United States Department of Labor
Employees' Compensation Appeals Board

D.K., Appellant	)	
and	)	**Docket No. 15-0665**
	)	**Issued: August 10, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Harrisburg, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 11, 2015 appellant, through counsel, filed a timely appeal from August 26 and December 17, 2014 merit decisions of the Office of Workers' Compensation Programs (OWCP). 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 met her burden of proof to establish a recurrence of disability on June 17, 2014.

FACTUAL HISTORY

On July 10, 2012 appellant, then a 55-year-old mail clerk, filed a traumatic injury claim alleging that on July 7, 2012 she experienced low back and right leg pain as a result of bending down and lifting a parcel weighing approximately 15 to 20 pounds. She stopped work on

[1] 5 U.S.C. § 8101 *et seq.*

July 10, 2012. On August 11, 2012 appellant returned to part-time light duty and on September 10, 2012 she returned to full-time light duty.[2] OWCP accepted her claim for aggravation of L4-5 disc herniation.

On May 28, 2013 appellant stopped work again and filed a claim for recurrence. OWCP accepted her recurrence claim because the employing establishment no longer had work available for her within her restrictions. It reinstated appellant's disability compensation benefits. On December 13, 2013 OWCP placed her on the periodic rolls.

On January 8, 2014 OWCP referred appellant, along with the medical record and statement of accepted facts (SOAF), to Dr. Peter A. Feinstein, a Board-certified orthopedist, for a second opinion examination to determine whether appellant's recurrence had ended or lessened or whether she was capable of returning to work. In a February 14, 2014 report, Dr. Feinstein reviewed the statement of accepted facts and the medical record. Appellant related that her lumbar condition felt the same as it did six months ago and she felt that she could not return to work. Upon examination, Dr. Feinstein observed that her neck and upper extremities appeared to be grossly intact. He noted that appellant's right paravertebral, buttocks, and sacroiliac (SI) joint area showed discomfort to palpation, with minimal discomfort on the left side. Dr. Feinstein stated that forward flexion of her lumbar spine was limited to approximately 60 degrees, with some right paravertebral muscular discomfort. Straight leg raise testing was positive in both lower extremities radiating to the right buttocks, even in the left lower extremity. Dr. Feinstein stated that appellant's aggravation had not ended or lessened. He reported that she was capable of returning to work at a sedentary capacity, with the option to sit and stand at her own discretion, for four hours per day. Dr. Feinstein recommended that appellant continue taking anti-inflammatories and muscle relaxants.

In a February 14, 2014 work capacity evaluation form, Dr. Feinstein reported that appellant could work four hours per day with restrictions of sitting, walking, and standing for two hours, pulling, and lifting for one hour, and no bending, stooping, twisting, squatting, or kneeling. He stated that she needed to be able to sit and stand at her discretion.

In reports dated March 27 to May 29, 2014, Dr. Avner R. Griver, Board-certified in physical medicine and rehabilitation, related appellant's complaints of constant low back and left leg pain as a result of a July 7, 2012 injury when she bent down to lift an object at work. He reviewed her history and reported that overall her low back pain had not significantly improved. Dr. Griver noted that appellant returned to limited duty, but stopped work again in June 2013. Upon examination of the lumbar spine, he observed tenderness of the lumbar paraspinal area bilaterally and left sciatic notch tenderness, but no tenderness of the costovertebral angle. Dr. Griver also reported obvious and new spasm of the lumbosacral spine, right greater than left. He found full extension and mildly limited flexion with discomfort. Dr. Griver noted no instability or scoliosis. Straight leg raise testing was positive bilaterally. Dr. Griver stated that appellant appeared to have a flare up of lower back pain. He diagnosed lumbago, intervertebral

[2] Appellant's modified distribution clerk position involved throwing letters and flats for 2 hours at 30-minute intervals and working shared services accounting. The physical requirements of the job were sitting and standing for 30 minutes intermittently and working 4 hours for the first two weeks and slowly increasing the number of total hours worked.

disc disorder, neuritis or radiculitis of the lumbosacral spine, spasm muscle, and intervertebral lumbar disc degeneration. Dr. Griver recommended that appellant "continue off work for now and be reevaluated in two to three months." He noted that appellant was capable of work with restrictions.

On May 28, 2014 the employing establishment offered appellant a part-time modified-duty assignment with duties of assisting customers at automated self-service unit in the lobby area and verbally providing customer assistance. The physical requirements of the job included sitting, standing, and walking as comfortable for up to two hours and speaking and explaining for four hours.

In a June 9, 2014 report, Dr. Griver stated that appellant was under his care and could return to work on July 9, 2014 with her prior restrictions and limitations.

On June 16, 2014 appellant returned to part-time limited duty. She worked two hours before going home. On June 17, 2014 appellant briefly returned to work and worked 1.38 hours before stopping work again.

In a June 18, 2014 statement, appellant noted that on May 28, 2014 she went to the employing establishment and accepted a job offer for a modified position. She explained that she gave a start date of June 16, 2014, but she did not know if Dr. Griver would release her on that date. Appellant stated that at her next appointment on May 29, 2014, Dr. Griver wanted to schedule her for an emergency procedure. She then informed the employing establishment that she could not start work on June 16, 2014 due to the procedure. Appellant reported that she did not refuse the job offer. She explained that on June 16, 2014 she reported to work with leg and back pain and was only able to work two hours. On June 17, 2014 appellant attempted to work again and only worked one and a half hours.

In a June 17, 2014 report, Dr. Griver examined appellant for complaints of increased pain in her low back and left leg. He related that she was having difficulty at work with the time off note that he had given her and wanted to give her another note to enforce his first note of being off work. Dr. Griver noted that appellant tried to work yesterday and today, but experienced increased pain. Upon examination, he observed pain but no swelling. Dr. Griver reported that appellant walked with a slightly antalgic gait. He related that she denied anxiety, depression, or mood changes. Dr. Griver diagnosed lumbago and lumbosacral neuritis or radiculitis. He indicated that he would issue an out of work note until he evaluated appellant on June 23, 2014.

In a June 26, 2014 report, Dr. Griver related that appellant developed an acute flare up of low back pain which radiated across the low back and into her legs. He noted that she had a work-related injury in July 2012 and complained of constant low back and left leg pain since that time. Upon examination of her lumbar spine, Dr. Griver observed left antalgic gait and a notable extension posture. The left hamstring reflex was absent and right reflex was normal. Straight leg raise testing was positive on the left. Dr. Griver also noted positive left sciatic notch tenderness and notable left-sided lumbar tenderness. He diagnosed lumbago, intervertebral disc displacement lumbar without myelopathy, and intervertebral disc degeneration.

In a June 26, 2014 work note, Dr. Griver indicated that appellant could not work from June 26 to July 26, 2014 due to illness or injury.

In a CA-7 form dated July 3, 2014, appellant requested wage-loss compensation for the period June 14 to 27, 2014. She continued to submit CA-7 forms for wage-loss compensation until November 28, 2014.

In a July 8, 2014 report, Dr. Griver stated that appellant was under his care for a lumbar herniated disc and radiculopathy. He related that she had improved and was authorized to work restricted duty. Dr. Griver reported that appellant had a recent flare up in April 2014 and he had taken her temporarily off work. When he examined her on May 29, 2014 he recommended that she try to comply with Dr. Feinstein's recommendation of four hours a day of restricted duty. Dr. Griver stated that when appellant could not work even at a part-time basis, he further restricted her to be completely off work beginning June 9, 2014. He explained that she was currently undergoing a regimen of treatment that would hopefully resolve her flare up and allow her to return to work at a part-time or full-time basis. Dr. Griver recommended that appellant be off work through July 26, 2014 in order to allow her to receive proper treatment.

By letter dated July 10, 2014, OWCP stated that it received appellant's informal claim for recurrence of disability beginning June 16, 2014. It advised her that no supporting documentation was submitted along with her CA-7 form and requested additional evidence to establish that she was unable to work limited duty due to a material worsening or change in her accepted lumbar condition.

On July 11, 2014 appellant filed a recurrence claim alleging that on June 17, 2014 she sustained a recurrence of disability. She stated that after returning to work she was able to sit, stand, and walk up to two hours per shift. Appellant reported that her condition was the same as the original July 7, 2012 injury and that the pain was continuous. She explained that on June 17, 2014 she sat, stood, and walked as she needed to be comfortable but she was still aggravated, which made it difficult to continue to work.

On July 16, 2014 appellant responded to OWCP's development letter. She stated that on June 17, 2014 she was standing and walking on a concrete floor, which aggravated her left foot and lower back and made it difficult to continue working. Appellant noted that she stood, sat, and walked as needed but her condition was still aggravated. She explained that she believed her disability was due to her original condition because her flare up was exactly the same as the original July 7, 2012 injury. Appellant stated that she did not see it as a recurrence but as continuous pain since July 7, 2012.

In July 17 and 24, 2014 reports, Dr. Griver stated that appellant had a history of constant low back and left leg pain since a July 7, 2012 work injury. He noted that she experienced an acute flare up of pain beginning in April 2014. Dr. Griver related that a magnetic resonance imaging (MRI) scan examination was done on June 5, 2014 and showed a central herniated disc at L3-4 and L4-5 levels. He reported that appellant's workload was adjusted to try to give her some relief but she continued to experience significant pain. Upon examination, Dr. Griver observed signs and symptoms of radiculitis with an absent left hamstring reflex. Straight leg raise testing was positive on the left. Dr. Griver also noted sciatic notch tenderness. He stated

that appellant's extension posture was notable and reflexes were normal. Dr. Griver diagnosed lumbago, lumbosacral neuritis, and intervertebral disc disorder with myelopathy.

In an August 22, 2014 report, Dr. Akash Agarwal, a Board-certified neurological surgeon, noted that he examined appellant at his neurosurgery clinic. He related that she had a long history of back pain due to bending and picking up packages at work. Dr. Agarwal reported that the back pain worsened in 2012 and began to radiate into her left leg. He reviewed her history and conducted an examination. Dr. Agarwal observed mild-to-moderate discomfort on palpation of her lumbar spine. Deep tendon reflexes were 1+ throughout. Toes were downgoing bilaterally with no Hoffman sign. Dr. Agarwal reported that he reviewed appellant's MRI scan of the lumbar spine and found mild arthritic changes and a small central disc protrusion at L3-4, which is less pronounced, but with no known neural foraminal narrowing. He also noted a small central disc protrusion at L4-5 but this did not impinge on the existing nerve root.

In a decision dated August 26, 2014, OWCP denied appellant's recurrence claim because the evidence of record failed to demonstrate a change in the nature and extent of appellant's injury-related disability or the nature and extent of her limited-duty position. The decision noted that appellant failed to present any rationalized medical evidence to establish that she could not perform her part-time light-duty assignment.[3]

On September 18, 2014 OWCP received appellant's request for reconsideration.

In August 29 and September 30, 2014 reports, Dr. Griver related that appellant experienced an acute flare up of low back pain in April 2014. He reported that she was trying various accommodations at work but was getting a hard time from her employer due to her limitations. Dr. Griver noted that appellant had been off work since June 2013. He stated that she returned to work in June 2014 on a part-time basis but had to stop working because of pain and difficulty dealing with customers. Upon examination, Dr. Griver observed that appellant's lumbar spine was notable for extension posture and decreased left hamstring reflex. Straight leg raise testing was positive on the left at 70 degrees and negative on the right. Dr. Griver also reported positive left sciatic notch tenderness and notable left-sided lumbar tenderness with no formal spasm. Lumbar flexion was limited to 30 degrees. Dr. Griver diagnosed lumbago, lumbosacral neuritis or radiculitis, intervertebral disc displacement, and muscle spasm. He stated that appellant "definitely had an exacerbation of her lumbar pain and worsening of her examination in April … therefore, I feel the issue is related to her original injury." Dr. Griver reported that she could return to a sedentary part-time position, but explained that her psychiatrists felt that the issues from a psychiatric standpoint were too severe for her to return to work.

In a handwritten September 8, 2014 report, Dr. Robert E. Griffin, a psychologist, stated that appellant was under his care for anxiety and depression in response to her disability. He reported that appellant needed to be excused from work until her symptoms were less severe.

[3] The decision stated that appellant was still entitled to medical benefits and four hours of wage-loss compensation per day.

In a September 9, 2014 statement, appellant's counsel noted that he provided medical documentation which explained that appellant was unable to work due to her accepted medical conditions. He explained that while the reports may not be sufficiently detailed to establish a causal relationship between the aggravation of her preexisting depression and anxiety, these reports were sufficient to describe an aggravation of a preexisting condition which prevented her from being able to work. Counsel pointed out that according to OWCP's procedure manual if medical reports show that a condition has arisen or worsened since the accepted injury and the condition disabled the employee from the offered job, then the offered job is considered unsuitable.

In a September 9, 2014 report, Dr. Philip J. Mertz, a clinical psychologist, related that appellant was under his care for a condition which limited her ability to function without proper pharmaceutical intervention. He requested that appellant take a leave of absence until a specialist was able to evaluate her and develop an appropriate medication regimen.

In reports dated September 23 and October 7, 2014, Dr. Mark J. Saxon, a psychiatrist, stated that appellant had severe anxiety and depression due to reported high pain levels. He reported that appellant could not perform her duties at work at this time and would be reevaluated on November 12, 2014 for possible return to work.

In an October 30, 2014 statement, appellant's counsel related that documentation from appellant's physicians and psychologist explained that she was unable to work at the present time due to a consequential emotional condition. He contended that the medical reports were sufficiently detailed to establish causation with regard to the aggravation of her preexisting depression and anxiety and were sufficient to establish that these conditions prevented her from being able to perform the allegedly suitable job.

By decision dated December 17, 2014, OWCP denied modification of the August 26, 2014 denial decision.

LEGAL PRECEDENT

OWCP's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which 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 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]

[4] 20 C.F.R. § 10.5(x).

[5] *Id.*

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 the limited-duty position. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty requirements.[6]

OWCP's procedures provide that if a claim of recurrence of disability is made within 90 days or less following the first return to duty, the focus is on disability, rather than causal relationship.[7] The attending physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability for work.[8]

ANALYSIS

OWCP accepted that on July 7, 2012 appellant sustained an aggravation of L4-5 disc herniation in the performance of duty. Appellant stopped work and returned to full-time light duty on September 10, 2012. OWCP accepted that on May 28, 2013 she stopped work again because the employing establishment could no longer accommodate her work restrictions. On June 16, 2014 appellant returned to part-time light duty. She stopped work again on June 17, 2014 and filed a claim for recurrence of disability.

Appellant does not allege and the record does not reflect that any of her light-duty job requirements had changed. Rather, she attributes her disability on June 17, 2014 to her July 7, 2012 employment injury such that she could not perform the light-duty job requirements. As noted above, when the claim for recurrence is within 90 days of a return to work, the focus is on disability, rather than whether appellant continues to have an employment-related condition. Regarding disability, the medical evidence must provide a description of the job duties she cannot perform and the objective findings that support disability.[9] The Board finds that appellant has failed to provide sufficient medical evidence showing how or why her accepted back condition objectively worsened such that she was unable to work her part-time limited-duty assignment as of June 17, 2014.

Appellant submitted several reports by Dr. Griver dated March 27 to September 30, 2014. Dr. Griver related her complaints of constant low back and lower extremity pain as a result of a July 7, 2012 employment injury. He reviewed appellant's history and provided findings on examination. Dr. Griver stated that she appeared to have a flare up of lower back pain. He diagnosed lumbago, intervertebral disc disorder, neuritis or radiculitis of the lumbosacral spine,

[6] *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500(5) (June 2013).

[8] *Id.*

[9] *Id.*

spasm muscle, and intervertebral lumbar disc degeneration. In a June 17, 2014 report, Dr. Griver related that appellant had returned to work but continued to experience increased pain. He recommended that she be off work until he reevaluated her on June 23, 2014. In a June 26, 2014 return to work note, Dr. Griver indicated that appellant could not work from June 26 to July 26, 2014 due to illness or injury. In August 29 and September 30, 2014 reports, he related that she returned to part-time duty in June 2014 but had to stop working due to pain and difficulty dealing with customers. Dr. Griver opined that appellant "definitely had an exacerbation of her lumbar pain."

The Board notes that Dr. Griver provides findings on examination and an opinion that appellant sustained an exacerbation of lumbar pain. In a June 17, 2014 report, Dr. Griver recommended that she be off work until he reevaluated her. Although he opines that appellant was unable to work on June 17, 2014, he failed to provide any detailed explanation or medical rationale to support his opinion. Dr. Griver does not explain how his findings on examination supported that her accepted condition of aggravation of L4-5 disc herniation had worsened to the point where she could not perform part-time limited duty. He merely states that appellant had an exacerbation of lumbar pain. The Board notes Dr. Grivers' opinion is not based on objective medical findings but on appellant's complaints of too much pain, which is insufficient to establish a recurrence of disability.[10] Dr. Griver fails to provide any explanation, based on objective medical evidence, of why appellant was unable to perform her part-time light-duty assignment.

Appellant also submitted an August 22, 2014 report by Dr. Agarwal who related that appellant had a long history of back pain due to bending and picking up packages at work. Dr. Agarwal reviewed her history and conducted an examination. He reported that he reviewed appellant's MRI scan of the lumbar spine and found mild arthritic changes and a small central disc protrusion at L3-4, which is less pronounced but with no known neural foraminal narrowing. Dr. Agarwal also noted a small central disc protrusion at L4-5 but this did not impinge on the existing nerve root. The Board notes that Dr. Agarwal did not provide any opinion on the cause of appellant's inability to work beginning June 17, 2014. His report, therefore, is insufficient to establish her recurrence claim.[11]

The numerous psychologist reports are also insufficient to establish appellant's claim as they do not attribute appellant's inability to work to a worsening or change in her accepted July 7, 2012 injury. In a September 8, 2014 report, Dr. Griffin noted that appellant was under his care for anxiety and depression. He requested that appellant be excused from work until her symptoms were less severe. The Board notes that Dr. Griffin relates appellant's disability to anxiety and depression, which are not accepted conditions by OWCP. Similarly, Drs. Mertz and Saxon also report that appellant was under their care for anxiety and depression and was unable to perform her work duties. The Board has found that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA.[12] An employee who claims a recurrence of disability due to an accepted injury has the

[10] *See V.T.*, Docket No. 14-1251 (issued April 28, 2015).

[11] *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

[12] *A.M.*, Docket No. 09-1895 (issued April 23, 2010).

burden of establishing by the weight of the evidence that the disability for which she claims compensation is causally related to the accepted injury.[13] None of these physicians have provided probative evidence that appellant was unable to work beginning June 17, 2014 as a result of her accepted lumbar condition.[14]

On appeal, counsel contends that the medical evidence documented a worsening of both her physical and emotional conditions that OWCP failed to adjudicate and established a recurrence of disability. In the alternative, he alleges that the medical evidence was sufficient that OWCP should have undertaken the development of the medical evidence by referring appellant to a directed medical examination with an orthopedist. As explained above, however, the medical reports submitted failed to contain rationalized medical opinion, with objective findings, explaining why appellant was unable to work her part-time light-duty job beginning June 17, 2014. The Board also notes that the medical reports lack probative value and are therefore insufficient to require OWCP to refer appellant's claim to a second opinion examiner.

The Board finds the medical evidence in this case insufficient to meet appellant's burden of proof to establish a recurrence of disability. Focusing on the issue of disability, the evidence does not contain an opinion supported by objective findings and discussing specific job duties, establishing a recurrence of disability commencing June 17, 2014.

Appellant may submit new evidence or argument as part of a formal 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 has not met her burden of proof to establish a recurrence of disability on June 17, 2014.

[13] *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[14] The Board notes that appellant has not filed a claim alleging that she sustained an emotional condition causally related to her accepted July 7, 2014 injury or any other factor of employment. OWCP has, therefore, never accepted anxiety or depression as compensable conditions. Appellant may file a claim alleging that her anxiety and depression were consequential to her accepted July 7, 2014 employment injury. *See S.S.*, 59 ECAB 315 (2008).

ORDER

IT IS HEREBY ORDERED THAT the December 17 and August 26, 2014 merit decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 10, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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