

back while trying to avoid falling. OWCP accepted the claim for spinal stenosis, lumbar region and paid appropriate benefits.² Appellant stopped work on May 6 to August 10, 2009, when he returned to light duty four hours a day.

On September 8, 2009 OWCP requested that appellant's treating physician provide a reasoned report addressing whether appellant continued to have disability due to his accepted conditions. Thereafter, appellant's treating physician, Dr. Purnima Thakran, a neurologist, submitted a September 28, 2009, prescription slip stating that appellant should be off work for one month.

On January 11, 2010 Dr. Ghol Bahman Ha'Eri, an orthopedic surgeon and OWCP referral physician, reviewed the job description of a heavy mobile equipment mechanic leader, the medical records and a statement of accepted facts. He presented examination findings and opined that the objective findings of mild bilateral neural foraminal stenosis, as seen on the November 28, 2008 magnetic resonance imaging (MRI) scan, was of a degenerative nature and not due to the mechanism of injury as noted in the statement of accepted facts. Dr. Ha'Eri opined that the multilevel lumbar degenerative discs and mild bilateral foraminal stenosis at L4-5 were temporarily aggravated by the work injury and that appellant reached his preinjury status when he returned to part-time modified duties on August 10, 2009. He opined that appellant reached maximum medical improvement from all conditions related to the mechanism of injury. Dr. Ha'Eri indicated that appellant was unable to perform his usual job, but could perform limited duty eight hours a day based on his degenerative lumbar disc and stenosis conditions. Following OWCP's request for clarification as to whether appellant was capable of performing full time on a "5/4/9" compressed work schedule, Dr. Ha'Eri opined, in a follow-up report of July 11, 2010, that appellant was able to perform modified work under a 5/4/9 compressed work schedule and work eight 9-hour days and one 8-hour day for a total of 80 hours biweekly.

In July 2010, appellant began working light duty on a full-time basis. The employing establishment indicated that it would accommodate Dr. Ha'Eri's restrictions beginning July 26, 2010.

In a January 11, 2011 progress note, Dr. Navdeep Loomba, a Board-certified pain specialist to whom appellant was referred by Dr. Thakran, indicated that appellant last worked January 4, 2011. Dr. Loomba provided an assessment of lumbosacral radiculitis, herniated lumbar disc and osteoarthritis lower leg and took appellant off work for three weeks. In subsequent progress notes, he continued to take appellant off work. Progress notes from Dr. James H. Lehto, a chiropractor, were also received.

On April 20, 2011 appellant filed a claim for total disability commencing April 19, 2011. In an April 19, 2011 note, Dr. Loomba advised that appellant was being treated for low back pain and requested that he be excused from work from April 19 to July 19, 2011.

² Appellant has two prior claims for low back injuries: under case number xxxxx565, date of injury November 15, 2004, he is an unadjudicated claim which was allowed for limited medical benefits. Under case number xxxxx505, date of injury April 27, 2005, he has an accepted lumbar strain/sprain.

In a May 10, 2011 letter, OWCP indicated that medical evidence establishing disability for the period April 19, 2011 and continuing was needed. It also advised appellant of the definition of a recurrence and noted that since he was performing light or limited duty at the time of his claimed recurrence, the medical evidence must show that he cannot perform such duty. No new medical evidence was received.

By decision dated June 10, 2011, OWCP denied appellant's claim for disability compensation from April 19, 2011 and continuing. It adjudicated the claim as a recurrence claim and determined that the evidence of record failed to establish that he sustained a recurrence of total disability from April 19, 2011 and continuing due to his work injury.

On June 23, 2011 appellant, through his attorney, requested a telephonic hearing before an OWCP hearing representative, which was held October 12, 2011. He stated that he last worked on February 21, 2011 and indicated that he was granted social security disability for his low back condition. Appellant testified that, when he began light duty, he performed duties that did not involve lifting or climbing.

Additional medical evidence received consisted of progress notes from Dr. Loomba and Dr. Lehto. In a September 16, 2011 operative report, Dr. Loomba diagnosed lumbar radiculitis and performed a left L3-4, L4-5 transforaminal epidural steroid injection procedure. In an October 17, 2011 report, he noted that appellant was being treated for lumbosacral radiculitis and asked that he be excused from work from October 5, 2011 to January 5, 2012.

By decision dated December 22, 2011 an OWCP hearing representative affirmed the denial of appellant's recurrence claim as modified to reflect the date of recurrence as January 4, 2011 as opposed to April 19, 2011.³

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.⁴ OWCP's procedure manual provides that a recurrence of disability also includes worsening of disability due to an accepted consequential injury.⁵

³ The hearing representative noted that in view of Dr. Ha'Eri's report that, the temporary aggravation of appellant's back condition had ceased, OWCP should review his entitlement to continuing medical benefits. As OWCP has issued no final decision regarding this, the matter of appellant's entitlement to medical benefits is not before the Board on the present appeal. *See* 20 C.F.R. § 501.2(c).

⁴ 20 C.F.R. § 10.5(x).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997).

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.⁶ 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.⁷

ANALYSIS

Appellant's claim was accepted for lumbar spinal stenosis. Dr. Ha'Eri, an OWCP referral physician opined that appellant could perform full-time modified work under a compressed work schedule. In July 2010, appellant began working light duty on a full-time basis. He stopped work on January 4, 2011 and filed a claim for total disability commencing. OWCP developed the matter as a claim for a recurrence of disability which it denied.

Appellant has not alleged a change in his light-duty job requirements. Instead, he attributed his recurrence of disability to a change in the nature and extent of his employment-related conditions. Appellant must provide medical evidence to establish that he was disabled due to a worsening of his accepted work-related conditions. The Board finds that he has not met his burden of proof in establishing his claim.

In his January 11, 2011 progress note, Dr. Loomba indicated that appellant last worked on January 4, 2011 and took him off work for three weeks. In subsequent progress notes and disability notes, he excuses appellant from work on an ongoing basis. Dr. Loomba, however, fails to discuss any objective findings which establish a change in the nature and extent of appellant's low back condition. While he notes that appellant was being treated for low back pain and lumbosacral radiculitis, he does not show a change in the nature of appellant's low back condition or provide a medical explanation, based on objective findings, as to why he was unable to perform the duties of his light-duty assignment. Although Dr. Loomba also found that appellant was totally disabled, he did not express an opinion as to whether and how his disability commencing January 4, 2011 was causally related to the accepted employment injuries.⁸ Thus, his reports are insufficient to establish appellant's burden of proof.

The reports from Dr. Lehto, a chiropractor, are of no probative value because a chiropractor is not a physician as defined under FECA unless a subluxation by x-ray is

⁶ *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁷ *Maurissa Mack*, 50 ECAB 498 (1999).

⁸ *See A.D.*, 58 ECAB 159 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Willie M. Miller*, 53 ECAB 697 (2002); *Michael E. Smith*, 50 ECAB 313 (1999).

diagnosed.⁹ There is no evidence he diagnosed a subluxation by x-ray and, thus, he is not considered a physician under FECA. Accordingly, Dr. Lehto's reports are of no probative medical value.

Appellant has not met his burden of proof in establishing that there was a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the limited light-duty requirements, which would prohibit him from performing the light-duty position he assumed after he returned to work.

On appeal, appellant's attorney generally contended that OWCP's hearing representative's decision was contrary to fact and law. For the reasons stated above, the Board finds that appellant did not submit sufficient medical evidence establishing that he sustained a recurrence of disability as of January 4, 2011 due to his accepted September 12, 2008 employment injuries.

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 a recurrence of disability commencing January 4, 2011 causally related to his accepted employment conditions.

⁹ See 5 U.S.C. § 8101(2); A.C., Docket No. 08-1453 (issued November 18, 2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 22, 2011 is affirmed.

Issued: October 12, 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