

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

S.M., Appellant)

and)

U.S. POSTAL SERVICE, RADIO CITY)
STATION, New York, NY, Employer)

**Docket No. 14-1581
Issued: January 21, 2015**

Appearances:
Thomas R. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 10, 2014 appellant, through her attorney, filed a timely appeal of a February 6, 2014 Office of Workers' Compensation Programs' (OWCP) merit decision denying her claim for recurrence of disability. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on November 24 and 30, 2009 and February 13 and March 26, 2010.

On appeal counsel argued that appellant had submitted sufficient medical evidence to meet her burden of proof.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on appeal. On March 6, 2010 appellant filed a traumatic injury claim alleging that on November 21, 2009 she injured her lower back and hip pushing a fully loaded cart of mail. OWCP accepted her claim for herniated disc lumbar spine and lumbar radiculopathy on May 3, 2010. It noted that appellant was entitled to up to 45 days of continuation of pay until she returned to light duty. OWCP further noted that she returned to work on November 26, 2009 and later stopped work.

Appellant filed notices of recurrence of disability on June 25, 2010 alleging that she sustained a recurrence of disability on November 24 and 30, 2009, February 13 and March 26, 2010 due to her November 21, 2009 employment injury.

By decision December 1, 2010, OWCP denied appellant's claims for recurrences of disability on the grounds that the medical evidence was not sufficient to meet appellant's burden of proof. Appellant requested an oral hearing on December 8, 2010 before an OWCP hearing representative.

By decision dated May 23, 2011, an OWCP hearing representative stated that appellant had not shown why she was able to return to regular duty only to stop in February 2010. Appellant requested reconsideration on August 1, 2011.

By decision dated November 7, 2011, OWCP reviewed the merits of her claim and denied modification of its prior decisions. Appellant appealed this decision to the Board. The Board issued a decision on November 19, 2012² and found that appellant was not entitled to compensation for November 24 and 25, 2009 and had not established any periods of disability after November 26, 2009 due to her accepted employment injury. The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Dr. Michael Cushner, a Board-certified orthopedic surgeon, examined appellant on December 26, 2012 and diagnosed lumbar disc bulge L4-5 and lumbar radiculopathy. He opined that she was totally disabled due to her back condition from January 28 to February 25, 2013.

Dr. Joshua Lehman, an osteopath, examined appellant on January 17, 2013 and diagnosed lumbar radiculopathy. He stated that there was "a probable causal relationship" between her back pain and her November 21, 2009 employment incident. Dr. Lehman stated that appellant's 2010 magnetic resonance imaging (MRI) scan demonstrated pressure on the L4 nerve root and that her December 2012 MRI scan revealed moderate-to-severe degeneration at L4-5 with disc bulge and mild central canal stenosis as well as degeneration at L5-S1 and L3-4. He stated that it was common after an injury to one level that the levels above and below would experience more stress and earlier degeneration. Dr. Lehman opined that appellant's current pain was related to her 2009 injury.

² Docket No. 12-407 (issued November 19, 2012).

On March 26, 2013 Dr. Cushner supported appellant's total disability from March 26 to April 30, 2013. He examined her on April 17 and 29, 2013 and repeated his previous diagnoses. Dr. Cushner continued to find that appellant was totally disabled for work.

Dr. Lehman provided reports from March 13 to September 12, 2013 describing appellant's November 21, 2009 work incident of pushing an overloaded cart and experiencing a sharp pain in her left hip. He stated that appellant stopped work on March 27, 2010 due to pain. Dr. Lehman diagnosed lumbar radiculopathy and lumbar disc disorder. He stated that the events of November 21, 2009 were a significant contributing factor to appellant's condition. Dr. Lehman stated that she remained unable to work and to perform heavy lifting or bending. He further limited her standing.

In a note dated June 4, 2013, Dr. Cushner diagnosed lumbar disc bulge L4-5 and lumbar radiculopathy. He found decreased sensation in the L4 distribution with activity. Dr. Cushner stated that appellant was totally disabled from June 17 through July 26, 2013. Dr. Jared Bradoff, a Board-certified orthopedic surgeon, examined appellant on June 4, 2013 and noted her history of a work injury in November 2009 pushing a heavy cart of mail and straining her lower back. He stated that the incident described was the competent medical cause of her condition and that her complaints were consistent with her history of injury. Dr. Bradoff stated that appellant was 100 percent disabled. Dr. Cushner completed notes on August 27 and September 5, 2013 diagnosing lumbar disc bulge L4-5 as well as lumbar radiculopathy and finding appellant totally disabled.

Counsel requested reconsideration on November 8, 2013 and argued that appellant had met her burden of proof in establishing a recurrence of disability on or after November 26, 2009. He noted that appellant stopped work on March 27, 2010 after a return to light-duty work. Counsel submitted Dr. Cushner's December 17, 2012 note, Dr. Lehman's January 17, 2013 note, and a report dated October 28, 2013 from Dr. Hal Rosenfeld, a chiropractor, who diagnosed lumbar disc herniation and lumbar radiculopathy.

On October 3 and November 20, 2013 Dr. Stephen Andrus, a Board-certified orthopedic surgeon, listed appellant's history of injury, examined her, and stated that her clinical examination was consistent with bilateral lumbar radiculopathy L4-5 and L5-S1. He stated that she experienced an excellent clinical response to left-sided epidural injection at L5 and S1.

Dr. Cushner examined appellant on January 14, 2014 and repeated his earlier findings and conclusions.

By decision dated February 6, 2014, OWCP denied modification of its prior decisions finding that appellant had not submitted the necessary medical opinion evidence to meet her burden of proof.

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. 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.³ Appellant has the burden of establishing by the weight of the substantial, reliable, and probative evidence, a causal relationship between her recurrence of disability commencing after November 26, 2009 and her November 21, 2009 employment injury.⁴ This burden includes that necessity of furnishing 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 employment factors and supports that conclusion with sound medical reasoning.⁵ A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.⁶ Medical rationale includes a physician's detailed opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated disability for work. The opinion of the physician must be based on a complete factual and medical background of the claim, must be one of reasonable medical certainty, and must be supported by medical reasoning explaining the nature of the relationship between the diagnosed condition and specific periods of disability alleged.⁷

ANALYSIS

The Board previously found that appellant was not entitled to wage-loss compensation for November 24 and 25, 2009. Following the Board's November 19, 2012 decision, appellant continued to submit reports from Dr. Cushner who examined appellant on December 26, 2012 and diagnosed lumbar disc bulge L4-5 and lumbar radiculopathy. Dr. Cushner opined that appellant was totally disabled due to her back condition from January 28, 2013 to January 14, 2014. The Board finds that Dr. Cushner has not provided the necessary medical opinion evidence to establish a causal relationship between appellant's accepted back injury on November 26, 2009 and her claimed periods of disability. While Dr. Cushner has noted that appellant sustained back injury due to her employment and provided consistent diagnoses of lumbar disc bulge L4-5 and lumbar radiculopathy, he has not explained why he believed that appellant was incapable of returning to full-duty work on November 26, 2009 following her employment injury and why her disability for work would spontaneously increase after that date resulting in a recurrence of disability. Without medical reasoning explaining the biomechanical process resulted in appellant's increased disability for work, Dr. Cushner's reports are not sufficiently rationalized to meet appellant's burden of proof in establishing a recurrence of disability on or after November 26, 2009.

³ 20 C.F.R. § 10.5(x).

⁴ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-9 (1982).

⁵ *See Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

⁶ *T.F.*, 58 ECAB 128 (2006).

⁷ *A.D.*, 58 ECAB 149 (2006).

Dr. Lehman also submitted a series of reports diagnosing lumbar radiculopathy. He described appellant's November 21, 2009 work incident of pushing an overloaded cart and experiencing a sharp pain in her left hip. Dr. Lehman diagnosed lumbar radiculopathy and lumbar disc disorder. He stated that there was "a probable causal relationship" between her back pain and her November 21, 2009 employment incident and that the events of November 21, 2009 were a significant contributing factor to appellant's condition. The Board has held that medical opinions that are speculative or equivocal in character diminish the probative value of the medical opinion.⁸ Dr. Lehman did not offer a clear opinion that appellant's current condition and disability was due to her accepted employment injury, instead stating that it was "probable" that there was a causal relationship. As he did not submit a definitive opinion, his reports are not sufficient to meet appellant's burden of proof.

Dr. Bradoff noted appellant's history of a work injury in November 2009 pushing a heavy cart of mail and straining her lower back. He stated that the incident described was the competent medical cause of her condition and that her complaints were consistent with her history of injury. Dr. Bradoff provided an appropriate history of injury and offered an opinion that this incident was the cause of her condition. He did not, however, provide sufficient medical reasoning to support that appellant sustained a recurrence of total disability on or after November 26, 2009 due to her accepted employment injury. Dr. Bradoff did not explain why he believed the employment injury resulted in continuing disability. Without medical rationale, his report is not sufficient to meet appellant's burden of proof in establishing a recurrence of disability.

Dr. Andrus, listed appellant's history of injury and stated that her clinical examination was consistent with bilateral lumbar radiculopathy L4-5 and L5-S1. This report is not sufficient to meet appellant's burden of proof because Dr. Andrus did not provide an opinion on the causal relationship between her accepted employment injury and her alleged recurrence of disability.

Appellant also submitted a report from Dr. Rosenfeld, chiropractor, diagnosed lumbar disc herniation and lumbar radiculopathy. Under FECA a chiropractor is a physician only to the extent that the reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.⁹ Dr. Rosenfeld indicated that appellant's spine had been injured, but he did not diagnose a subluxation of the spine and did not provide x-rays demonstrating such a subluxation of the spine. Accordingly, the Board finds that Dr. Rosenfeld does not qualify as a physician under FECA. Dr. Rosenfeld's reports are not considered probative medical evidence to establish a causal connection between a diagnosed medical condition and the accepted employment incident.

⁸ A.G., Docket No. 12-659 (issued August 22, 2012); *D.D.*, 57 ECAB 734, 738 (2006).

⁹ Section 8101(2) of FECA provide as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners with the scope of their practice as defined by State law. The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. *See Merton J. Sills*, 39 ECAB 572, 575 (1988); *P.R.*, Docket No 14-1007 (issued August 13, 2014).

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant failed to submit the necessary medical opinion evidence to establishing a recurrence of disability due to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 21, 2015
Washington, DC

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

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

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