

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

K.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Louisville, KY, Employer**

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**Docket No. 12-1777
Issued: February 7, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 22, 2012 appellant filed a timely appeal from a June 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that he did not establish a recurrence of disability and a July 26, 2012 nonmerit decision denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the July 26, 2012 nonmerit decision.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability beginning July 12, 2011 causally related to his March 26, 1996 employment injury; and (2) whether OWCP properly denied his request for reconsideration under 5 U.S.C. § 8128.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated September 15, 2010, the Board set aside July 14 and August 31, 2009 decisions finding that appellant had not established a recurrence of disability beginning April 11, 2009 due to his March 26, 1996 employment injury.² It determined that the medical evidence was sufficient to warrant further development regarding whether he sustained a recurrence of disability as a result of his accepted employment injury and authorized surgeries. The facts and the circumstances set forth in the prior decision are hereby incorporated by reference.

On February 28, 2011 OWCP accepted that appellant sustained a recurrence of disability from April 1 to July 14, 2009.³

On September 22, 2011 appellant filed a claim for compensation from July 12 to September 16, 2011. In an emergency room report dated July 12, 2011, a physician diagnosed acute or chronic low back pain.⁴

In a report dated September 9, 2011, Dr. Kimber D'Antoni, a Board-certified internist, related that he treated appellant for "a severe exacerbation of his chronic work[-]related back pain" on July 18, 2011. He stated, "At that time the claimant's level of pain was such that his usual pain medications were not working. Dr. D'Antoni was hospitalized July 29 to August 2, 2011 for pain control." He related that appellant could resume his usual full-time modified employment after one week of part-time work.

By decision dated November 8, 2011, OWCP found that appellant had not established a recurrence of disability beginning July 12, 2011 due to his March 26, 1996 employment injury. It found that he had not submitted sufficient medical evidence to show a change in his injury-related condition.

On December 5, 2011 appellant requested a telephone hearing. In a letter dated December 22, 2011, Dr. D'Antoni related that he treated appellant on July 19, 2011 "for exacerbation of his long[-]standing work[-]related low back pain for which he has undergone 12 surgeries." He noted that appellant was admitted to the hospital from July 30 to August 2, 2011 for "management of the work[-]related back pain." Dr. D'Antoni submitted the reports from appellant's July 30, 2011 hospitalization.

² Docket No. 10-457 (issued September 15, 2010). OWCP accepted that on March 26, 1996 appellant, then a 45-year-old custodian, sustained lumbar strain and a herniated disc in the performance of duty. Appellant underwent a decompression hemilaminectomy in June 1996, a repeat laminectomy in August 1996 and a lumbar fusion at L4-5 in February 2003.

³ In a decision dated November 3, 2011, OWCP found that appellant had not established an employment-related recurrence of disability beginning April 2009. By decision dated February 28, 2011, it vacated the November 3, 2011 decision and accepted the recurrence of disability.

⁴ The name of the physician is not legible.

A hearing was held on April 18, 2012. Appellant related that he had undergone 12 surgeries on his back, excluding epidural injections, as a result of his employment injury.

In a report dated May 1, 2012, Dr. D'Antoni related that appellant was unable to work beginning July 19, 2011 due to an increase in his pain medication such that he could not drive or make decisions. He admitted appellant to the hospital from July 29 to August 2, 2011. Dr. D'Antoni asserted that he was disabled from July 12 to September 9, 2011, the date he returned to work, due to "severe pain exacerbation of his workers' comp[ensation] back condition, pain medication, adjustments and hospitalization all related to the exacerbation of pain related to his workers' comp[ensation] back condition." He advised that appellant's condition fit the definition of a recurrence of disability and noted that it "was truly an exacerbation of his old work[-]related back condition without provocation" Dr. D'Antoni concluded, "Therefore it is requested that you once again consider [appellant] for compensation for his time for July 12, 2011 through September 9, 2011 as totally and completely related to a spontaneous exacerbation of his work[-]related back condition and that he was medically unable to work during this period either due to pain, medication adjustments or hospitalization."

By decision dated June 26, 2012, OWCP's hearing representative affirmed the November 8, 2011 decision. She found that appellant had not submitted sufficient medical evidence to show that he was unable to perform his work duties from July 12 to September 9, 2011.

On July 13, 2012 appellant requested reconsideration. He submitted a report dated July 12, 2012 from Dr. Steven H. Smoger, a Board-certified internist, who attributed appellant's chronic low back pain to "failed back syndrome related to numerous spinal surgeries."

By decision dated July 26, 2012, OWCP denied appellant's request for reconsideration after finding that the evidence submitted was irrelevant and insufficient to warrant reopening his case for further merit review.

On appeal, appellant argues that OWCP should have accepted the opinion of Dr. D'Antoni that he was disabled from work and notes that proceedings are not adversarial in nature.

LEGAL PRECEDENT -- ISSUE 1

Where 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.⁵

⁵ *Richard A. Neidert*, 57 ECAB 474 (2006); *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

OWCP regulations provide that 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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁶ 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, (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.⁷

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.⁸ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained lumbar strain and a herniated disc as a result of a March 26, 1996 work injury. Appellant underwent multiple back surgeries, including hemilaminectomies in June and August 2006, an L4-5 lumbar decompression and fusion in February 2003 and a stimulator implant in December 2007. He resumed modified employment on October 1, 2001 after intermittent periods of disability. OWCP accepted that appellant sustained a recurrence of disability from April 1 to July 14, 2009. On September 22, 2011 appellant requested compensation for disability from July 12 to September 16, 2011.

Appellant has not alleged a change in the nature and extent of his light-duty job requirements. Instead, he attributed his recurrence of disability to a change in the nature and extent of his employment-related conditions. Appellant must provide medical evidence to establish that he was disabled due to a worsening of his accepted work-related conditions.¹⁰

On September 9, 2011 Dr. D'Antoni found that appellant sustained a "severe exacerbation" of his employment-related back pain beginning July 18, 2011. He asserted that medication was not controlling the pain. Appellant was hospitalized from July 29 to August 2, 2011 to manage the pain.

On December 22, 2011 Dr. D'Antoni indicated that he evaluated appellant on July 19, 2011 for an exacerbation of his employment-related back pain. He noted that appellant had undergone 12 surgeries on his back. In a report dated May 1, 2012, Dr. D'Antoni related that he

⁶ 20 C.F.R. § 10.5(x).

⁷ *Id.*

⁸ *Jimmy A. Hammons*, 51 ECAB 219 (1999).

⁹ 20 C.F.R. § 10.121.

¹⁰ *See Jackie D. West*, *supra* note 5.

took appellant off work beginning July 19, 2011 because he had increased his pain medication such that he should not drive or make any decisions. He discussed appellant's hospitalization from July 29 to August 2, 2011. Dr. D'Antoni opined that he was disabled from July 12 through September 9, 2011 as a result of an exacerbation of his work-related back condition and the resulting need for pain medication and hospitalization. He concluded that appellant's disability from July 12 through September 9, 2011 was a "spontaneous exacerbation of his work[-]related back condition" and asserted that he was "medically unable to work during this period either due to pain, medication adjustments or hospitalization."

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹¹ The Board has reviewed Dr. D'Antoni's reports and notes that he provided a clear opinion that appellant was disabled from work from July 12 through September 9, 2011 due to an exacerbation of his employment-related back condition. Dr. D'Antoni's opinion is supportive and unequivocal. He asserted that appellant was disabled from an exacerbation of work-related back pain that required an adjustment in medication and hospitalization. Dr. D'Antoni does not, however, provide rationale explaining the exact nature of appellant's condition or how it worsened such that he was disabled due to pain. Consequently, while the medical reports from him are insufficiently rationalized to meet his burden of proof to establish that appellant sustained a recurrence of disability, they raise an undisputed inference of causal relationship sufficient to require further development by OWCP.¹² Accordingly, the Board will remand the case to OWCP. On remand, it should further develop the medical record to determine whether appellant sustained an employment-related recurrence of disability from July 12 through September 9, 2011. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.¹³

¹¹ A.A., 59 ECAB 726 (2008); *Phillip L. Barnes*, 55 ECAB 426 (2004).

¹² *Id.*

¹³ In view of the Board's disposition of the merits, the issue of whether OWCP properly denied appellant's request for reconsideration under section 8128 is moot.

ORDER

IT IS HEREBY ORDERED THAT the July 26 and June 26, 2012 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: February 7, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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