided work restrictions.

In a letter dated March 31, 2010, OWCP requested additional factual and medical evidence from appellant in support of her claimed injury. It allowed 30 days for a response. Appellant underwent a magnetic resonance imaging (MRI) scan on February 24, 2010 which demonstrated left-sided disc bulge at L4-5 and left-sided annular tear. Dr. Andrus completed a report on April 5, 2010 and stated that she reported an onset of lower back pain on November 21, 2009 while pushing a cart of mail. He stated that appellant missed a few days of work after that injury and continued to have persistent lower back pain while developing radiating pain down the left leg in February 2010. Dr. Andrus stated that she had a back injury at work 10 years ago which disabled her for a significant period of time. He stated, "The injury 10 years ago ultimately resolved until [appellant] injured her back again on November 12, 2009...." Dr. Andrus examined the MRI scan noting evidence of a left-sided disc bulge at L4-5 abutting the left L4 nerve root. He provided work restrictions.

Appellant submitted a report dated April 6, 2010 from Dr. Cushner diagnosing lumbosacral strain and intermittent radiculopathy. He noted that appellant developed back pain due to a work injury 10 years ago. Dr. Cushner indicated that, while pushing an over loaded cart and trying to keep it straight, appellant felt a strain in her lower back, left hip and leg. He answered "yes" to the question of whether in his opinion the incident that she described was the competent medical cause of her injury. Dr. Cushner indicated that appellant was totally disabled.

In a statement dated April 19, 2010, appellant reported that she advised her supervisor of her November 21, 2009 back injury on that date. She noted that she had returned to work on November 18, 2009 following several months' absence due to eye surgery. Appellant reported her back pain to her union steward on November 23, 2009 and utilized sick leave on November 24, 2009. She again reported severe back pain on December 4, 2009 and left work early to see her physician. Appellant stated that since her injury she had limited the weight of the cart. She described her previous work injury as falling on the left side of her body at work, but stated that she did not file a claim for this injury. Appellant stated that she believed that her cart was over loaded on November 21, 2009 as the supervisors were checking carts.

Appellant submitted a statement dated April 14, 2010 from Mark P. Thomas, a doorman on her route, noting that her cart was filled such that he had to open both doors to allow her ingress. Dr. Thomas reported that she was grimacing and stated that she had pulled her back as she entered. Appellant also submitted a statement from Vincent Cama, her shop steward, dated April 13, 2010 noting that she reported her back pain on November 23, 2009 and attributed her condition from pushing a heavy mail cart on November 21, 2009. Mr. Cama stated that she stopped work on December 4, 2009 and sought medical treatment.

OWCP accepted appellant's claim for herniated disc lumbar spine and lumbar radiculopathy on May 3, 2010. It noted that she was entitled to up to 45 days of continuation of

pay until she returned to light duty. OWCP noted that appellant returned to work on November 26, 2009 and later stopped work.

Appellant filed a claim for compensation on June 7, 2010 requesting payment for leave without pay intermittently from November 24, 2009 through June 4, 2010. She indicated that she did not work on November 24, December 4 and 5, 2009 and again from February 24 through 26, March 2 through 12 and 22 through 29 as well as April 22 through June 4, 2010. Appellant filed notices of recurrence of disability on June 25, 2010 alleging that she sustained a recurrence of disability on November 24 and 30, 2009, February 13 and March 26, 2010 due to her November 21, 2009 employment injury.

Dr. Cushner completed a report on August 31, 2010 and stated that he examined appellant on November 24, 2009 at which time she reported back pain and discomfort. At that visit, appellant mentioned her back injury from 10 years ago. She later reported that the exacerbation of her back pain occurred while pushing an over loaded cart on November 21, 2009. Dr. Cushner stated, "While forcing to keep it straight, she put strain on her back and began having pain and radicular component." He noted, "The stress across the back and disc has caused a radicular component...." Dr. Cushner included his treatment note dated November 24, 2009 which diagnosed lumbar strain and found that appellant was totally disabled on November 24 and 25, 2009, but could return to work without restrictions on November 26, 2009.

Dr. Christopher Mattern, a Board-certified orthopedic surgeon, examined appellant on December 4, 2009 and noted that she had experienced left low back pain for two weeks.

OWCP requested additional evidence in support of appellant's claimed recurrences on October 13, 2010 and allowed 30 days for a response.

By decision December 1, 2010, OWCP denied appellant's claims for recurrent disability on the grounds that the medical evidence was not sufficient to meet her burden of proof.

OWCP referred appellant for a second opinion evaluation. In a report dated November 12, 1010, Dr. Robert J. Orlandi, a Board-certified orthopedic surgeon, noted appellant's history of pushing an over loaded mail cart and injuring her left low back. After physical examination, he diagnosed lumbar strain resolved and unassociated with an L4, L5 or S1 radicular syndrome. Dr. Orlandi opined that appellant could return to work without restriction and that she had no disability.

Appellant requested an oral hearing on December 8, 2010 before an OWCP hearing representative. She submitted a report from Dr. Cushner dated March 28, 2011. Dr. Cushner diagnosed lumbar radiculopathy and opined that appellant was totally disabled.

Appellant testified at the oral hearing on April 18, 2011. She stated that she stopped work on March 27, 2010.

By decision dated May 23, 2011, the hearing representative stated that appellant had not shown why she was able to return to regular duty only to stop in February 2010. He noted that appellant's radicular symptoms began at that time, but that there was no medical evidence

explaining why her symptoms changed. The hearing representative affirmed OWCP's December 1, 2010 decision.

Dr. Richard J. Radna, a Board-certified neurosurgeon, examined appellant on June 28, 2011 and noted her history of pushing a cart on November 21, 2009 and injuring her low back. He found severe bilateral paravertebral spasm in the cervical and lumbosacral regions with loss of range of motion. Dr. Radna mentioned appellant's back injury in 1998 and stated that she had a full recovery. He opined that appellant had "causally related" cervical and lumbosacral, musculoskeletal and radicular pain syndromes. Dr. Radna opined that appellant was totally disabled and indicated that this disability was "causally related."

Appellant requested reconsideration on August 1, 2011.

By decision dated November 7, 2011, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions.

#### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>2</sup> has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>3</sup> The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.<sup>4</sup>

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>5</sup> Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>6</sup> The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>7</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

<sup>5</sup> *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>8</sup> Rationalized medical evidence is medical evidence which includes a physician's detailed 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.<sup>9</sup> Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>10</sup>

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. 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.<sup>11</sup> Appellant has the burden of establishing by the weight of the substantial, reliable, and probative evidence, a causal relationship between her recurrence of disability commencing December 2009 and her November 21, 2009 employment injury.<sup>12</sup> This 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 disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>13</sup>

## ANALYSIS

Appellant filed a claim in March 2010 alleging that in November 2009 she injured her back pushing a cart in the performance of duty. OWCP accepted her claim for herniated disc at L4-5 and lumbar radiculopathy on May 3, 2010. It did not accept that any period of disability resulted from the accepted conditions.

Appellant filed claims for compensation requesting wage-loss compensation due to leave without pay for intermittent dates including November 24, December 4 and 5, 2009. She did not work from February 24 through 26, March 2 through 12 and 22 through 29 as well as April 22

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<sup>8</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>9</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>10</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>11</sup> 20 C.F.R. § 10.5(x).

<sup>12</sup> *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-9 (1982).

<sup>13</sup> See *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

through June 4, 2010. Appellant also filed claims for recurrence of disability covering these periods.

Dr. Cushner first examined appellant on November 24, 2009, diagnosed lumbar strain and found that appellant was totally disabled on November 24 and 25, 2009, but could return to work without restrictions on November 26, 2009. Appellant has submitted medical evidence of disability on November 24 and 25, 2009. Section 8117 of FECA provides that an employee is not entitled to compensation for the first three days of temporary disability except: (1) when the disability exceeds 14 days; (2) when the disability is followed by permanent disability; or (3) as provided by sections 8103 and 8104 of this title. Section 8103 of FECA refers to the payment of medical expenses, while section 8104 refers to vocational rehabilitation expenses.<sup>14</sup> In order to determine the three-day waiting period under section 8117, it must first be determined under section 8118(a) of FECA whether the entitlement to continuation of pay had ceased as of those dates.<sup>15</sup> Under OWCP's implementing federal regulations, postal employees are not entitled to continuation of pay for the first three days of temporary disability and may use annual, sick or leave without pay during that period, except that if the disability exceeds 14 days or is followed by permanent disability.<sup>16</sup> Appellant has not alleged that her initial period of disability exceeded 14 days and has not alleged permanent disability.

Appellant again stopped work on December 4 and 5, 2009. She sought treatment from Dr. Mattern on December 4, 2009, but the note from that date does not include his diagnosis or a history of injury. Appellant has not established that her alleged disability for work on December 4 or 5, 2009 was due to her accepted employment injuries. The medical evidence addressing this specific period of alleged disability does not contain a diagnosis, a history of injury or an opinion that appellant's disability is related to her November 2009 employment injury. Without the necessary medical opinion evidence appellant has failed to meet her burden of proof to establish entitlement to continuation of pay for these dates.

Dr. Cushner examined appellant on February 17, 2010 for lumbar strain and found that she was totally disabled from February 13 through 22, 2010. On March 2, 2010 he again diagnosed lumbosacral strain with intermittent radiculopathy and stated that appellant could not work from March 2 through April 9, 2010. While these reports support a period of disability, Dr. Cushner did not provide an opinion that appellant's disability was due to her accepted employment injury of November 21, 2009. Without a detailed factual background, an opinion on the relationship between appellant's disability and her work injury as well as medical evidence explaining how and why her injury resulted in the specific period of total disability, these reports are not sufficient to meet her burden of proof.

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<sup>14</sup> 5 U.S.C. §§ 8103, 8104.

<sup>15</sup> *K.L.*, Docket No. 10-1803 (issued March 21, 2011) (explaining that the claimant was initially entitled to continuation of pay and as she returned to regular full-time work with loss of pay within the 45-day period could receive additional continuation of pay.)

<sup>16</sup> 20 C.F.R. § 10.200(c). (This regulation came into effect on August 29, 2011 prior to the most recent merit decision in this case on November 7, 2011.)

Dr. Andrus examined appellant April 5, 2010 and noted her history of back pain on November 21, 2009 while pushing a cart of mail. He stated that she had persistent lower back pain and developed radiating pain down the left leg in February 2010. Dr. Andrus provided work restrictions. This report does not support appellant's claim for a period of total disability as Dr. Andrus indicated that she could return to light-duty work and was not therefore totally disabled.

Dr. Cushner examined appellant on April 6, 2010 and diagnosed lumbosacral strain and intermittent radiculopathy. He noted that, while pushing an over loaded cart and trying to keep it straight, appellant felt a strain in her lower back, left hip and leg. Dr. Cushner answered "yes" to the question of whether in his opinion the incident that appellant described was the competent medical cause of her injury. The Board has held that an opinion on causal relationship which consists only of a physician answering "yes" to a question on whether the claimant's disability was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.<sup>17</sup> While Dr. Cushner indicated that appellant was totally disabled from February 13 through 22 and March 2 through April 9, 2010, he did not provide the necessary medical reasoning explaining why he believed that appellant's ongoing back condition was related to her November 21, 2009 employment injury. As Dr. Cushner did offer any explanation or medical reasoning in support of his affirmative opinion on causal relationship, his reports are not sufficient to meet appellant's burden of proof in establishing disability for the periods claimed.

In a report dated August 31, 2010, Dr. Cushner mentioned examining appellant on November 24, 2009 at which time she reported back pain and discomfort while pushing an over loaded cart on November 21, 2009. He stated, "While forcing to keep it straight, she put strain on her back and began having pain and radicular component." Dr. Cushner noted, "The stress across the back and disc has caused a radicular component...." He has offered an opinion that appellant's initial employment injury was sufficient to cause the radicular portion of her diagnosis. This opinion is, however, contradicted by his note releasing appellant to return to work on November 26, 2009. At the time of his initial examination, Dr. Cushner did not report a radicular component and felt that appellant was capable of returning to full duty. Due to the discrepancies in his reports, Dr. Cushner has not offered sufficient medical reasoning to explain how and why appellant's employment injury on November 21, 2009 resulted in additional periods of disability after November 26, 2009.

On June 28, 2011 Dr. Radna described appellant's history of pushing a cart on November 21, 2009 and injuring her low back. On physical examination, he found severe bilateral paravertebral spasm in the cervical and lumbosacral regions with loss of range of motion. Dr. Radna noted appellant's history of back injury in 1998. He opined that appellant had causally related cervical and lumbosacral, musculoskeletal and radicular pain syndromes. Dr. Radna found that appellant was totally disabled, but did not address any specific periods of disability due to appellant's accepted conditions. The Board notes that Dr. Radna also indicated that appellant had developed a cervical condition, which was not accepted by OWCP as related to her accepted work injury. Finally, while Dr. Radna offered his opinion that appellant's

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<sup>17</sup> *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

conditions and disability were “causally related,” he did not offer any medical reasons or descriptions correlating her accepted conditions and resulting periods of disability with her employment injury. For these reasons, the Board finds that appellant has not submitted the necessary medical opinion evidence to meet her burden of proof in establishing periods of disability after November 26, 2009.

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 has failed to meet her burden of proof in establishing any period of disability on or after November 26, 2009 due to her accepted November 21, 2009 employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 7, 2011 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: November 19, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees’ Compensation Appeals Board

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