

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

R.M., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 08-1802
Issued: December 10, 2008**

Appearances:
Karen M. Rye, Esq., for the appellant
No appearance, for the Director

Oral Argument October 21, 2008

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 10, 2008 appellant, through her representative, filed a timely appeal of the March 17, 2008 merit decision of the Office of Workers' Compensation Programs, denying his claim for a recurrence of disability. Pursuant to 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 sustained a recurrence of disability on August 16, 1999 causally related to his accepted April 8, 1999 employment-related injuries.

FACTUAL HISTORY

On April 9, 1999 appellant, then a 45-year-old painter filed a traumatic injury claim alleging that on April 8, 1999 he hurt his top teeth, right elbow and knee and back when he fell while working at the employing establishment. By letter dated November 24, 1999, the Office accepted the claim for right elbow strain, bilateral knee contusion and multiple fractured teeth. Appellant was terminated by the employing establishment effective June 22, 1999.

On May 10, 2001 appellant filed a claim alleging that he sustained a recurrence of disability on August 16, 1999 when he fell at work. In a May 10, 2001 narrative statement, he stated that he never fully recovered from his April 8, 1999 employment injuries although he returned to light-duty work until he was laid off by the employing establishment in 1999. Appellant began working at Moon Engineering Shipyard through a temporary employment service in July 1999. He alleged that on August 16, 1999 he fell while working for this employer and sustained a recurrence of disability. Appellant was treated by Dr. Sidney S. Loxley, an attending Board-certified orthopedic surgeon, on August 17, 1999 and since that time his condition has worsened. He stated that he was still being treated by Dr. Loxley on a monthly basis and contended that he was totally disabled.

In a February 16, 2001 medical report, Dr. Loxley stated that appellant sustained lumbar radiculopathy. He opined that appellant remained disabled. Dr. Loxley stated that the diameter of appellant's spinal canal in the mid-lumbar region was as small as eight millimeters which made it extremely hazardous for him to consider resuming vigorous physical duties at the shipyard. In a March 26, 2001 report, he provided a history that appellant sustained a back injury while working at the employing establishment on August 16, 1999. Dr. Loxley also provided a history of the medical treatment he provided to appellant and his findings on physical and objective examination. He noted appellant's April 8, 1999 employment injuries and stated that he also sustained lumbar radiculopathy based on a magnetic resonance imaging (MRI) scan. Dr. Loxley opined that appellant was totally disabled due to his April 1999 employment injuries and the August 16, 1999 fall.

In a July 16, 2001 letter, the employing establishment controverted the claim. It stated that appellant's alleged recurrence of disability occurred while he was working for a private employer. The employing establishment further contended that the medical evidence of record was insufficient to establish his claim.

By decision dated December 11, 2001, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on August 16, 1999 causally related to his April 8, 1999 employment-related injuries. The evidence of record established that he sustained an intervening injury on August 16, 1999 and that he had no residuals of the accepted employment injuries on that date.

In an October 28, 2002 letter, appellant, through his representative, requested reconsideration. In a January 16, 2003 report, Dr. Loxley stated that appellant suffered from disabling tardy ulnar nerve palsy in the right arm, lumbar radiculopathy and chronic bilateral knee pain secondary to his April 8, 1999 employment-related contusions. He opined that appellant was totally disabled due to this injury.

By decision dated May 20, 2003, the Office denied modification of the December 11, 2001 decision. The evidence of record established that appellant's present condition and disability were aggravated by the August 16, 1999 incident and not by the April 8, 1999 employment-related injuries.

A September 4, 2001 x-ray report of Dr. Scott A. Kellermeyer, a Board-certified radiologist, stated that appellant sustained advanced cervical spondylitic change. Dr. Kellermeyer found no evidence of an acute fracture or subluxation.

In a November 5, 2003 letter, appellant, through his representative, requested reconsideration of the Office's May 20, 2003 decision. By decision dated November 24, 2003, the Office denied his request for reconsideration. It neither raised substantive legal questions nor included new and relevant evidence and, thus, was insufficient to warrant a merit review of its prior decisions.

In a May 19, 2004 letter, appellant, through his representative, requested reconsideration. In a March 21, 2003 treatment note, Dr. Loxley stated that appellant was disabled due to his back condition and that he required a lumbar laminectomy.

By decision dated June 28, 2004, the Office denied appellant's request for reconsideration. Appellant's letter requesting reconsideration was dated May 19, 2004, more than one year after its last merit decision dated May 20, 2003 and, thus, was untimely. In letters dated July 7, 2004 and January 12, 2005, appellant, through his representative, requested reconsideration.

By decision dated March 2, 2005, the Office denied modification of the June 28, 2004 decision. The evidence of record was insufficient to establish that appellant sustained a recurrence of disability on August 16, 1999 causally related to his April 8, 1999 employment-related injuries.

In a March 15, 2005 letter, appellant, through his representative, requested reconsideration. In a May 19, 2004 questionnaire, Dr. Loxley stated, among other things, that appellant's April 8, 1999 employment injuries had not resolved as of August 15, 1999 and they continued to deteriorate. He related that appellant sustained a new injury, a contusion, due to his fall on August 16, 1999 while working for another employer. Dr. Loxley opined that the August 16, 1999 incident did not cause reinjury or aggravation of the accepted employment-related injuries. He further opined that there was a causal relationship between appellant's April 8, 1999 employment injuries and his current right extremity symptoms, disability for work after January 16, 2003 and need for continuing medical treatment and surgery as the April 8, 1999 employment incident caused severe injuries that never cleared up.

By decision dated May 31, 2005, the Office denied modification of the March 2, 2005 decision. Appellant failed to submit a rationalized medical opinion establishing that he sustained a recurrence of disability causally related to the accepted employment-related injuries.

In an October 31, 2005 report, Dr. Glenn W. Nichols, a Board-certified orthopedic surgeon, reviewed a history of the April 8, 1999 employment injuries. He diagnosed appellant as having synovitis of the right knee.

On March 3, 2006 appellant requested reconsideration of the Office's May 31, 2005 decision. By decision dated March 13, 2006, the Office denied his request for reconsideration on the grounds that the evidence submitted was not relevant and, thus, insufficient to warrant a merit review of its prior decisions.

In reports dated March 24 and April 26, 2006, Dr. Nichols stated that appellant's significant retropatellar crepitus and medial joint line pain of the right knee required surgery.

By letter dated May 24, 2006, appellant, through his representative, requested reconsideration of the Office's March 13, 2006 decision. In a May 18, 2006 questionnaire, Christine Griffiths, a family nurse practitioner, stated, among other things, that the August 16, 1999 incident reinjured or aggravated the April 8, 1999 employment injuries. She also stated that appellant continued to suffer from residuals and disability due to the accepted employment injuries. Treatment notes covering the period June 28, 2004 through March 21, 2006 of Dr. David G. Goss, a Board-certified orthopedic surgeon, stated that appellant had cervical stenosis at C3-4, C5-6 and C6-7 with cord signal change and lumbar degeneration with foraminal stenosis at L5-S1 and L4-5 with right lower extremity radiating pain. An August 19, 2004 treatment note of Dr. Richard I. Wertheimer, a Board-certified neurologist, stated that appellant experienced tingling of the first three fingers of the right hand. Dr. Wertheimer was not sure if this was due to carpal tunnel entrapment or a shoulder problem. In an April 28, 2006 report, Dr. Nichols noted appellant's desire to undergo arthroscopic right knee surgery.

By letter dated July 12, 2006, the Office accepted appellant's claim for villonodular synovitis and an old bucket handle meniscus tear of the right knee.

In a September 8, 2006 decision, the Office denied modification of the March 13, 2006 decision. Appellant failed to submit rationalized medical evidence establishing a causal relationship between his claimed recurrence of disability and his accepted employment injuries.

In reports dated July 31 and October 26, 2006, Dr. Nichols addressed appellant's continuing right knee problems. Treatment notes of Beth Gist and Rich Kosiorek, appellant's physical therapists, addressed the treatment of appellant's right knee condition in September and October 2006.

In a December 13, 2006 letter, appellant, through his representative, requested reconsideration of the Office's September 8, 2006 decision. By decision dated January 26, 2007 decision, the Office denied modification of the September 8, 2006 decision. The evidence submitted by appellant was insufficient to establish that he sustained a recurrence of disability causally related to his April 8, 1999 employment injuries.

In reports dated December 27, 2006 and February 15, 2007, Dr. Nichols noted appellant's neck, back and right knee pain and medical treatment. In reports dated August 13 and 23, 2007, he stated that appellant was status post resolving septic left olecranon bursa and he had a left elbow olecranon spur.

The reports of Ms. Gist, Mr. Kosiorek and Cheryl Monroe, a physical therapist, addressed the treatment of appellant's right lower extremity on intermittent dates from August 21 to November 29, 2006

In a January 25, 2008 letter, appellant, through his representative, requested reconsideration of the January 26, 2007 decision. In reports dated September 12, 2006, and March 13 and August 14, 2007, Dr. Goss addressed appellant's cervical and lumbar stenosis and medical treatment. In a January 21, 2008 questionnaire, he stated, among other things, that

appellant's April 8, 1999 employment injuries had not resolved as of August 15, 1999 and that they continued to deteriorate. Dr. Goss further stated that he sustained a new injury, a contusion, due to the August 16, 1999 fall while working for another employer. He opined that the August 16, 1999 incident did not cause reinjury or aggravation of the accepted employment-related injuries. Dr. Goss further opined that there was a causal relationship between appellant's April 8, 1999 employment injuries and his current right extremity symptoms, disability for work after January 16, 2003 and need for continuing medical treatment and surgery. He stated that his ongoing cervical and lumbar stenosis, were made symptomatic by the accepted employment incident.

In a December 1, 2006 report, Dr. Beth M. Winke, a Board-certified physiatrist with a subspecialty in pain medicine, stated that appellant suffered from chronic neck and myofascial pain. In an October 21, 2006 report, she stated that appellant sustained cervical spondylosis with cervical spinal stenosis at C3-4 and C5-6 and chronic low back pain with a history of foraminal narrowing bilaterally at L5-S1 and L4-5.

By decision dated March 17, 2008, the Office denied modification of the January 26, 2007 decision.

LEGAL PRECEDENT

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.¹ 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.²

A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which he claims compensation is causally related to the accepted employment injury.³ Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and his employment injury.⁴ This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally

¹ 20 C.F.R. § 10.5(x).

² *Id.*

³ *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

⁴ *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139 (1993).

related to the employment injury.⁵ Moreover, the physician's conclusion must be supported by sound medical reasoning.⁶

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.⁷ In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship.⁸ While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.⁹

ANALYSIS

The Office accepted that appellant sustained a right elbow strain, bilateral knee contusion and multiple fractured teeth while in the performance of duty on April 8, 1999. Appellant claimed a recurrence of disability commencing August 16, 1999. The Board finds that he has failed to submit rationalized medical evidence establishing that his claimed recurrence of right elbow and bilateral knee problems and disability were caused or aggravated by his accepted employment-related right elbow strain, bilateral knee contusion and multiple fractured teeth.

Dr. Loxley's February 16 and March 26, 2001 reports stated that appellant sustained lumbar radiculopathy and that he was totally disabled due to the April 8, 1999 employment injuries and August 16, 1999 fall. In the March 26, 2001 report, he provided an inaccurate history of injury as he stated that appellant was working at the employing establishment when he fell on August 16, 1999. The record reveals that appellant was in fact working for a private employer when he fell on August 16, 1999. The Board finds that this incident constitutes an intervening incident that negates a causal relationship between the April 8, 1999 employment injuries and appellant's condition as of August 16, 1999. Dr. Loxley failed to provide medical rationale explaining how or why appellant's recurrence of disability was caused by the April 8, 1999 employment injuries. The Board has held that medical reports not supported by medical rationale are of limited probative value.¹⁰

Similarly, Dr. Loxley's January 16, 2003 report and March 21, 2003 treatment note are of limited probative value. In the January 16, 2003 report, he opined that appellant had disabling tardy ulnar nerve pulsy in the right arm, lumbar radiculopathy and chronic bilateral knee pain

⁵ *Ricky S. Storms*, 52 ECAB 349 (2001); *see also* 20 C.F.R. § 10.104(a)-(b).

⁶ *Alfredo Rodriguez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

⁷ *See Ricky S. Storms*, *supra* note 5; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

⁸ For the importance of bridging information in establishing a claim for a recurrence of disability, *see Richard McBride*, 37 ECAB 748 at 753 (1986).

⁹ *See Ricky S. Storms*, *supra* note 5; *Morris Scanlon*, 11 ECAB 384, 385 (1960).

¹⁰ *See Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

secondary to his April 8, 1999 employment-related contusions. Dr. Loxley further opined that appellant was totally disabled due to the accepted employment injury. In the March 21, 2003 treatment note, he opined that appellant was disabled due to his back condition and he required a lumbar laminectomy. However, Dr. Loxley failed to explain how or why appellant's diagnosed conditions and disability were causally related to the April 8, 1999 employment-related injuries.¹¹

Moreover, Dr. Loxley's May 19, 2004 and Dr. Goss's January 21, 2008 questionnaires are insufficient to establish appellant's claim. Both physicians stated, among other things, that appellant's April 8, 1999 employment injuries had not resolved as of August 15, 1999 and that they continued to deteriorate. They related that appellant sustained a new injury, a contusion, due to his fall on August 16, 1999. The physicians opined that the August 16, 1999 incident did not cause reinjury or aggravation of the accepted employment-related injuries. They further opined that there was a causal relationship between appellant's April 8, 1999 employment injuries and his current right extremity symptoms, disability for work after January 16, 2003 and need for continuing medical treatment and surgery. Dr. Loxley stated that the April 8, 1999 employment incident caused severe injuries that never cleared up. Dr. Goss stated that appellant's ongoing cervical and lumbar stenosis, were made symptomatic by the accepted employment incident. However, neither Dr. Loxley nor Dr. Goss provided any medical rationale explaining how or why appellant's current symptoms and disability were causally related to the April 8, 1999 employment injuries especially in light of their finding that appellant sustained a new injury on August 16, 1999.¹²

The reports and treatment notes of Dr. Kellermeyer, Dr. Nichols, Dr. Wertheimer, Dr. Goss and Dr. Winke are of limited probative value as none of the physicians opined that appellant's diagnosed conditions were causally related to the April 8, 1999 employment injuries. The Board has long held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹³

The May 18, 2006 questionnaire of Ms. Griffiths, a family nurse practitioner and the treatment notes of Ms. Gist, Mr. Kosiorek and Ms. Monroe, appellant's physical therapists, do not constitute probative medical evidence. Neither a nurse practitioner¹⁴ nor a physical therapist¹⁵ is a "physician" as defined under the Federal Employees' Compensation Act.¹⁶ Therefore, the nurse practitioner's questionnaire and the physical therapists' reports do not constitute competent medical evidence to support appellant's claim.

¹¹ *Id.*

¹² *Id.*

¹³ *Willie M. Miller*, 53 ECAB 697 (2002).

¹⁴ *Paul Foster*, 56 ECAB 208 (2004).

¹⁵ *See David P. Sawchuk*, 57 ECAB 316 (2006).

¹⁶ *See* 5 U.S.C. § 8101(2).

Appellant failed to submit rationalized medical evidence establishing that his disability commencing August 16, 1999 resulted from the effects of his employment-related right elbow strain, bilateral knee contusion and multiple fractured teeth. The Board finds that he has not met his burden of proof.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a recurrence of disability commencing August 16, 1999 causally related to his accepted April 8, 1999 employment-related injuries.

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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