United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 12-859**
	)	**Issued: September 7, 2012**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Kansas City, MO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 7, 2012 appellant filed an appeal from a January 19, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability on June 8, 2010 caused by the accepted lumbar radiculitis.

FACTUAL HISTORY

On March 4, 2010 OWCP accepted that appellant, then a 47-year-old computer assistant, sustained lumbar radiculitis on February 9, 2010 when an elevator suddenly dropped. Appellant stopped work on Friday, February 12, 2010. A March 2, 2008 magnetic resonance imaging

[1] 5 U.S.C. §§ 8101-8193.

(MRI) scan of the lumbar spine showed mild-to-moderate degenerative disc disease at T11-12 with no disc herniation, stenosis or foraminal encroachment and mild scoliosis. A February 15, 2010 pelvis x-ray demonstrated mild degenerative changes. A February 12, 2010 lumbar spine MRI scan revealed a small disc protrusion at T10-11, disc bulges at T11-12 and L4-5 and a posterior disc bulge at L5-S1 with facet arthropathy. On March 5, 2010 OWCP assigned a medical management nurse to assist in appellant's recovery. Appellant received appropriate continuation of pay and compensation beginning April 1, 2010.

In an April 9, 2010 work capacity evaluation, Dr. Vincent G. Johnson, an osteopath Board-certified in anesthesiology and pain medicine, advised that appellant could return to work in two weeks if she progressed to the point where she could stand/sit two to four hours at a time. In a treatment note dated April 22, 2010, he advised that she had been attending physical therapy. Dr. Johnson provided physical examination findings and diagnosed lumbar radiculopathy historically, symptoms improved, myofascial type pain and possible component of some right degenerative joint disease. He advised that appellant could return to work, to start at two half days a week for the first week, three half days the second week, gradually working into full-time work at the end of four weeks. An April 22, 2010 right hip x-ray demonstrated no acute osseous abnormality.

Appellant returned to limited duty for four hours a day on April 26, 2010.[2] She worked two four-hour days the first week, three four-hour days the second week and was to begin five four-hour days the third week or on May 10, 2010. An amended time analysis form dated July 6, 2010 indicated that appellant worked half days May 10, 11, 12 and 14, 2010 and called in sick due to pain May 13 and 17 to 21, 2010. She was on leave the week of May 24, 2010 and worked four hours on June 2, one hour on June 3 and four hours on June 4, 2010.

In a May 19, 2010 report, Dr. Glenn M. Amundson, a Board-certified orthopedic surgeon, noted the history of injury. He diagnosed chronic muscular ligamentous strain and recommended MRI scan and electrodiagnostic studies. On June 1, 2010 Dr. Johnson noted that appellant had been treated with epidural injections. He noted the electromyogram (EMG) findings, stating that they were compatible with a very mild, healed old lumbar radiculopathy. Dr. Johnson diagnosed symptomatic lumbar radiculopathy and myofascial pain, both relatively resolved "in a patient who has ongoing subjective pain." A June 1, 2010 right lower extremity EMG study demonstrated very mild chronic right L5 lumbar radiculopathy, with no acute or subacute process noted. On a duty status report, also dated June 1, 2010, Dr. Johnson advised that if the EMG study was negative, appellant could return to work for four hours a day for two weeks, then to full duty. A June 9, 2010 lumbar spine MRI scan study noted that, when compared with the earlier examination, the herniated disc at T11-12 was not appreciated and there was a redemonstration of diffuse bulging at L4-5 and L5-S1.

On June 11, 2010 Dr. John Verstraete, an osteopath and a Board-certified internist, advised that due to pain, appellant was excused from work until further notice. In reports dated

[2] The physical requirements of the modified position were described as sitting in a chair, working on a desktop computer intermittently, not to exceed four hours a day, with the terminal at eye level. There was no reaching above shoulder level. Walking short distances on an intermittent basis was required, not to exceed one hour a day, with intermittent bending, stooping, lifting, pulling and pushing limited to one-hour a day with a 10-pound weight restriction. Appellant was allowed to sit or stand at her convenience.

June 17, 2010, Dr. Johnson noted her complaint of continued radiating low back pain. He reviewed the objective studies with appellant and advised that she could not return to work until she had a functional capacity evaluation (FCE).

By letter dated June 25, 2010, OWCP noted that appellant stopped work on or around June 8, 2010 and advised her of the evidence needed to establish a recurrence of disability.

A July 1, 2010 FCE demonstrated that appellant did not perform near to her best ability. She displayed significant deconditioning with pain and guarding through the activities but demonstrated the ability to perform sedentary work.

Appellant received wage-loss compensation for four hours a day through May 23, 2010. On July 8, 2010 she filed a claim for compensation for the period June 21 to July 4, 2010.

On July 12, 2010 Dr. Johnson noted appellant's complaint of exquisite, disabling pain that prevented her from working. He advised that he had reviewed the FCE which suggested poor patient compliance and discussed the findings with her, who maintained that she could not work due to pain. Dr. Johnson also reviewed the MRI scan and EMG findings, stating that he found no objective evidence for appellant's pain and discharged her from his care. In a second July 12, 2010 report, he answered OWCP questions, stating that objective evidence was equivocal for right leg radiculopathy, and that she told him she could not work, even four hours a day, due to pain. Dr. Johnson also provided a duty status report in which he advised that appellant could return to work with restrictions but noted that she stated she was unable to work due to pain.

In a July 16, 2010 letter, OWCP advised appellant that she needed to submit medical evidence supporting total disability before compensation could be granted for the claimed wage loss for June 21 to July 4, 2010. Appellant submitted additional claims for compensation.

In an August 4, 2010 report, Dr. Amundson reviewed the EMG and June 9, 2010 MRI scan. Regarding the latter, he advised that he reviewed the study carefully and found no evidence of significant nerve root impingement, and asked another physician to review the study, who agreed that there was no evidence of nerve root encroachment. Dr. Amundson advised that appellant was not a surgical candidate and should remain off work for four weeks because she needed reconditioning. He indicated that physical therapy and work hardening was the most appropriate measure and recommended that she be seen by Dr. Steven Hendler, a Board-certified physiatrist. Appellant did not keep a scheduled appointment with Dr. Hendler.

In an August 6, 2010 report, Dr. Verstraete noted that he saw appellant on February 15, 2010, shortly after the work injury, and she had consistent complaints of unrelenting pain. He did not believe she was malingering or that she could tolerate physical therapy or an FCE due to pain exacerbation. Dr. Verstraete concluded that work hardening would be detrimental to appellant.

OWCP referred appellant to Dr. Edward J. Prostic, Board-certified in orthopedic surgery, for a second-opinion evaluation. In an August 13, 2010 report, Dr. Prostic described the history of injury and appellant's complaint of radiating back pain, worsened with most activity. He provided examination findings, noting that she had a cane and walked with an antalgic gait. Appellant had tenderness of the lumbosacral junction and limited lumbar range of motion.

Straight leg examination was negative, both seated and supine. No weakness was noted, and sensation was satisfactory. Dr. Prostic reviewed the June 9, 2010 MRI scan study and advised that a pelvis x-ray that day demonstrated no abnormality on the right and cysts about the left femoral head and neck. In answer to specific OWCP questions, he advised that a decrease in circumference of the right calf as compared to the left and the EMG findings gave some support to a diagnosis of right radiculopathy, but that the need for a cane, the minimal abnormalities on MRI scan, the poor range of motion and the lack of improvement with time and treatment suggested symptom magnification. Dr. Prostic recommended psychometric testing to rule out depression, hypochondriasis and/or hysteria and a gentle but increasing exercise program, indicating that if the psychometric testing was within normal limits, computerized tomography (CT) myelography could be performed to see if there was a surgically correctable condition. He advised that there were no objective findings that demonstrated a material change or worsening in the accepted condition which rendered her totally disabled for all work activity.

In reports dated September 13, 14 and 15, 2010, Dr. Verstraete noted examining appellant on September 13, 2010 and treating her for a number of years. He advised that he referred her to pain management for consultation and treatment only, stating, "like all consultations, the consulted physician is expected to provide an opinion and aid in treatment but not necessarily take over total care of the patient thus disregarding the original treating physician." Dr. Verstraete advised that he had seen appellant multiple times when her pain was exacerbated by trying to work, by physical therapy and by the FCE and that her pain from the work injury was constant and unrelenting. He opined that she had nerve root damage due to the employment injury, as supported by MRI scan findings, abnormal neurological tests and clinical findings of persistent abnormal reflexes, positive straight leg tests and obvious progressive muscle wasting. Dr. Verstraete stated that the work injury resulted in appellant's total disability, in part due to what appeared to be a manipulative workers' compensation case worker who lied to appellant. He stated that, although he valued Dr. Johnson's opinion, he did not agree with his findings, "especially when his reports appeared to be influenced," indicating that Dr. Johnson was not treating appellant's pain effectively. Dr. Verstraete reviewed Dr. Prostic's report, and disagreed with his opinion about the EMG findings and his characterization of symptom magnification, opining that appellant was not a malingerer.

An October 14, 2010 lumbar myelogram was unremarkable. A postmyelogram CT scan showed no significant disc bulge, canal stenosis or foraminal narrowing at any level. On October 25, 2010 Dr. Prostic reviewed the CT myelogram and FCE results. He advised that there was no objective evidence of a surgically correctable lesion in the low back and no objective evidence that permanent injury occurred due to the February 9, 2010 employment injury. Dr. Prostic indicated that additional physical treatment was unlikely to be beneficial, stating that appellant was more likely to respond to treatments that were oriented toward an abnormal psychological response to the February 9, 2010 incident.

In a decision dated October 27, 2010, OWCP denied appellant's claim for wage-loss compensation for the period June 21 through July 11, 2010, finding that the weight of the medical evidence rested with Dr. Johnson for the period of claimed disability.

On November 5, 2010 Dr. Prostic advised that he had reviewed Dr. Verstraete's reports and disagreed with his opinion. He stated that his opinion remained as previously reported.

Appellant, through her attorney, timely requested a review of the written record of the October 27, 2011 decision.[3]

By decision dated January 14, 2011, OWCP denied appellant's claim that she sustained a recurrence beginning June 8, 2011 on the grounds that the medical evidence did not establish that she was totally disabled from work due to the accepted condition. Appellant timely requested a review of the written record.

On January 21, 2011 Dr. Verstraete reiterated his disagreement with Dr. Prostic's opinion. He maintained that the CT myelogram results were 80 percent accurate and reiterated that appellant had nerve root damage as a direct result of the February 9, 2010 employment injury, was in constant pain and was totally disabled.

In a March 17, 2011 decision, OWCP's hearing representative affirmed the October 27, 2010 decision finding that appellant was not entitled to wage-loss compensation for the period June 21 through July 11, 2010. In a May 16, 2011 decision, he affirmed the January 14, 2011 decision, finding that she did not establish that she sustained a recurrence of disability on June 8, 2010.

On October 18, 2011 appellant requested reconsideration of the May 16, 2011 OWCP decision.[4] She argued that Dr. Prostic was biased and his opinion should not be used. Appellant submitted a July 27, 2011 report in which Dr. Verstraete discussed her care, treatment and objective studies. Dr. Verstraete advised that, although she had a 2008 episode of low back pain, it quickly resolved and she had no additional back problems until the February 9, 2010 work injury. He provided examination findings, noting positive straight leg raising and that appellant's right calf was nearly one inch smaller than the left. Dr. Verstraete opined that she had persistent nerve root damage and was totally disabled.

In a merit decision dated January 19, 2012, OWCP denied modification of the May 16, 2011 decision.

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.[5] 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 misconduct, nonperformance of job duties or a reduction-in-force) or when the physical

[3] The attorney initially requested a hearing and on January 25, 2011 changed the request to a review of the written record.

[4] Appellant initially requested reconsideration of the March 17, 2011 decision, but changed the request to reflect a reconsideration request of the May 16, 2011 decision.

[5] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

requirements of such an assignment are altered so that they exceed his or her established physical limitations.[6]

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.[7]

ANALYSIS

The Board finds that appellant has not established a recurrence of total disability on June 8, 2010 causally related to the accepted lumbar radiculitis 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.

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.[8] 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.[9] 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.[10]

On April 22, 2010 Dr. Johnson, an attending pain management specialist, advised that appellant could return to work, with a gradual progression to full-time work by the end of the fourth week. Appellant returned to a modified position on April 26, 2010.[11] She stopped work in early June 2010 and filed claims for wage-loss compensation. While Dr. Johnson recommended that she remain off work until after an FCE, this was completed on July 1, 2010 and was invalid due to poor effort on appellant's part. Nonetheless, the FCE indicated that appellant could perform sedentary work. On July 12, 2010 Dr. Johnson reviewed a June 1, 2010 EMG study that demonstrated very mild, chronic L5 lumbar radiculopathy with no acute or subacute process. He also discussed lumbar MRI scan findings and advised that there was no objective evidence for appellant's reported severe pain that kept her from work. Dr. Johnson dismissed her from his care.

[6] *Id.*

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

[8] *See William M. Bailey*, 51 ECAB 197 (1999).

[9] *Cecelia M. Corley*, 56 ECAB 662 (2005).

[10] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[11] *Supra* note 3.

Dr. Amundson, an attending orthopedic surgeon, first saw appellant on May 19, 2010 when he diagnosed chronic muscular ligamentous strain. On August 4, 2010 he reviewed the EMG study and June 9, 2010 MRI scan study which, he opined, demonstrated no significant nerve root encroachment. While Dr. Amundson advised that appellant should remain off work for four weeks so that she could complete work hardening with Dr. Hendler, appellant did not attend the scheduled work-hardening appointment.

In an August 13, 2010 report, Dr. Prostic, an orthopedist who provided a second-opinion evaluation for OWCP, noted appellant's complaint of radiating back pain worsened with most activity. He provided findings on examination and advised that a decrease in circumference of the right calf and the EMG findings gave some support for right radiculopathy, but appellant's need for a cane, along with minimal abnormalities on MRI scan, her poor range of motion and the lack of improvement with time and treatment suggested symptom magnification. Dr. Prostic recommended psychometric testing and a gentle but increasing exercise program. He concluded that there were no objective findings that showed that on or around May 10 or June 8, 2010 appellant had a material change or worsening in the accepted condition which rendered her totally disabled. On October 25, 2010 Dr. Prostic reviewed the CT myelogram and FCE results and found no objective evidence of a correctable lesion or that permanent injury occurred due to the February 9, 2010 work injury. He opined that additional physical treatment was unlikely to be beneficial as appellant was more likely to respond to treatment of an abnormal psychological response to the February 9, 2010 incident. After a review of Dr. Verstraete's reports, on November 5, 2010 Dr. Prostic advised that his opinion was unchanged.

Dr. Verstraete, an attending internist, provided reports dated June 11, 2010 to July 27, 2011. He was consistent in his opinion that appellant sustained nerve root damage on February 9, 2010 and had such severe, unrelenting pain due to this, that she was totally disabled from all work. Dr. Verstraete stated that physical findings and objective studies supported this opinion, and indicated that physical therapy and the FCE increased her pain. He maintained that work hardening would harm appellant, disagreed with the opinions of Drs. Johnson and Prostic, and maintained that an OWCP nurse manager was manipulative.

The Board finds the reports of Dr. Verstraete insufficient to establish appellant's recurrence claim as the physician did not provide a sufficient explanation as to how the mechanics of the February 9, 2010 employment injury, accepted for lumbar radiculitis, caused her complaints of unrelenting back pain such that she could not perform the essentially sedentary duties of the modified assignment. Dr. Verstraete did not demonstrate specific knowledge of the assignment or provide an explanation with sufficient rationale as to why appellant could not perform the modified work duties. Moreover, pain is a symptom, not a compensable medical diagnosis.[12] Thus, Dr. Verstraete'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.[13] The record does not contain a medical report providing a reasoned medical opinion that her claimed recurrence of disability was caused by the February 9, 2010

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

[13] *Beverly A. Spencer*, 55 ECAB 501 (2004).

employment injury.[14] Furthermore, 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 June 8, 2010 causally related to her accepted lumbar radiculitis.

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 7, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[14] *Cecelia M. Corley*, *supra* note 9.