

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Jose, CA, Employer**

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**Docket No. 12-1031
Issued: November 27, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 16, 2012 appellant filed a timely appeal from an April 5, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 disability from December 13, 2010 to January 15, 2011, causally related to her accepted lumbar conditions.

FACTUAL HISTORY

On March 7, 1996 appellant, then a 35-year-old clerk, filed an occupational disease claim alleging a back condition due to her federal employment. She first became aware of her condition on October 6, 1994 and stated that her physician believed that her work activities aggravated her preexisting degenerative joint disease and bulging disc at L5-S1.

¹ 5 U.S.C. § 8101 *et seq.*

OWCP initially accepted appellant's claim for aggravation of preexisting lumbar disc bulge at L5-S1.² On January 31, 2006 it accepted the claim for a lumbar sprain.

Appellant submitted a recurrence claim for the period December 13, 2010 to January 15, 2011, which OWCP received on January 28, 2011.

Appellant submitted a November 8, 2010 report from Dr. Peter Chiu, Board-certified in occupational medicine, who noted that her foot pain and low back pain had worsened. Dr. Chiu stated that appellant had mild tenderness in the right plantar foot arch area and in the left plantar foot metatarsal heads. He diagnosed her with low back strain, disc herniation and sciatica radiculopathy. Dr. Chiu also noted that appellant's left and right foot pain was due to abnormal gait from her low back pain. He referred her to a podiatry clinic for possible cortisone injection treatment.

On December 13, 2010 Dr. Najwa Javed, a Board-certified physician in podiatric medicine, indicated that appellant had a pinched nerve in her lower back, which was causing her pain and numbness in her lower extremity. He noted that this was related to her October 6, 1994 work injury. Dr. Javed also stated that appellant would be in a cast and will not be able to drive or attend work for the period December 13, 2010 to January 15, 2011.

In a January 5, 2011 report, Dr. Thao Pham, Board-certified in physical medicine and rehabilitation, presented an account of appellant's medical history. He diagnosed herniation of intervertebral disc, lumbar radiculopathy, degenerative joint disease, lumbar disc disease and somatic dysfunction of the sacroiliac joint. Dr. Pham noted that appellant was involved in a work incident and sustained low back pain as a result. Regarding her current condition, he stated that her low back pain had "flared up" for a few months. Physical examination showed a limited range of motion of the lumbar spine. Dr. Pham noted that appellant's low back and right leg pain were aggravated while bending, lifting and carrying. In a January 12, 2011 report, he recommended permanent work restrictions, including limiting nonrepetitive lifting and carrying to 15 pounds and that she self-pace at work.

A January 11, 2011 lumbar spine magnetic resonance imaging (MRI) scan report reviewed by both Dr. Pham and Dr. Chiu stated an impression of a moderate-sized central disc extrusion at L5-S1 pressing on the thecal sac, mild central spinal stenosis at L4-5 spondylolisthesis, broad-based disc bulge, diffuse disc fusion at L3-4 causing compression of the left side of the canal and stenosis of the left lateral recess.

In a February 18, 2011 progress report, Dr. Chiu noted that appellant had a burning sensation in her feet and that she did not feel better after an epidural injection. He indicated that, as a result of her October 6, 1994 work injury, she developed low back pain with pain radiating to the legs and numbness and tingling in the right foot. Dr. Chiu diagnosed appellant with lumbosacral strain, low back strain, sciatica and radiculopathy. He released appellant to modified duty with the following restrictions: bending and twisting occasionally; squatting, climbing stairs and reaching above shoulder intermittently; no ladder climbing; standing for 45 minutes, standing for 55 minutes per hour for two hours total; walking for four to eight hours;

² By decision dated December 5, 2005 an OWCP hearing representative reiterated that benefits had not been terminated for the accepted condition of aggravation of preexisting disc bulge L5-S1.

sitting four to eight hours; gripping and grasping for 45 minutes, 55 minutes per hour for eight hours; lifting up to 15 pounds. In another progress note February 25, 2011, Dr. Chiu diagnosed low back strain with disc herniation as well as neck and shoulder strain. He suggested that appellant continue her home exercise and recommended permanent modified work restrictions.

On February 25, 2011 Dr. Chiu reviewed appellant's medical records. He diagnosed lumbosacral strain, low back strain and radiculopathy and noted that her right foot pain was due to abnormal gait from her low back pain. Dr. Chiu He concluded that appellant's low back pain and her right foot pain were caused by her October 6, 1994 injury when she was pushing 600-pound mail cases, which caused central disc protrusion at L5-S1 with radiculopathy and that the disc extrusion grew worse overtime. He stated that it was medically far less likely that a degenerative disc condition caused the disc extrusion. Dr. Chiu pointed out that his conclusion was supported by Dr. Javed's note, who also considered the most likely cause for appellant's right foot pain as her low back condition, because her right foot and ankle MRI scan did not reveal any pathology. He went on to state that appellant's temporary total disability from December 2010 to January 2011 was a result of her October 6, 1994 injury.

In a statement dated March 7, 2011, appellant explained that she was given a new job assignment in May 2010. She stated that the written job assignment was thereafter changed orally to require lifting 20-pound boxes on a regular basis.

On September 14, 2011 OWCP received from the employing establishment an offer of modified assignment (light duty) dated April 29, 2010. This offer noted that the position required lifting up to 10 pounds continuously and 25 pounds occasionally, with standing up to 55 minutes an hour and walking up to 60 minutes an hour.

OWCP denied appellant's recurrence claim by decision dated September 16, 2011. Appellant disagreed with the decision and requested a hearing before the Branch of Hearings and Review.

On April 5, 2012 an OWCP hearing representative affirmed the denial of appellant's claim on the grounds that the medical evidence failed to show an objective worsening of her condition such that she was unable to perform her light-duty assignment.

LEGAL PRECEDENT

OWCP's regulations define the term recurrence of disability as 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

When an employee, who is disabled from the job that he or she held when injured due to employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or 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 he or she cannot perform such light duty. As part of this burden, the

³ 20 C.F.R. § 10.5(x).

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.⁴ To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.⁵

ANALYSIS

The Board finds that this case is not in posture for decision. Further development of the medical evidence is warranted.

OWCP accepted appellant's claim for aggravation of lumbar disc bulge at L5-S1, as well as lumbar sprain. Appellant now seeks compensation for the period December 13, 2010 to January 15, 2011 due to an alleged worsening of her accepted lumbar conditions.

Dr. Chiu explained in a November 8, 2010 report that appellant's back pain had worsened, which affected her gait and caused foot pain. In a February 25, 2011 narrative report, he thoroughly reviewed her medical history. Dr. Chiu thereafter explained that, on October 6, 1994, appellant sustained a central disc extrusion at L5-S1 as a result of pushing 600-pound mail cases and that the extrusion had worsened overtime. He noted that medically it was far less likely that a degenerative disc condition caused the current disc extrusion. Dr. Chiu also explained that the pain in appellant's right foot pain was caused by her disc protrusion pressing on the thecal sac. He concluded that her temporary total disability from December 2010 to January 2011 for her right foot condition was the result of her accepted October 6, 1994 injury.

The Board notes that Dr. Chiu's report is consistent with other medical reports in finding that appellant's accepted disc protrusion had worsened and was causing her right foot pain. Dr. Javed's December 13, 2010 note affirmed Dr. Chiu's view that her right foot pain was due to the disc extrusion pressing on her thecal sac. In reviewing the January 11, 2011 MRI scan, Dr. Pham also found that the L5-S1 disc protrusion was now pressing on the thecal sac.

The Board finds Dr. Chiu's February 25, 2011 report to be generally supportive of appellant's claim. While this report did not provide sufficient medical rationale explaining change in the nature and extent of her disc extrusion, the Board finds that it is sufficiently supportive of her claim to warrant further development. Dr. Chiu did relate that appellant was totally disabled during the relevant time period. Dr. Javed also explained that the pinched nerve in her back was causing the numbness in her lower extremity. These reports constitute substantial, uncontradicted evidence in support of appellant's claim and are sufficient to require that the case be remanded for further development of the claim.⁶

⁴ *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ *Maurissa Mack*, 50 ECAB 498 (1999).

⁶ *Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987); *Horace Langhorne*, 29 ECAB 820 (1978).

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter.⁷ While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.⁸ The Board will set aside OWCP's April 5, 2012 decision and remand the case for further development of the medical evidence. Following such further development of the case record as it deems necessary, OWCP should issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 5, 2012 is set aside and remanded for further action consistent with this opinion.

Issued: November 27, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

⁷ *Phillip L. Barnes*, 55 ECAB 426 (2004).

⁸ *Donald R. Gervasi*, 57 ECAB 281(2005); *William B. Webb*, 56 ECAB 156 (2004).