

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

J.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Blue Springs, MO, Employer**

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**Docket No. 12-1099
Issued: November 7, 2012**

Appearances:
Edward L. Daniel, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 23, 2012 appellant, through her representative, filed a timely appeal from the March 13, 2012 Office of Workers' Compensation Programs' (OWCP) decision which denied modification of a prior decision dated November 24, 2010 denying her claim for a recurrence. 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 has established that she sustained a recurrence of disability on September 20, 2008 causally related to her January 10, 2007 injury.

FACTUAL HISTORY

This case has previously been on appeal before the Board.² In a May 25, 2010 decision, the Board found that the case was not in posture for decision regarding whether appellant

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 09-1792 (issued May 25, 2010).

established that she sustained a concussion causally related to her accepted employment injuries. The Board found that the case must be referred to an impartial medical specialist to resolve the conflict in medical opinion evidence between OWCP's medical adviser and the treating physicians regarding whether appellant sustained an employment-related concussion. The facts and history contained in the prior appeal are incorporated by reference.

The relevant facts include the September 10, 2008 report of Dr. W. John Ellis, Board-certified in family medicine, who stated that appellant had a concussion during a motor vehicle accident on January 10, 2007 and had difficulty remembering all of the accident. Dr. Ellis noted that appellant was in another motor vehicle accident on January 15, 2008 that left her dazed but not unconscious. He indicated that she was already undergoing physical therapy for her neck and, at that time, she had more pain in her neck. Dr. Ellis related that appellant did not believe that it changed her memory, thinking, dizziness or headaches. He noted her symptoms and indicated that she had headaches that could be tight in the back of the head, top of the head and sides of the head and were continuous since the accident. Dr. Ellis offered work-related diagnoses that included a concussion causing complex with integrated cerebral function disturbance due to brain damage and postconcussion headache syndrome as well as strains in the back and left arm conditions. He opined that appellant was disabled on February 23, March 30, April 11 and 20, May 7, 8 and 9, 2007 due to headaches, pain or doctor visits. Dr. Ellis noted that she missed work to attend his appointment and expressed amazement that she continued to work with "this severe head injury."

Following the prior appeal, on June 17, 2010 OWCP referred appellant to Dr. John Sand, a Board-certified neurologist, for an impartial medical evaluation to resolve the conflict in medical opinion evidence regarding whether she sustained an employment-related concussion. In a July 7, 2010 report, Dr. Sand examined appellant and opined that her work-related motor vehicle accident in January 2007 resulted in a concussion or postconcussion syndrome. He indicated that she was symptomatic but there were no objective findings on neurologic examination. Dr. Sand indicated that appellant's condition primarily caused headache and reduced concentration, without objective finding on neurologic examination. Regarding appellant's nonwork motor vehicle accident on January 15, 2008, and the current condition, there was "little or no contribution."

On August 13, 2010 OWCP accepted postconcussion syndrome. It also noted that the other accepted conditions included sprain of the back, thoracic region, sprain of the back, lumbar region, contusion of face, scalp and neck, except eyes on the left, sprain of the shoulder and upper arm, unspecified site on the left.

On September 13, 2010 appellant filed a Form CA-7 claim for total disability since September 20, 2008. OWCP adjudicated this as a claim for a recurrence of disability. In an attachment, the employing establishment indicated that appellant was given a modified assignment after her January 10, 2007 injury. It noted that she worked the modified assignment until she was released to full duty on March 23, 2007. Additionally, the employing establishment indicated that appellant retired on March 23, 2009 and explained either full duty or

a modified job assignment would have been available for her. It noted that she voluntarily retired and there was no medical documentation indicating that she could not work.³

By letter dated October 8, 2010, OWCP informed appellant of the type of evidence needed to support her claim and requested that she submit such evidence within 30 days.

In an October 15, 2010 response, appellant's representative indicated that he had instructed appellant to contact her physicians to obtain a medical report addressing the issues pertaining to her recurrence.

On November 8, 2010 OWCP received an unsigned and undated response from the employing establishment. It noted that appellant was in a leave-without-pay (LWOP) status from September 20, 2008 until she retired on March 23, 2009. Additionally, in a November 4, 2010 e-mail, David Smith, a supervisor, indicated that he did not have any knowledge that appellant reported any complaints or difficulty related to her previous job injury. He further noted that she did "demonstrate poor attendance giving various reasonings for her failure to maintain regular reporting." Mr. Smith indicated that appellant reported a nonemployment-related motor vehicle accident that occurred a year after the January 10, 2007 employment injury.

By decision dated November 24, 2010, OWCP denied appellant's claim for a recurrence of disability as the medical evidence did not establish that the claimed disability was due to the accepted work injury.

By letters dated November 2, 2011 and January 26, 2012, counsel requested reconsideration. He argued that additional medical evidence supported that appellant's condition caused her to stop work on September 19, 2008. OWCP received: unsigned medical reports dated April 22, 30 and June 4, 2009 from Dr. Jeffrey T. McMillan, an orthopedic surgeon, who diagnosed right occipital neuralgia, upper back pain and low back pain, bilateral carpal tunnel syndrome and possible herniated nucleus pulposus C5-6; an April 22, 2009 cervical spine magnetic resonance imaging (MRI) scan read by Dr. John S. Yungmeyer, a Board-certified diagnostic radiologist, which revealed mild degenerative disc space narrowing at C5-6 with mild degenerative facet joint arthropathy; and June 5, 2009 MRI scans of the lumbar and thoracic spines read by Dr. Robert C. Newth, a Board-certified diagnostic radiologist, which were negative. It also received records dated August 18 and September 3, 2009 from Dr. Carl S. Davis, Board-certified in family medicine and an emergency room physician, who noted that appellant was seen for a vestibular issue. Dr. Davis referred appellant for physical therapy which she attended on various dates in August and September 15, 2009. In a work capacity evaluation dated November 30, 2010, Dr. Michael Everson, a Board-certified psychiatrist and neurologist, indicated that she could not work eight hours a day or perform her usual job.

In a November 30, 2010 report, Dr. Jay Robinson, Board-certified in clinical neurophysiology and neurology, indicated that he had treated appellant since October 19, 2009. He noted that "[a]s a result of her severe auto accident [she] has been left with ongoing headaches, neck pain, lumbar pain, thoracic pain, difficulty with her thought processes and memory and an intolerance for such things as bright lights, excessive noise, excessive physical

³ This was also confirmed by PS Form 50 "Notification of Personnel Action" dated March 23, 2009.

activity, *etc.*” Dr. Robinson noted that Dr. Ellis documented a neuropsychological examination indicating that appellant had cognitive difficulties based on a brain injury suffered at the time of the auto accident. He indicated that appellant’s symptoms were unrelenting and “refractory to treatment.” Dr. Robinson explained that she had a negative MRI head scan and a normal electroencephalography and believed that she continued with symptoms as a result of musculoskeletal damage as well as brain damage suffered at the time of the accident. He explained that the accident occurred January 10, 2007 and appellant continued working with her symptoms, until September 20, 2008 at which point she had to stop work. Dr. Robinson opined that she never recovered from the original injury and “simply tried to work while suffering from the above[-]mentioned conditions.” He indicated that appellant was reluctant to take medication during that time period as she felt that it might further impair her ability to work, and that she was barely able to tolerate her symptoms until September 30, 2008, “at which point she simply could not go on any longer.” Dr. Robinson opined that she “never did recover from the original injury and its symptoms, but she simply tried to ‘press on’ and do the best she could but eventually was unable to continue as the suffering from these conditions and symptoms tends to be ‘cumulative.’” He also explained that he was “not aware of any other factors which could cause these symptoms other than the auto accident itself.”

In an August 8, 2011 report, Dr. James Stuckmeyer, a Board-certified orthopedic surgeon, noted appellant’s history and treatment. He noted that on January 7, 2008 she was seen by Dr. Ann Lee, a Board-certified internist, for complaints of back and neck pain after a motor vehicle accident. Dr. Stuckmeyer noted that appellant was working full time at the time of the accident and continued to do so. He stated that Dr. Lee saw appellant on February 5, 2008 and allowed her to return to work full time and released her from care. Appellant’s current major complaint was daily headaches with memory issues and persistent dizziness. She also had difficulty with prolonged standing, walking, lifting, bending and looking up. Appellant reported left shoulder and radiating left arm pain with numbness and tingling and thoracolumbar pain with radiating pain into the right buttock. Examination showed some tenderness of the spine, normal muscle strength and diminished rotation of the left shoulder with a positive impingement sign. Dr. Stuckmeyer examined appellant and opined that “prior to the accident date in discussion the patient stated she was completely asymptomatic.” He stated that she had multiple traumas as a “direct and proximate prevailing factor of the accident occurring on January 10, 2007.” Dr. Stuckmeyer indicated that appellant had ongoing accident-related diagnoses of occipital neuralgia that was nonresponsive to occipital nerve blocks, chronic cervical strain with left upper extremity radiculopathy, chronic thoracic strain and absence of radiculopathy, lumbosacral strain with radicular symptoms in the right buttock region, impingement syndrome left shoulder, partial rotator cuff tear nonresponsive to conservative modalities and chronic bitemporal headaches, vertigo and significant memory issues. He opined that “[w]hen one considers the global presentation of [her], it would be the opinion of this examiner that she is permanently and totally disabled as a direct result of the multiple injuries sustained as a result of the accident on January 10, 2007. I would concur with Dr. Robinson that these diagnoses and conditions have not improved and persist I would also concur with Dr. Robinson that the patient attempted to ‘stick it out,’ but was unable to continue [appellant’s] occupational duties due to the persistent multiple complaints. It would be the opinion of this examiner that the accident in discussion considered in isolation and the subsequent diagnoses as a result of this accident have deemed [her] to be permanently and totally disabled.”

By decision dated March 13, 2012, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

Section 10.5(x) of OWCP's regulations provide that 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.⁴

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing 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 who supports that conclusion with sound medical reasoning.⁵

Appellant has the burden of establishing that she sustained a recurrence of a medical condition⁶ that is causally related to her accepted employment injury. To meet her 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.⁷ Where no such rationale is present, the medical evidence is of diminished probative value.⁸

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.⁹

ANALYSIS

OWCP accepted appellant's claim for sprain of the back, thoracic region, sprain of the back, lumbar region, contusion of face, scalp and neck, except eyes on the left, sprain of the shoulder and upper arm, unspecified site on the left. Appellant returned to regular duty on March 27, 2007. On January 15, 2008 she had a nonwork-related motor vehicle accident.

Appellant subsequently requested that her claim be accepted for a recurrence of total disability on September 20, 2008.

However, there is no rationalized medical opinion which explains why appellant's condition worsened after seeing Dr. Ellis on September 10, 2008. While Dr. Ellis expressed

⁴ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

⁵ *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.104.

⁶ 20 C.F.R. § 10.5(y) (2002).

⁷ *Ronald A. Eldridge*, 53 ECAB 218 (2001).

⁸ *Mary A. Ceglia*, 55 ECAB 626 (2004); *Albert C. Brown*, 52 ECAB 152 (2000).

⁹ *Walter D. Morehead*, 31 ECAB 188 (1986).

surprise that she continued to work with her conditions, he did not prospectively indicate that or explain why she would be unable to work as of September 20, 2008 due to her accepted conditions. The Board notes that appellant continued to work her regular duty prior to the nonwork-related motor vehicle accident on January 15, 2008. Furthermore, there is no bridging medical evidence from February 5 until September 10, 2008 regarding appellant's inability to work. This is especially important in light of the January 15, 2008 motor vehicle accident and her retirement on March 23, 2009. The Board also notes that Dr. Sand, while indicating that the subsequent accident made little or no contribution to appellant's concussion condition, did not indicate that appellant had any objective findings on examination and did not offer any opinion that she was disabled for work beginning September 30, 2008 due to her accepted conditions.¹⁰

In a November 30, 2010 report, Dr. Robinson noted appellant's history and explained that she was barely able to tolerate her symptoms until she stopped work. He explained that she never recovered from the original injury "but she simply tried to 'press on' and do the best she could but eventually was unable to continue as the suffering from these conditions and symptoms tends to be 'cumulative.'" Dr. Robinson stated that he was "not aware of any other factors which could cause these symptoms other than the auto accident itself." The Board notes that this report is not factually accurate as he does not appear to be aware of the January 2008 motor vehicle accident. It is well established that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value.¹¹ Dr. Robinson did not otherwise explain the medical reasons why the disability beginning September 20, 2008 was due to a spontaneous change in the accepted condition.

In an August 8, 2011 report, Dr. Stuckmeyer noted appellant's history of injury and treatment. He opined that "prior to the accident dated in discussion the patient stated she was completely asymptomatic. The Board has found that the fact that a condition arises after an injury and was not present before an injury is not sufficient to support causal relationship.¹² Dr. Stuckmeyer further opined that appellant sustained multiple traumas as a "direct and proximate prevailing factor of the accident occurring on January 10, 2007." However, the Board notes that the subsequent accident of January 15, 2008 was a nonwork accident and he did not clearly explain why the later nonwork accident would not be the cause of appellant's subsequent disability. Dr. Stuckmeyer also did not sufficiently explain why appellant's disability beginning September 20, 2008 would be due to a spontaneous change in the accepted condition when she had been working regular duty after the work injury. Therefore, the Board finds that his conclusion on appellant's disability is insufficiently reasoned and insufficient to establish the claim for a recurrence of disability beginning September 20, 2008.

Other medical evidence submitted by appellant is insufficient as it did not offer any opinion regarding her inability to work commencing September 10, 2008.

¹⁰ Dr. Sand is only an impartial specialist with regards to whether appellant's concussion condition is work related. He was not asked to address the period of disability at issue in the present appeal.

¹¹ *Douglas M. McQuaid*, 52 ECAB 382 (2001).

¹² *Michael S. Mina*, 57 ECAB 379 (2006).

Accordingly, the Board finds that appellant has not met her burden of proof in this case as she has not submitted reasoned medical opinion explaining why her recurrence of disability beginning September 20, 2008 was caused or aggravated by the January 10, 2007 employment injury and not the result of her subsequent motor vehicle accident.

On appeal, counsel argued that OWCP should have obtained a medical review. However, as explained, appellant has the burden of proof to establish the claim and, for the reasons set forth, she had not met her burden of proof. She 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 has not established that she sustained a recurrence of disability on September 20, 2008 causally related to her January 10, 2007 injury.

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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