

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

T.F., Appellant

and

**DEPARTMENT OF LABOR, OFFICE OF THE
SOLICITOR, Kansas City, MO, Employer**

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**Docket No. 11-763
Issued: November 7, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 8, 2011 appellant filed a timely appeal from the January 26, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his recurrence of disability claim. Pursuant to the Federal Employees' Compensation Act¹ 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 his burden of proof to establish that he sustained a recurrence of total disability commencing January 2, 2010 due to his accepted employment injuries.

FACTUAL HISTORY

OWCP accepted that on January 16, 1987 appellant, then a 33-year-old attorney, sustained left sciatica, aggravation of a herniated nucleus pulposus (HNP) at L4-5, HNP at L3-4

¹ 20 C.F.R. § 8101 *et seq.*

and L5-S1 and aggravation of grade 1 spondylolisthesis at L3-4 when he slipped and fell on snow at work.² On November 10, 1989 he underwent a hemilaminectomy at L3-4 on the right with removal of an extruded disc fragment and a hemilaminectomy and discectomy at L5-S1 on the left. These procedures were authorized by OWCP.

On September 15, 2009 Dr. Stephen L. Reintjes, an attending Board-certified neurosurgeon, performed a decompressive lumbar laminectomy at L3-4 with microdissection and a left L5-S1 reexploration and discectomy. The procedures were authorized by OWCP. OWCP paid compensation for periods of disability. Appellant performed intermittent light-duty work for the employing establishment.

Appellant stopped work in late 2009 and retired from the employing establishment effective January 2, 2010. He filed a claim on August 7, 2010 alleging that he sustained a recurrence of total disability on January 2, 2010 due to his accepted employment injuries.

In a February 17, 2010 form report, Dr. Reintjes stated that appellant was unable to return to his occupation from January 2, 2010 until “no end date.” He listed “never” in response to a question regarding when appellant was expected to be able to perform some of his work duties. In response to a question regarding appellant’s present limitations, Dr. Reintjes stated that appellant could not lift more than 25 pounds or sit for more than two hours.

In an August 13, 2010 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his recurrence of disability claim.

In an undated letter received by OWCP on August 30, 2010, appellant asserted that the opinion of Dr. Reintjes established that he could not perform his usual work. He contended that he could not sit for even a few minutes without having pain in his hips and legs when he got up. Walking was possible but not without pain and sometimes overwhelming pain. Appellant stated that he was forced to retire effective January 2, 2010, because he could not tolerate his job requirements, including traveling and spending time in court.

In a February 17, 2010 note, Dr. Reintjes stated that appellant reported that he was “about 70 percent better” and that he had some hip pain that was equal on both sides. He diagnosed low back and bilateral hip pain and stated, “I do not think this is related to his surgery.” Appellant also submitted diagnostic testing reports from September 1, 2009 and a report of the September 15, 2009 surgery. In September 25 and October 23, 2009 reports, Dr. Reintjes discussed appellant’s back and leg problems.

In an August 31, 2010 letter, Michael Stabler, a regional solicitor for the employing establishment, stated that, prior to stopping work in late 1999, appellant worked as an attorney and handled litigation cases, office desk work, trial preparation, witness interviews and, when necessary, trial presentation. Appellant requested that he not be given cases that required travel

² In 1984, OWCP previously accepted that appellant sustained an aggravation of an HNP at L4-5 and authorized a laminectomy/excision procedure at L4-5 which was performed on January 29, 1985. Appellant attributed his injuries to engaging in extensive driving for work between July and October 1984 as well as lifting and carrying luggage and walking up and down stairs.

which necessitated long car rides and the employer accommodated that request. He was assigned cases near to his duty station, was allowed sufficient time for necessary car travel that would provide adequate rest stops and was allowed to have file materials shipped to remote locations so that he would not have to lift or carry them. Mr. Stabler stated that the employer was lenient in allowing appellant to participate in teleworking and to choose convenient exercise times for stretching and therapy. He noted that the employer made every effort to accommodate appellant by eliminating any prolonged sitting and any lifting, at his request and appellant was able to perform all assigned duties with accommodation. Mr. Stabler stated that his employment with continuing accommodations would be available to appellant but for his retirement.

In a November 16, 2010 decision, OWCP denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of total disability on or after January 2, 2010 due to his accepted employment injuries.³

Appellant requested reconsideration of his claim and submitted an August 27, 2010 report in which Dr. Reintjes reported that he had followed him for over a period of nearly 20 years. Dr. Reintjes stated that appellant had worked as an attorney for the employing establishment and had returned on August 27, 2010 complaining of constant low back pain and of an inability to sit for prolonged periods, to stand for more than 10 minutes without a significant increase in low back pain and to drive one hour without pain. He briefly discussed appellant's back surgeries and noted that, given his reported discomfort with standing, sitting and driving, he believed that appellant's "work requirements by airline travel and prolonged driving exacerbates his complaints." Dr. Reintjes noted that, although appellant reported improvement after his September 2009 surgery, he still had constant and daily pain upon prolonged sitting, standing and driving. He indicated that appellant's "complaints have been constant and consistent over the 20 years that I have known him." Dr. Reintjes stated that he encouraged appellant to continue to stay fit with daily walks, exercising on a stationary bike, swimming and doing back exercises and noted that he had used a health center locally over the past 20 years for this purpose. He stated:

"Given [appellant] multiple surgeries as well as his L3-4 spondylolisthesis, I do believe that he is at risk for injuring his back further if he is retired to sit for more than [two] hours at a time or lift over 25 pounds. I think that his back complaints will be exacerbated by extended periods of car or airline travel. I do not believe that [appellant] will have significant improvement in his back condition going forward and I do not believe that he would be able to perform the required functions of a senior trial attorney for the [F]ederal [G]overnment."

In a January 26, 2010 decision, OWCP affirmed its November 16, 2010 decision noting that Dr. Reintjes' opinion on disability was not well rationalized.

³ On November 16, 2010 OWCP sent appellant a letter advising him that his claim was still open for payment of medical treatment due to his work-related conditions.

LEGAL PRECEDENT

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she 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 show that 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.⁴ It is well established that the possibility of future injury constitutes no basis for the payment of compensation.⁵

ANALYSIS

OWCP accepted that appellant sustained left sciatica, aggravation of an HNP at L4-5, HNP at L3-4 and L5-S1 and aggravation of grade 1 spondylolisthesis at L3-4 and authorized low back surgeries that were performed on January 29, 1985, November 10, 1989 and September 15, 2009. Appellant stopped work in late 1999, returned to light-duty work thereafter and retired from the employing establishment effective January 2, 2010. He filed a claim on August 7, 2010 alleging that he sustained a recurrence of total disability on January 2, 2010 due to his accepted employment injuries.

The Board finds that appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of total disability on or after January 2, 2010 due to his accepted employment injuries.

Appellant submitted a February 17, 2010 form report in which Dr. Reintjes, an attending Board-certified neurosurgeon, stated that he was unable to return to his occupation from January 2, 2010 until “no end date” and recommended work restrictions of lifting no more than 25 pounds and sitting no more than two hours. However, this report is of limited probative value in showing that appellant sustained a work-related recurrence of disability on January 2, 2010 because Dr. Reintjes did not provide adequate medical rationale in support of his conclusion on appellant’s level of disability.⁶ Dr. Reintjes did not describe appellant’s medical condition at all in this report and he did not provide any objective findings to support his findings on disability, nor did he provide any explanation of the role work-related conditions played in his disability determination.⁷

⁴ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁵ *Gaeten F. Valenza*, 39 ECAB 1349, 1356 (1988).

⁶ *See Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value if it contains an opinion on a medical matter which is unsupported by medical rationale).

⁷ It should be noted that, in another February 17, 2010 report, Dr. Reintjes stated that appellant reported that he was “about 70 percent better” and that he had some hip pain that was equal on both sides. He provided a diagnosis of low back and bilateral hip pain and stated, “I do not think this is related to [appellant’s] surgery.”

In an August 27, 2010 report, Dr. Reintjes indicated that appellant could not perform the attorney work that he performed prior to retiring effective January 2, 2010 and noted that he could not lift more than 25 pounds or sit for more than two hours at a time. He stated that appellant was complaining of constant low back pain and of an inability to sit for prolonged periods, to stand for more than 10 minutes without a significant increase in low back pain and to drive one hour without pain. Dr. Reintjes briefly discussed appellant's back surgeries and noted that, given his reported discomfort with standing, sitting and driving, he believed that appellant's "work requirements by airline travel and prolonged driving exacerbates his complaints."

The Board finds that this opinion on disability is of limited probative value because Dr. Reintjes again failed to present any objective findings on physical examination or diagnostic testing to support his disability finding. Dr. Reintjes followed appellant's back condition for many years as he worked in a position that accommodated appellant's back condition, but Dr. Reintjes did not provide medical rationale explaining how appellant's condition changed around January 2010 such that he could no longer perform his light-duty work. In fact, it is unclear whether Dr. Reintjes had a clear understanding of appellant's work duties as he did not provide any detailed description of these duties and it appears that he believed that appellant had extensive driving and airline travel duties that are not supported by the record.⁸ An August 31, 2010 statement from the employing establishment shows that considerable accommodations were made to prevent appellant from engaging in prolonged sitting or notable lifting and carrying. Dr. Reintjes further stated, "Given [appellant's] multiple surgeries as well as his L3-4 spondylolisthesis, I do believe that he is at risk for injuring his back further if he is retired to sit for more than [two] hours at a time or lift over 25 pounds. I think that his back complaints will be exacerbated by extended periods of car or airline travel." It appears that his opinion on disability is mostly based on appellant's own subjective complaints and a fear of future injury. However, it is well established that the possibility of future injury constitutes no basis for the payment of compensation.⁹ For these reasons, appellant has not shown a change in his injury-related condition such that he was totally disabled on or after January 2, 2010.

On appeal, appellant claimed that his total disability was caused by the fact that the employing establishment exceeded his work restrictions. He did not, however, submit any evidence in support of this assertion and, as noted above, it appears that the employing establishment made considerable accommodations to limit such activities as lifting and sitting for extended periods. Therefore, appellant has not shown that a change in his light-duty requirements caused total disability. For these reasons, OWCP properly denied his claim for recurrence of total disability.

Appellant may submit new evidence or argument with a 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.

⁸ Moreover, it does not appear that Dr. Reintjes' work restrictions of no lifting more than 25 pounds and no sitting for more than two hours at a time would have prevented appellant from performing his light-duty work.

⁹ See *supra* note 5.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability on or after January 2, 2010 due to his accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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