

returned to work on October 4, 2011 for four hours a day in a limited-duty capacity. She later progressed to performing limited-duty work for six hours a day.

In an August 7, 2012 report, Dr. Paula Lenny, an attending Board-certified occupational medicine physician, noted that appellant reported experiencing mild low back pain. She described findings on physical examination and diagnosed L4-5 and L5-S1 degenerative disc disease with chronic low back pain. Dr. Lenny stated that the range of back motion was normal, muscle strength was 5/5 in the back and legs and reflexes were normal and symmetric throughout.

Appellant stopped work on October 22, 2012 and on November 2, 2012, she submitted a claim (Form CA-7) alleging that she was entitled to full wage-loss compensation effective October 22, 2012.

In an October 22, 2012 report, Dr. Lenny discussed the March 26, 2011 work injury noting that appellant reported that she was loading a lot of boxes into her mail vehicle on that date and aggravated her low back. She stated, “[appellant] has had a magnetic resonance imaging (MRI) scan test which showed progression in her L5-S1 degenerative disc disease.” Dr. Lenny indicated that appellant came in prior to her next scheduled appointment due to experiencing increased low back pain and pain to the right thigh. Appellant denied reinjury and indicated that she went to the beach the previous day and did her usual amount of walking. Dr. Lenny indicated that, upon examination, appellant had some limitation of range of back motion. She diagnosed L4-5 and L5-S1 degenerative disc disease “with chronic low back pain, flare up of low back pain and [right] thigh pain.” In an October 22, 2012 note, Dr. Lenny stated that appellant was placed off work from October 22 to 29, 2012.²

In an October 29, 2012 note, Dr. Lenny stated that appellant was placed off work on October 29, 2012 and that she would be on modified duty from October 30 to November 19, 2012 during which time she could not bend at the waist, twist her torso/spine or lift, carry, push or pull more than five pounds.

In a November 16, 2012 letter, OWCP advised appellant that, due to the fact that she was previously working six hours a day, her total disability wage-loss claim was being viewed as a claim for recurrence of total disability. It requested that she submit additional factual and medical evidence in support of her claim.

In an October 29, 2012 report, Dr. Lenny stated that appellant came in for follow up of her increased low back pain and pain to the right thigh. Appellant reported that her pain was deep and still went to her right thigh. Dr. Lenny’s findings on physical examination were similar to those observed on October 22, 2012.

On November 19, 2012 Dr. Lenny indicated that appellant came in again for follow up of increased low back pain and pain to the right thigh. Physical examination findings revealed no

² In an October 16, 2012 note, Dr. Lenny had indicated that appellant could lift or carry up to 35 pounds and pull or push up to 75 pounds. The precise requirements of the limited-duty job appellant performed when she stopped work on October 22, 2012 remain unclear.

major changes, although range of back motion showed improvement. In a November 19, 2012 note, Dr. Lenny stated that appellant should be on modified duty from November 19 to December 19, 2012. Appellant was not to lift, carry, push or pull more than 10 pounds. On December 17, 2012 Dr. Lenny indicated that appellant should continue on modified duty from December 17, 2012 to January 17, 2013 with no lifting, carrying, pushing or pulling of more than 10 pounds.

In a December 5, 2012 report, Dr. Lenny opined that the herniated L5-S1 disc observed in the findings of an October 31, 2012 MRI scan test was caused by the March 26, 2011 work incident. She indicated that this work-related condition prevented appellant from meeting the lifting requirements of her limited-duty position.

By decision dated January 14, 2013, OWCP denied appellant's claim on the grounds that she had not submitted sufficient medical evidence to establish a recurrence of total disability on or after October 22, 2012 due to her March 26, 2011 work injury. It indicated that the reports of Dr. Lenny did not provide a rationalized opinion that appellant's injury-related condition had worsened such that she could no longer perform her limited-duty work.

After OWCP's January 14, 2013 decision, appellant submitted additional progress reports and work limitation notes of Dr. Lenny dated beginning in early 2013. Dr. Lenny discussed appellant's back and right leg condition and recommended work restrictions such as no lifting more than 10 pounds.

Appellant requested a telephone hearing with an OWCP hearing representative. During the May 7, 2013 hearing, counsel argued that Dr. Lenny's reports showed that appellant's work-related back condition worsened such that she could no longer work.³ Appellant testified that she stopped working on October 22, 2012 due to a worsening of her work-related condition. She stated that prior to that date she had been doing her normal work but that on October 22, 2012 she woke feeling that her condition had worsened.

After the hearing, appellant submitted additional progress reports and work limitation notes of Dr. Lenny dated in June and July 2013. Dr. Lenny continued to report that appellant's back and right leg condition had worsened and that she had such work limitations as no lifting more than 10 pounds.

In April 2013, OWCP had referred appellant to Dr. Steven A. Kaneshiro, a Board-certified orthopedic surgeon, for evaluation of her work-related residuals and her ability to perform work. In a July 15, 2013 report, received on July 23, 2013, Dr. Kaneshiro posited that appellant's March 26, 2011 work incident permanently aggravated her preexisting lumbar degenerative disc disease as evidenced by a July 5, 2011 MRI scan test showing progressive L5-S1 disc herniation and development of an extruded free fragment with impingement on the right S1 nerve root. He indicated that her current symptoms were due to this permanent aggravation and required the imposition of work restrictions such as no lifting, carrying, pushing or pulling more than 10 pounds.

³ Counsel indicated that in approximately January 2013 OWCP increased appellant's disability payments.

In a July 26, 2013 decision, OWCP's hearing representative affirmed the January 14, 2013 decision denying appellant's claim for a recurrence of total disability. He indicated that, since the January 14, 2013 decision, she had not submitted sufficient medical evidence to establish a work-related recurrence of total disability. However, the hearing representative did not provide any discussion of the numerous medical reports submitted since that time, including the July 15, 2003 report of Dr. Kaneshiro.⁴

LEGAL PRECEDENT

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 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 employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁵

FECA provides that OWCP shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as OWCP considers necessary with respect to the claim.⁶ Since the Board's jurisdiction of a case is limited to reviewing that evidence which is before OWCP at the time of its final decision,⁷ it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,⁸ it is crucial that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by OWCP.⁹

⁴ OWCP's hearing representative indicated that in December 2012, OWCP "began paying [appellant] full disability wage-loss compensation" which was based on the employing establishment's indication on a payment form that it could no longer accommodate her work restrictions. The record reflects that appellant received increased disability payments beginning in December 2012, but the reason for this increase remains unclear.

⁵ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986). 20 C.F.R. § 10.5(x) provides, "*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 (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."

⁶ 5 U.S.C. § 8124(a)(2).

⁷ See 20 C.F.R. § 501.2(c).

⁸ *Id.* at § 501.6(d).

⁹ *William A. Couch*, 41 ECAB 548, 553 (1990).

ANALYSIS

OWCP accepted that on March 26, 2011 appellant sustained a lumbar sprain and aggravation of degeneration of lumbar or lumbosacral intervertebral disc due to loading boxes at work. She returned to limited-duty work for the employing establishment. Appellant stopped work on October 22, 2012 and on November 2, 2012 she submitted a claim (Form CA-7) alleging that she was entitled to full wage-loss compensation effective October 22, 2012. In decisions dated January 14 and July 26, 2013, OWCP denied her claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability on or after October 22, 2012 due to her March 26, 2011 work injury.

In the present case, OWCP's hearing representative noted that no new medical evidence, specifically addressing the claimed recurrence had been received since the date of the hearing. The record did reflect receipt on July 23, 2012 of the July 15, 2013 report of Dr. Kaneshiro, a Board-certified orthopedic surgeon, who served as an OWCP referral physician.¹⁰ The Board, therefore, must set aside the July 26, 2013 decision of OWCP and remand the case so that OWCP may fully consider the second opinion report received by OWCP prior to the issuance of these decisions.¹¹ Following such further consideration and after such further development as it deems necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she sustained a recurrence of total disability on or after October 22, 2012 due to her March 26, 2011 work injury. The case is remanded to OWCP for further development.

¹⁰ In this report, Dr. Kaneshiro posited that appellant's March 26, 2011 work incident permanently aggravated her preexisting lumbar degenerative disc disease as evidenced by a July 5, 2011 MRI scan test showing progressive L5-S1 disc herniation and development of an extruded free fragment with impingement on the right S1 nerve root. He noted that this permanent aggravation required the imposition of work restrictions such as no lifting, carrying, pushing or pulling more than 10 pounds.

¹¹ See *supra* notes 6 through 9.

ORDER

IT IS HEREBY ORDERED THAT the July 26, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: February 18, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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