

**United States Department of Labor
Employees' Compensation Appeals Board**

S.S., Appellant

and

U.S. POSTAL SERVICE, MAIN POST OFFICE,
Detroit, MI, Employer

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**Docket No. 13-1590
Issued: May 15, 2014**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 26, 2013 appellant, through her attorney, filed a timely appeal from a May 17, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her recurrence of disability claim. Pursuant to the Federal Employees' Compensation Act¹ (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 sustained a recurrence of total disability commencing July 28, 2012 causally related to her June 1, 2008 employment injury.

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

FACTUAL HISTORY

OWCP accepted that on June 1, 2008 appellant, then a 38-year-old mail clerk, sustained a central disc protrusion at L4-S1 due to a fall at work. She sat down on a chair and a leg on the chair broke. Appellant stopped work on June 2, 2008.

¹ 5 U.S.C. § 8101 *et seq.*

On November 7, 2008 Dr. Hugh P. Pabarue, Jr., a Board-certified internist, provided a history of the June 1, 2008 employment injury. He diagnosed low back pain with multilevel degenerative disc disease and central disc protrusions at L4-S1 vertebral levels. Dr. Pabarue advised that appellant could return to work on November 20, 2008 with restrictions that included no heavy lifting over 10 pounds and no repetitive bending or twisting.

On January 2, 2009 appellant returned to part-time, limited-duty work, four hours a day as approved by Dr. Pabarue.²

By letter dated January 7, 2010, the employing establishment advised that effective January 16, 2010 appellant would be transferred from the Detroit, Michigan employing establishment to the Grand Rapids processing and distribution center.³ It enclosed an injury and the National Reassessment Process (NRP) file for her active OWCP claim under File No. xxxxxx055.⁴

A release form dated April 10, 2012 and signed by an emergency room registered nurse whose signature is illegible, stated that appellant could return to work on April 11, 2012. Appellant was restricted from lifting more than 10 pounds. In an April 13, 2012 note, Dr. John R. Mogor, a Board-certified internist, stated that she was incapacitated for work from April 9 and 13, 2012. Appellant could return to work on April 14, 2012 with restrictions that included lifting no more than 20 pounds and being seated for 30 minutes periodically.

On April 10, 2012 appellant advised OWCP that she never stopped seeing her treating physician until she moved and had to find a new physician. On April 10, 2012 OWCP reopened her claim only for medical benefits. On April 11, 2012 it advised appellant to file claims for wage-loss compensation (Form CA-7) for anytime off work.

Appellant filed CA-7 forms seeking compensation for leave without pay from April 10 to June 29, 2012. On April 18, 2012 the employing establishment stated that it could not identify any adequate available work in her date-of-injury position or within her work limitations. On June 26, 2012 appellant returned to work two hours a day. OWCP paid her appropriate disability compensation for the period April 9 to June 29, 2012.

Appellant filed CA-7 forms seeking compensation for leave without pay from July 2, 2012 to April 19, 2013. On the forms, the employing establishment stated that it did not have any work within her restrictions.

In work certificates dated July 16, 18 and 20, 2012, Dr. James R. Ellis, an attending Board-certified physiatrist, advised that appellant had right S1 radiculopathy and that she was totally incapacitated for work on July 9, 2012. He set forth her restrictions which included no lifting over 10 pounds, limited bending and twisting, option to sit or stand and 1 to 2 hours

² In a December 30, 2008 medical report, Dr. Pabarue advised that appellant could not return to work in her current job. Appellant could work in a part-time regular clerk position that involved answering telephones, desk work and no heavy lifting, twisting or bending.

³ The record indicates that appellant worked as a postal sales and service/distribution associate in the Grand Rapids Processing and Distribution Center.

⁴ The Board notes that an "NRP" file is not contained in the case record.

standing and then 30 minutes sitting and rotation thereafter. In a July 18, 2012 report, Dr. Ellis listed findings on physical examination and diagnosed chronic low back pain and L5-S1 degenerative disc changes. Appellant was status post a 2008 work injury. Dr. Ellis ordered a lumbar magnetic resonance imaging scan to rule out lumbar radiculopathy.

On July 26, 2012 the employing establishment stated that it sent appellant home because it could not identify adequate work available within her restrictions. On July 24 and 31, 2012 OWCP paid her disability compensation for the periods July 2 to 13⁵ and July 14 to 25, 2012, respectively.

In return to work certificates dated August 22, 2012, Dr. Ellis reiterated his diagnosis of right S1 radiculopathy and restrictions. He excused her from work on that date. Dr. Ellis also excused appellant from work to undergo an MRI scan on August 9, 2012. In a September 10, 2012 report, he advised that her current restrictions and leg radiculopathy were caused by her 2008 employment-related disc bulge/herniation. On September 18, 2012 Dr. Ellis revised appellant's lifting restriction due to her worsening back pain that resulted from her bulging/herniated disc.

In reports dated July 18 and September 10 and 18, 2012, William G. Brinkmeier, a physician's assistant, diagnosed right S1 radiculitis, chronic low back pain, degenerative disc changes at L4-5, discogenic low back with degenerative changes at L4-5 and L5-S1 due to appellant's 2008 work-related back injury. He stated that her current restrictions of limited bending and twisting and no lifting over 10 pounds would remain the same.

In an August 9, 2012 report, Dr. Angelo J. Porcari, a Board-certified radiologist, advised that a lumbar MRI scan showed degenerative changes of the disc and facet joints at L4-5 and L5-S1 which did not result in severe spinal canal or foraminal narrowing or impingement of neural elements. He stated that the remainder of the study was unremarkable.

In a November 9, 2012 decision, OWCP denied appellant's claim for disability compensation, finding that she failed to submit rationalized medical evidence to establish that she was totally disabled commencing July 28, 2012 due to her accepted June 1, 2008 employment injury. It noted that, if she sustained a new identifiable exacerbation while performing her new position duties since January 16, 2012, then she would have to file a traumatic injury or occupational disease claim.

By letter dated November 16, 2012, appellant, through her attorney, requested a telephone hearing with an OWCP hearing representative. In a December 3, 2012 letter, counsel contended that it appeared OWCP completely ignored the fact that the employing establishment withdrew her light-duty job. He noted that no loss of wage-earning capacity decision had been issued. Counsel, therefore, contended that the withdrawal of appellant's light-duty job constituted an absolute right for her to return to the compensation rolls.⁶

⁵ OWCP paid appellant four hours of compensation to attend a physician's appointment on July 2, 2012. It did not pay any compensation for July 9, 2012 as there was no medical evidence to support her absence from work. OWCP also did not pay appellant disability compensation for the period July 28, 2012 to April 19, 2013.

⁶ The Board notes that the issue of the withdrawal of appellant's light-duty position under NRP was not raised by appellant before OWCP or adjudicated in the decision currently on appeal.

In reports dated June 2, 2008 to April 1, 2009, Dr. Pabarue obtained a history of the June 1, 2008 employment injury and noted appellant's complaints of low back and leg pain and edema. He listed normal findings on physical examination.

In a June 30, 2008 report, Kim Stark, a physician's assistant, noted appellant's complaint of continuing back pain and listed normal findings on physical examination.

In an August 8, 2008 report, Dr. Jerald W. Henry, a Board-certified radiologist, advised that a lumbar MRI scan revealed mild degenerative disc disease with small central disc protrusions from L4-S1. In a September 18, 2008 report, Dr. Haranath Policherla, a Board-certified neurologist, advised that a nerve and electromyogram study revealed left L5-S1 radiculopathy.

In reports dated August 31, 2012 to April 2, 2013, Dr. Ellis reiterated his diagnoses of right-sided radiculopathy, chronic low back pain and herniated lumbar disc and appellant's work restrictions. In the November 20, 2012, March 1 and April 2, 2013 reports, he advised that her herniated lumbar disc was job related.

An October 12, 2012 report cosigned by Jennifer White, a registered nurse, and Dr. Lisa A. Pullum, a Board-certified anesthesiologist, noted appellant's complaints of back and right leg pain and a history of her medical treatment, family and social background. Dr. Pullum reviewed a lumbar MRI scan and listed physical examination findings. She diagnosed degenerative disc disease and lumbar radiculopathy. In reports dated December 28, 2012 and March 22, 2013, Dr. Pullum advised that appellant had lumbar spondylosis and lumbago.

In a March 4, 2013 report, Mr. Brinkmeier advised that appellant had a herniated lumbar disc with persistent discogenic pain due to her work injury. Appellant also had a persistent right-sided S1 radicular complaint.

In an April 27, 2013 report, Dr. James A. Dehaan, a Board-certified radiologist, advised that an MRI scan of the cervical spine revealed limited spondylosis centrally at C3-4, C4-5 and C5-6. No significant abnormality was identified.

In investigative reports dated March 22 and May 14, 2013 accompanied by supportive exhibits, the employing establishment's Office of the Inspector General conducted an ongoing investigation into whether appellant filed a fraudulent OWCP claim. The report covered the period January 22 to March 22, 2013 and obtained surveillance of her from February 11 to 20, 2013 showing her being more physically active than her medical restrictions allowed in relation to her OWCP claim.

During the February 19, 2013 hearing, appellant's attorney argued that OWCP relied on an MRI scan that it found to be negative for radiculopathy, but that an MRI scan was not the appropriate diagnostic test to determine radiculopathy. He stated that discs protrusions were present on the MRI scan. Counsel further argued that the employing establishment was unable to accommodate appellant's restrictions and withdrew her limited-duty position.

In a May 17, 2013 decision, an OWCP hearing representative affirmed the November 9, 2012 decision. She found that appellant did not submit rationalized medical evidence to establish that her claimed disability was causally related to the June 1, 2008 employment injury. The hearing representative noted that the surveillance video and investigative report showed that

appellant could move with ease in and out of her vehicle and carry and lift various bags and articles. She further found that the evidence did not establish a withdrawal of appellant's limited-duty work.

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.⁷ 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.⁸

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-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 to show that he or she cannot perform such limited-duty work. 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 limited-duty job requirements.⁹

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.¹⁰

ANALYSIS

Appellant claimed that she sustained a recurrence of total disability commencing July 28, 2012 when her limited-duty sales and service distribution associate position was withdrawn by the employing establishment on July 26, 2012. The employing establishment advised that appellant was sent home because it could not identify adequate work available within her restrictions due to residuals of her employment injury. There is no indication that the sales and service distribution associate position was withdrawn due to misconduct or nonperformance of job duties. The Board finds, therefore, that appellant sustained an employment-related

⁷ 20 C.F.R. § 10.5(x).

⁸ *Id.*

⁹ *Richard A. Neidert*, 57 ECAB 474 (2006); *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁰ *James H. Botts*, 50 ECAB 265 (1999).

recurrence of total disability when her modified work was withdrawn by her employer on July 26, 2012.¹¹

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that she sustained a recurrence of disability commencing July 28, 2012 due to her June 1, 2008 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 15, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ *Jackie D. West*, *supra* note 9; *K.S.*, Docket No. 08-2105 (2009).