



September 5, 2000. OWCP accepted her claim for herniated lumbosacral disc, postlaminectomy syndrome and lumbosacral intervertebral disc disorder/spondylosis.<sup>3</sup>

In May 2011, appellant returned to work as a part-time, limited-duty clerk and OWCP compensated her based on a loss of wage-earning capacity (LWEC).<sup>4</sup> On October 3, 2011 she stopped work entirely and has not returned. Following her work stoppage, appellant continued to receive regular compensation payments for partial disability in accordance with OWCP's previous LWEC determination. Effective March 23, 2012, the employing establishment formally removed appellant because of her work-related disability. OWCP ultimately paid wage-loss compensation for total disability retroactive to appellant's March 23, 2012 removal.

Appellant seeks compensation for total disability (Form CA-7) for the period October 3, 2011 to March 22, 2012. She claimed that the employing establishment sent her home on October 3, 2011 because it was no longer able to accommodate her work restrictions. Appellant's counsel argues that she is entitled to temporary total disability beginning October 3, 2011 due to the employing establishment's withdrawal of her limited-duty clerk assignment.

The part-time, limited-duty clerk position appellant performed from May 9 to October 3, 2011 was based on limitations imposed by her treating physician, Dr. Jean-Jacques Abitbol, a Board-certified orthopedic surgeon. In a January 17, 2011 work capacity evaluation (OWCP-5c), Dr. Abitbol advised that appellant was able to work 4 hours per day with a 25-pound, 30-minute lifting restriction. Appellant could also sit for 4 hours and walk and stand for 30 minutes each. Additionally, Dr. Abitbol precluded all twisting and he limited her to 10 minutes of kneeling and climbing.

The limited-duty clerk position description indicated that appellant would be assigned a clerical position, sedentary in nature with no specific or unusual physical requirements. She was expected to work four hours per day in an office environment and was allowed to sit and stand as needed. The position description further indicated that appellant would be assigned simple tasks of a nonrepetitive nature, such as answering the telephone, taking messages, greeting and directing customers/visitors, assembling office material binders, reviewing correspondence, shredding documents, ordering supplies and light typing. The limited-duty clerk position description specifically incorporated Dr. Abitbol's January 17, 2011 physical restrictions. Moreover, appellant was allowed to change positions, move about and alter her activities

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<sup>3</sup> Appellant underwent OWCP-approved lumbar surgeries on March 20, 2002, November 14, 2004 and June 19, 2006.

<sup>4</sup> Appellant was formerly a full-time employee, so when she resumed part-time work (20 hours/week) on May 9, 2011, OWCP compensated her for what amounted to a 65 percent loss in wage-earning capacity. By decision dated September 13, 2011, OWCP found that her actual earnings as a part-time clerk fairly and reasonably represented her wage-earning capacity. When the case was last on appeal, the Board reversed OWCP's finding that appellant's actual earnings as a part-time clerk fairly and reasonably represented her wage-earning capacity. The Board's October 9, 2012 decision is incorporated herein by reference. Since the prior appeal, OWCP has amended its procedure manual to permit wage-earning capacity determinations based on part-time reemployment of former full-time employees. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5c(1)(b) (June 2013).

throughout the day, as needed. The position description also included a diagram of appellant's workstation.<sup>5</sup>

Following her May 2011 return to work, appellant saw Dr. Abitbol on August 25 and September 1, 2011. His progress reports did not reflect any particular changes in appellant's work status.

On September 6, 2011, appellant's supervisor, Jorge Mercado, issued a letter of reprimand for failure to adhere to her physical restrictions as outlined in Dr. Abitbol's January 17, 2011 OWCP-5c. Mr. Mercado identified three instances where appellant fell at work. The first incident occurred on June 6, 2011 when she fell to the grounds due to numbness in her legs. On June 17, 2011 appellant reportedly sat too long causing numbness in her legs. When she stood up, she fell. The third incident occurred on July 21, 2011 when appellant bent down to pick up official personnel folders and fell. Mr. Mercado indicated that on a number of occasions appellant had been counseled to adhere to her noted physical limitations, but she continued to work outside those limitations. He admonished appellant for working outside her limitations and advised her that she was expected to comply with the work restrictions. Mr. Mercado also instructed appellant to request assistance as necessary to accomplish her assigned duties.

In a September 20, 2011 report, Dr. Abitbol reviewed appellant's recent lumbar magnetic resonance imaging (MRI) scan which revealed postlaminectomy changes from L4 to S1. He saw no evidence of recurrent stenosis. Appellant's prior x-rays showed her hardware to be in good position and there was a solid fusion. Dr. Abitbol assured her that there was no new instability or stenosis or adjacent changes in her lumbar spine. He advised appellant to continue with home exercises and suggested a pain management consultation. Dr. Abitbol did not specifically comment on her work status.

Dr. Franklin H. Dulin, a Board-certified physiatrist, examined appellant on September 21, 2011. His involvement with her lumbar condition dated back as early as October 2000. Dr. Dulin noted a history of a work-related back injury on September 5, 2000, and three subsequent lumbar surgeries in 2002, 2004 and 2006. He also noted that, since returning to modified work this past summer, appellant fell on at least three occasions. Appellant's work restrictions reportedly included no prolonged standing, walking or sitting and she was to avoid repetitive bending and stooping. Additionally, Dr. Dulin noted a limited lifting capacity of 25 pounds. Appellant's recent falls at work were reportedly due to loss of balance and loss of lower extremity muscle strength. She reported persistent back pain that complicated her standing balance. Appellant also reported a loss of feeling/sensation at the bottom of her feet, right greater than left. On physical examination, she exhibited poor tolerance for prolonged standing and walking and poor standing balance. Dr. Dulin also noted appellant's use of a walker. Appellant was unable to balance herself with one leg or do deep knee bending and sit-squat. However, she was able to stand with stand-by-assist. There was also evidence of lower extremity muscle weakness and loss of sensation. Dr. Dulin's diagnoses included, *inter alia*, history of lumbar disc injury from repetitive lifting and multilevel lumbar disc derangement with lumbosacral nerve root injury, status postlumbar interbody fusion at L4-5, status post L5-S1

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<sup>5</sup> On March 25, 2011 OWCP advised appellant that it considered the part-time, limited-duty clerk position suitable in accordance with Dr. Abitbol's January 17, 2011 OWCP-5c.

fusion, residual chronic low back pain and bilateral lower extremity peripheral neuropathy at L5-S1.

Dr. Dulin explained that appellant's frequent falls were not surprising due to her development of peripheral neuropathy secondary to severe scar formation at the surgical site from repetitive lumbar spine procedures. All of appellant's current symptomatology stemmed from her September 5, 2000 work-related lumbar disc injury and being subjected to several failed lumbar spine surgical procedures. As a result of the surgeries, she formed fibrotic scarring and consequently developed peripheral neuropathy, numbness and weakness of her lower extremity and loss of balance. Dr. Dulin indicated that appellant achieved maximum medical improvement (MMI) and should be declared permanently disabled requiring a walker for safe ambulation. He further indicated that appellant was totally incapable of performing her designated job description. Dr. Dulin explained that appellant was always at risk of falling and required a walker to maintain her balance. Appellant also needed to wear a back brace.

Appellant provided her supervisor a copy of Dr. Dulin's September 21, 2011 report. She met with Mr. Mercado on the morning of October 3, 2011 to discuss Dr. Dulin's findings. Also present was Teresa Salcedo, the department head, who reportedly told appellant there was no way she could remain at work given Dr. Dulin's finding that she was 100 percent disabled. Appellant was to be placed on leave-without-pay (LWOP) status for at least 30 days, and Ms. Salcedo reportedly encouraged her to resign. Appellant, however, expressed interest in applying for retirement instead. After the meeting, she cleared her desk, packed her belongings and departed around 9:30 a.m. Ms. Salcedo acknowledged that appellant had been placed in LWOP status effective October 3, 2011 in order to accommodate her latest documented medical condition.<sup>6</sup>

Regarding appellant's need for a walker, Mr. Mercado indicated that she initially carried a cane with her, but he never observed appellant actually depending on it to ambulate. On or about August 16, 2011, appellant began bringing her walker to work and occasionally she would only bring her cane. Based on Mr. Mercado's observations, it did not appear that appellant used either the walker or cane to support her weight. Appellant also claimed that the clerk position required lifting in excess of 25 pounds. Mr. Mercado indicated that appellant had always been assigned work within her restrictions. Her main assignment was to swipe a barcode pen across a personnel file, then place the files in a basket so they could be filed later. Mr. Mercado's sampling of six personnel files revealed an average weight of 1 pound, 12 ounces per file.<sup>7</sup>

Dr. Abitbol saw appellant in follow up on October 20 and November 8, 2011. His progress notes for those dates did not indicate a change in appellant's work status.

In a December 20, 2011 report, Dr. Dulin reiterated that, due to a series of lumbar surgeries, appellant developed marked scar formation about the nerve root and surgical site resulting in peripheral neuropathy affecting the strength of her hip and leg muscles. As a

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<sup>6</sup> As noted, appellant was removed from service effective March 23, 2012 due to her medical disability. Ms. Salcedo authored the February 10, 2012 notice of proposed separation which specifically referenced Dr. Dulin's September 21, 2011 findings. The proposal also noted appellant's LWOP status effective October 3, 2011.

<sup>7</sup> In a December 20, 2011 statement, the employing establishment indicated that the sample included personnel files ranging in weight from 0.5 ounces to 3 pounds, 6 ounces.

consequence, her standing and walking balance deteriorated. Dr. Dulin noted that appellant had not improved since his last examination. Appellant continued to use a cane to assist in balance and walking and had poor tolerance for prolonged standing/walking and poor standing balance. Regarding her ability to return to her previous occupation, Dr. Dulin explained that frequent standing and walking as part of her job, placed appellant at potentially high risk of losing her balance and falling due to her peripheral neuropathy. He recommended a different occupation; one that did not require standing and walking. Otherwise, Dr. Dulin advised that appellant seek early retirement.

An April 2, 2012 bilateral lower extremity electromyography and nerve conduction study (EMG/NCV) revealed no evidence of peripheral neuropathy or compression neuropathy. However, the needle EMG examination results were abnormal. The study showed evidence of right L5-S1 subacute lumbosacral radiculopathy with a possibility of L4 nerve root involvement on the right side. Correlation with lumbar imaging studies was recommended.

Dr. Abitbol's follow-up treatment notes for October 2, 2012 included a diagnosis of low back syndrome and postlaminectomy syndrome. There was no reported change in appellant's work status.

In a February 8, 2013 report, Dr. Dulin indicated that appellant was suffering from the outcome of multiple failed back surgeries at L4-S1. Appellant currently experienced persistent back pain, numbness of her legs -- left greater than right, weakness and burning pain to both legs, indicative of lumbar spine radiculopathy. Her walking tolerance was limited to 25 to 30 feet before having to pause and she was often aided by a cane. Dr. Dulin stated that appellant was currently not working due to weakness of hips and lower extremity flexor/extensor muscles affecting her balance and muscle strength for endurance. He advised that she needed to improve in these areas in order to return to the open labor market. Because of persistent hip and low back muscle cramps, compounded by continuing deep aching pain, appellant was unable to tolerate prolonged sitting, standing or walking. Dr. Dulin also noted that she was limited to lifting 10 pounds.

In an April 12, 2013 decision, OWCP denied appellant's claim for recurrence of disability beginning October 3, 2011.<sup>8</sup> Appellant timely requested a hearing.<sup>9</sup>

Dr. Jon P. Kelly, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant on May 15, 2013. Appellant's current complaints included constant low back pain and daily episodes of lower extremity numbness of two hours' duration. She was reportedly using a walker and at times was able to walk with a cane. Even at home, appellant could not walk unassisted and used the walls for support. Dr. Kelly noted a history of acute herniated nucleus pulposus (HNP) at L5-S1. He also noted that appellant had been treated with fusion but developed problems that ultimately necessitated another fusion with hardware from L4 to the sacrum. The hardware was in good position and she was considered permanent and stationary. Further medical treatment, including hardware removal and use of a pain stimulator

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<sup>8</sup> Appellant filed separate claims for her falls on June 6 and 17 and July 21, 2011. OWCP denied all three claims (xxxxxx208, xxxxxx756 and xxxxxx986).

<sup>9</sup> The hearing was conducted *via* telephone on August 13, 2013.

was recommended, but appellant reportedly declined preferring not to undergo additional surgery. Dr. Kelly diagnosed lumbar spine HNP, lumbar spine degenerative disc disease, spondylosis and history of failed back which required repeat surgery. He stated that appellant's balance problems were the result of deconditioning and obesity. Dr. Kelly did not identify any focal weakness which could be attributed to any denervation as related to appellant's back condition. While her fused spine resulted in limited lumbar flexibility, Dr. Kelly nonetheless believed appellant could work full time with restrictions. He also noted that she needed to lose weight and suggested that she embark on a program of aerobic conditioning and muscle strengthening within her physical parameters. Although appellant had undergone significant surgery and had objective findings of impairment, Dr. Kelly found no reason to disqualify her for any work that fit within defined parameters. Because of her age and the length of time she had been off work, Dr. Kelly thought it unlikely she would return to the workforce.

In a separate work capacity evaluation (OWCP-5c), Dr. Kelly advised that appellant reached MMI and was able to work eight hours per day with restrictions. Appellant could sit for four hours and walk and stand for two hours each. She was precluded from squatting, kneeling, climbing, bending/stooping and she could not operate a motor vehicle at work. However, appellant could drive to/from work up to one hour. Also, Dr. Kelly imposed a two-hour limitation on pushing, pulling and lifting with a 10-pound weight restriction.

By decision dated October 29, 2013, the hearing representative affirmed OWCP's April 12, 2013 decision. Appellant did not establish that her part-time, limited-duty clerk position had been withdrawn effective October 3, 2011. There was also no proof that the position had been changed prior to her work stoppage. Lastly, the hearing representative found that appellant failed to demonstrate a change in her work-related condition that would have prevented her from performing her limited-duty clerk position. Consequently, appellant was not entitled to compensation for total disability during the period October 3, 2011 to March 22, 2012.

### **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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>10</sup> Recurrence of disability 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>11</sup> A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties or other downsizing or where an LWEC determination is in place.<sup>12</sup>

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<sup>10</sup> 20 C.F.R. § 10.5(x).

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

<sup>12</sup> *Id.*; 20 C.F.R. §§ 10.104(c) and 10.509; see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013).

Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.<sup>13</sup>

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing that the recurrence of disability is causally related to the original injury.<sup>14</sup> This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.<sup>15</sup> The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.<sup>16</sup>

### ANALYSIS

Appellant indicated that the employing establishment sent her home on October 3, 2011 because there was no work within her restrictions. Counsel characterized the employing establishment's action as a withdrawal of appellant's limited-duty clerk assignment. Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty.<sup>17</sup> However, there is no evidence that the employing establishment withdrew appellant's limited-duty clerk assignment on October 3, 2011. Granted, appellant was sent home on that day and placed on LWOP status. This was not because of a withdrawal of her limited-duty assignment. It was merely an acknowledgment of Dr. Dulin's September 21, 2011 work restrictions. Dr. Dulin represented that appellant's recent spate of falls was due to surgery-related peripheral neuropathy and that she was "totally incapable of performing her designated job description." He further noted that she was always at risk of falling. Consequently, appellant failed to establish a withdrawal of her limited-duty assignment effective October 3, 2011. Also, the record does not establish that the employing establishment altered the requirements of her modified-clerk assignment to exceed her physical limitations. Appellant claimed that the clerk position required lifting in excess of her 25-pound weight restriction, but Mr. Mercado disputed her allegation. Mr. Mercado noted that she primarily handled personnel files, which she scanned and then placed in a cart for refile. His sampling of six personnel files revealed an average weight of one pound, 12 ounces per file. Appellant has not substantiated her claim that she was required to lift in excess of her 25-pound restriction.

Appellant may also establish a recurrence of disability by demonstrating a change in the nature and extent of her injury-related condition such that she could no longer perform her

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<sup>13</sup> *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

<sup>14</sup> 20 C.F.R. § 10.104(b); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapters 2.1500.5a and 2.1500.6b (June 2013).

<sup>15</sup> *See S.S.*, 59 ECAB 315, 318-19 (2008).

<sup>16</sup> *Id.* at 319.

<sup>17</sup> 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

limited-duty clerk assignment. Counsel argued before the Branch of Hearings and Review that Dr. Kelly's May 15, 2013 report established that appellant was not employable, and therefore, supported compensation for the period requested. Dr. Kelly did not specifically address appellant's work status for the period October 3, 2011 to March 22, 2012. Also, he indicated that appellant was capable of working full time with restrictions as outlined in his March 15, 2013 OWCP-5c. Although Dr. Kelly expressed skepticism regarding appellant's return to the workforce, he clearly indicated that she was capable of working in some capacity. Therefore, his report does not establish a change in the nature and extent of appellant's injury-related condition on or about October 3, 2011.

As noted, Dr. Abitbol provided the January 2011 work restrictions that formed the basis of appellant's part-time, limited-duty clerk assignment. Appellant returned to work in May 2011, and none of Dr. Abitbol's subsequent progress reports from August 2011 to October 2012 reflect a change in her work status and does not support entitlement to total disability compensation.

While Dr. Dulin's September 21, 2011 report was the precipitating factor behind appellant's October 3, 2011 work stoppage, this evidence along with his subsequent reports does not establish a change in the nature and extent of her injury-related condition. He attributed her lower extremity complaints and loss of balance to peripheral neuropathy, which in turn was purportedly due to fibrotic scarring from her multiple lumbar surgeries. Dr. Dulin did not reference any electrodiagnostic studies at the time. Six months later, an April 2, 2012 bilateral lower extremity NCV revealed no evidence of peripheral neuropathy or compression neuropathy.

On the contrary, Dr. Kelly noted in his May 15, 2013 report that he had not identified any focal weakness which could be attributed to any denervation as related to appellant's accepted back condition. Unlike Dr. Dulin, Dr. Kelly attributed appellant's balance problems to deconditioning and obesity.

Dr. Dulin's various reports also reflect an inaccurate or incomplete understanding of appellant's injury-related restrictions and her responsibilities as a part-time, limited-duty clerk. In his September 21, 2011 report, he noted restrictions that included "no prolonged ... sitting" and avoidance of "bending and stooping." As to sitting, Dr. Abitbol indicated that appellant could work a four-hour day and was able to sit for four hours. It is not clear what Dr. Dulin meant by no prolonged sitting or that he knew that appellant's limited-duty clerk position allowed her to change positions and move about as needed. Also, Dr. Abitbol did not comment on bending and/or stooping. The version of Form OWCP-5c he utilized did not even include bending/stooping as an activity. Thus, it is unclear what information Dr. Dulin relied upon in identifying appellant's injury-related work restrictions. Moreover, his December 20, 2011 report mischaracterized her job as involving "frequent standing and walking," which reportedly placed her at a potentially high risk of losing her balance and falling. Appellant's limited-duty clerk assignment actually included a 30-minute restriction on both walking and standing consistent with Dr. Abitbol's January 17, 2011 OWCP-5c.

The Board finds that the medical evidence of record does not establish a change in the nature and extent of appellant's injury-related condition such that she could no longer perform her limited-duty clerk position as of October 3, 2011. As previously discussed, there is no

evidence that the employing establishment altered appellant's limited-duty clerk position or withdrew the position effective October 3, 2011.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision.<sup>18</sup>

**CONCLUSION**

Appellant failed to establish a recurrence of disability for the period October 3, 2011 to March 22, 2012.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 29, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 24, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>18</sup> See 5 U.S.C. § 8128 (a); 20 C.F.R. §§ 10.605-10.607.