

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

D.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Metro, GA, Employer**

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**Docket No. 15-729
Issued: June 3, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 4, 2015 appellant filed a timely appeal from a January 16, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 that he sustained a recurrence of total disability on or after November 18, 2014 due to his March 2, 2005 work injury.

FACTUAL HISTORY

OWCP accepted that on March 2, 2005 appellant, then a 48-year-old tractor trailer operator, sustained a lumbar strain and herniated lumbar disc at L2-3 without myelopathy due to

¹ 5 U.S.C. §§ 8101-8193.

positioning a heavy dock board inside his tractor trailer at work.² Appellant did not stop work at that time, but began working in a limited-duty position for the employing establishment.

On March 8, 2006 OWCP granted appellant a schedule award for two percent permanent impairment of his left leg. The award ran for 5.76 weeks from December 28, 2005 to February 6, 2006. Appellant continued to complain of back and leg pain and his attending physicians provided conservative medical care with pain medication.

In August 2011 appellant was referred to Dr. Marc J. Kornfield, an attending Board-certified physical medicine and rehabilitation physician, for chronic pain management. In a June 27, 2013 report, Dr. Kornfield stated that appellant reported that he continued to experience back and leg pain after engaging in pushing and pulling at work. He recommended that he use a back brace.

On July 18, 2013 appellant filed a claim for recurrence of disability (Form CA-2a) alleging that he sustained a recurrence of total disability on July 11, 2013 due to his March 2, 2005 work injury.

In a September 13, 2013 decision, OWCP denied appellant's claim as he did not submit sufficient medical evidence to establish that he sustained a recurrence of total disability on or after July 11, 2013 due to his March 2, 2005 work injury.

In a report dated July 25, 2014, Dr. Kornfield indicated that appellant reported that his back pain was 7 out of 10, but that he continued to work on a full-time basis at the employing establishment. He noted that appellant would continue with his medication regimen. On August 22 and October 15, 2014 Dr. Kornfield provided a similar assessment of appellant's condition.

Appellant stopped work on November 18, 2014. On December 3 and 24, 2014 he filed CA-7 claim forms alleging that he sustained total disability beginning on November 18, 2014 and continuing as a result of his March 2, 2005 work injury. In a development letter dated December 8, 2014, OWCP advised appellant of the evidence needed to establish his claim. It provided him with a questionnaire form to complete.

In support of his claim, appellant submitted a December 10, 2014 report in which Dr. Kornfield stated that another attending physician had recommended that he undergo back fusion surgery. Dr. Kornfield noted that he told appellant that he could not render an opinion regarding whether the proposed surgery was advisable. He told appellant that he should not work more than 40 hours per week in his job.

On December 15, 2014 Dr. Gower, an attending Board-certified neurosurgeon, performed decompressive laminectomies at L1-2, L2-3, L3-4, L4-5, and L5-S1. This surgery was not

² Evidence of record suggests that appellant was involved in a vehicular accident at work on January 20, 2010, but it is unclear whether a medical condition was accepted in connection with this incident. OWCP later accepted that he sustained a work-related left knee injury on May 20, 2012 which was developed under a different claim file number xxxxxx159. These matters are not the subject of the present appeal.

authorized by OWCP and there is no indication in the record that OWCP accepted that it was necessitated by residuals of the March 2, 2005 work injury.

In a duty status report dated December 16, 2014, Dr. Gower indicated that appellant could not perform any work. He listed clinical findings of postoperative five level decompression and stated “2005” in the portion of the form report for “diagnosis due to injury.” In a January 7, 2015 report, Dr. Kornfield indicated that appellant did not appear for a visit scheduled for that date.

Appellant submitted a questionnaire form, signed on December 24, 2014, in which he asserted that his work necessitated his December 15, 2014 surgery. In an undated handwritten notation on the questionnaire, Dr. Gower stated:

“[Appellant] demonstrates five levels of severe spinal stenosis requiring him to have an [L1 through S1] lumbar laminectomy. Please excuse him from work. The effective start date is November 16, 2014 through May 16, 2015. I will be happy to fill out any [Family and Medical Leave Act and Short Term Disability] benefits packets.”

By decision dated January 16, 2015, OWCP denied appellant’s claim as he did not submit sufficient medical evidence to establish that he sustained a recurrence of total disability on or after November 18, 2014 due to his March 2, 2005 work injury.

LEGAL PRECEDENT

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 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.³

ANALYSIS

OWCP accepted that on March 2, 2005 appellant sustained a lumbar strain and herniated lumbar disc at L2-3 without myelopathy due to positioning a heavy dock board inside his tractor trailer at work. Appellant did not stop work at that time but began working in a limited-duty position for the employing establishment. He stopped work on November 18, 2014 and filed

³ *S.F.*, 59 ECAB 525 (2008); *Terry R. Hedman*, 38 ECAB 222 (1986). 20 C.F.R. § 10.5(x) provides, “*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 (except when such withdrawal occurs for reasons of misconduct, non-performance 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.”

claim forms alleging that he was totally disabled beginning on November 18, 2014 and continuing as a result of his work injury. By decision dated January 16, 2015, OWCP denied appellant's claim that he sustained a recurrence of total disability on or after November 18, 2014 due to his March 2, 2005 work injury.

The Board finds that appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of total disability on or after November 18, 2014 due to his March 2, 2005 work injury.

In a December 10, 2014 report, Dr. Kornfield, an attending Board-certified physical medicine and rehabilitation physician, stated that appellant reported that another attending physician had recommended that he undergo back fusion surgery. However, the submission of this report would not support appellant's claim for a recurrence of total disability on or after November 18, 2014 due to his March 2, 2005 work injury. Dr. Kornfield noted that he told appellant that he could not render an opinion regarding whether the proposed surgery was advisable. He did not provide any opinion that appellant was disabled from his modified work due to his March 2, 2005 work injury and, in fact, he told appellant that he could work 40 hours per week in his job.

On December 15, 2014 Dr. Gower, an attending Board-certified neurosurgeon, performed decompressive laminectomies at L1-2, L2-3, L3-4, L4-5, and L5-S1. In a duty status report dated December 16, 2014, he indicated that appellant could not perform any work, but he did not provide any clear opinion for the cause of this disability.⁴ In an undated handwritten notation on a questionnaire appellant signed on December 24, 2015, Dr. Gower stated that appellant demonstrated five levels of severe spinal stenosis requiring him to have an L1 through S1 lumbar laminectomy. He indicated that appellant should be excused from work from November 16, 2014 through May 16, 2015 and noted, "I will be happy to fill out any [Family and Medical Leave Act and Short Term Disability] benefits packets."

The evidence of Dr. Gower does not establish that appellant sustained a recurrence of total disability on or after November 18, 2014 due to his March 2, 2005 work injury. The Board notes that the December 15, 2014 surgery at multiple levels was not authorized by OWCP and there is no indication in the record that OWCP accepted that it was necessitated by residuals of the March 2, 2005 work injury. Appellant's March 2, 2005 injury was only accepted for lumbar strain and herniated lumbar disc at L2-3 without myelopathy. Dr. Gower has not provided a rationalized medical opinion that the surgery or any disability was due to the March 2, 2005 work injury.⁵ In fact, he has not provided any meaningful discussion of the March 2, 2005 work injury. Dr. Gower mentioned spinal stenosis as a contributor to the need for surgery but he did not provide an opinion that this condition was related to the March 2, 2005 work injury. He performed surgery at multiple levels of appellant's back and there is no compelling medical evidence of record showing that the March 2, 2005 work injury contributed to the need for the surgery and resultant disability.

⁴ Dr. Gower stated "2005" in the portion of the form report for "diagnosis due to injury."

⁵ See *supra* note 3.

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 did not meet his burden of proof to establish that he sustained a recurrence of total disability on or after November 18, 2014 due to his March 2, 2005 work injury.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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