

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

S.C., Appellant

and

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**

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**Docket No. 11-240
Issued: November 14, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On November 8, 2010 appellant filed a timely appeal from a May 13, 2010 merit decision wherein the Office of Workers' Compensation Programs (OWCP) denied his claim for a recurrence.¹ Pursuant to the Federal Employees' Compensation Act² and 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 met his burden to establish that he sustained a recurrence of disability for the period May 21 through June 14, 2009, causally related to his accepted September 29, 2003 employment injury.

¹ Appellant lists the date of OWCP's decision as September 21, 2010. The September 21, 2010 letter to appellant from OWCP only gave appellant an update on his request for leave buyback; it was not a final adverse decision over which the Board may exercise jurisdiction. *See* 20 C.F.R. §§ 501.2(c) and 501.3(a).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 3, 2003 appellant, then a 52-year-old health physics instructor, filed a traumatic injury claim alleging that, while responding to a casualty drill on September 29, 2003, he injured his right leg. On January 20, 2004 OWCP accepted his claim for lumbosacral strain and sciatica. On July 7, 2004 it expanded its acceptance to include an L4-5 herniated disc. In a decision dated May 3, 2005, the Board affirmed OWCP's denial of appellant's claim for continuation of pay as notice of injury was not filed within 30 days of injury.³

On July 26, 2009 appellant filed a notice of recurrence wherein he alleged a recurrence of the September 29, 2003 employment injury on May 14, 2009. He noted that he was placed on permanent light duty on June 24, 2004 by Dr. Michael McManus, a physician Board-certified in occupational medicine. Appellant stated that he had been working in a light-duty capacity and had appointments with Dr. McManus weekly while off of work. He indicated that on May 14, 2009 he awoke with back pain associated with his diagnosed lumbar disc disease caused by the acknowledged on-the-job injury in 2003. Appellant indicated that he stopped work on May 20, 2009, began receiving medical treatment on May 21, 2009 and returned to work on June 15, 2009. On the form the employing establishment contended that he was working in the shop within his limitations, which were made permanent on August 5, 2004. The employing establishment noted that appellant worked as an instructor and that on June 15, 2009 he was released to full duty.

In a May 21, 2009 report, Dr. Timothy Symonds, a Board-certified family practitioner, diagnosed appellant with intervertebral lumbar disc disorder with myelopathy, lumbar region. He noted that appellant reported a flare of severe pain starting about six days ago. Dr. Symonds noted that he was seen in the Urgent Care Center two days ago. In his progress notes, he noted that appellant had an open claim for a September 29, 2003 aggravation of lumbar disc disease. Dr. Symonds indicated that appellant had been doing well but that on a recent trip to the Arizona desert, his back pain and sciatica in the left leg flared up acutely without specific inciting injury or activity. He noted that pain began in the left lumbosacral region and radiated into the posterior left buttock, posterior lateral thigh to below the knee. Dr. Symonds wrote prescriptions for Prednisone, Naproxen and Baclofen.

In a May 29, 2009 report, Dr. McManus listed his impressions as lumbosacral spondylosis with L4-5 and L5-S1 disc protrusions, left L5 radiculopathy and chronic right L5-S1 radiculopathy. He discussed appellant's injury. Dr. McManus noted that appellant's most recent onset of symptoms was while on vacation in Arizona. He stated that appellant told him that he awoke on May 14, 2009 with onset of pain in his low back and left gluteal region which gradually worsened with onset of pain radiating down the posterior aspect to the left lower extremity to the posterior ankle. Dr. McManus noted that, upon appellant's return to Washington State, he was seen at the Urgent Care Center on May 19, 2009. He noted that appellant indicated that he had experienced some improvement. Dr. McManus advised that appellant should continue back rest, walk therapy and medication and not work at this time.

³ Docket No. 05-211 (issued May 3, 2005).

In a June 15, 2009 report, Garrett W. Duckworth, M.D., indicated that appellant was released to work without limitations.

In a July 2, 2009 report, Dr. McManus listed date of injury as September 29, 2003 and his impression as recurrence lumbosacral strain with recurrent L5-S1 disc intrusion and resolving left radiculopathies. He noted that appellant was to continue full/unrestricted work activity. Dr. McManus noted that appellant was continuing to improve. In a July 31, 2009 report, he noted that on May 14, 2009 appellant awoke with low back pain and pain in the left gluteal region, which gradually worsened and began radiating down the posterior aspect of his left lower extremity. Dr. McManus noted that he originally evaluated appellant with his recurrent symptoms on May 29, 2009. He stated that at that time his examination was consistent with a subacute left L5 and S1 radiculopathy. Dr. McManus stated that a subsequent MRI scan study performed on June 4, 2009 revealed a large left L5-S1 disc extrusion compromise the left S1 spinal nerve root and possibly the left root, and that these findings were consistent with his compliance and examination findings. He opined that appellant was predisposed to recurrent disc herniation at the L5-S1 level due to his prior work injury or work injury of May 29, 2003 with a disc herniation at this level. Dr. McManus noted that persons who have experienced a disc herniation have a 15 to 20 percent increased risk of reherniating in the future, and that, for these reasons, he supported appellant's request for leave buyback for the period May 21 through June 12, 2009. In a treatment note for the same date, he indicated that appellant could continue full work duties.

By decision dated August 21, 2009, OWCP denied appellant's recurrence and leave buyback claims as it found that the evidence was not sufficient to establish that his current condition was due to the accepted work injury. It noted that the evidence did not support a recurrence but rather an intervening event or new injury that occurred on appellant's Arizona vacation.

On September 17, 2009 appellant requested an oral hearing before an OWCP hearing representative. At the hearing held on February 23, 2010, he testified that, when he awoke one morning to turn off the alarm clock, he felt instantaneous pain in his back. The hearing representative noted a gap in medical records between 2005 and 2009. Appellant noted that between 2005 and 2009 he was seeing his general practitioner and taking medication while he was on light-duty work with permanent restrictions. The hearing representative explained that the record was lacking continuous medical evidence showing that appellant was continually treated for back pain and had ongoing back problems. The hearing representative gave appellant 30 days to submit further medical evidence.

After the hearing, appellant submitted additional evidence. Appellant submitted After-Visit Summaries by Dr. Richard Moore indicating that he saw appellant on September 28 and October 12, 2005 and that appellant was taking Oxycodone-Acetaminophen for pain and Baclofen for muscle spasm. In a November 16, 2007 report, Dr. Symonds noted that he treated appellant on that date for a workers' compensation back problem, and listed his diagnosis as intervertebral lumbar disc disorder with myelopathy, lumbar region. He prescribed Baclofen for muscle spasms and Oxycodone-Acetaminophen for pain. In a January 29, 2009 report, Dr. Symonds noted that appellant was seen for a back problem and that he diagnosed intervertebral lumbar disc disorder with myelopathy, lumbar region and prescribed Baclofen.

In a March 8, 2010 report, Dr. McManus stated, “I feel [appellant’s] acute left S1 radiculopathy is due to his prior industrial injury because his prior industrial injury documented the presence of disc herniations and his new radicular symptoms are at the level his previously documented work injury disc herniations occurred.” He reiterated that having a prior disc herniation at these levels predisposed appellant to a 15 to 20 percent increased risk of reherniation.

In a May 13, 2010 decision, the hearing representative modified the prior decision by OWCP by finding that the evidence did not support a new intervening injury. However, she denied appellant’s recurrence of disability claim for the period May 21 through June 14, 2009 as she found that the medical evidence on record was insufficient to support that the disc bulge at L5-S1 was work related, and accordingly, the subsequent herniation and the resulting disability could not be accepted as a consequence of the work injury.

LEGAL PRECEDENT

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. This term also means an inability to work that takes place 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁴

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 to establish 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 either 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.⁵ To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.⁶ Where no rationale is present, the medical evidence is of diminished probative value.⁷

⁴ 20 C.F.R. § 10.5(x); *E.R.*, Docket No. 10-1470 (issued June 23, 2011).

⁵ *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *Maurissa Mack*, 50 ECAB 498 (1999).

⁷ *L.P.*, Docket No. 10-1390 (issued March 9, 2011).

ANALYSIS

OWCP accepted that appellant sustained a lumbosacral strain, sciatica and an L4-5 herniated disc as a result of an employment-related injury. Appellant returned to limited-duty work for the employing establishment. However, he alleged that he suffered a recurrence of disability on May 14, 2009. The record does not contain any substantive allegation that the nature and extent of appellant's light-duty job requirements changed or that the appropriate light-duty work was made unavailable. Accordingly, the issue is whether the medical evidence established that he was unable to perform the duties of his light-duty assignment.

Dr. Symonds noted in his May 21, 2009 report that appellant had a flare-up of his back pain and sciatica on a recent trip to Arizona without specific inciting injury or activity. He wrote prescriptions to treat appellant's pain and spasms. The Board finds that Dr. Symonds did not provide a rationalized opinion linking appellant's accepted employment injury with the recent pain; he mentioned the prior injury but did not provide rationalized medical evidence linking the September 29, 2003 employment injury to appellant's condition in May 2009.

Dr. Duckworth does not address causal relationship. As such, his opinion is insufficient to establish appellant's claim.

Finally the Board finds that the opinions of Dr. McManus are insufficient to show that appellant sustained a recurrence of disability causally related to his accepted injury. Dr. McManus opined that he supported appellant's request for leave buyback for the period May 21 through June 12, 2009, noting that appellant was predisposed to recurrent disc herniation at the L5-S1 level due to his prior work injury of May 29, 2003 as persons who have experienced a disc herniation have a 15 percent increased risk of reherniating in the future. In a March 10, 2010 report, Dr. McManus stated that appellant's left S1 radiculopathy was due to his prior industrial injury because his prior industrial injury documented the presence of disc herniations and his new radicular symptoms are at the level his previously documented work injury disc herniations occurred. The Board finds that the opinions of Dr. McManus linking appellant's injury to his accepted work-related injury rest on the absence of any other known cause for appellant's injuries and his opinion that persons who have a herniation are at greater risk of recurrence. These opinions are based on general statistics more than a discussion of appellant as a patient and a unique, individual case. Appellant alleged that he had pain when he woke up on May 14, 2009. Dr. McManus failed to explain how this particular event was a spontaneous change of condition causally related to an injury that occurred five years earlier. Furthermore, he does not explain why appellant's condition in May 2009 prevented him from performing his limited-duty work. Accordingly, the Board finds that the medical reports are insufficient to establish a recurrence of 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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability for the period May 21 through June 14, 2009 causally related to his September 29, 2003 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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