

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

A.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Columbus, OH, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-266
Issued: October 24, 2013**

Appearances:

*Stanley R. Stein, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 16, 2012 appellant, through his representative, filed a timely appeal of a May 30, 2012 decision of the Office of Workers' Compensation Programs (OWCP), which denied his claim for a recurrence of disability. 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.

ISSUE

The issue is whether appellant met his burden of proof to establish a recurrence of total disability beginning February 24, 2010, causally related to his employment-related conditions.

FACTUAL HISTORY

On February 23, 2009 appellant, then a 43-year-old part-time flexible clerk, was injured when he bent over a hamper to retrieve a bundle of flats and felt pain through his lower back. He stopped work on February 24, 2009 and returned with restrictions on February 25, 2009 for four

¹ 5 U.S.C. § 8101 *et seq.*

hours a day. On March 10, 2009 appellant was released to work up to eight hours a day with work restrictions. OWCP accepted the claim for lumbar and thoracic sprains.

In a March 30, 2009 report, Dr. Stephen Altic, a Board-certified family practitioner and osteopath, noted that on February 24, 2009 appellant bent over to pick up some magazines at work and felt low and mid back pain. He diagnosed thoracic strain and sprain, lumbar strain and sprain and provided work restrictions on lifting over 15 pounds and overhead reaching.

In an August 3, 2009 report, Dr. Gregory Z. Mavian, a Board-certified neurosurgeon and osteopath, diagnosed lumbosacral myalgia without neurologic impairment or extreme pain. He noted associated degenerative disc disease and protrusion and stenosis of the foramen at L4-5, worse at L5-S1.

In a February 11, 2010 work restriction report, Dr. Altic noted appellant's restrictions for sedentary sitting work only. He precluded bending, twisting or turning, reaching below the knees, pushing or pulling, squatting or kneeling, standing or walking. Appellant could lift up to 10 pounds occasionally and could sit continuously.

On February 12, 2010 appellant accepted a modified-duty assignment. The duties were listed as verbally engage customers who were mailing letters and parcels at the automated postal center (APC), a standalone kiosk. The position did not include any physical requirements other than sitting. Appellant was assigned to sit in a chair for six hours a day and verbally assist the postal customers in using the APC.

In a February 24, 2010 attending physician's report, Dr. Altic diagnosed an L4-5 and L5-S1 disc bulge. He checked the box "yes" that appellant's condition was caused or aggravated by his employment activities. Dr. Altic placed appellant off work from February 24 through August 1, 2010. He noted that appellant's condition was worsening.

On March 4, 2010 appellant filed a Form CA-7 requesting compensation for leave without pay for the period February 24 to 26, 2010. He filed additional claims for compensation from February 27 to March 12, 2010.

By letters dated March 8 and 22, 2010, OWCP informed appellant of the evidence needed to support his claim. It requested that he submit such evidence within 30 days.

In a March 25, 2010 report, Dr. Altic placed appellant off work from February 24 through May 31, 2010 due to worsening low back pain. He advised that appellant had significant painful range of motion in the lumbar spine with positive straight leg raising on the right that was worsening. Dr. Altic reiterated that appellant had an L4-5 and L5-S1 disc herniation.

In an April 16, 2010 decision, OWCP denied the claim finding that the evidence failed to establish his total disability beginning February 24, 2010.

On March 22, 2010 OWCP referred appellant to Dr. James Rutherford, a Board-certified orthopedic surgeon, for a second opinion. In a report dated April 19, 2010, Dr. Rutherford reviewed appellant's history of injury and treatment. On examination he determined that appellant continued to have residuals of his injuries. Dr. Rutherford prescribed work limitations

and recommended an electromyography and nerve conduction study (EMG/NCS) to determine whether he had any radicular clinical findings. He recommended follow-up with a neurosurgeon based upon the results. Dr. Rutherford recommended physical therapy and a reevaluation if the EMG was normal. He advised that appellant could work eight hours daily within restrictions. Dr. Rutherford placed no restriction on sitting.

In a May 10, 2010 attending physician's report, Dr. Altic diagnosed L4-5 and L5-S2 disc bulge. He advised that appellant's condition was worsening and placed him off work. Dr. Altic continued to treat appellant and advised that he was unable to work.

In a May 19, 2010 decision, OWCP denied appellant's claim for compensation beginning February 27, 2010.

Appellant requested hearings from both the April 16 and May 19, 2010 decisions. The hearings were combined on August 4, 2010.

An August 6, 2010 EMG read by Dr. Thomas Skeels, Board-certified in rehabilitative medicine and an osteopath, revealed right S1 radiculopathy, lumbar paraspinal muscle guarding and increased insertional activity in the L4-S1 areas. The examination revealed no denervation and no motor unit loss. Dr. Skeels recommended a series of lumbar epidural steroid injections.

In a September 1, 2010 report, Dr. Altic noted that appellant continued to have low back pain and radicular complaints that were greater on the right. He reiterated that the injury resulted in L4-5 and L5-S1 disc bulge with foraminal stenosis. Dr. Altic noted that the updated MRI scan from May 12, 2010 showed disc bulges at L4-5 and L5-S1 with foraminal stenosis. He stated that the most recent EMG nerve conduction study revealed a right S1 radiculopathy consistent with the L5-S1 disc bulge and foraminal stenosis, which was additional evidence of the injury resulting in significant pathology. Dr. Altic explained that the right S1 radiculopathy was "basically 'nerve damage' due to this injury and the disc pathology at L5-S1." He opined that the L4-5 and L5-S1 disc bulges, foraminal stenosis and right S1 radiculopathy were a result of the industrial injury.

In a September 30, 2010 report, J. Nick Marzella, Ph.D., a clinical psychologist, diagnosed dysthymic disorder. He opined that appellant's condition was a result of his industrial injury and its subsequent impact on his lifestyle.

In a November 3, 2010 attending physician's report, Dr. Altic noted that appellant had no history of concurrent or preexisting injury or disease or physical impairment. He checked the box "yes" that the diagnosed condition was caused or aggravated by an employment activity. Dr. Altic indicated that appellant was totally disabled since February 24, 2010.

By decision dated November 9, 2010, an OWCP hearing representative set aside the April 16 and May 19, 2010 decisions and remanded the claim for further development. She noted that Dr. Rutherford had recommended an EMG/NCS and, if it was positive for radiculopathy, additional allowances might be considered. The hearing representative directed that the job duties that appellant was performing at the time he stopped working on February 23, 2010, be added to the statement of accepted facts. She also directed development of the medical evidence on whether the bulging discs and right radiculopathy were directly caused, aggravated

or accelerated as the result of the February 23, 2009 injury. The hearing representative also directed medical development with regard to whether appellant's condition prevented him from working at modified duty as of February 23, 2010.

On December 30, 2010 the employing establishment controverted the claim. A copy of appellant's modified job duties as an APC host was provided. The modified assignment noted that appellant was provided with a comfortable chair for support.

In a letter dated January 24, 2011, appellant's counsel requested that OWCP allow the additional condition of dysthymic disorders.

On April 11, 2011 OWCP referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Edward G. Fisher, a Board-certified orthopedic surgeon.

In a report dated May 9, 2011, Dr. Fisher reviewed appellant's history of injury and treatment, and the new statement of accepted facts. He examined appellant and noted that the only objective findings were decreased range of back motion of flexion and lateral bending. There were subjective complaints of pain over the low back area only when performing active range of motion of the back. Dr. Fisher opined that appellant's accepted work-related conditions of lumbar sprain and thoracic sprain has resolved. They were soft tissue injuries which healed or resolved in a matter of a few weeks, or up to two months following the injury. Dr. Fisher stated that appellant's preexisting degenerative disc disease over L4-5 and L5-S1 was aggravated by the work injury. He described the aggravation as temporary, once appellant received definitive appropriate treatment. Dr. Fisher found that appellant was capable of performing his preinjury duties as a part-time flexible postal clerk.

In a decision dated June 3, 2011, OWCP denied appellant's claim for total disability commencing February 24, 2010. It found the medical evidence failed to establish that he was disabled for work due to the work-related injury of February 23, 2009. On June 14, 2011 appellant's counsel requested a hearing.

By decision dated September 7, 2011, an OWCP hearing representative set aside the June 3, 2011 OWCP decision. She remanded the case for a supplemental opinion from Dr. Fisher addressing whether the EMG reports and the medical evidence supported an aggravation of appellant's degenerative disease.

In an August 31, 2011 report, Dr. Altic noted that appellant continued to have low back pain and right lower extremity radicular pain.

In a letter dated September 23, 2011, OWCP provided Dr. Fisher with an updated statement of accepted facts, and the medical record, including EMG reports. It requested that he further address his previous conclusions and whether appellant's February 24, 2010 work stoppage from his modified job was justified.

In an October 10, 2011 addendum, Dr. Fisher reviewed the diagnostic studies and medical records. He noted that the EMG/NCV of the lower extremities performed in December 2009 was normal with no evidence of radiculopathy. The EMG/NCV of August 2010

mentioned S1 radiculopathy on the right side but this was not supported by objective clinical evidence. Dr. Fisher explained that appellant had objective findings of decreased range of back motion of flexion of 25 degrees, extension of 5 degrees and laterally bending of 10 degrees with complaints of pain only over the low back area. Neurological examination of the lower extremities was entirely normal with the reflexes equal, the motor power 5/5, sensation intact and no radicular signs or symptoms over the lower extremities. The Lasegue test and straight leg raising were negative bilaterally. Dr. Fisher explained that during the examination, appellant exhibited no radicular signs or symptoms over the lower extremities to confirm radiculopathy. He found no clinical evidence that appellant sustained lumbar radiculopathy as a result of the February 23, 2009 work injury. Dr. Fisher reiterated that, while the August 2010 EMG/NCV mentioned S1 radiculopathy on the right, the clinical examination did not support this finding. He explained the S1 radiculopathy was not supported on any clinical examination of record and opined that appellant did not have lumbar radiculopathy as a result of his February 23, 2009 lumbar injury. Dr. Fisher explained that the degenerative disc disease was aggravated by the work incident. He found that appellant was capable of working in the modified lobby director position on February 24, 2010 and on May 5, 2011. Dr. Fisher explained that there were no objective findings on examination to preclude appellant from working in such position.

In a November 2, 2011 decision, OWCP denied appellant's claim for total disability compensation commencing February 24, 2010. The evidence did not support total disability causally related to the February 23, 2009 injury. In a separate November 2, 2011 decision, it accepted the claim for displacement of lumbar intervertebral disc without myelopathy.

On November 15, 2011 appellant's counsel requested a hearing, which was held on March 14, 2012. In a letter dated December 15, 2011, he requested a copy of the physical description for appellant's modified position.

In an April 5, 2012 letter, Annette Clark, a health and resource management specialist with the employer, controverted the claim. She noted that Dr. Altic's February 11, 2010 work restrictions allowed for sedentary sitting work. Ms. Clark explained that appellant was offered a new job for six hours a day to "assist customers with APC." The position allowed sitting for six hours a day. Appellant accepted the job offer on February 12, 2010 and had a comfortable chair for support. Ms. Clark noted that on February 24, 2010 appellant saw Dr. Altic, who commented that the "condition was worsening" and advised that appellant was unable to work. She stated that appellant stopped work on February 24, 2010 and did not return.

By decision dated May 30, 2012, OWCP's hearing representative affirmed the November 2, 2011 decision, finding that appellant had not established a recurrence of total disability.²

² The hearing representative also found that appellant provided *prima facie* medical evidence supportive of his having developed a psychiatric condition due to his February 23, 2009 accepted work injury. On May 31, 2012 OWCP accepted that dysthymic disorder was work related.

LEGAL PRECEDENT

Section 10.5(x) of OWCP's regulations define "recurrence of disability" as 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 (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.³

Appellant has the burden of establishing that he sustained a recurrence of a medical condition⁴ that is causally related to his accepted employment injury. To meet his burden, appellant must furnish medical evidence from a 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 and supports that conclusion with sound medical rationale.⁵ Where no such rationale is present, the medical evidence is of diminished probative value.⁶

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 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 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.⁷

ANALYSIS

OWCP accepted the claim for lumbar and thoracic sprains as well as displacement of lumbar intervertebral disc without myelopathy. On February 12, 2010 appellant accepted a modified assignment that involved sitting for six hours daily. This assignment was based on the February 11, 2010 restrictions of appellant's physician, Dr. Altic, who advised that appellant could occasionally lift up to 10 pounds and had no restrictions on sitting. Beginning February 24, 2010, appellant claimed compensation asserting that he was totally disabled

³ 20 C.F.R. § 10.5(x). See *Carlos A. Marrero*, 50 ECAB 117 (1998).

⁴ "Recurrence of medical condition" means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a need for further medical treatment after release from treatment, nor is an examination without treatment. 20 C.F.R. § 10.5(y).

⁵ *Ronald A. Eldridge*, 53 ECAB 218 (2001).

⁶ *Albert C. Brown*, 52 ECAB 152 (2000).

⁷ *Conard Hightower*, 54 ECAB 796 (2003).

beginning that date. There is no evidence that the employing establishment withdrew this job or changed its duties before appellant stopped work.

Thereafter, OWCP referred appellant to Dr. Fisher for a second opinion. In a May 6, 2011 report, Dr. Fisher noted appellant's history, examined appellant and noted that the only objective findings were decreased range of back motion. He opined that appellant no longer suffered from the accepted work-related conditions of lumbar sprain and thoracic sprain, as they were soft tissue injuries that healed within two months of the injury. Dr. Fisher noted that preexisting degenerative disc disease over L4-5 and L5-S1 was temporarily aggravated by the work injury. He indicated that appellant was capable of performing his preinjury duties. OWCP thereafter sought clarification and also requested that he address appellant's ability to perform the modified job beginning February 24, 2010. In an October 10, 2011 addendum, Dr. Fisher explained that the EMG/NCV of the lower extremities performed in December 2009 was normal with no radiculopathy and that, while an August 2010 EMG/NCV of mentioned S1 radiculopathy on the right side, this was not clinically supported with objective evidence. He explained the neurological examination of the lower extremities was entirely normal and there were no radicular signs or symptoms over the lower extremities. Dr. Fisher noted that none of the examinations of appellant revealed radicular signs or symptoms over the lower extremities to confirm radiculopathy. He concluded that there was no supportive clinical evidence that appellant sustained lumbar radiculopathy as a result of the February 23, 2009 work injury. Dr. Fisher indicated that, while degenerative disc disease was aggravated by the work injury, appellant was capable of working as a modified lobby director position on February 24, 2010. He explained that there were no objective findings on his examination to preclude appellant from working as a modified lobby director.

In support of his claim, appellant provided reports from Dr. Altic. In a September 1, 2010 report, Dr. Altic noted that appellant continued to have low back pain and radicular complaints and opined that the work injury resulted in L4-5 and L5-S1 disc bulge with foraminal stenosis. He stated that an MRI scan from May 12, 2010 showed disc bulges at L4-5 and L5-S1 with foraminal stenosis and that a recent EMG was consistent with such diagnoses which were due to the work injury. The Board notes that Dr. Altic did not clearly explain the reasons why the conditions were caused or aggravated by the February 23, 2009 work injury.⁸ He also did not offer a rationalized opinion to explain why appellant could no longer perform the duties of his light-duty position beginning February 24, 2010, and why any such disability or continuing condition would be due to the accepted conditions. Dr. Altic also offered several attending physician's reports finding appellant disabled and also diagnosing L4-5 and L5-S1 disc bulge and checked a box "yes" to support that appellant's condition was caused or aggravated by his employment activities and placed appellant off work from February 24, 2010 through February 28, 2011. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim.⁹ Thus, these reports

⁸ See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury).

⁹ *Deborah L. Beatty*, 54 ECAB 340 (2003).

are insufficient to establish that appellant could no longer perform the duties of his light-duty position due to his accepted conditions on or after February 24, 2010. Also, as noted, OWCP has not accepted L4-5 and L5-S1 disc bulge as employment related. Other reports from Dr. Altic did not specifically address the reasons why appellant's accepted back conditions contributed to his inability to perform the sitting duties of his modified position beginning February 24, 2010. Thus, his reports are insufficient to establish appellant's claim.¹⁰

Appellant also provided a report from Dr. Marzella, however, he did not provide an opinion that appellant was disabled and unable to work on or after February 24, 2010 as a result of his employment-related condition. Likewise, several diagnostic reports submitted by appellant are insufficient to establish appellant's claim as they did not address whether the claimed disability commencing February 24, 2010 was causally related to appellant's accepted conditions.

In the instant case, none of the medical reports submitted by appellant contained a rationalized opinion to explain why appellant could no longer perform the duties of his light-duty position and why any such disability or continuing condition commencing February 24, 2010 would be due to the accepted condition. As appellant has not submitted any medical evidence establishing that he sustained a recurrence of disability commencing February 24, 2010 which was causally related to his accepted employment injury, he has not met his burden of proof.

On appeal, appellant's counsel argued that Dr. Rutherford supported appellant's inability to work. While Dr. Rutherford opined that appellant could not perform the duties of his date-of-injury position, he opined that appellant could work within restrictions for eight hours daily. As noted, he placed no restrictions on sitting.¹¹

Appellant may submit evidence or argument with a written request for reconsideration 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 did not meet his burden of proof to establish a recurrence of total disability beginning on or after February 24, 2010, causally related to his employment-related conditions.

¹⁰ See *Michael E. Smith*, 50 ECAB 313 (1999) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹¹ Counsel also noted that appellant's condition was accepted for a dysthymic disorder. See *supra* note 2. However, OWCP has not issued a decision regarding any disability that may be due to this newly accepted condition. Therefore, the Board is without jurisdiction to review this on appeal. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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