United States Department of Labor
Employees' Compensation Appeals Board

D.J., Appellant	)	
and	)	**Docket No. 14-961**
	)	**Issued: September 23, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Riverview, MI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 17, 2014 appellant, through her attorney, filed a timely appeal from October 24, 2013 and January 30, 2014 merit decisions of the Office of Workers' Compensation Programs (OWCP) finding that she did not establish a recurrence of disability. 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 sustained a recurrence of disability on July 6, 2012 causally related to her January 21, 2008 employment injury.

FACTUAL HISTORY

On January 30, 2008 appellant, then a 55-year-old clerk, filed a traumatic injury claim alleging that on January 21, 2008 she injured her lower back unloading parcels containing

[1] 5 U.S.C. § 8101 *et seq.*

catalogs. OWCP accepted the claim for lumbosacral strain and a herniated disc at L3-4. Appellant stopped work on January 21, 2008.

On January 30, 2008 Dr. Gregory M. Garvin, who specializes in occupational medicine, released appellant to return to work lifting, pushing and pulling up to five pounds with no prolonged standing or walking more than tolerated. On January 30, 2008 appellant returned to work in a full-time modified position. The position required standing at the window for three to four hours as tolerated, sitting to answer telephones three to four hours as tolerated and limited lifting three to four hours as tolerated. Appellant worked full time in the modified position until November 9, 2009, when she began working six hours a day.

In a decision dated January 29, 2010, OWCP found that appellant did not establish a recurrence of disability beginning November 9, 2009. By decision dated June 14, 2010, it vacated the January 29, 2010 decision and accepted that she sustained an employment-related recurrence of disability such that she could work only six hours a day in her modified position. OWCP further accepted appellant's claim for a herniated disc at L3-4.

On July 6, 2012 appellant filed a notice of recurrence of disability beginning July 6, 2012 causally related to her January 21, 2008 employment injury. She related that her condition had not improved.

In a duty status report dated July 6, 2012, Dr. Phillip Friedman, a Board-certified neurosurgeon, found that appellant could work six hours a day with restrictions. In a disability certificate dated July 6, 2012, he also advised that she was temporarily disabled from employment.

By letter dated July 27, 2012, OWCP requested that appellant submit additional factual and medical information supporting that she sustained a recurrence of disability.

On August 3, 2012 Dr. Friedman related that appellant complained of back pain aggravated by walking. He stated:

> "[Appellant] remains extremely despondent about her progressive disability and her inability to perform her duties in the [employing establishment]. Despite the fact that [the employing establishment] was adherent to restrictions as far as bending and lifting, she found herself having to stand extended periods of time. [Appellant] would be the only one at the window on Saturdays and she would not be given breaks. She would have to be on her feet for six hours and she can no longer deal with the level of pain that she is experiencing."

Dr. Friedman concluded that, "At this time, I believe that [appellant] is disabled by severe mechanical low back pain. While her lumbar disc protrusion did improve, she continues to have progressive dysfunction of the disc itself, which is responsible for her mechanical low back pain."

In a duty status report dated August 3, 2012, Dr. Friedman determined that appellant was totally disabled from employment.

In a statement dated August 15, 2012, appellant asserted that the employing establishment adhered to her work restrictions with the exception of sitting, standing and walking. She related that she had a chair at the window where she worked but if she sat down she would have to get up again to help customers. Appellant maintained that she could not take breaks when needed.

In a statement dated August 15, 2012, Francine Smith, a manager, related that she began working at appellant's location in February 13, 2012 and knew of her work restrictions. She stated:

> "[Appellant] is well accommodated in regards to her restrictions. She has a chair at her station where she sits between customers. Fellow employees as well as members of the management staff lifted any heavy packages and moved any equipment for [her]. While it is true that [appellant] was the only sales and service associate serving customers at the window on several occasions, not once did she come to me and state that she could not serve the customers and needed a break outside of her regularly scheduled breaks or lunch. Her restrictions simply stated 'as needed' which is something that cannot be determined by myself or any member of my staff, only by [her]. Accordingly, to [appellant's] statement, it appears [that she] took it upon herself to work without additional breaks after determining on her own that she had no choice or that we were too short staffed to accommodate her."

In an August 17, 2012 electronic mail message, Daniel G. O'Donnell, a supervisor, maintained that he had not violated appellant's work restrictions. He related:

> "Since [appellant] is a window clerk, I ask the other window associates to help her lift the heavy parcels she cannot lift due to her restrictions. [She] has always taken all the breaks due her on a daily basis which includes [two] 10[-]minute breaks and a lunch. [Appellant] keeps a chair at her counter to rest in between customers to alleviate the constant standing a window clerk does. At no time has [she] ever approached me and state that we were violating her restrictions. At no time has [appellant] approached me and [stated that] she needed to take an extra break to rest. Also when [she] works on Saturday she always asks if she can take a no lunch to get out earlier than scheduled."

In an e-mail message dated August 20, 2012, Charles Thomas, with the employing establishment, questioned how appellant could work as a retail associate given her restriction to sit or stand as needed. He noted that she could always state that she needed to sit.

In a September 5, 2012 duty status report, Dr. Friedman diagnosed mechanical low back pain and opined that appellant was disabled from employment.

By decision dated October 11, 2012, OWCP found that appellant had not established a recurrence of disability beginning July 6, 2012 due to her accepted work injury. It determined that she had not established that her condition worsened such that she was unable to perform her

part-time modified employment. OWCP also noted that appellant had undergone nonemployment-related right hip surgery.

In a progress report dated October 16, 2012, Dr. Friedman described appellant's complaints of low back pain radiating into the hips and difficulty standing or walking. He found that she was disabled from employment. In an October 16, 2012 duty status report, Dr. Friedman diagnosed mechanical low back pain and advised that appellant was totally disabled. On October 30, 2012 he stated:

> "[Appellant] has suffered a work-related injury, which resulted in anatomical alteration with a lumbar disc protrusion resulting in radicular symptoms. While the size of [the] lumbar disc protrusion did improve, [she] at this time continues to have intractable mechanical low back complaints. The etiology of [appellant's] complaints is work related and her continuing disability relates to a work injury."

In a form received by OWCP on November 7, 2012 appellant requested an oral hearing before an OWCP hearing representative. In a letter dated November 27, 2012, she asked that various individuals testify regarding her work duties and the fact that she was unable to take a break. Appellant related that she brought a chair from home because the one provided by the employing establishment was unbalanced. She alleged that management told her she could not take a break while there were a lot of customers so she was unable to sit and stand as required by her medical restrictions. On certain Saturdays, appellant would not be able to take a break for five hours.

In a progress report dated November 28, 2012, Dr. Friedman noted that appellant was experiencing increased pain. He stated, "[Appellant] appears neurologically stable; however, she continues to have evidence of mechanical low back pain." Dr. Friedman recommended a functional recovery program and extended his finding that appellant was disabled. In a duty status report dated January 9, 2013, he found that she was disabled from employment.

At the telephonic hearing, held on February 11, 2013, appellant related that in January 2012 she began getting shots in her back that helped for a few months. In May 2012, she was unable to take breaks because of the shortage of help at the employing establishment and the effects of the shot wore off. Appellant's physician determined that appellant was unable to work beginning July 6, 2012 because of her bulging discs. The hearing representative explained to her the need to submit rationalized medical evidence supporting that her low back condition changed at the time of her alleged recurrence of disability.

In a report dated February 20, 2013, Dr. Friedman diagnosed status post lumbar disc protrusion with regression. He noted that appellant's disc protrusion had improved but that she experienced "progressive mechanical low back complaints related to the progressive degenerative changes [and] dysfunction of the disc itself as a result of the work injury that caused her disc protrusion." Dr. Friedman related that appellant did not believe that the employing establishment complied with her restrictions and that she was thus unable to perform the duties of her employment.

On March 1, 2013 appellant alleged that she provided her own chair at work and often worked through her breaks. She could not take a break when they were busy. Appellant did not ask Mr. O'Donnell for an extra break as she was not able to take normal breaks. She asked to take her lunch at the end of Saturday since her supervisor wanted her to take lunch around the morning break time. In another March 1, 2013 statement, appellant noted that Mr. Thomas confirmed that the employing establishment could not accommodate her sitting requirement. She expressed frustration over having a later break but did not feel that she had to tell every supervisor about her complaints or ask for extra breaks. Appellant contended that management knew they were violating her restrictions by placing her alone at the window.

By decision dated April 8, 2013, the hearing representative affirmed the October 11, 2012 decision.

On July 17, 2013 appellant, through her attorney, requested reconsideration and submitted a June 7, 2013 report from Dr. Friedman, who related that he had treated her beginning in March 2008 for a January 2008 employment injury.[2] Dr. Friedman opined that diagnostic studies showed "a very significant disc protrusion at L3-4 [and] possibly L4-5 on the right." He noted that appellant's radiculopathy improved but that she had continuing mechanical low back pain and hip symptoms due to degenerative disc disease. Appellant underwent a total hip replacement. Dr. Friedman related that her back pain continued and that MRI scan studies showed "extensive disc desiccation, bulging, facet arthrosis with resolution of previous disc herniation." He opined that appellant's condition worsened and that she was disabled due to her intractable pain complaints. Dr. Friedman attributed her low back condition to the employment incident.

By decision dated October 24, 2013, OWCP denied modification of its April 8, 2013 decision.

On November 18, 2013 appellant, through her attorney, again requested reconsideration.

In progress reports dated December 18, 2013, Dr. Friedman related that appellant was "demonstrating increasingly severe chronic pain behavior." In a duty status report of the same date, he stated that she was disabled from employment.

By decision dated January 30, 2014, OWCP denied modification of its October 24, 2013 decision.

LEGAL PRECEDENT

Where 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 establishes that the employee 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

[2] In progress reports dated April 9 and June 4, 2013 progress report, Dr. Friedman provided findings on examination and opined that appellant remained disabled. In progress reports dated August 21 and October 15, 2013, he found that she had declining function but was neurologically stable.

disability and to 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.[3]

OWCP regulations provide that 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.[4] 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.[5]

ANALYSIS

OWCP accepted that appellant sustained lumbosacral strain and a herniated disc at L3-4 as the result of a January 21, 2008 employment injury. Appellant stopped work on January 21, 2008. On January 30, 2008 Dr. Garvin found that she could return to work lifting, pushing and pulling up to five pounds and with no prolonged standing or walking more than tolerated. Appellant returned to a modified position with the employing establishment that required standing at the window three to four hours a day as tolerated and sitting and lifting three to four hours a day as tolerated. OWCP accepted that she sustained a recurrence of disability on November 9, 2009 such that she could only work six hours a day. On July 6, 2012 appellant stopped work and filed a notice of recurrence of total disability.

Appellant alleged that the employing establishment required her to work outside of her restrictions. She related that she had a chair at the window, which she provided, but that she could not always take breaks because she needed to help customers. Appellant indicated that she did not ask for extra breaks and requested lunch at the end of her Saturday shift instead of the morning break time. She did not feel that it was necessary to complain to her supervisors as they knew that they were violating her restrictions by placing her at the window without help.

The Board finds that appellant has not established that she sustained a recurrence of total disability due to a change in the nature and extent of her limited-duty job requirements. In a statement dated August 15, 2012, Ms. Smith related that management had complied with appellant's work restrictions. She advised that employees and management lifted any heavy packages. Appellant did work the window alone but did not request extra breaks. Ms. Smith noted that appellant appeared to believe that she could not take breaks when busy with customers. Mr. O'Donnell asserted that appellant did not complain about any violation of

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

[4] 20 C.F.R. § 10.5(x).

[5] *Id*.

restrictions. He noted that she had a chair to rest in between customers and always took 10-minute breaks twice a day and a lunch each day. On Saturday appellant asked to work without lunch so that she could leave earlier.[6] The Board finds that she has not established that the employing establishment required her to work outside of her restrictions.

The Board further finds that appellant has not established that the nature and extent of her injury-related condition changed on July 6, 2012 such that she could no longer perform her part-time limited-duty assignment. On July 6, 2012 Dr. Friedman found that she could continue to work six hours a day with restrictions. In a disability report of the same date, he determined that appellant was temporarily totally disabled. Dr. Friedman did not provide any rationale for his disability finding or explain the discrepancy between his two reports. Consequently, his opinion is insufficient to meet appellant's burden of proof.[7]

On August 3, 2012 Dr. Friedman related that appellant had to stand for prolonged periods and work without breaks on Saturdays at the employing establishment. He advised that she was totally disabled by significant low back pain. Dr. Friedman noted that appellant's disc protrusion had improved but the disc had progressive dysfunction causing mechanical low back pain. He did not, however, explain how her condition changed such that she was unable to perform the duties of her modified position. Medical conclusions unsupported by rationale are of diminished probative value.[8]

On October 30, 2012 Dr. Friedman related that appellant sustained a lumbar disc protrusion causing radiculopathy due to her employment injury. The disc protrusion improved but that appellant experienced intractable mechanical low back complaints. Dr. Friedman attributed the complaints and disability to her employment injury. He did not, however, provide a firm diagnosis of her condition other than to note that appellant had low back pain. Further, Dr. Friedman did not explain how the accepted work injury resulted in low back pain sufficient to cause disability from employment. Without a firm diagnosis supported by medical rationale, the report is of diminished probative value.[9] Such rationale is particularly necessary given that appellant had other medical conditions, including a hip condition necessitating a total hip replacement.

In a report dated February 20, 2013, Dr. Friedman diagnosed status post lumbar disc protrusion with regression. He stated that, while appellant's disc protrusion had improved, she had increasing degeneration and disc dysfunction due to her employment injury. Dr. Friedman related that she believed that she could no longer be able to perform her modified employment as

[6] In an e-mail Mr. Thomas questioned how appellant could work given her requirement to sit or stand as needed was something that only she could determine. He did not, however, find that she had been provided work outside her restrictions.

[7] *See Albert C. Brown*, 52 ECAB 152 (2000). (Medical conclusions unsupported by rationale are of diminished probative value and insufficient to establish causal relationship).

[8] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[9] *See Samuel Senkow*, 50 ECAB 370 (1999) (finding that, because a physician's opinion of Legionnaires disease was not definite and was unsupported by medical rationale, it was insufficient to establish causal relationship).

management did not comply with her restrictions. He did not, however, provide an independent determination of disability but instead discussed appellant's opinion that she was no longer able to work. A physician's report is of reduced probative value when it is based on a claimant's belief rather than the physician's independent judgment.[10]

In a report dated June 7, 2013, Dr. Friedman discussed appellant's history of a January 2008 work injury and the results of diagnostic studies showing a disc protrusion at L3-4 and possibly L4-5. He found that her radiculopathy improved but that she had degenerative disc disease causing mechanical pain in her low back and hip. Dr. Friedman determined that appellant was totally disabled due to pain and that the low back condition resulted from her employment injury. OWCP, however, did not accept that she sustained degenerative disc disease due to the January 21, 2008 work injury. Where appellant claims that, a condition not accepted or approved by OWCP was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.[11] Dr. Friedman did not provide adequate rationale for his opinion that the work injury resulted in degenerative disc disease. Medical conclusions unsupported by rationale are of little probative value.[12] Appellant did not meet her burden of proof.

The record further contains duty status reports and progress reports dated September 5, October 16, 2012 and December 18, 2013.[13] Dr. Friedman diagnosed low back pain and found that appellant was disabled from employment. He checked "yes" that the history of injury corresponded to that provided on the form of appellant injuring her lower back lifting. The Board has held, however, that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form question on whether the claimant's condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[14] The record further contains progress reports from Dr. Friedman dated July 6, 2012 through December 18, 2013 finding appellant disabled from employment. As he did not address causation in his progress reports, they are insufficient to meet her burden of proof.[15]

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between her claimed condition and her employment.[16] Appellant must submit a physician's report in which the physician reviews those

[10] *See Earl David Seale*, 49 ECAB 152 (1997).

[11] *See JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

[12] *See Willa M. Frazier*, 55 ECAB 379 (2004); *Jimmy H. Duckett*, 52 ECAB 332 (2001).

[13] In a duty status report dated January 9, 2013, Dr. Friedman found that appellant was unable to work but did not provide a diagnosis or causation finding.

[14] *Deborah L. Beatty*, 54 ECAB 334 (2003) (the checking of a box "yes" in a form report, without additional explanation or rationale, is insufficient to establish causal relationship).

[15] *See Conard Hightower*, 54 ECAB 796 (2003).

[16] *D.E.*, 58 ECAB 448 (2007); *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

factors of employment identified by her as causing her condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[17] She failed to submit such evidence and therefore failed to discharge her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability on July 6, 2012 causally related to her January 21, 2008 employment injury.

ORDER

IT IS HEREBY ORDERED THAT January 30, 2014 and October 24, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 23, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

[17] *D.D.*, 57 ECAB 734 (2006); *Robert Broome*, 55 ECAB 339 (2004).