United States Department of Labor
Employees' Compensation Appeals Board

DONNA F. WHITTINGTON, Appellant **and** **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Alexandria, LA, Employer**	)	**Docket No. 04-1335** **Issued: January 11, 2005**

Appearances:
Bradley L. Drell, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 21, 2004 appellant filed a timely appeal from two Office of Workers' Compensation Programs' merit decisions dated October 21, 2003 and January 23, 2004, which denied her claim for a recurrence of disability commencing on or about August 28, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant sustained a recurrence of disability commencing on or about August 28, 2002 causally related to a June 25, 2001 employment injuries.

FACTUAL HISTORY

The Office accepted that on June 25, 2001, appellant, then a 36-year-old social worker, sustained a right wrist contusion and right shoulder/upper arm strain/sprain when she fell into a drain while at a gasoline station in the performance of duty. She noted that at the time of the fall

her lower back felt like she had twisted her body when she fell. No low back condition was accepted by the Office at that time.

Appellant received medical treatment on June 27, 2001; on July 10, 2001 Dr. Douglas A. Waldman, a Board-certified orthopedic surgeon, diagnosed right rotator cuff strain secondary to trauma, right medial and lateral epicondylitis secondary to trauma and right wrist contusion.[1] He released appellant to return to light active duties at work and indicated that no x-rays were needed.

On August 23, 2001 appellant was treated for a dorsal ganglion of the right wrist which Dr. Mark A. Dodson, a Board-certified orthopedic surgeon, opined was related to her fall. However, this condition was not accepted as being employment related.

On September 26, 2001 appellant indicated that her pain was limited to her right upper extremity. She noted that her right arm became numb, especially in the early morning after sleeping.

By report dated September 27, 2001, Dr. Louis C. Blanda, Jr., a Board-certified orthopedic surgeon, noted appellant's symptomatology, examined her sensory and motor reactions and diagnosed shoulder and upper extremity pain, rule out cervical disc herniation or nerve root impingement, rotator cuff tear and ganglion cyst of the right wrist.

Dr. M. Dale Allen a Board-certified radiologist, read appellant's October 18, 2001 right shoulder magnetic resonance imaging (MRI) scan. He opined that there was evidence of mild supraspinatus tendinosis but no evidence of a cuff tear; he read appellant's cervical spine MRI scan of that date as revealing no focal disc protrusion or neural impingement and no lateralized abnormality to the right. Dr. Allen read the MRI scan as revealing lateralized osteophyte/disc process posterolaterally to the left at C6-7 level which he noted was the opposite side from her current symptomatology.

In a November 14, 2001 attending physician's report, Dr. Blanda noted that an MRI scan revealed tendinitis of the rotator cuff and a small herniated disc at C6-7. He diagnosed neck pain and rotator cuff tear, indicated that appellant was partially disabled until November 6, 2001, but opined that she was capable of working light duty as a social worker. On January 24, 2002 Dr. Blanda noted that she still complained of neck and right shoulder pain and the right wrist ganglion cyst. He recommended physical therapy and continuation of light duty.

Appellant filed multiple Forms CA-7 claiming compensation for one day each on February 22 and 28, 2002 and on March 4, 6, 8, 13, 14 and 15, 2002.

In a March 12, 2002 medical progress note, Dr. Blanda discussed pain in appellant's right upper extremity and cervical spine.

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[1] Dr. Waldman noted that appellant had [previously been seen for lumbar sprain but now complained of right wrist pain, right elbow pain and right shoulder pain. This reference seems to pertain to a period prior to her June 25, 2001 trip and fall.

In a May 7, 2002 medical progress note, Dr. Blanda mentions for the first time that appellant's back was starting to hurt as well as her right upper extremity. He did not discuss causation.

In response to a May 10, 2002 request, Dr. Blanda noted appellant's diagnosis as "herniated cervical and lumbar discs," noted specific functional deficits as "neck and back pain with radiculopathy" and recommended periodic treatment by a therapist.

On June 11, 2002 Dr. Blanda noted that appellant complained of back and neck pain which decreased with therapy. He noted that her cervical spine was tender to palpation and had a decreased range of motion and that she had disc protrusions at L4-5 and L5-S1. Dr. Blanda indicated that appellant could return to regular work.

On August 5, 2002 Dr. Blanda diagnosed herniated cervical and lumbar discs and noted that appellant was experiencing radiculopathy. On August 13, 2002 he opined that she was unable to work for six months. Dr. Blanda diagnosed herniated discs at L4-5 and L5-S1 and recommended surgical intervention with decompression and pedicle screw fusion.

In an August 21, 2002 attending physician's report, Dr. Blanda noted history of injury as "same," diagnosed neck/back pain and noted "same" to the question of whether the condition found was caused or aggravated by an employment activity.

On August 28, 2002 appellant filed a Form CA-7 claiming that on August 27, 2002 she sustained a recurrence of total disability. On August 30, 2002 Dr. Blanda indicated that he was changing her physical work status to "no work pending treatment," based on her complaints of increasing back pain.

In a September 24, 2002 medical progress note, Dr. Blanda noted that appellant had bowel and bladder incontinence, mostly right but some left leg pain, tenderness and spasm of the lumbar spine on palpation and bilateral positive straight leg raising, right more than left, with weakness in the right foot.

By report dated October 16, 2002, Dr. James N. Domingue, a Board-certified neurologist, indicated that since appellant's June 25, 2001 employment injury, she had developed complaints of low back and neck pain, which increased over the course of a year without any new injury. He noted her complaints of neck and low back pain and he noted that the MRI scan revealed an L5-S1 disc herniation and L4-L5 disc herniation. Dr. Domingue indicated that a follow up MRI scan on November 27, 2002 demonstrated degenerative lumbar spinal changes with L4-5 and L5-S1 disc protrusions. He opined that appellant had spinal cord dysfunction which might require surgery. Causal relation was not discussed.

By report dated December 2, 2002, Dr. Renato Bosita, a Board-certified anesthesiologist, noted that appellant complained of low back pain which had been present for about 18 months. He diagnosed bilateral sacroiliac joint dysfunction, bilateral lumbar radiculopathy and L4-5 and L5-S1 disc herniations.

By decision dated January 8, 2003, the Office rejected appellant's recurrence of disability claim, finding that the medical evidence did not support the causal relationship between her current symptoms and her accepted employment injuries.

Appellant requested an oral hearing which was held on August 27, 2003 at which she testified. She claimed that on June 25, 2001 she injured her back and neck, but was told not to list it if it was not actively bothering her. Appellant claimed that her low back pain gradually worsened until she ceased work on August 28, 2002.

Appellant also submitted the report from a discogram which had been performed on October 14, 2003 which was reported as revealing mildly degenerative discs at C4-5 and C5-6.

By decision dated October 21, 2003, the Office hearing representative affirmed the January 8, 2003 decision, finding that appellant had not submitted sufficient medical evidence to establish that she sustained a disabling condition on August 28, 2002 causally related to her accepted employment injuries.

In a November 10, 2003 medical progress note, Dr. Bosita noted that, regarding causal relationship, the only source of history he had was appellant. He noted that prior to her 2001 fall she had no history of low back, buttock or neck pain and opined that "This is the only causality to which I can possibly contribute [her condition]." Dr. Bosita noted that appellant had undergone a lumbar spinal fusion and would need a cervical spinal fusion and he opined that she had chronic myofascial pain syndrome which was aggravated by her 2001 fall.

In a November 13, 2003 narrative report, Dr. Stephen Goldware, a Board-certified neurological surgeon, reviewed appellant's factual and medical history, stated that she had fallen against the vehicle and hurt her neck and back, noted that she had undergone a laminectomy from L4 through S1 and noted that she had instrumentation and a 360 degree spinal fusion from L4 through S1. He noted that appellant had had multiple follow up sacroiliac joint injections by Dr. Bosita and opined that she was injured when she stumbled on the drain cover and fell, sustaining a herniated disc at L4-5 on the left and a disc herniation or bony damage at C5-6.

Appellant submitted several chiropractic reports. No subluxations were diagnosed.

By letter dated December 19, 2003, appellant disagreed with the October 21, 2003 decision and she requested an oral hearing. She submitted reports from Dr. Bosita and Dr. Goldware.

By decision dated January 23, 2004, the Office reviewed appellant's case on its merits and denied modification of the October 21, 2003 decision, finding that the medical evidence of record still did not establish a causal relationship between her current symptomatology and her accepted employment injuries.

LEGAL PRECEDENT

When an employee claims a recurrence of disability due to an accepted employment-related injury, he or she 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.[2]

When 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 of record establishes that he or she can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and 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]

As used in the Federal Employees' Compensation Act,[4] the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[5] Even with establishing that an employee sustained a change in the nature and extent of her injury-related conditions or in her light-duty job requirements, she still has the burden of establishing by the weight of the substantial, reliable and probative medical evidence that the changes identified caused disability for work. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the employee is disabled for work due to the change in the nature and extent of his or her job duty requirements or injury-related medical conditions.[6] Causal relationship is a medical issue and can be established only by rationalized medical evidence.[7] Rationalized medical evidence concludes that the disabling condition is causally related to the employment injury or to the changes in the nature and extent of the light-duty job requirements and supports that conclusion with sound medical rationale.[8] Where no such rationale is present, medical evidence is of diminished probative value.[9]

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[2] *Ricky S. Storms*, 52 ECAB 349 (2001).

[3] *Terry R. Hedman*, 38 ECAB 222 (1986).

[4] 5 U.S.C. §§ 8101-8193.

[5] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f). (Disability is not synonymous with physical impairment. An employee who has a physical impairment, even a severe one, but who has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to disability compensation.) *See Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

[6] *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956).

[7] *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

[8] *Mary S. Brock*, 40 ECAB 461 (1989); *Nicolea Bruso*, 33 ECAB 1138 (1982).

[9] *Michael Stockert*, 39 ECAB 1186 (1988).

The weight of a physician's medical opinion evidence is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of his or her knowledge of the facts and history of the case, the care of analysis manifested and the medical rationale expressed in support of the opinion.[10] The opinion must be one of reasonable medical certainty supported with affirmative evidence, explained by medical rationale and based on a complete and accurate factual and medical background.[11]

ANALYSIS

Appellant has not submitted any probative medical evidence that establishes that she sustained a recurrence of disability causally related to her original injuries. As her regular duties were also light duties, she additionally did not show any change in the nature and extent of her injury-related conditions or a change in the nature and extent of her light-duty job requirements.

At the time of her original injuries in June 2001, the record supports that appellant sustained injury only to her right upper extremity, including her right rotator cuff, right medial and lateral epicondylitis and a right wrist contusion. Dr. Waldman diagnosed right rotator cuff strain, right medial and lateral epicondylitis and a right wrist contusion. No low back injury was mentioned or complained of. In August 2001, Dr. Dodson diagnosed a right wrist dorsal ganglion related to her accident. This condition, however, was not accepted as being employment related as no rationalized medical evidence was presented which supported causal relation. No low back injury was complained of or documented. In September 2001, Dr. Blanda noted that appellant's symptomatology was confined to her right upper extremity and cervical spine. No low back injury was identified. Dr. Allen also found no low back diagnosis or problem. In November 2001, Dr. Blanda returned appellant to light duty, but still noted no low back symptomatology. He diagnosed neck and right shoulder pain and right wrist ganglion.

Dr. Waldman and Dr. Blanda both released appellant to resume work in a light-duty position, which was actually the category of her usual employment.[12] However, on June 11, 2002 Dr. Blanda opined that she could return to her regular duties, which continued to be the light duties of a social worker. Therefore, there is no evidence in the case record that establishes that appellant returned to any duties which were not her regular light duties as a social worker.

The first mention of any low back symptomatology was made on May 7, 2002, almost one year after appellant's actual injurious incident. On May 7, 2002 Dr. Blanda stated that her back was starting to hurt her as well as her right upper extremity. However, no causal relationship of the back pain with the June 2001 injurious incident was identified and no explanation of why back symptoms would take 11 months to manifest was provided. Thereafter Dr. Blanda diagnosed herniated lumbar discs, but he still did not provide any detailed or comprehensive opinion as to a causal relationship with her June 2001 trip and fall. He continued to diagnose herniated lumbar discs, but never gave any rationalized medical opinion explaining a

[10] *Anna C. Leanza*, 48 ECAB 115 (1996).

[11] *Connie Johns*, 44 ECAB 560 (1993).

[12] The duties of her usual job of a social worker were considered to be light duties.

causal relationship with appellant's original employment injuries or the trip and fall incident itself.

Appellant claimed that on or around August 28, 2002 she sustained a recurrence of disability causally related to her original employment injury. The only contemporaneous evidence that supported this occurrence was Dr. Blanda's August 30, 2002 report, in which he determined that she was off work pending treatment. Again, no rationalized medical opinion discussing any causal relationship between appellant's low back condition and the June 2001 injurious incident or the June 2001 accepted injuries was provided, nor was any change in the nature and extent of either the job requirements or her accepted disability documented, except for the presence of the lumbar herniated discs which were not supported by an opinion relating them to the original injury. Therefore, at the time of the alleged recurrence, appellant has not documented that her disabling low back condition was causally related to the accepted employment injuries or the trip and fall incident.

Subsequently, Dr. Domingue did not discuss causal relation of appellant's low back condition with any employment injury or incident. Therefore, his opinions do not support her allegations. Dr. Bosita stated in December 2002, that appellant's low back symptoms had been present for about 18 months, which would have placed their onset prior to her accepted employment injuries on June 25, 2001. Further, this opinion is not supported by any factual or medical background or any other notation of low back complaints either by previous treating physicians or by appellant. As there is not corroboration of Dr. Bosita's statement and as it factually placed the low back symptomatology before the employment injury, it does not have high probative value and is not rationalized or supported by the case record, such that causal relationship is not established under Dr. Bosita's opinion.

As there was no probative medical evidence submitted which causally related appellant's low back condition to her June 25, 2001 injuries or the incident, she has not demonstrated that her cessation of work due to low back considerations on or about August 28, 2002 was in any way causally related to her prior employment injury. Accordingly, she has not proven that she sustained any recurrence of disability as alleged.

While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to her federal employment, and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate factual and medical background.[13]

[13] *See Samuel Senkow,* 50 ECAB 370 (1999); *Thomas A. Faber*, 50 ECAB 566 (1999); *Judith J. Montage*, 48 ECAB 292 (1997).

Section 8101(2) of the Act provides that 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...."[14]

In this case, appellant submitted new medical evidence in support of her request for reconsideration of the January 8, 2003 decision.

Appellant submitted discograms demonstrating the herniated lumbar discs she claimed were employment related. She also testified that she had experienced low back pain from the date of injury, but was told not to mention it on her claim form.

However, none of the medical evidence submitted to the record mentioned the presence of low back pain either until May, 2002, 11 months after the employment incident and accepted injuries.

Appellant submitted a report from Dr. Bosita which noted that prior to her 2001 fall, she had had no history of low back, buttock or neck pain and he provided an opinion on causal relationship noting that, "This is the only causality to which I can possibly "contribute" [her condition]." Simply because there is not another causal incident considered, that does not support that the employment incident on June 25, 2001 caused her low back symptomatology manifesting 11 months later. Further, Dr. Bosita contradicted himself as he earlier had opined that appellant had had low back symptoms which developed 18 months earlier, which would have placed their onset prior to any employment incident or injuries. No explanation for this discrepancy was provided, which diminishes the probative value of Dr. Bosita's opinions. Additionally, he states that he believes there is a causal relationship simply because there is no other explanation. That is not adequate rationale for support of a medical opinion on causal relationship.[15]

Thereafter appellant submitted a November 2003 report from Dr. Goldware which opined that she was injured when she stumbled on the drain cover and fell, sustained an L4-5 herniated disc on the left. This opinion lacks any further medical rationale for this conclusion and is, therefore, of reduced probative value.[16] Further, its assumption is not supported by the rest of the evidentiary record as appellant did not complain of low back pain for 11 months following her employment injury. Further, no physician noted any low back involvement during that 11-month period. Therefore, it is a conclusory assumption unsupported by the record and, therefore, of reduced probative value, such that it is insufficient to establish appellant's recurrence claim.

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[14] 5 U.S.C. § 8101(2). *See also Linda Holbrook*, 38 ECAB 229 (1986). *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[15] *See Thomas R. Horsfall*, 48 ECAB 180 (1996); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996); *Kimper Lee*, 45 ECAB 565 (1994); *Leon D. Faidley, Jr.,* 41 ECAB 104 (1989). (It is related because appellant was asymptomatic prior to the incident.

[16] *Id.*

Appellant also submitted chiropractic records which did not include the diagnosis of a subluxation. As a chiropractor must diagnose a subluxation as demonstrated by x-ray to exist, for his opinion to be considered probative medical evidence and as none of the chiropractic reports submitted rise to this level of probative medical evidence or establish that appellant injured her lower back on June 25, 2001, she has not met her burden of proof to establish her recurrence claim.

CONCLUSION

Appellant has not met her burden of proof to establish that the June 25, 2001 employment incident caused a low back injury which did not manifest itself until 11 months later.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 23, 2004 and October 21, 2003 are hereby affirmed.

Issued: January 11, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member