

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

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<b>E.O., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 11-1898</b>
	)	<b>Issued: March 21, 2012</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp; DISTRIBUTION CENTER, Teterboro, NJ, Employer</b>	)	
	)	
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*Appearances:*  
*James Muirhead, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 16, 2011 appellant, through her attorney, filed a timely appeal from an April 20, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 has established a recurrence of disability commencing May 21, 2009.

**FACTUAL HISTORY**

In the present case, OWCP accepted that appellant sustained a herniated L5-S1 disc with lumbosacral radiculopathy when she tripped on electrical cords and fell in the performance of

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

duty on April 27, 1993.<sup>2</sup> Appellant filed a claim for a recurrence of disability commencing February 28, 2003. She underwent an L5-S1 microdiscectomy surgery on August 29, 2003. The surgeon, Dr. Paul Ratzker, indicated in a December 8, 2004 report that appellant had marked lumbosacral degeneration and the only definitive treatment would be a total discectomy, interbody fusion or pedicle screw fixation procedure. OWCP accepted the claim for a recurrence of disability.

On November 24, 2009 appellant filed a claim for a recurrence of disability (Form CA-2a) as of May 21, 2009. She indicated that the date of the original injury was April 27, 1993 and she had undergone surgery on May 21, 2009. On the claim form appellant indicated that she stopped working in September 2008.<sup>3</sup>

By decision dated February 27, 2010, OWCP denied the claim for a recurrence of disability. It found that the medical evidence was insufficient to establish the claim.

In a letter dated February 22, 2010, appellant requested a telephonic hearing with an OWCP hearing representative. She also submitted additional medical evidence.

By report dated May 8, 2007, Dr. Robert Heary, a neurosurgeon, indicated that a lumbar discogram was performed on April 11, 2007. He diagnosed an L5-S1 herniated disc with degenerative changes and positive discogram. Dr. Heary stated, "Surgical treatment would be a one-level lumbar fusion." He recommended a weight control and exercise program.

In a report dated September 30, 2008, Dr. Heary provided results on examination and stated that appellant had an exacerbation of symptoms secondary to an L5-S1 degenerative disc since a September 2, 2008 work injury. He recommended a discogram.

By report dated March 22, 2010, Dr. Heary indicated that he first treated appellant on December 12, 2006. He stated that she had a 1993 injury from a fall, a second back injury in 2003, a May 4, 2005 back injury while moving heavy objects and a June 9, 2005 neck injury. Dr. Heary reviewed medical treatment and indicated that his most recent evaluation was September 15, 2009. He concluded that appellant "has had an assortment of work-related injuries over the past 17 years. At a minimum, [appellant] has had documented injuries at work in 1993, 2003, on May 4, 2005, June 9, 2005 and September 2, 2008." Dr. Heary stated that after the most recent work-related injury on September 2, 2008, she had developed intractable low back pain, which ultimately required surgical intervention on May 21, 2009. He further stated, "It is not possible for me to determine with any high degree of medical certainty exactly which injury resulted in what degree of painful low back symptoms; however, it is clear that

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<sup>2</sup> According to an OWCP's hearing representative there were additional claims filed by appellant: (1) a claim for injury on May 4, 2005, accepted for lumbar sprain and temporary aggravation of lumbar spondylosis and degenerative disc disease, resolved as of June 4, 2006; (2) a claim for injury on June 9, 2005 accepted for cervical radiculopathy, with compensation terminated by decision July 18, 2008; and (3) a claim for a lumbar injury on September 3, 2008 that was denied by OWCP.

<sup>3</sup> The employing establishment indicated that appellant had been working a modified position, worked regular duty on September 2, 2008, and then filed a claim for injury. Appellant was off work until December 18, 2009.

[appellant's] most recent fall on September 2, 2008 directly led to deterioration in her clinical condition that ultimately required surgical intervention.”

A telephonic hearing with an OWCP hearing representative was held on May 26, 2010. By decision dated July 21, 2010, the hearing representative affirmed the February 17, 2010 OWCP decision.

In a letter dated February 7, 2011 appellant, through her representative, requested reconsideration. Counsel argued that the 2009 fusion surgery was inevitable, as Dr. Ratzker was recommending the surgery in 2004 and Dr. Heary in 2007. Appellant submitted a copy of the May 21, 2009 operative report from Dr. Heary indicating that she underwent an anterior lumbar fusion surgery.

By decision dated April 20, 2011, OWCP reviewed the case on its merits. It found the evidence was insufficient to warrant modification of the prior decision.

### **LEGAL PRECEDENT**

A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>4</sup> 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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.”<sup>5</sup>

### **ANALYSIS**

The record indicates that OWCP accepted that appellant sustained an L5-S1 herniated disc with radiculopathy in the performance of duty on April 27, 1993. OWCP also accepted a recurrence of disability in February 2003 and appellant received compensation for wage loss through November 30, 2003. Appellant's claim in this case is for a recurrence of disability commencing May 21, 2009, when she underwent L5-S1 lumbar fusion surgery, causally related to the April 27, 1993 injury. The Board notes that the record indicates that appellant had stopped working on or about September 2, 2008. The circumstances of the work stoppage are not entirely clear, but it appears OWCP developed a claim for a new injury on that date. That claim is not before the Board. In addition, there were additional claims for injury filed in 2005. While it appeared appellant had been working in a modified position at times in 2008, there is no

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<sup>4</sup> *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

<sup>5</sup> 20 C.F.R. § 10.5(x).

indication that any light duty was related to the April 27, 1993 injury.<sup>6</sup> She has the burden of proof to submit medical evidence containing a well-reasoned medical opinion on causal relationship between the disability and the employment injury.

The medical evidence establishes that appellant underwent lumbar fusion surgery on May 21, 2009 but as to causal relationship between the surgery and the April 27, 1993 employment injury, the evidence is of diminished probative value. Dr. Heary's March 22, 2010 report did not provide a complete and accurate factual and medical history. He referred only briefly to a fall in 1993, and then noted a second back injury in 2003 without further explanation. The record does not establish a second back injury in 2003, but a recurrence of disability at that time. Dr. Heary did not demonstrate an understanding of the 1993 injury and the subsequent medical and factual history. Moreover, the opinion as to the cause of the May 21, 2009 fusion surgery is equivocal and, to the extent it identifies a particular injury, refers to a September 2, 2008 injury. Dr. Heary stated that he could not determine "which injury resulted in what degree of painful low back symptoms," and then concluded that the "most recent fall on September 2, 2008 directly led to deterioration in her clinical condition that ultimately required surgical intervention." The claim for injury on or about September 2, 2008 is not, as noted above, before the Board on this appeal.

There is no additional medical evidence that provides an opinion on causal relationship with respect to the May 21, 2009 surgery. The Board accordingly finds that appellant has not met her burden of proof in this case.

On appeal, counsel argues that Dr. Ratzker and Dr. Heary had "predicted" the need for lumbar fusion surgery in 2004 and 2007, but the medical evidence indicated only that Dr. Ratzker and Dr. Heary had referred briefly to the possibility of a fusion surgery in the future. The issue is whether the actual surgery performed on May 21, 2009 and the subsequent disability, were causally related to the April 27, 1993 employment injury. The opinion of Dr. Heary on the issue was, for the reasons noted above, insufficient to establish a recurrence of disability causally related to the employment injury. 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 her burden of proof to establish a recurrence of disability commencing May 21, 2009.

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<sup>6</sup> If a claimant returns to work in a light-duty position following an employment injury, it would be her burden of proof to establish a change in the nature and extent of the injury-related condition resulting in disability. *See S.F.*, 59 ECAB 525 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 20, 2011 is affirmed.

Issued: March 21, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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