



all-purpose container around. On April 2, 2001 the Office accepted her claim for lower back strain. Appellant was released to limited-duty work on May 14, 2001 by Dr. Robert M. Kaplan, her treating Board-certified neurologist and returned to work on that date.

On July 23, 2001 appellant filed a claim alleging that she sustained a recurrence of disability. She stopped work on July 9, 2001. In an August 2, 2001 letter, Christel Hoffman, a registered nurse, related that she saw appellant at a casino on July 8, 2001 and that appellant asked to borrow money from her in order that she could continue gambling. Ms. Hoffman stated that she denied appellant's request. In a July 2, 2001 disability certificate, Dr. Kaplan noted that appellant was incapacitated from an unidentified date until the date of the disability certificate. He stated that appellant could return to limited-duty work and listed her physical restrictions. Dr. Kaplan's July 9, 2001 disability certificate revealed that appellant was incapacitated from July 8 through 12, 2001, because she experienced an exacerbation of back pain that required time off from work. He stated that she could return to work with her previous restrictions. In a July 14, 2001 disability certificate, Dr. Kaplan repeated his findings. A July 17, 2001 disability certificate provided that appellant was incapacitated from July 16 through 18, 2001 and that she could return to work on July 18, 2001 with her previous physical restrictions. Treatment notes dated June 4 and 14 and July 23, 2001 from the employing establishment's health unit revealed that appellant was unable to work due to an exacerbation of her left sciatica.

Appellant submitted a claim for wage-loss compensation (Form CA-7) dated July 23, 2001 for the period July 9 through 17, 2001 and leave records covering the period June 30 through July 27, 2001. In a July 26, 2001 attending physician's report, Dr. Kaplan diagnosed cervical and lumbar back strains, a bulging lumbar disc and left lumbar radiculopathy with leg pain and numbness. He indicated with an affirmative check mark that appellant's conditions were caused by the January 19, 2001 employment injury and noted that she was partially disabled from February 13, 2001 through the date of his report.

On August 14, 2001 appellant filed a Form CA-7 for the period July 31 through August 4, 2001. She submitted Dr. Kaplan's August 14, 2001 attending physician's report indicating that appellant sustained a "probable" lumbosacral sprain/strain with left lumbar radiculopathy down the left leg and a mild sprain/strain of the cervical spine. He noted that a magnetic resonance imaging scan showed a bulging disc at L4-5 without herniation. Dr. Kaplan indicated with an affirmative check mark that appellant's conditions were caused by the January 19, 2001 employment injury. He indicated that she was totally disabled from July 31 through August 4, 2001.

By letter dated August 31, 2001, the Office advised appellant that the evidence of record was insufficient to establish her claim. The Office requested that she submit additional medical evidence to support total disability during the claimed period. The Office also requested that appellant clarify whether she was at a casino on July 8, 2001 and, if so, to describe her activities.

In a August 22, 2001 disability certificate, Dr. Kaplan indicated that appellant was incapacitated from an unidentified date until the date of the disability certificate.

The Office received the employing establishment's treatment notes, which covered intermittent dates from June 4 through August 31, 2001 and addressed appellant's back pain,

gastroenteritis, inability to work and physical restrictions. The employing establishment stated that appellant was on leave without pay from August 1 through 5, 2001 and that she returned to work on August 6, 2001. In a September 6, 2001 letter, the employing establishment advised that, on August 31, 2001, appellant was seen by Dr. William J. McMahan, a Board-certified radiologist, who recommended an independent medical evaluation. The employing establishment submitted a copy of Dr. McMahan's August 31, 2001 report.

In a September 19, 2001 letter, appellant acknowledged that she went to a casino but noted that the activities she performed did not cause any strain to her body. She saw her physician the following day and he advised her to stay home.

In a September 12, 2001 narrative report, Dr. Kaplan stated that appellant had chronic lumbar and cervical back pain following the January 19, 2001 employment-related injury. This injury was exacerbated by her inability to follow the prescribed work restrictions when she returned to work. For this reason, appellant often experienced increased neck and lumbar back pain and stiffness. He evaluated her on July 9, 2001 regarding her complaints of increased lumbar back pain and stated that her increased symptoms were presumed to be due to the original accident though a more recent acute etiology of appellant's exacerbated pain could not be ruled out. Dr. Kaplan stated that the employment injury made appellant more vulnerable to subsequent reinjury because ligament sprains heal by scarring, not by forming new ligaments. He stated that, even if the exacerbation of appellant's injury was not due to the original accident, the weakened condition of her back and neck made her vulnerable to reinjury. Dr. Kaplan concluded that the increased symptoms noted on July 9, 2001 were "indirectly" due to appellant's accepted injury.

The Office also received additional treatment notes and disability certificates.

By letter dated October 18, 2001, the Office referred appellant, together with the medical records, a list of questions to be addressed and a statement of accepted facts, to Dr. Leonard R. Smith, a Board-certified orthopedic surgeon, for a second opinion medical examination. The questions requested a diagnosis of appellant's lower back condition and an opinion on whether a current causal relationship existed between the diagnosed condition and the January 19, 2001 employment injury. He was also asked to address whether appellant could return to her date-of-injury position or perform modified work subject to limitations.

By decision dated October 25, 2001, the Office found the evidence of record insufficient to establish that appellant sustained recurrences of disability from July 9 through 17, 2001 and July 31 through August 4, 2001 due to her January 19, 2001 employment injury.

The Office also received a September 25, 2001 treatment note of Dr. Jordan H. Trafimow, a Board-certified orthopedic surgeon, who noted appellant's longtime symptoms of pain, his findings on physical examination and diagnosis of myofascial pain with a particularly severe tender point in the left quadratus lumborum. Dr. Trafimow's October 2, 2001 treatment note reported that appellant had been performing the prescribed exercise and the pain she experienced while doing so. The Office received Dr. Kaplan's August 22, 2001 prescription for a transcutaneous electrical nerve stimulator unit for home and work use and his treatment note of the same date regarding this treatment.

In a November 8, 2001 report, Dr. Smith opined that appellant had made a satisfactory recovery of her January 19, 2001 employment injury and that she could perform her duties as a mail processor without any limitations based on her medical background. Additionally, the doctor reported that there was no need for further treatment, that she had reached maximum medical improvement, that no additional diagnostic testing was indicated. Dr. Smith commented that her "subjective complaints appear to be somewhat out of proportion to the objective findings, which are minimal," and found that no permanent impairment resulted from the employment injury.

On November 23, 2001 appellant requested an oral hearing before an Office hearing representative regarding the Office's October 25, 2001 decision. She submitted Dr. Kaplan's treatment notes covering intermittent dates from March 20 through October 12, 2001 and the employing establishment's medical treatment notes covering the period June 4 through November 30, 2001.

In a February 26, 2002 decision, the Office hearing representative set aside the October 25, 2001 decision and remanded the case for further medical development as it issued the decision prior to receiving Dr. Smith's second opinion medical report. The hearing representative instructed the Office to issue a *de novo* decision after any further review and development of the medical evidence.

By decision dated May 30, 2002, the Office found the evidence of record insufficient to establish that appellant sustained recurrences of disability from July 9 through 17, 2001 and July 30 through August 4, 2001 due to her January 19, 2001 employment injury. It found that the report of Dr. Smith constituted the weight of medical opinion.

Appellant requested an oral hearing before an Office hearing representative on June 28, 2002. After the February 23, 2003 hearing, the Office received a January 23, 2003 treatment note from Dr. Mitchell L. Goldflies, a Board-certified orthopedic surgeon, who stated that appellant had lumbo pelvic dysfunction and tendinitis in the left shoulder. The Office also received treatment notes dated February 3 and March 5, 2003, from appellant's physical therapists regarding her back condition. In a January 30, 2003 attending physician's report, Dr. Goldflies indicated with an affirmative check mark that appellant's lumbo pelvic dysfunction was caused by the January 19, 2001 employment injury and noted that she was totally disabled from January 30 through February 28, 2003. In a work status report dated January 30, 2003, Dr. Goldflies reiterated his diagnosis. In a narrative report of the same date, Dr. Goldflies provided his findings on physical examination. On June 3, 2003 he stated that appellant remained symptomatic from her lumbar radiculopathy and noted her physical limitations.

By decision dated June 16, 2003, the Office hearing representative found that appellant did not sustain recurrences of disability during the periods July 9 through 17, 2001 and July 31 through August 4, 2001. The hearing representative found that the medical evidence did not establish a worsening of her accepted condition.

Thereafter, the Office received Dr. McMahon's June 18, 2003 letter requesting that Dr. Goldflies release appellant to full-duty work as her many complaints could not be substantiated with positive objective findings. A July 9, 2003 operative report of

Dr. Sarmed G. Elias, an orthopedic surgeon, found a herniated nucleus pulposus at L4-5 and an annular tear at L2-3 with radiculopathy all the way down to the calf to the big toe with numbness and midline pain.<sup>1</sup> Dr. Elias stated that appellant required an endoscopic L4-5 discectomy and IDET/nucleoplasty at L2-3. His July 15, 2003 disability certificate listed a diagnosis of annular tears of L2-3 and L4-5 with left radiculopathy. Dr. Elias indicated that appellant was totally incapacitated for work from July 10 through 17, 2003 and that she could return to work with physical limitations on July 17, 2003. Correspondence from Dr. McMahon and Dr. Goldflies addressed the results of appellant's discogram and need for surgery.<sup>2</sup>

In an undated letter received by the Office on September 19, 2003 appellant requested reconsideration of the June 16, 2003 decision. In a January 23, 2003 report, Dr. Goldflies diagnosed lumbo pelvic dysfunction as a consequence of her January 19, 2001 employment injury and listed recommended work restrictions. In an October 21, 2003 report, Dr. Goldflies noted that appellant continued to complain of severe lower back pain and that she had been advised that she was denied back surgery. He had no other advice for appellant and concluded that, as of the date of his report, she remained disabled and off work. In October 30, 2003 report, Dr. Elias discussed the July 9, 2003 discogram and need for immediate treatment for appellant's herniated disc at L4-5 and annular tear at L2-3. Dr. Kaplan's December 9, 2003 report noted the findings of the July 9, 2003 discogram and found that they served as an adequate explanation for appellant's continued symptoms which were out of proportion to her objective findings. He concluded that appellant's condition was a result of her January 2001 employment injury.

By decision dated December 18, 2003, the Office denied modification of the June 16, 2003 decision. The Office found the evidence of record insufficient to establish that appellant sustained recurrences of disability during the claimed periods.

In an April 22, 2003 report, Dr. Belich listed mild impingement syndrome of the left shoulder and a chronic soft tissue lumbar strain. He opined that appellant could return to regular-duty work in 10 to 14 days. A February 5, 2004 report diagnosed degenerative bulging of the intervertebral disc at L4-5 and an annular tear at L2-3. Another report of the same date recommended that appellant undergo another discogram of the lumbosacral spine.

By letter dated March 18, 2004, appellant, through her union representative, requested reconsideration of the Office's December 18, 2003 decision. Appellant submitted Dr. Elias' reports covering intermittent dates from July 15 to November 13, 2003 addressing appellant's July 9, 2003 discogram and recommendations for treatment.

In a March 30, 2004 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative or irrelevant and, thus, insufficient to warrant a merit review of her claim.

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<sup>1</sup> The Office later expanded the acceptance of appellant's claim to include a herniated disc at L4-5, an annular tear at L2-3 and lumbar radiculopathy.

<sup>2</sup> By letter dated September 30, 2003, the Office denied Dr. Elias' request for authorization of a discogram based on the opinion of an Office medical adviser.

In an April 6, 2004 letter, appellant, through her union representative, requested reconsideration on the grounds that Dr. Kaplan's December 9, 2003 report was not given any consideration. Appellant submitted additional reports from Dr. Elias pertaining to treatment of her lumbar disc. In a May 25, 2004 operative report, he addressed a discogram performed on May 24, 2004 and diagnosed a herniated nucleus pulposus at L4-5, an annular tear at L4-5 and left lumbar radiculopathy.

By decision dated August 11, 2004, the Office denied modification of the December 18, 2003 decision.<sup>3</sup>

### **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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment.<sup>4</sup>

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 establishes that the employee can perform the light-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 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.<sup>5</sup>

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.<sup>6</sup>

### **ANALYSIS**

The Office initially accepted that appellant sustained an employment-related low back strain on January 19, 2001 and later expanded the acceptance of her claim to include a herniated disc at L4-5, an annular tear at L2-3 and lumbar radiculopathy. Following the January 19, 2001 employment injury, appellant returned to limited-duty work on May 14, 2001. She has claimed compensation for total disability for the periods July 9 through 17, 2001 and July 31 through August 4, 2001 due to the January 19, 2001 employment injury.

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<sup>3</sup> Following the issuance of the Office's August 11, 2004 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

<sup>4</sup> 20 C.F.R. § 10.5(x) (2002).

<sup>5</sup> *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>6</sup> *James H. Botts*, 50 ECAB 265 (1999).

In finding that appellant did not sustain a recurrence of disability during the claimed periods, the Office relied on the November 8, 2001 medical opinion of Dr. Smith, an Office referral physician. He found that appellant had recovered from her employment-related back strain, that she was capable of performing her regular work duties without any limitations and that her subjective complaints were not supported by objective evidence. The Board notes that the Office did not ask Dr. Smith to address the underlying issue in this case, whether appellant suffered from residuals of her employment-related injuries that caused her to be totally disabled during the periods July 9 through 17, 2001 and July 31 and August 4, 2001. As Dr. Smith did not address whether appellant was totally disabled during the claimed periods, his report does not constitute the weight of the medical opinion evidence on this issue.

The medical evidence relevant to the claimed periods of total disability consists of Dr. Kaplan's disability certificates which indicated that appellant was incapacitated on intermittent dates from an unidentified period through August 22, 2001 and that she could return to limited-duty work with certain physical restrictions. For the period of total disability from July 8 through 12, 2001, Dr. Kaplan stated that appellant sustained an exacerbation of back pain that required time off from work. The Board notes that pain is considered a symptom, not a diagnosis and does not constitute a basis for payment of compensation.<sup>7</sup> Further, Dr. Kaplan failed to discuss how appellant's disability was caused by the January 19, 2001 employment-related injuries. Thus, the Board finds that Dr. Kaplan's disability certificates are insufficient to establish appellant's claim.<sup>8</sup>

Dr. Kaplan's prescription which indicated that appellant should be transferred to a facility within a 15-minute drive from her house and that she should continue working with her previous restrictions fails to address whether she was totally disabled for work due to her accepted employment injuries during the claimed periods.

In a July 26, 2001 attending physician's report, Dr. Kaplan indicated that appellant's cervical and lumbar back strains, a bulging lumbar disc and left lumbar radiculopathy with leg pain and numbness were caused by the January 19, 2001 employment injuries with an affirmative mark. He stated that appellant was partially disabled from February 13, 2001 through the date of his report. Dr. Kaplan's report does not provide any medical rationale explaining how or why appellant's conditions were caused by the accepted employment injury and, therefore, the report is insufficient to establish her claim. This type of report, without more by way of medical rationale, explaining how the incident caused the injury, is insufficient to establish causal relationship and is of diminished probative value.<sup>9</sup>

Similarly, Dr. Kaplan's August 14, 2001 attending physician's report in which he indicated with an affirmative mark that appellant's "probable" lumbosacral sprain/strain with left lumbar radiculopathy down the left leg and a mild sprain/strain of the cervical spine were caused by the January 19, 2001 employment injuries is insufficient to establish appellant's burden of

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<sup>7</sup> See *Robert Broome*, 55 ECAB \_\_\_\_ (Docket No. 04-93, issued February 23, 2004).

<sup>8</sup> *Daniel Deparini*, 44 ECAB 657, 659 (1993).

<sup>9</sup> See *Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

proof because he did not provide any rationale in support of his opinion.<sup>10</sup> Further, Dr. Kaplan did not provide a definitive diagnosis.<sup>11</sup>

Dr. Kaplan's September 12, 2001 report negated the January 19, 2001 employment injuries as the indirect cause of appellant's increased neck and back symptoms that he evaluated on July 9, 2001. Thus, the Board finds that his report is insufficient to establish appellant's burden of proof.

Dr. Kaplan's treatment notes covering intermittent dates from March 20 through October 12, 2001 are insufficient to establish appellant's burden of proof because they fail to address whether she was disabled for work during the claimed period due to her accepted employment-related injuries.

The employing establishment's treatment notes covering intermittent dates from June 4 through August 31, 2001 indicate that appellant was unable to work due to an exacerbation of her lumbar sciatica. The Board finds that the employing establishment's treatment notes fail to establish appellant's claim because they do not provide any rationale explaining how or why appellant's disability for work was caused by her accepted employment injuries.

Dr. Elias' reports which covered intermittent dates from July 15 through November 13, 2003 addressed a July 9, 2003 discogram, appellant's work restrictions and the need for her to undergo another discogram. None of these reports, however, addressed whether appellant was totally disabled during the periods July 9 through 17, 2001 and July 31 through August 4, 2001. Thus, the Board finds Dr. Elias' reports insufficient to establish appellant's claim.

The Board finds that appellant has not submitted sufficiently rationalized medical evidence establishing that she was totally disabled from July 9 through 17, 2001 and July 31 through August 4, 2001 due to her January 19, 2001 employment-related lower back strain, herniated disc at L4-5, annular tear at L2-3 and lumbar radiculopathy. Further, appellant has not alleged and there is no evidence of record establishing a change in the nature and extent of her limited-duty work during the alleged time periods. Therefore, the Board finds that she has not met her burden of proof in this case.

### **CONCLUSION**

The Board finds that appellant has failed to establish that she sustained a recurrence of disability during the periods July 9 through 17, 2001 and July 31 through August 4, 2003 causally related to the January 19, 2001 employment injuries.

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<sup>10</sup> *Id.*

<sup>11</sup> *Robert J. Krstyen, 44 ECAB 227 (1992).*



**ORDER**

**IT IS HEREBY ORDERED THAT** the August 11, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 1, 2005  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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