United States Department of Labor
Employees' Compensation Appeals Board

N.L., Appellant	)	
and	)	**Docket No. 11-2134**
	)	**Issued: September 26, 2012**
DEPARTMENT OF VETERANS AFFAIRS, JERRY L. PETTIS MEMORIAL VETERANS AFFAIRS MEDICAL CENTER, Loma Linda, CA, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 21, 2011 appellant, through her counsel, filed a timely appeal from an August 7, 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.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the August 7, 2011 decision, OWCP received additional evidence. The Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

ISSUE

The issue is whether appellant has established that she sustained a recurrence of disability on and after August 20, 2009 causally related to her accepted August 22, 2003 employment injuries.

On appeal, counsel contends that OWCP erred in developing the claim as one for a recurrence of disability; rather counsel believes it should have been handled as a termination claim. He further contends that, if the case is properly handled as a recurrence, appellant has clearly met her burden of proof to establish a recurrence or at the least to create a conflict in medical evidence. If appellant has not met her burden of proof, counsel points to those situations where causal relationship can be inferred when the recurrence takes place within 90 days of a return to work.

FACTUAL HISTORY

On August 22, 2003 appellant, then a 45-year-old diagnostic radiologic technician, filed a traumatic injury claim alleging that on that day she injured her lower back when she stumbled.[3] OWCP accepted the claim for aggravation of L5-S1 spondylolisthesis, aggravation of acquired spondylolisthesis, deviated nasal septum, scar conditions and fibrosis of the skin, closed nasal bone fracture, which was expanded to include a consequential right knee sprain.[4] Appellant stopped work the day of the injury and was thereafter placed on the periodic rolls. She returned to a limited-duty job on May 16, 2005 and stopped work on May 20, 2005. Appellant returned to work on May 23, 2005 for four hours, but stopped again on May 24, 2005. OWCP continued to pay compensation through the periodic rolls.

On December 17, 2008 OWCP referred appellant for a second opinion evaluation with Dr. John Pierce Conaty, a Board-certified orthopedic surgeon, for an assessment of her medical condition, extent of disability and appropriate treatment. On January 9, 2009 Dr. Conaty, based upon a physical examination and review of the medical record and statement of accepted facts, concluded that appellant continued to suffer from residuals of her accepted employment-related condition but was capable of working eight hours with restrictions. He approved appellant's referral to vocational rehabilitation, within the noted restrictions. A work capacity evaluation form dated January 10, 2009 found that appellant could sit up to six hours, walk and stand for four hours, stoop for up to one hour, with no lifting, pushing or pulling more than 10 pounds for up to one hour.

OWCP referred appellant to vocational rehabilitation on April 7, 2009. On June 22, 2009 the employing establishment offered appellant the position of medical support assistant working eight hours per day based on the work restrictions provided by Dr. Conaty. According to the rehabilitation counselor, appellant believed that she would not be able to sustain working at this

[3] OWCP assigned claim number xxxxxx088.

[4] OWCP combined claim number xxxxxx088 with claim number xxxxxx431, with the former number as the master file number. Under claim number xxxxxx321 it accepted that appellant sustained lumbosacral strain due to a July 10, 2002 traumatic injury.

position due to pain of getting in and out of a chair and asked that the job description be forwarded to her treating physician. The rehabilitation counselor reportedly tried to comply but could not reach the treating physician. With no changes in the job description, the position was again offered to appellant by letter of July 24, 2009.

Appellant accepted the position offered by the employing establishment and returned to work on August 3, 2009. After her first day at work, according to the rehabilitation counselor's report, appellant stated that she was in "horrendous pain … the worst pain she had ever been in before." She also found the room to be too small and the chair to be "hideous." The rehabilitation counselor reported the probability of successful return to work was guarded. She noted that appellant was "annoyed that attempts [were] being made again to return her to work because she [said] she [would] have to go through an ordeal of pain while she [attempted] to return to work."

Appellant was monitored in her new employment daily and according to the report from the rehabilitation counselor there were regular complaints from appellant that the chair was uncomfortable, the wheels of the chair did not roll easily enough, the room was too small, the door was too hard to push open and she had nothing to do. The employing establishment provided an ergonomic assessment by Monica Fry, an Agency Industrial Hygienist/Ergonomics Assessor, and found her worksite to be appropriate but that appellant was sitting with her "left leg over the right leg at the thigh." Appellant was advised that she would need to sit "ergonomically correct" in her chair. The employing establishment agreed to find appellant an office without a door and one with a tiled floor to allow the chair to move more easily. Despite the efforts of the employing establishment, the report concluded that the probability of successful return to work was "poor."

Appellant advised the rehabilitation counselor that she did not go to work on Friday, August 21, 2009 due to extreme pain. She submitted an August 21, 2009 work status form completed by Christopher Cody Blanchfield, a nurse practitioner, indicating that appellant was disabled from work for the period August 21 to 31, 2009 due to incapacitating injury or pain.

Appellant was off work again through September 6, 2009 and after Labor Day returned to work on September 8, 2009. The rehabilitation counselor reported that appellant submitted a work status report of that date by Dr. Guirguis S. Hanna, a Board-certified physiatrist, who placed her off work from September 9 through 18, 2009 for uncontrolled symptoms.

Appellant submitted a claim for wage-loss compensation (Form CA-7) requesting leave buyback for the period August 21 to September 7, 2009.

In August 21, 2009 progress notes, Dr. Stacie A. Cruz, a treating Board-certified family practitioner, diagnosed degeneration of lumbar or lumbosacral intervertebral disc and provided physical findings. A review of systems was positive for back pain and tingling. Dr. Cruz found that appellant was totally disabled from work for the period August 21 to 31, 2009.

In an August 31, 2009 progress note, Dr. Hanna indicated that appellant was seen for complaints of low back pain. Diagnoses included spinal stenosis of the lumbar region, lumbar radiculopathy and degeneration of lumbar intervertebral disc. Appellant related having difficulty

sitting at work and that she felt worse after going back to work. A physical examination of the lumbar back revealed tenderness, pain and decreased range of motion, a slightly abnormal gait and decreased lower extremity sensation. Dr. Hanna placed appellant off work for the period August 31 to September 6, 2009 due to uncontrolled symptoms.

A September 9, 2009 industrial work status form from a Dr. Renu Mittal, a treating Board-certified orthopedic surgeon, placed appellant off work from September 9 to 18, 2009. No reasons were provided for the disability.

A September 24, 2009 industrial work status form from Dr. Patricia Gayle McGhee, a treating Board-certified family practitioner, indicated that appellant was unable to work from September 21 to October 5, 2009 due to "uncontrolled symptoms."

OWCP granted appellant's request to change physicians to Dr. Jacob E. Tauber, a treating Board-certified orthopedic surgeon.

In a letter dated October 5, 2010, OWCP informed appellant of the evidence required to support a recurrence of disability where an employee returns to light-duty work.

On December 17, 2009 Dr. Tauber conducted a physical examination and diagnosed L4-5 and L5-S1 spondylolisthesis with sciatica. A physical examination revealed that appellant was able to ambulate but with severe pain, severely limited lumbar motion, decreased pinprick in both feet, straight leg raising elicited low back pain, intact deep tendon reflexes and intact motor strength. Dr. Tauber opined that she had significant lumbar spine pathology and was temporarily totally disabled. He noted that appellant's claim had been accepted for aggravation of preexisting spondylolisthesis at the L5-S1 level but that it should have been accepted for both L4-5 and L5-S1. Dr. Tauber recommended an MRI scan of the lumbar spine and a nerve conduction study of her back and lower extremities. He also recommended a pain management program for appellant as well as a psychiatric evaluation. Dr. Tauber believed she would be a candidate for decompression and fusion of the L4-5 and L5-S1 levels.

An electrodiagnostic consultation report, dated February 16, 2010, was prepared by Dr. Aaron Coppelson, Board-certified in electrodiagnostic medicine, physical medicine and rehabilitation and pain management. Dr. Coppelson's report reflected "no evidence of peripheral neuropathy" and "no evidence of lumbar radiculopathy" in the bilateral lower extremities.

Dr. Tauber provided supplemental reports dated February 25 and March 25, 2010 in which he reported that appellant was seen for back pain and remained temporarily totally disabled.

On March 31, 2010 appellant submitted a CA-7 form for wage-loss compensation for the period August 20, 2009 to March 31, 2010.

Following the second claim for wage-loss compensation, Dr. Tauber submitted supplemental reports indicating that appellant continued to be in pain, her status was unchanged and she remained temporarily totally disabled. On September 30, 2010 appellant was seen by Dr. Tauber for pain on coughing who found that her physical condition was unchanged.

By decision dated November 18, 2010, OWCP denied appellant's claim for a recurrence of disability beginning August 20, 2009. It noted the reports of Dr. Cruz reflected that appellant was not in any stress, that the neurological examination reflected normal gait but that her system was positive for back pain and tingling. In Dr. Hanna's report, OWCP found that there was a decreased range of motion, tenderness and pain, diminished sensation in both lower limbs and an abnormal gait. It noted that appellant was placed off work for uncontrolled symptoms. OWCP noted there were no reasons given for the total disability slips from September 21, through October 5, 2009. It further noted that Dr. Tauber found decreased sensation to pinprick in both feet and severe pain and limited motion of the lumbar spine, but EMG and nerve conduction studies found no evidence of peripheral neuropathy or lumbar radiculopathy. OWCP found that she failed to establish a change in her job duties or an objective worsening of her condition.

A functional capacity evaluation was performed by Safety Works Medical, Inc. Appellant was provided restrictions of "no lifting over 55 pounds from ground level. Limited [or] prolonged standing, sitting or walking greater than 10 minutes without a change in position."

On January 20, 2011 Dr. Tauber provided a supplemental report wherein he opined that appellant's disability was due to her severe pain, based on her physical examination and abnormal magnetic resonance imaging (MRI) scan findings. He noted that her severe pain was supported by decreased pinprick sensation in the dermatomal distribution. Dr. Tauber related that appellant's inability to tolerate long periods of sitting due to her severe pain is what prevents her ability to work.

Appellant's counsel provided Dr. Hanna with a list of physical restrictions for the accepted position and requested a supplemental medical report. In a January 28, 2011 report, Dr. Hanna stated that appellant was last seen on August 31, 2009 and noted her work restrictions. Based on a review of the physical demands of the limited-duty job position and her objective and subjective findings, he concluded that appellant could not perform the essential job demands due to her residual impairment and the recommended work restrictions.

On February 15, 2011 appellant, through counsel, requested reconsideration. Counsel claimed that appellant was never fit to return to work in the first place and that the job offered by the employing establishment was not suitable.

On April 26, 2011 OWCP received Dr. Tauber's April 18, 2011 report, in which he noted that he had reviewed an April 14, 2011 functional capacity evaluation and provided findings from the report.

OWCP received an April 14, 2011 supplemental report from Dr. Tauber, in which he noted that appellant's pain was progressing, straight leg testing was positive and there was pain on motion and a June 29, 2011 report in which he indicated that appellant's condition was unchanged.

By decision dated August 7, 2011, OWCP denied modification. It reiterated counsel's argument but found that appellant had failed to provide sufficient medical evidence to support disability and wage loss.

LEGAL PRECEDENT

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that 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 she cannot perform such light duty. As part of this burden, the employee must show 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.[5]

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[6] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurts too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[7] The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[8]

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[9]

OWCP's procedures state that a recurrence of disability includes a work stoppage caused by a spontaneous material change, demonstrated by objective findings, in the medical condition that resulted from a previous injury or occupational illness without an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.[10]

Regarding recurrent disability within 90 days of a return to employment, the procedure manual provides as follows:

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[5] *K.S.*, Docket No. 08-2105 (issued February 11, 2009); *Richard A. Neidert*, 57 ECAB 474 (2006); *Terry R. Hedman*, 38 ECAB 222 (1986).

[6] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

[7] *Id*.

[8] *Id*.

[9] 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008); *Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Phillip L. Barnes*, 55 ECAB 426 (2004).

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

> "a. *Burden of Proof.* The claimant is not required to provide the same evidence as for a recurrence claimed long after apparent recovery and return to work. Therefore, in cases where recurring disability for work is claimed within 90 days or less from the first return to duty, the focus is on disability rather than causal relationship.
>
> "b. *Disability for Work.* Assuming the requirements described in paragraph 5 above concerning causal relationship are met, the CE [claims examiner] should ask the employee to submit a Form OWCP-5 and/or narrative statement from the attending physician which describes the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for renewed disability for work."[11]

Paragraph five of OWCP's procedures, which is applicable to a recurrence of a medical condition within 90 days of release from medical care, provides that, "The CE may accept the attending physician's statement supporting causal relationship between the claimant's current condition and the accepted condition, even if the statement contains no rationale unless" there is clear evidence of an intervening injury, an intervening decision, the claim was originally accepted for a temporary aggravation of a preexisting condition or the renewed claim involves a different diagnosis from the accepted condition.[12]

ANALYSIS

OWCP accepted that in August 2003 appellant sustained aggravation of L5-S1 spondylolisthesis, aggravation of acquired spondylolisthesis, deviated nasal septum, scar conditions and fibrosis of the skin, closed nasal bone fracture and a consequential right knee sprain and paid wage-loss compensation for hours of work missed. Appellant returned to work in 2005 but was returned to the periodic rolls shortly thereafter.

In 2008, appellant was seen by the second opinion physician, Dr. Conaty who found appellant able to work for eight hours a day with restrictions. Based on Dr. Conaty's restrictions, the position of medical support assistant was offered to appellant. Appellant accepted in writing the written offer of employment and returned to work on August 3, 2009. She worked in that limited-duty position until August 20, 2009 at which point she stopped working. Appellant again briefly returned to work on September 8, 2009 but stopped again on September 9, 2009.

In support of her request to return to total disability and full compensation benefits, appellant relies on reports of various treating physicians. In order to meet her burden of proof, she 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. There is no suggestion that the nature or extent of the light-duty requirements changed. This case revolves solely on the issue of whether appellant has established a change in the nature and extent of the accepted conditions.

[11] *Id.* at Chapter 2.1500.6(a) and (b) (January 1995).

[12] *Id.* at Chapter 2.1500(5)(a) (May 2003).

Appellant submitted reports from Drs. Cruz and McGhee indicating that appellant was disabled for work. Dr. Cruz, in an August 21, 2009 progress note, diagnosed lumbar or lumbosacral intervertebral disc degeneration and concluded that appellant was totally disabled from work for the period August 21 to 31, 2009. She provided physical findings and concluded that appellant was disabled from working. On September 24, 2009 Dr. McGhee indicated that appellant was unable to work from September 21 to October 5 2009 due to uncontrolled symptoms. Neither, Dr. Cruz nor Dr. McGhee provided any opinion as to the cause of appellant's disability. The Board has held that medical evidence that does not address the cause of a claimant's disability is of diminished probative value.[13] Thus the reports from Drs. Cruz and McGhee are insufficient to establish disability for the period August 21 to 31, 2009 and September 21 to October 5, 2009 due to the accepted employment injuries. Further, although these reports suggest that appellant was having pain sufficient to warrant a return to total disability, for these conditions to return her to compensation it must be established that they were related to the accepted conditions. Neither lumbar nor lumbosacral intervertebral disc degeneration were accepted conditions. Appellant's accepted back conditions were aggravation of L5-S1 spondylolisthesis and aggravation of acquired spondylolisthesis. Thus the reports from Drs. Cruz and McGhee are insufficient to establish a recurrence of the accepted employment injuries.

Appellant also submitted progress notes and reports from Dr. Hanna, a treating Board-certified physiatrist, who diagnosed lumbar spinal stenosis, lumbar radiculopathy and lumbar intervertebral disc degeneration. Dr. Hanna placed her off work for the period August 31 to September 17, 2009 due to uncontrolled symptoms but also did not provide any reason for her need to be off work. Without such specificity, this report is insufficient to meet the burden of proof necessary to establish a recurrence.

The form report from Mr. Blanchfield, a nurse practitioner, has no probative medical value in establishing appellant's recurrence claim. A nurse practitioner is not a physician as defined under FECA.[14]

The record also contains reports from Dr. Tauber diagnosing L4-5 and L5-S1 spondylolisthesis with sciatica, providing physical findings and supporting appellant's claim for disability. On December 17, 2009 Dr. Tauber found appellant to be temporarily disabled due to significant lumbar spine pathology. Subsequent supplemental reports indicated that appellant was seen by him for back pain and that she remained temporarily disabled from working. On January 20, 2011 Dr. Tauber attributed her disability to her severe pain which he found was supported by a physical examination and abnormal MRI scan findings. He opined that appellant was unable to perform her light-duty job due to her inability to tolerate long periods of sitting as a result of her severe pain. The Board has consistently held that pain is a symptom, not a

[13] *A.D.*, 58 ECAB 149 (2006); *Ellen L. Noble*, 55 ECAB 530 (2004).

[14] *See B.B.*, Docket No. 09-1858 (issued April 16, 2010); *L.D.*, 59 ECAB 648 (2008); *G.G.*, *supra* note 2; *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

compensable medical diagnosis.[15] Further, Dr. Tauber did not provide sufficient rationale explaining how appellant's diagnosed conditions and disability commencing August 20, 2009 were causally related to the accepted conditions of August 22, 2003. Thus his opinion is of little probative value these reasons.[16] For these reasons, the Board finds that Dr. Tauber's reports are insufficient to establish appellant's claim.

In a January 28, 2011 report, Dr. Hanna stated that appellant was last seen on August 31, 2009 and noted her work restrictions. Based on a review of the physical demands of the limited-duty job position and her objective and subjective findings, he concluded that she was unable to perform the essential job duties of the modified position. While Dr. Hanna opined that appellant's recurrence of disability was due to her inability to perform the light-duty job, he did not provide any rationale or explanation supporting his conclusion and thus his opinion is of little probative value.[17] The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background.[18] As Dr. Hanna failed to do this, his reports are insufficient to support appellant's burden of proof.

Appellant's counsel has argued that the provision for recurrences within 90 days of return to work should apply thereby relaxing the need for the medical evidence to support causal relationship. The Board disagrees. OWCP's procedure manual states this section applies in cases where recurring disability for work is claimed within 90 days or less from the "first return to duty."[19] Appellant's accepted work injury occurred on August 23, 2003. Since then she returned to work on May 16, 2005 and worked through May 20, 2005. Appellant again returned to work on May 23, 2005 and stopped work on May 24, 2005. She returned to work again on August 3 through 20, 2009 and worked again from September 8 through 9, 2009. As this is not appellant's "first return to duty," this section is not applicable.

Counsel further argues that this case should have been handled as a termination of benefits rather than a recurrence. He contends the burden of proof remained with OWCP as appellant had never successfully returned to full duty. The Board finds this case is properly adjudicated as a recurrence. There are situations where a claimant returns to work for a short period of time and in those cases the Board has found that the burden remained with OWCP.[20] Here appellant had accepted the employing establishment light-duty position in writing and had returned to work from August 3 to 20, 2009 and again from September 8 to 9, 2009. The facts of this case are distinguishable from that line of cases.

[15] *C.F.*, Docket No. 08-1102 (issued October 10, 2008); *Robert Broome*, 55 ECAB 339 (2004).

[16] *See Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[17] *Albert C. Brown*, 52 ECAB 152 (2000).

[18] *Conard Hightower*, 54 ECAB 796 (2003).

[19] *Supra* note 11.

[20] *Fred Reese*, 56 ECAB 568 (2005); *Janice Migut*, 50 ECAB 166 (1998).

As discussed above, appellant failed to provide evidence establishing that her disability was due to the accepted conditions of aggravation of L5-S1 spondylolisthesis, aggravation of acquired spondylolisthesis, deviated nasal septum, scar conditions and fibrosis of the skin, closed nasal bone fracture and a consequential right knee sprain and consequently failed to meet her burden. The record contains no report from her treating physician describing the duties she could not perform or noting any objective evidence other than pain which would support disability. In accordance with Board case law, in order to establish a recurrence of disability due to a worsening of her condition, appellant must establish a change in the light-duty position (which has not been alleged) or a change in the nature and extent of her accepted injury-related condition such that she can no longer perform her light-duty employment.[21] Appellant failed to meet that burden.

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 has not established that she sustained a recurrence of disability on and after August 20, 2009 causally related to her accepted August 22, 2003 employment injuries.

[21] *Richard A. Neidert*, 57 ECAB 474 (2006); *see J.F.*, 58 ECAB 124 (2006); *Sherry A. Hunt*, 49 ECAB 467 (1998); *Glenn Robertson*, 48 ECAB 344 (1997).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 7, 2011 is affirmed.

Issued: September 26, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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