United States Department of Labor
Employees' Compensation Appeals Board

S.Y., Appellant	)	
and	)	**Docket No. 13-2096**
	)	**Issued: April 18, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Dayton, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 19, 2013 appellant, through her attorney, filed a timely appeal from the July 12, 2013 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 total disability on April 10, 2012.

FACTUAL HISTORY

On August 5, 2011 appellant, then a 58-year-old clerk, injured her left leg while lifting boxes off a scale at work. She stopped work on August 6, 2011 and returned to full-time

[1] 5 U.S.C. § 8101 *et seq.*

restricted duty on December 1, 2011. OWCP accepted the claim for lumbar sprain/strain with sciatica.[2] Appellant received wage-loss benefits.

In an April 10, 2012 report, Dr. Matthew Hodges, Board-certified in physiatry and pain medicine, noted that appellant was seen for evaluation and an electromyography (EMG) scan, which revealed probable left L5 radiculopathy. He examined her and found that she was in no apparent distress, her reflexes were diminished at the patella and the Achilles, although obtainable. Appellant continued to use medication on an as needed basis and was limited in her standing and walking tolerance with work modifications of light duty. Dr. Hodges noted that she had to go home and lay down for a day or two to return to work. He explained that appellant would miss a few days of work and take sick leave due to her back condition. Dr. Hodges diagnosed lumbar sprain/strain and electrodiagnostic evidence of neuritis. He recommended including lumbar neuritis and noted that appellant indicated that her symptoms increased during work hardening. Dr. Hodges recommended additional testing and medication. A March 20, 2012 EMG scan and nerve conduction studies (NCS) report, read by Dr. David S. Seymour, a Board-certified internist, was consistent with posterior rami irritation and L5 radiculopathy.

On April 24, 2012 OWCP received a Form CA-7 claim for wage loss due to total disability commencing on April 10, 2012.

In an April 25, 2012 letter, OWCP advised appellant that it received her claim for compensation. It advised her that the evidence failed to establish her claim for total disability and to file a claim for a recurrence of disability if she believed that her current low back symptoms were due solely to her work injury in August 2011. OWCP advised appellant of the evidence needed to establish her claim.

On April 25, 2012 OWCP referred appellant to Dr. Edward Gregory Fisher, a Board-certified orthopedic surgeon, for a second opinion regarding the nature and extent of her work-related conditions.

In a May 8, 2012 report, Dr. Hodges noted that he first evaluated appellant on January 10, 2012 and administered a sacroiliac (SI) joint injection with limited relief. He indicated that, with the August 5, 2011 injury, she reported pain across the back radiating into her left buttock and lateral thigh. Appellant also had degenerative disc findings, off to the left and an annular tear at L5. On reevaluation, despite her sedentary work capacity, she felt that being seated bending forward aggravated her symptoms. The April 10, 2012 examination revealed a positive straight leg raise and pain complaints in the L5 distribution. Dr. Hodges related that appellant reported a symptomatic increase in her prior area of pain complaints in August 2011, while doing work hardening. Appellant reported that her symptoms became refractory despite work modifications and placed her off work, pending further imaging. Dr. Hodges explained that, if she demonstrated new discogenic changes, he would deem it related to her initial injury and possible exacerbation, which was all within a reasonable degree of medical probability. He diagnosed lumbar sprain/strain and requested that the claim be amended to include lumbar neuritis. Dr. Hodges recommended additional diagnostic testing.

[2] OWCP noted that appellant had a history of nonwork-related lumbar and thoracic degenerative disc disease.

In a May 24, 2012 report, Dr. Fisher noted appellant's history of injury and treatment. On examination, appellant was obese and rated her pain as 8/10 although she was not in clinical distress or appear to be uncomfortable. She had a normal gait without a discernible limp and was able to walk on her tip toes and her heels. Appellant was able to stand erect with no tilting of the head/back to the right or left and she went from the sitting to standing position normally. The general alignment of the back was normal, the pelvis was level, the chest expansion was normal and there were no kyphosis or scoliosis deformities over the thoracic or lumbar regions. On palpation of the back, appellant noted soreness and discomfort over the left lumbar area, with no pain/discomfort or tenderness over the SI joints bilaterally. She had no pain/tenderness over the buttocks or posterior thighs bilaterally. There were no muscle spasms, muscle guarding or trigger points over the lumbar or sacral areas. Appellant was able to forward flex the back to where her finger tips were over the mid tibia area or approximately 45 degrees with complaints of soreness/discomfort over the left side of the low back. She could laterally bend to the right and left 20 degrees with complaints of discomfort over the left side of the low back. Leg lengths were equal and straight leg raising was bilaterally negative. Appellant had a negative Lasegue's test bilaterally; the Faber/Patrick test was bilaterally negative; reflexes over the knees and ankles were trace but equal and symmetrical while the motor power over the legs was normal with no apparent muscle loss or muscle weakness. Sensation over the lower extremities was intact to light touch.

Dr. Fisher found that appellant no longer had residuals of the lumbar strain/sprain. He explained that it was a soft tissue injury and would have healed and resolved in a matter of a few weeks up to two months and was not clinically present on examination. Dr. Fisher advised that there were no residuals of her left-sided sciatica. The examination revealed no objective clinical findings of neurological deficits over the lower extremities or radicular signs over the left leg. Dr. Fisher explained that motor power was normal, sensation was intact, straight leg raising was negative, reflexes were trace but equal and symmetrical over the lower extremities bilaterally and EMG results did not show evidence of a left-sided radiculopathy. He noted that there was no evidence on the lumbar MRI scan of disc herniations or spinal stenosis to support sciatica. Dr. Fisher opined that appellant's low back arthritic condition was aggravated by the work injury of August 5, 2011. He noted that she still had residuals over the low back that stemmed from the aggravation of the preexisting degenerative low back arthritis which were mild decreased range of back motion secondary to subjective complaints over the left side of the low back. Dr. Fisher indicated that there were no residuals remaining from the accepted work-related conditions of a lumbar strain and sciatica. He advised that appellant could perform her work duties without restrictions.

On June 1, 2012 appellant claimed a recurrence of disability for which she stopped work on May 10, 2012. She stated that she never stopped being in pain and tried to work with limitations but her condition worsened.

In a June 7, 2012 report, Dr. Hodges noted that appellant had started walking regularly, which increased some of her symptoms. Appellant's pain was across the back and into the left buttock and lateral leg on the left with some left arm tingling. She denied any right leg pain. Dr. Hodges repeated a request for an MRI scan.

In a July 16, 2012 decision, OWCP denied appellant's recurrence of disability claim. It found that the medical evidence was insufficient to establish that her disability was due to a change or worsening of her accepted conditions. OWCP noted that Dr. Fisher indicated that, despite residuals, appellant was capable of working without restrictions.

In a July 24, 2012 report, Dr. Hodges noted that appellant underwent an MRI scan that showed no definitive nerve root impingement but degenerative disc change at L5-S1 with a small annular tear. He did not find anything structurally that would cause radiating symptoms down the leg. Dr. Hodges diagnosed lumbar sprain/strain, limb pain, etiology undefined.

By letter dated August 1, 2012, appellant, through her attorney, requested a telephonic hearing, which was held on November 6, 2012. At the hearing, counsel requested that the claim be accepted for lumbar neuritis and aggravation of degenerative arthritis at L5-S1. Appellant noted that she worked beyond her restrictions and that her work load increased. Her treating physician placed her off work effective April 10, 2012.

In an October 16, 2012 report, Dr. Hodges reviewed Dr. Fisher's May 24, 2012 report and diagnosed lumbar sacral sprain/strain and SI joint dysfunction. He found that appellant reached maximum medical improvement. Dr. Hodges placed her off work on April 10, 2012 for increased symptoms directly related to her work-related injury. He advised that he was going to review appellant's functional capacity examination and return her to work within modified duties, if available. Dr. Hodges recommended job retraining or vocational rehabilitation if that was not an option.

By decision dated January 18, 2013, the hearing representative affirmed the July 16, 2012 decision.

By letter dated February 8, 2013, appellant's attorney requested reconsideration and submitted new medical evidence.

In a November 15, 2012 report, Dr. Hodges noted that appellant had not undergone a functional capacity evaluation. He took her off work in April 2012 for a "symptomatic flare." Dr. Hodges examined appellant and diagnosed lumbosacral sprain/strain and SI joint dysfunction. He again recommended a functional capacity evaluation and advised that she might benefit from vocational rehabilitation. On April 10, 2012 appellant's straight leg raise was positive on the left, negative on the right and her strength testing remained intact. Dr. Hodges stated that the prolonged sitting and forward bending at light duty caused a recurrence and increase in her symptoms, for which he took her off work. Nonsteroidal medication and a home stretching exercise program provided some symptomatic improvement.

By decision dated July 12, 2013, OWCP affirmed the July 16, 2012 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 resulting from a previous injury or illness without an intervening cause or a new exposure to the work environment that caused the illness. It can also mean 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.[3]

An employee who claims a recurrence of disability due to an accepted employment injury has the burden of proof to establish by the weight of substantial, reliable, and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden requires that an employee furnish 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 the employment injury and supports that conclusion with sound medical reasoning.[4] Where no such rationale is present, the medical evidence is of diminished probative value.[5] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, it must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[6]

Section 8123(a), in pertinent part provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[7]

ANALYSIS

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

OWCP accepted appellant's claim for lumbar sprain/strain and sciatica. Appellant returned to work following the acceptance of the employment injury in a part-time limited-duty capacity on December 1, 2011. The issue on appeal is whether she has established a recurrence of total disability commencing April 10, 2012 causally related to the accepted employment injury. Appellant has the burden of proof to establish a change in the nature and extent of her injury-related condition or a change in the nature and extent of her limited-duty job requirements.

The treating physician, Dr. Hodges, provided several opinions in which he noted that there was a change in the nature and extent of the injury-related condition. In an April 10, 2012 report, he noted that the EMG scan revealed probable left L5 radiculopathy. Dr. Hodges noted his findings and explained that appellant had difficulty pursuing her work. He noted that the claim should be accepted for lumbar neuritis. In his October 16, 2012 report, Dr. Hodges diagnosed lumbar sprain/strain and SI joint dysfunction. He explained that he placed appellant off work on April 10, 2012 for increased symptoms and opined that they were "directly related to

[3] *J.F.*, 58 ECAB 124 (2006); 20 C.F.R. § 10.5(x). *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[4] *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[5] *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[6] *Ricky S. Storms*, 52 ECAB 349 (2001).

[7] 5 U.S.C. § 8123(a).

her work-related injury." In his November 15, 2012 report, Dr. Hodges advised that he took appellant off work in April 2012 for "symptomatic flare." He explained that his examination revealed lumbosacral sprain/strain and SI joint dysfunction and that appellant had increased symptoms while she was at work, even though she was on light-duty modifications. Dr. Hodges explained that he believed that the prolonged sitting and forward bending required even at light duty at that time was causing a recurrence and an increase in her symptoms such that he placed her off work.

On May 24, 2012 Dr. Fisher, a second opinion physician, examined appellant and found that she could perform her regular duties. He noted examination findings and opined that she no longer had residuals of the lumbar strain/sprain as it was a soft tissue injury and would have healed and resolved in a matter of a few weeks up to two months and was not clinically present on his examination. Dr. Fisher noted that his examination revealed no objective clinical findings of neurological deficits over the lower extremities or radicular signs over the left lower extremity. He also advised that there was no evidence on the lumbar MRI scan of disc herniations or spinal stenosis to support sciatica. Dr. Fisher noted that appellant's low back arthritic condition was aggravated by the August 5, 2011 work injury and that she still had residuals of the aggravation of the preexisting degenerative arthritis of the low back. He, however, determined that she was capable of performing her work duties without physical restrictions.

The Board finds that a conflict in medical opinion arose between Drs. Fisher and Hodges. Dr. Fisher found that appellant was capable of performing her work duties without physical restrictions. Dr. Hodges explained that she was not capable of work effective April 10, 2012 and placed her off work. The issue of whether appellant sustained a recurrence of disability as a result of a change in the nature and extent of her injury-related condition is unresolved.

The case will be referred to an impartial medical specialist to resolve whether appellant's disability beginning April 10, 2012 is due to her accepted condition and the nature and extent of her residuals. On remand, OWCP should refer appellant, together with the case file and the statement of accepted facts, to an appropriate Board-certified specialist for an impartial medical evaluation. After such further development as it deems necessary, OWCP shall issue an appropriate *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2013 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: April 18, 2014
Washington, DC

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

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

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