

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

T.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Carol Stream, IL, Employer**

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**Docket No. 09-145
Issued: August 3, 2009**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 20, 2008 appellant, through counsel, filed a timely appeal from a September 5, 2008 decision of the Office of Workers' Compensation Programs which denied her recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant established a recurrence of disability causally related to an October 20, 2004 employment injury commencing November 1, 2005.

FACTUAL HISTORY

On October 20, 2004 appellant, then a 45-year-old flat sorting machine clerk, sustained injury to her right hip while lifting a tub out of a sorting machine. She stopped work on the date of the injury. On November 2, 2004 the Office accepted appellant's claim for a right hip strain.

On September 6, 2005 the employing establishment offered appellant a modified assignment (limited duty) as a rewrap clerk, with duties of rewrapping unmachinable and

damaged mail. The physical requirements of this position were frequent sitting; standing/walking two to three minutes occasionally; occasional lifting of up to 15 pounds; no pulling/pushing over 15 pounds; no carrying over 5 pounds; no overhead reaching; occasional reaching at floor level and stooping occasionally. Appellant accepted the position.

On November 14, 2005 appellant filed a recurrence of disability claim as of November 1, 2005 causally related to her October 20, 2004 injury. She stopped limited-duty work on November 9, 2005. After appellant returned to work, she experienced acute-to-severe pain and discomfort in her right lower extremity. In a November 8, 2005 work status form, Dr. Daniel A. Troy, a Board-certified orthopedic surgeon, diagnosed sacroiliitis low back pain and indicated that appellant could not return to work. On December 13, 2005 he advised that appellant still complained of significant discomfort to the low back which he isolated to the S1 joint. Dr. Troy noted that a magnetic resonance imaging (MRI) scan showed no significant foraminal or spinal stenosis. He noted that appellant would follow up with Dr. Howard S. An, an orthopedic surgeon.

By decision dated January 18, 2006, the Office denied appellant's recurrence of disability claim. It found that the medical evidence was not sufficient to establish her claim.

In a January 3, 2006 medical report, Dr. An listed an impression as "mostly mechanical low back pain with some intermittent right-sided pain." He found no evidence of any significant spinal stenosis or disc herniation. Dr. An recommended pain management with nonnarcotic analgesics and perhaps a facet injection to the right L5-S1 level. He noted that appellant might have sacroiliitis on the right side. Dr. An stated, "At this time, [appellant] is unable to work due to her symptoms of pain, however with proper treatment and pain reduction she should be able to resume work in about six to eight weeks.

In a January 31, 2006 report, Dr. Troy noted that appellant was treated for sacroiliac joint dysfunction secondary to a work-related injury sustained on October 20, 2004. Appellant had been placed off duty since November 8, 2005 due to her worsening symptoms. Dr. Troy advised that she was not a good surgical candidate and was being referred to a pain clinic for pain management. On February 7, 2006 he noted that he had recently discharged appellant from his care. Dr. Troy noted that she had not improved with treatment. He noted that appellant was unable to work secondary to pain in the S1 joint and low back area. Appellant was being referred to a pain medication clinic.

On February 9, 2006 appellant requested an oral hearing.

In a March 16, 2006 report, Dr. Mahesh Shah, a Board-certified internist, noted that he first examined appellant on October 21 2004, the day after she sustained an injury to her right hip. He treated her for right hip sprain, which Dr. Troy diagnosed as sacroiliac dysfunction. Dr. Shah noted that appellant returned to work in May 2005 for four hours a day performing sedentary work and worked until June 21, 2005. Appellant again returned to work in September 2005 but stopped on November 8, 2005. Dr. Shah noted that she did have a preexisting condition of scoliosis for which she had surgery in 1968 or 1969. Appellant's x-rays showed no sign of acute fracture or dislocation but did reveal degenerative changes in the spine. Since she developed her hip condition, she has been treated with a course of physical therapy and

medication but her condition persisted. Appellant's discomfort became worse with prolonged standing, lifting, bending, walking and sitting. Dr. Shah opined that she was unable to work due to her symptoms. He advised that appellant's sacroiliac dysfunction was related to the October 20, 2004 injury and was likely exacerbated from lifting heavy objects at work.

At a hearing held on December 20, 2006, appellant testified that her work duties on September 6, 2005 consisted of repairing and taping letters for four hours a day. She sometimes had to twist and bend to pick up tubs of mail.

In a January 16, 2007 report, Dr. Jacob Salomon, a surgeon, noted that appellant had been unable to work since November 9, 2005 due to her right hip condition. He noted that she returned to work in September 2005 and that her duties involved limited-duty assignments for four hours a day working at the Nixie table. This involved sitting, standing, and occasionally twisting, lifting, bending, pushing, pulling and repairing damage to mail and flats. Appellant's discomfort worsened with prolonged standing, lifting, twisting, bending, walking and sitting with pain, numbness and tingling in the right lower extremity. Dr. Saloman stated that appellant's back condition was related to her accepted right hip condition and work duties as a postal clerk. He opined that her lower back pain was an exacerbation of a chronic pathology of the injury of October 20, 2004.

By decision dated March 22, 2007, an Office hearing representative found that appellant failed to establish that she sustained a recurrence of disability commencing November 1, 2005 due to her accepted employment injury. The hearing representative found that the evidence did not show a worsening of appellant's injury or contain a rationalized medical opinion explaining how appellant's condition prevented her from performing her light-duty job requirements.

By letter dated April 27, 2007, appellant requested reconsideration. In an April 17, 2007 report, Dr. Salomon contended that the medical evidence was sufficient to show a worsening of the condition. He also noted that appellant's treating physician noted that she could not work due to pain. Dr. Salomon opined that her disability was a natural deterioration of her condition without any intervening causes. He requested that the recurrence be accepted.

On July 30, 2007 appellant was referred by the Office to Dr. Hythein P. Shadid, a Board-certified orthopedic surgeon, for a second opinion.¹ In an August 29, 2007 report, Dr. Shadid diagnosed degenerative arthritis of appellant's lumbosacral spine and mechanical low back pain. He advised that her degenerative arthritis was not causally related to the October 20, 2004 employment injury for which she was diagnosed with a hip strain and sacroiliitis. Dr. Shadid opined that both of these conditions were transient and that the physiologic process involved in a strain resolved within 6 to 12 weeks and would no longer continue. He noted that appellant had a preexisting back condition. While appellant sustained a hip or lower back strain on October 20, 2004 that possibly involved the sacroiliac region, such condition was only temporary. Dr. Shadid opined that appellant was able to return to work but, due to her chronic arthritis, she should be limited to sedentary work.

¹ The Office issued a decision on August 9, 2007 denying appellant's reconsideration request.

In a September 19, 2007 report, John B. McClellan, M.D., diagnosed scoliosis and chronic right low back pain. He instructed appellant to remain off work. On October 15, 2007 Dr. McClellan indicated that appellant could return to work.

The Office found a conflict in medical opinion between appellant's attending physician and Dr. Shadid. On January 9, 2008 it referred appellant to Dr. Jaroslaw Dzwinyk, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a February 4, 2008 report, Dr. Dzwinyk diagnosed a lumbosacral strain and healed lateral malleolar fracture right ankle. Although there were multiple references to a hip strain, he suspected that this referred to the pain in appellant's lower back, buttock and lateral aspect of the right hip. Dr. Dzwinyk noted that the current examination of the right hip revealed no abnormalities. Appellant's symptoms were explained by lumbar spondylosis between L3 and S1 which preexisted the accepted injury and may have been temporarily aggravated. Dr. Dzwinyk noted that the medical records did not support any type of new injury to the low back causally related to the October 20, 2004 injury. While appellant's preexisting back problem was aggravated by the injury, such aggravation was temporary and resolved within three to six months at the latest. Dr. Dzwinyk noted the lack of any acute findings on multiple MRI scans of the lower back, sacroiliac joints and right hip. He advised that appellant was able to return to work on a full-time basis. Dr. Dzwinyk noted that his examination revealed symptoms and pain behavior out of proportion to the objective findings.

In a January 22, 2008 note, Dr. Salomon reviewed Dr. Shadid's report and disagreed with his opinion. He noted that appellant had been constant in her complaints regarding her S1 joint dysfunction. Dr. Salomon noted that people heal at different rates and as one gets older it takes longer to heal.

On June 1, 2008 appellant requested reconsideration.

In a decision dated September 5, 2008, the Office denied modification of the decisions.

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.² A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which he claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish 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 the employment injury and

² 20 C.F.R. § 10.5(x); R.S., 58 ECAB ____ (Docket No. 06-1346, issued February 16, 2007).

supports that conclusion with sound medical reasoning.³ Where no such rationale is present, medical evidence is of diminished probative value.⁴

The Federal Employees' Compensation Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.⁵ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office must appoint a third physician to make an examination. This is called a referee examination and it is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁶ It is well established that, when a case is referred to an impartial specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.⁷

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of disability commencing November 1, 2005 causally related to her October 20, 2004 employment injury.

Dr. Salomon noted that appellant was unable to work since November 9, 2005. He did list her employment duties and noted that her discomfort tended to worsen with prolonged standing, lifting, twisting, bending, walking and sitting. Dr. Salomon noted that appellant sustained a natural worsening of her condition with no intervening causes. In light of his opinion, the Office referred appellant for a second opinion to Dr. Shadid, who opined that appellant's October 20, 2004 work-related aggravation of her degenerative arthritis of her lumbosacral spine and mechanical back pain would have resolved within 6 to 12 weeks. In order to resolve the conflict between the opinion of Dr. Salomon and that of Dr. Shadid, the Office referred appellant to Dr. Dzwinyk for an impartial medical examination. In his February 4, 2008 opinion, Dr. Dzwinyk listed current diagnoses as lumbosacral strain and healed lateral malleolar fracture right ankle. He noted that appellant's current symptoms may be explained by lumbar spondylosis between L3 and S1 which preexisted the injury and may have been temporarily aggravated. Dr. Dzwinyk noted that the medical records did not support any type of new injury in the lower back causally related to the injury of October 20, 2004, that any aggravation was temporary and should have resolved within three to six months from the date of the injury or April 2005 at the latest. He noted that appellant could return to work full time. Dr. Dzwinyk provided a well-rationalized opinion wherein he explained his conclusion that any injury or

³ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁴ *See Ronald C. Hand*, 49 ECAB 113 (1997); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁵ 5 U.S.C. §§ 8101-8193, 8123(a).

⁶ 20 C.F.R. § 10.321.

⁷ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

aggravation caused by the employment injury on October 20, 2004 was temporary and would have resolved by April 2005. He did not believe appellant sustained a recurrence.

Appellant submitted a January 22, 2008 report of Dr. Salomon who noted his concerns with the second opinion physician, Dr. Shadid. Dr. Salomon noted that appellant has been constant in her complaints regarding her S1 joint dysfunction that movement is painful. He contended that people heal at different rates. However, reports from a physician such as Dr. Salomon who was on one side of a medical conflict resolved by an impartial specialist are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.⁸ The additional report from Dr. Salomon does not contain any new information or rationale sufficient to overcome or create a new conflict. The remaining medical evidence is not sufficient to overcome the special weight given to the well-rationalized opinion of the impartial medical examiner.⁹

CONCLUSION

The Board finds that appellant has not established a recurrence of disability causally related to her October 20, 2004 employment injury on or about November 1, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 5, 2008 is affirmed.

Issued: August 3, 2009
Washington, DC

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

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

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

⁸ See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁹ See *Gloria J. Godfrey*, *supra* note 7.