United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 11-1616**
	)	**Issued: March 1, 2012**
DEPARTMENT OF THE AIR FORCE, AIR FORCE RESERVE, Vienna, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 1, 2010 appellant, through his attorney, filed a timely appeal from a February 8, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 established a recurrence of disability commencing March 25, 2009.

FACTUAL HISTORY

OWCP accepted that appellant, an aviation mechanic, sustained a herniated L5-S1 disc in the performance of duty on March 24, 1989. He also sustained an aggravation of L5-S1

[1] 5 U.S.C. § 8101 *et seq.*

herniated disc on September 5, 2002 when he tripped and fell in the performance of duty.[2] In August 2005 appellant began working in a sedentary position as a mission support specialist.

On April 16, 2009 appellant filed a claim for compensation (Form CA-7) commencing March 25, 2009. In a report dated June 9, 2009, his treating physiatrist, Dr. Hyo Kim, stated that appellant's "condition has been deteriorating, even with medications, physical therapy, back brace and modified work." He noted that appellant's pain had been worsening, and he could not tolerate any prolonged sitting, standing or walking. Appellant took narcotics and antidepressants for his pain and depression, which affected him cognitively and mentally. Dr. Kim stated "it is not advisable to continue working, due to [appellant's] deteriorating physical condition and other issues mentioned earlier." He recommended a psychological evaluation and concluded, "The prognosis is poor for [appellant] to recover from his current conditions. I do n[o]t expect any improvement and his condition should deteriorate slowly instead. I do n[o]t expect [appellant] to return to any type of gainful employment or improvement, for good."

OWCP referred appellant to Dr. Michael Jurenovich, an osteopath, for a second opinion evaluation. In a report dated October 14, 2009, Dr. Jurenovich reviewed the history and results on examination. He diagnosed lumbar disc disease and status post 1990 and 1992 surgeries, stating that the conditions were work related. Dr. Jurenovich stated that the residuals were permanent in nature, that appellant could benefit from a functional capacity evaluation and needed depression issues to be addressed before any lumbar surgery. He stated that he disagreed with Dr. Kim that appellant was totally disabled, and while appellant clearly could not return to his former employment, he could consider a light-duty job at four hours per day.

Appellant was referred to Dr. James Brodell, a Board-certified orthopedic surgeon, as a referee physician to resolve a conflict in the medical evidence. In a report dated May 24, 2010, Dr. Brodell provided a history and results on examination. He diagnosed lumbosacral spondylosis, major psychiatric overlay, deconditioned state and nicotine abuse. Dr. Brodell noted many risk factors for appellant's current back pain, "including advancing age, deconditioned state, nicotine abuse, narcotic addiction, remote subjectively unsuccessful surgery, degenerative disc and joint disease, job dissatisfaction and affective disorder (depression)." As to the accepted work injuries, Dr. Brodell indicated that they were "no longer present and active." He noted that a significant percentage of patients with back surgery continued to have residuals diagnosed as failed surgical back syndrome and appellant's L5-S1 degenerative disc and joint disease could be considered a consequence of the surgeries. Dr. Brodell stated that emotional factors appeared to be more important that the underlying physical process, stating that appellant's actions during examination were typical of malingering, that patients with chronic depression suffer from symptom magnification, nicotine abusers have a higher incidence of lumbar pain and patients taking chronic narcotic analgesics can became dependent on the medication. As to the work stoppage on March 25, 2009, Dr. Brodell stated, "Based on the conditions allowed in the two [w]orkers' [c]ompensation claims, as well as any residuals, I am unable to identify a reasonable medical indication for [appellant] to have left his job as a Mission Support Specialist in March of 2009." He concluded that appellant could return to work in that position without restriction.

[2] OWCP's case file for the September 2, 2002 injury is a subsidiary file of the current master file (xxxxxx209).

By decision dated July 15, 2010, OWCP denied the claim for compensation. It found the weight of the evidence was represented by Dr. Brodell.

Appellant requested a hearing before an OWCP hearing representative, which was held on November 17, 2010. At the hearing he indicated that, after the report from Dr. Jurenovich, he inquired as to a four-hour-per-day job at the employing establishment, but was told there was none available.

By decision dated February 8, 2011, OWCP affirmed the July 15, 2010 decision. The hearing representative found that there was no conflict in the medical evidence on the recurrence issue presented, as neither Dr. Kim nor Dr. Jurenovich provided a probative medical opinion. The hearing representative further stated that at the hearing appellant and his representative had clarified that the basis for the claim was a withdrawal of the light-duty position.

LEGAL PRECEDENT

OWCP's regulations define the term recurrence of disability as follows:

> "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."[3]

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 requirements.[4] 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.[5]

---

[3] 20 C.F.R. § 10.5(x).

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

[5] *Maurissa Mack,* 50 ECAB 498 (1999).

ANALYSIS

Appellant was working in a modified position and stopped working on March 25, 2009. He has the burden of proof to establish a recurrence of disability commencing on that date. With respect to the employment-related medical condition, as noted above, the medical evidence must show a change in the nature and extent of the condition.

OWCP developed the medical evidence and found that a conflict existed under 5 U.S.C. 8123(a).[6] In this regard the Board concurs with the hearing representative that, with respect to a change in the nature and extent of an employment-related condition on or about March 25, 2009, there was no conflict in the medical evidence. Attending physician Dr. Kim did not discuss the work stoppage on March 25, 2009 and did not submit a report until June 9, 2009. He referred generally to a deteriorating physical condition and also noted depression. Dr. Kim did not offer an opinion that appellant was disabled due to an employment-related condition. In addition, the second opinion physician, Dr. Jurenovich, failed to properly address the issue in his October 14, 2009 report. He indicated that he disagreed with Dr. Kim regarding total disability at that time, without specifically discussing appellant's condition on March 25, 2009. Dr. Jurenovich did not provide an opinion with regard to a change in the nature and extent of the employment-related condition on March 25, 2009.

Having found there was no conflict, the hearing representative makes no further findings regarding the medical evidence. But it is well established that when OWCP selects a physician as a referee and there is no conflict under 5 U.S.C. § 8123(a), then the physician serves as a second opinion physician and his report may constitute the weight of the medical evidence.[7]

Dr. Brodell provided a detailed medical report based on an accurate background. While appellant's representative contested the description of appellant as a nicotine abuser at the November 17, 2010 hearing, appellant acknowledged that he was a smoker. Dr. Brodell provided a complete background and a review of medical records. Unlike Drs. Kim and Jurenovich, he specifically addressed the issue of the work stoppage. He opined that there was no reasonable medical indication for appellant to have left his job in March 2009. Dr. Brodell noted there were other nonemployment factors contributing to appellant's condition and offered an unequivocal opinion on the recurrence of disability issue.

The Board finds that Dr. Brodell represents the weight of the medical evidence in this case. He provided a rationalized medical opinion and is the only physician to address appellant's disability as of March 25, 2009.

With respect to a withdrawal of light duty, the hearing representative appeared to find that appellant was now basing his claim on a withdrawal of light duty. It is not clear from the record that appellant was claiming a withdrawal of the light-duty job on or about

[6] FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a).

[7] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

March 25, 2009. At the hearing appellant's representative referred to appellant no longer being an "EEOC rep[resentative]" without referring to the actual light-duty job. He then indicated that after appellant was told there was no part-time job available, his employment was eventually terminated. To the extent that appellant is alleging that on or about March 25, 2009 the employing establishment withdrew the mission control specialist job, he did not present any probative evidence in this regard. If he has new factual or medical evidence, or additional argument, he may submit such 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. Based on the current evidence of record, appellant has not established a claim for compensation commencing March 25, 2009.

CONCLUSION

The Board finds that appellant did not establish a recurrence of disability on or about March 25, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 8, 2011 is affirmed, as modified.

Issued: March 1, 2012
Washington, DC

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

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

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