



## **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated August 8, 2011, the Board affirmed OWCP's decisions dated April 29 and June 8, 2010, finding that appellant had not established that her herniated disc at L4-5 and protruding disc at L5-S1 were employment related. The Board further found that she had not established her claim for compensation for the periods November 20 through 27, 2009 and February 1 through March 12, 2010 but she was entitled to wage-loss compensation for October 29, 2009. The facts as set forth in the Board's prior decision are hereby incorporated by reference.<sup>2</sup>

By letter dated January 11, 2012 appellant, through counsel, requested reconsideration of OWCP's decisions of April 29 and June 8, 2010. Counsel attached a letter dated August 31, 2011 wherein he argued that her claim should be upgraded to include nerve root compression on the right and L4 level with spondylosis and disc protrusion. He also stated that appellant's disc herniations should be included in the accepted claim. Additional evidence had been submitted into the record.

In a December 7, 2010 report, Dr. Brian S. Vanderhoof, appellant's treating osteopath, listed his impressions as chronic lower lumbar and right leg pain with a right lower extremity radiculopathy secondary to a shallow disc displacement at the L4-5 level with a superimposed herniated nucleus pulposus and a right foraminal and extraforaminal extrusion of disc material superiorly, which he noted created moderate biforaminal stenosis. He also diagnosed foraminal disc protrusion at the L5-S1 level. Dr. Vanderhoof noted that he was going to refer appellant for chronic pain management.

Appellant submitted monthly reports from the Pain Consultants of Atlanta-Decatur where she was treated by multiple physicians including Dr. Chad Achilles, a Board-certified anesthesiologist with a Board-certified subspecialty in pain management, and Dr. William Keeton, a Board certified anesthesiologist, for pain management for back and right leg pain. New reports that were reviewed commence December 14, 2010 and run through June 15, 2012. In these reports, appellant was assessed with radiculitis, thoracic or lumbosacral, lumbar disc displacement and lumbosacral spondylitis without myelopathy.

On March 28, 2011 OWCP referred appellant to Dr. Harold H. Alexander, a Board-certified orthopedic surgeon, for a second opinion on the issue of expanding the claim. In an April 14, 2011 report, Dr. Alexander noted that appellant's lumbar spondylosis at L5-S1 appeared to be continuing to give her some difficulty along with disc herniations. He recommended repeating the magnetic resonance imaging (MRI) scan since it was two years since her last one. Dr. Alexander deferred an opinion on appellant's ability to work until after he had diagnostic tests. In a July 19, 2011 addendum, he reviewed the MRI scan findings and found them to be consistent with the previous MRI scan, which showed degenerative disc disease and facet arthropathy, most pronounced at L4-5 and L5-S1 as well as nerve root compression on the right at the L4 level, from a spondylosis and disc protrusion. Dr. Alexander noted that

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<sup>2</sup> Docket No. 10-2306 (issued August 8, 2011). OWCP accepted that as a result of a slip on a wet floor on December 22, 2006, appellant, then a 37-year-old nurse, sustained lumbosacral spondylosis without myelopathy at L5-S1 with encroachment.

appellant's functional capacity evaluation was compatible with sedentary light duty as long as she continues to show nerve root compression.

By letter dated August 2, 2011, OWCP asked appellant's treating osteopath, Dr. Vanderhoof, to comment on Dr. Alexander's report. In an August 25, 2011 report, Dr. Vanderhoof stated that he examined appellant on that date and that his impression was chronic lower lumbar and right leg pain with a right lower extremity radiculopathy with a herniated nucleus pulposus at the L4-5 level and a right foraminal disc protrusion at the L5-S1 level. He indicated that he would like a surgical consult. In response to OWCP's letter, Dr. Vanderhoof indicated that appellant's recent MRI scan demonstrated a shallow rightward eccentric mixed disc protrusion at the L4-5 level and a shallow disc displacement at the L5-S1 level which was not reported on her previous MRI scan in December 2006 and that these new findings were related to her second injury on December 22, 2006 as the new findings were not present on her previous MRI scan. In an October 20, 2011 report, he noted that she was back at work doing a sedentary job and was scheduled for gastric sleeve surgery the next month to try to help her lose weight, which would help her back as well.<sup>3</sup>

On February 16, 2012 OWCP accepted appellant's claim for aggravation of lumbosacral spondylosis without myelopathy and lumbosacral neuritis or radiculitis (L4-5 nerve root impingement).

On April 5, 2012 counsel requested reconsideration. He argued that as appellant's claim was upgraded to include the condition of nerve root impingement and L4-5 radiculopathy, she should be awarded compensation accordingly.

By decision dated July 5, 2012, OWCP denied modification of the April 29 and June 8, 2010 decisions on the grounds that appellant failed to establish an employment-related disability either for the periods November 20 through 27, 2009 and February 1 through March 12, 2010 or the additional conditions of herniated and protruding discs at L4-5 and L5-S1.

### **LEGAL PRECEDENT -- ISSUE 1**

When 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.<sup>4</sup> To establish a causal relationship between the condition claimed, as well as any attendant disability and the employment event or incident, an employee must submit rationalized medical evidence based on a complete medical and factual background to support such a causal relationship.<sup>5</sup> Causal relationship is a medical issue and the

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<sup>3</sup> By decision dated December 5, 2011, OWCP noted that appellant recently returned to work as a registered nurse, that this position fairly and reasonably represented her wage-earning capacity, that her actual earnings met or exceeded the current wages of the job held when injured, and that therefore appellant had zero percent loss of wage-earning capacity.

<sup>4</sup> See also *R.D.*, Docket No. 12-1415 (issued December 12, 2012); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>5</sup> *Jennifer Atkerson*, 55 ECAB 317 (2004).

medical evidence required to establish is rationalized medical evidence.<sup>6</sup> Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimed 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 rationalized medical evidence explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>7</sup> Neither the fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition as caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted appellant's claim for lumbosacral spondylosis without myelopathy at L5-S1 with encroachment. On February 16, 2012 it also accepted her claim for aggravation of lumbosacral spondylosis without myelopathy and lumbosacral neuritis or radiculitis (L4-5 nerve root impingement). However, OWCP has not accepted that appellant's herniated disc at L4-5 and protruding disc at L5-S1 were causally related to her accepted December 22, 2006 employment injury. The Board finds that the evidence does not establish that appellant had a herniated disc at L4-5 and protruding disc at L5-S1 that were causally related to her accepted December 22, 2006 employment injury.

Dr. Alexander, in discussing appellant's MRI scan history in his April 14, 2011 report, noted that her May 2009 MRI scan showed L4-5 and L5-S1 disc displacements. In answering questions sent by OWCP, he noted that he wanted to repeat appellant's MRI scan and noted that the aggravation of lumbar spondylosis, which began on December 22, 2006 appears to be continuing to give her some difficulty along with the disc herniations. Dr. Alexander did not indicate that the disc herniations were causally related to the employment injury of December 22, 2006. In a July 19, 2011 addendum, he noted that the April 22, 2011 MRI scan was consistent with the previous MRI scan.

In his August 25, 2011 report, Dr. Vanderhoof opines that appellant's MRI scan of May 2, 2009 demonstrated a shallow rightward eccentric mixed disc protrusion at the L4-5 level and a shallow disc displacement at the L5-S1 level which was not reported on her previous MRI scan done in December 2006 and that he believed that these new findings were related to the December 22, 2006 employment injury as they were not present on her previous MRI scan. However, this conclusion is not rationalized as it does not explain the cause of the change and does not address any other factors that may have caused the disc displacement during the three-year period between the scans. Furthermore, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference of causal

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<sup>6</sup> See also *J.G.*, Docket No. 12-1469 (issued January 11, 2013); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>7</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>8</sup> *Ernest St. Pierre*, 51 ECAB 623 (2000).

relation.<sup>9</sup> Accordingly, The Board finds that appellant has failed to establish the additional conditions of herniated disc at L4-5 or protruding disc at L5-S1.

### **LEGAL PRECEDENT -- ISSUE 2**

A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and to submit medical evidence for each period of disability claimed.<sup>10</sup> Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.<sup>11</sup> The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.<sup>12</sup> To meet this burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.<sup>13</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 he or 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>14</sup> The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation. For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

OWCP originally accepted appellant's claim for lumbosacral spondylosis without myelopathy at L5-S1 with encroachment. It later accepted her claim for aggravation of lumbosacral spondylosis, without myelopathy and lumbosacral neuritis or radiculitis (L4-5 nerve root impingement).

The recent reports of Dr. Vanderhoof, the reports of Dr. Alexander and the reports from Pain Consultants of Atlanta-Decatur were all issued subsequent to the claimed period of

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<sup>9</sup> See *Alberta S. Williamson*, 47 ECAB 569 (1996).

<sup>10</sup> See *Feridoon Kharabi*, 52 ECAB 291 (2001).

<sup>11</sup> *Id.*

<sup>12</sup> See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>13</sup> C.S., Docket No. 08-2218 (issued August 7, 2008).

<sup>14</sup> *Supra* note 10.

<sup>15</sup> *Sandra D. Pruitt*, 57 ECAB 126 (2005).

disability. Accordingly, as there is no new contemporary proof of disability for the period November 20 through 27, 2009, appellant has failed to meet her burden of proof.

With regards to the period February 1 through March 12, 2010, none of the new medical evidence addresses this period. Despite OWCP's acceptance of the additional conditions of lumbosacral spondylosis and lumbosacral neuritis or radiculitis (L4-5 nerve root impingement), the record fails to establish that these conditions were the cause of any periods of disability. Dr. Vanderhoof's report attribute disability to her L4-5 disc displacement and focal disc protrusion, conditions which were not accepted by OWCP as related to the December 22, 2006 employment injury. The Board has held that the burden of proof is on the claimant to prove conditions are employment related that have not been accepted by OWCP.<sup>16</sup> As Dr. Vanderhoof has not offered any medical rationale explaining the nexus between these conditions and the December 22, 2006 employment injury, the Board finds that appellant has failed to establish disability for the period February 1 through March 12, 2010.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that her herniated disc at L4-5 and protruding disc at L5-S1 was causally related to the accepted December 22, 2006 employment injury. The Board further finds that she has not established any employment-related disability for the periods November 20 through 27, 2009 and February 1 through March 12, 2010.

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<sup>16</sup> See *Jaja K. Asaramo, supra* note 4.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 5, 2012 is affirmed.

Issued: September 9, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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