

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

K.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fort Lauderdale, FL, Employer**

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**Docket No. 07-354
Issued: July 9, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 21, 2006 appellant filed a timely appeal from a September 14, 2006 merit decision of the Office of Workers' Compensation Programs which denied her claim and an October 30, 2006 decision which denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that she was totally disabled for the period beginning February 1, 2004; and (2) whether the Office properly refused to reopen her claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 20, 1998 appellant, then a 37-year-old clerk, sustained an employment-related lumbar strain when her chair collapsed and she fell. She came under the care of Dr. Philip F. Averbuch, a Board-certified orthopedic surgeon, who advised on August 10, 1998 that appellant

could return to limited duty. A July 9, 1998 bone scan demonstrated no occult fracture of the spine or hips. An August 25, 1998 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated degenerative and hypertrophic changes at T11-12 with a component of left paracentral disc herniation and compression of the thecal sac and disc desiccation at L5-S1 with left paracentral disc herniation and hypertrophy of the articular facets and sclerosis contributing to encroachment upon the neural foramina and other milder degenerative changes. In a September 3, 1998 report, Dr. Averbuch advised that the MRI scan did not show a true herniated disc.

By report dated September 29, 1998, Dr. Martin Lesser, a Board-certified neurologist, noted appellant's complaints of left-sided pain and advised that her weight was 300 pounds. Lower extremity electromyography (EMG) on October 8, 1998 was mildly abnormal consistent with but not diagnostic of left S1 radiculopathy. Dr. Jay Lasner, Board-certified in anesthesiology and pain medicine, began a series of epidural injections on January 28, 1999. A March 12, 1999 MRI scan of the lumbar spine revealed no significant change and a lumbar myelogram on April 8, 1999 demonstrated a herniated disc at L5-S1 with minor disc bulging at L3-4 and L4-5. On May 25, 1999 Dr. Averbuch advised that appellant could return to full duty on May 26, 1999. Lumbar spine discography on August 6, 1999 demonstrated annular tears at L5-S1 "to the degenerated pattern of this disc."¹

By report dated August 14, 2002, Dr. Lasner noted that he had not seen appellant since August 1999. He reported appellant's complaints of pain and diagnosed morbid obesity and a herniated degenerated disc at L5-S1 with left leg radiculopathy, rule out facet arthropathy. In reports dated December 30, 2002 and September 12, 2003, Dr. Lasner recommended pain management.

In November 2003, appellant came under the care of Dr. Matthew C. Deutscher, a Board-certified physiatrist, and stopped work on November 29, 2003. Dr. Deutscher provided reports dated November 18 and December 2, 2003 in which he noted a history that she injured her back at work and presented with symptoms of radiating pain into the left lower extremity. Straight leg raising was negative. Examination findings included antalgic gait and tenderness on examination of the left buttock. Dr. Deutscher diagnosed L5-S1 herniated nucleus pulposus (HNP) and obesity. By report dated December 8, 2003, Debbie Layton-Tholl, Psy.D., a licensed clinical psychologist, described the history of injury and appellant's past medical treatment. She provided psychological test results and stated that appellant was being evaluated prior to a pain management program. Dr. Layton-Tholl diagnosed pain disorder with both psychological factors and general medical condition, adjustment disorder mixed with anxiety and depression, morbid obesity and herniated discs and advised that psychosocial stressors were pain and decreased function and that appellant needed psychotherapy. In an attending physician's report dated December 19, 2003, Dr. Deutscher diagnosed depression secondary to L5-S1 HNP with S1 radiculopathy, low back pain and obesity. He checked the "yes" box, indicating that the diagnosed conditions were employment related and advised that appellant was totally disabled

¹ On March 28, 2002 appellant filed a Form CA-2a, recurrence of disability claim, stating that her symptoms of back pain were the same and could be unbearable. She advised that the date of recurrence was March 27, 2002 but did not stop work. By letter dated July 23, 2002, the Office advised appellant that her claim remained open for medical treatment.

for the period December 1 through 31, 2003 and that it was unknown when she could return to work.

On December 31, 2003 appellant submitted a claim for compensation for the period December 1 to 31, 2003 and on February 5, 2004 for the period January 1 to 31, 2004. By letters dated February 11 and April 7, 2004, the Office informed her of the evidence needed to support these claims.

Dr. Deutscher submitted reports and therapy notes dating January 7 to March 4, 2004. In a January 20, 2004 report, he related that appellant was first seen by him on November 18, 2003 and on December 1, 2003 he reported that she did not go to work because of increased pain. Examination on December 2, 2003 and January 7, 2004 revealed significant tenderness throughout her buttocks, lumbosacral and thoracic hip area with an antalgic gait to the left. Dr. Deutscher stated that appellant started a pain management program on December 8, 2003 and diagnosed L5-S1 HNP with S1 radiculopathy and obesity and advised that she could not work. In treatment notes dating January 5 to February 23, 2004, Dr. Layton-Tholl advised that appellant was seen for individual psychotherapy and relaxation training. A functional capacity evaluation dated March 9, 2004 noted that appellant complained of low back pain with repetitive bending, squatting, stair climbing and maneuvering a 200-pound cart. The report concluded that she could do medium work exerting 20 to 50 pounds occasionally, 10 to 25 pounds frequently or up to 10 pounds constantly. An April 30, 2004 MRI scan of the lumbar spine demonstrated posterior disc protrusions into the central canal at T11-12, L4-5 and L5-S1 with posterior disc bulging in the neural canals and bilateral neural canal narrowing at all levels between T10 and S1 except at T12-L1 with desiccation of the T11-12 disc, bilateral facet joint disease at L4-5 and L5-S1, impingement on the L4 and L5 nerve roots within their neural canals bilaterally and no significant central spinal stenosis.

In decisions dated May 18, 2004, the Office found that appellant did not sustain recurrences of disability for the period December 1 through 31, 2003 or January 1 through 31, 2004. On June 14, 2004 appellant requested a review of the written record and submitted additional reports from Dr. Deutscher dated from May 20 through August 26, 2004. Dr. Deutscher reiterated his findings and advised that appellant could not work. He noted that appellant worked as a letter sorter/box clerk and was being treated for a 1998 work injury and described her job duties of lifting up to 70 pounds, prolonged standing, constant bending and repetitive activities, relating that “[appellant] states [that] she cannot do these and I do not feel she can do these either. I would recommend sedentary duty for her.” In a June 9, 2004 report, Dr. Deutscher addressed the April 30, 2004 MRI scan findings and opined that “because of [appellant’s] complaints and physical condition and spinal pathology, I feel she cannot do her job as a box clerk as she described to me.”

By decision dated December 17, 2004, an Office hearing representative affirmed both May 18, 2004 decisions.²

On September 21, 2005 appellant submitted a claim for compensation for the period March 2004 through September 2005 and submitted additional medical evidence including

² Appellant did not file an appeal with the Board of this decision.

reports from Dr. Deutscher dated December 7, 2004 to January 31, 2006 in which he noted that appellant was markedly obese and reiterated his diagnoses regarding her back. Dr. Deutscher stated that appellant's pain was from the 1998 employment injury, continued to advise that she was unable to work and recommended postrehabilitation training. In an October 8, 2005 attending physician's report, he checked the "yes" box, explaining that appellant's diagnosis of L5-S1 HNP was documented on an April 2004 MRI scan and advised that she must lose weight.

In a May 17, 2006 letter, the Office informed appellant that the accepted conditions were back contusion and lumbar strain and that the medical evidence submitted did not explain how the L5-S1 HNP with radiculopathy was causally related to the May 20, 1998 employment injury. The letter explained that a physician's opinion was crucial to her claim and outlined what the medical report should contain. In a May 22, 2006 report, Dr. Deutscher reiterated his diagnoses and conclusions and by report dated June 22, 2006, noted that appellant reported that "she injured her back at work after a fall." He advised that his current examination demonstrated consistent pain behavior and tenderness on palpation of the lumbosacral area, on paraspinal motion, antalgic gait and impaired functional mobility. Dr. Deutscher reiterated the diagnoses and MRI scan findings and stated that appellant had a history of morbid obesity which was "apparently" exacerbated by her pain and restricted movement, again concluding that she could not work. On form reports dated June 28, 2006, he advised that appellant demonstrated criteria of a disorder of the spine with compromise of a nerve root, a neuron-anatomic distribution of pain, limited range of motion of the spine and motor loss with painful dysesthesia and that appellant needed to change her position or posture more than once every two hours and was unable to ambulate effectively. Dr. Deutscher checked that his opinion was based on his direct observation and treatment, physical examination, historical medical records, clinical testing, her report, his own experience and background and imaging studies.

In a September 14, 2006 decision, the Office found that appellant was not entitled to compensation benefits for the period commencing February 1, 2004.

On October 18, 2006 appellant requested reconsideration and submitted an October 10, 2006 report in which Dr. Deutscher reiterated that appellant's pain and impairment were secondary to the May 20, 1998 employment injury. By decision dated October 30, 2006, the Office denied appellant's reconsideration request on the grounds that she failed to submit evidence or argument sufficient to warrant merit review. The Office noted that Dr. Deutscher's October 10, 2006 report was cumulative in nature.

LEGAL PRECEDENT -- ISSUE 1

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally

related to the employment injury. Moreover, sound medical reasoning must support the physician's conclusion.³

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury. In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship. While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.⁴

Under the Federal Employees' Compensation Act⁵ the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁶ Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act,⁷ and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁸ Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁹

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁰ Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.¹¹

³ *Ricky S. Storms*, 52 ECAB 349 (2001).

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *See Prince E. Wallace*, 52 ECAB 357 (2001).

⁷ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁸ *Donald E. Ewals*, 51 ECAB 428 (2000).

⁹ *Tammy L. Medley*, 55 ECAB 182 (2003); *see Donald E. Ewals*, *supra* note 8.

¹⁰ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹¹ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar strain and back contusion on May 20, 1998. Appellant was released to return to limited duty in August 1998 and to full duty on May 26, 1999. She did not submit any medical reports regarding her back condition between August 1999 and August 2002 when Dr. Lasner noted her complaints of pain and diagnosed morbid obesity and a herniated degenerated disc at L5-S1 with left leg radiculopathy.

The medical evidence submitted regarding the claimed disability beginning February 1, 2004 consists of reports from Dr. Deutscher.¹² Appellant's treatment with Dr. Deutscher began on November 18, 2003 when he noted a history that she injured her back at work and presented with symptoms of radiating pain into the left lower extremity. Dr. Deutscher diagnosed L5-S1 HNP and obesity. In subsequent reports, he related a history that appellant injured her back after a fall at work, advised that she could not work and concluded that her May 20, 1998 employment injury attributed to her back pain, restricted movement and obesity.¹³ Dr. Deutscher related that, when appellant was injured in 1998, she was working as a letter sorter/box clerk and described her job duties as lifting up to 70 pounds with prolonged standing and constant bending which he advised that she could not do. He opined that the 1998 injury caused appellant pain and recommended a sedentary position. In an attending physician's report dated October 8, 2005, Dr. Deutscher checked the "yes" box indicating that the diagnosed conditions were employment related, explaining that her diagnoses of L5-S1 HNP was documented on an April 2004 MRI scan. He also advised that she must lose weight.

In form reports dated June 28, 2006, Dr. Deutscher checked a number of statements advising that appellant demonstrated criteria of a disorder of the spine with compromise of a nerve root, a neuron-anatomic distribution of pain, limited range of motion of the spine and motor loss with painful dysesthesia and that she needed to change her position or posture more than once every two hours and was unable to ambulate effectively. He checked that his opinion was based on his direct observation and treatment, physical examination, historical medical records, clinical testing, appellant's report, his own experience and background and imaging studies.

Appellant submitted no medical evidence between August 1999 and August 2002. The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.¹⁴ In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's

¹² Appellant also submitted reports from Dr. Layton-Tholl, a psychologist, dating from December 8, 2003 to February 23, 2004. Dr. Layton-Tholl performed psychological testing and counseling while appellant was in a pain management program. She, however, provided no opinion regarding the cause of appellant's back condition and medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *Willie M. Miller*, 53 ECAB 697 (2002). The record does not indicate that the pain management program was authorized.

¹³ Regarding the latter, it is noted that appellant weighed 300 pounds in July 1998, a few months after her May 1998 employment injury.

¹⁴ *Rickey S. Storms*, *supra* note 3.

conclusion of a causal relationship.¹⁵ As there was an absence in the case record of evidence of bridging symptoms between Dr. Lasner's August 1999 report and his report dated December 2002, the evidence in the record does not support that appellant had any back complaints during that period.

The Board finds that Dr. Deutscher's reports are insufficient to establish that appellant's condition and disability on or after February 1, 2004 were caused by the May 20, 1998 employment injury. The Office did not accept the condition of herniated disc or any condition other than a lumbar strain and back contusion. Dr. Deutscher did not exhibit a thorough knowledge of appellant's work injury and failed to provide a rationalized medical opinion explaining how appellant's condition and disability in February 2004 were related to the accepted work injury. His reports of the history of injury merely indicated that appellant fell at work without expressing specific knowledge of the fall from her chair or any explanation of the process of how this fall caused her diagnosed HNP with radiculopathy or disability from work.¹⁶ Furthermore, Dr. Deutscher did not explain why, with the absence of medical findings between 1999 and 2002, appellant's work-related lumbar strain had progressed to total disability from work.¹⁷ Appellant has not submitted the necessary rationalized medical evidence to substantiate that her diagnosed condition and disability on or after February 1, 2004 is causally related to the May 20, 1998 employment injury.¹⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.¹⁹ Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.²⁰ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.²¹ Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a

¹⁵ *Id.*

¹⁶ See generally *Bonnie A. Contreras*, 57 ECAB ____ (Docket No. 06-176, issued February 7, 2006).

¹⁷ *Ricky S. Storms*, *supra* note 3.

¹⁸ See *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹⁹ 5 U.S.C. § 8128(a).

²⁰ 20 C.F.R. § 10.606(b)(2).

²¹ 20 C.F.R. § 10.608(b).

case.²² Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.²³

ANALYSIS -- ISSUE 2

On her form requesting reconsideration, appellant merely checked that she was requesting reconsideration. Appellant, therefore, did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).²⁴

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted a report dated October 10, 2006 from Dr. Deutscher. The Board finds that this report is cumulative and repetitive of Dr. Deutscher's numerous previous reports as it merely restated his opinion that appellant's pain and impairment were secondary to the May 20, 1998 employment injury. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²⁵ Appellant, therefore, did not constitute relevant and pertinent new evidence not previously considered by the Office and the Office properly denied her reconsideration request.²⁶

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she was entitled to wage-loss compensation for the period beginning February 1, 2004 causally related to her employment injury and that the Office properly denied her request for reconsideration.

²² *Helen E. Paglinawan*, 51 ECAB 591 (2000).

²³ *Kevin M. Fatzer*, 51 ECAB 407 (2000).

²⁴ 20 C.F.R. § 10.606(b)(2).

²⁵ *Roger W. Robinson*, 54 ECAB 846 (2003).

²⁶ The Board notes that appellant submitted additional evidence subsequent to the October 30, 2006 decision of the Office. The Board, however, cannot consider this evidence as its review of the case is limited to that evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2c.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 30 and September 14, 2006 be affirmed.

Issued: July 9, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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