



## **FACTUAL HISTORY**

This case has previously been before the Board on appeal. On May 5, 2011 the Board remanded the case for OWCP to double appellant's case files in order to determine whether she had a back injury prior to January 28, 2006 such that the withdrawal of light duty on September 4, 2009 would result in a recurrence of disability under FECA.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference. The relevant facts are set forth below.

On November 7, 2001 appellant, then a 57-year-old distribution clerk, filed a claim for back injury on November 2, 2001.<sup>3</sup> Dr. Kenneth L. Lum, a physician Board-certified in emergency medicine, diagnosed low back strain, chronic and recurrent. Dr. Rose Melger, a Board-certified occupational medicine physician, stated that appellant had a back injury in 1997 with "permanent restrictions" causing occasional back pain. She diagnosed back strain. In a report of a telephone call dated March 26, 2002, OWCP noted that appellant had a "chronic condition apparently due to previous work injury" in claim number xxxxxx124. It stated that this claim number was closed with appellant receiving medication for pain. OWCP accepted her November 2, 2001 claim for sprain/strain of the sacroiliac region on January 7, 2002.

On March 15, 2002 Dr. Melger found that appellant could return to her permanent restrictions of September 25, 2000. She stated that appellant had chronic back pain, for which she received a permanent rating and restrictions on September 25, 2000.

Appellant filed a notice of recurrence of disability regarding the November 2, 2001 injury on June 30, 2004. The employing establishment indicated that the date of injury was May 25, 2004. OWCP treated this claim as a new traumatic injury. Appellant's work restrictions were lifting five pounds, standing one half-hour, walking and climbing one half-hour and no kneeling, bending, stooping, twisting, pushing or pulling. She underwent a magnetic resonance imaging (MRI) scan on July 16, 2004, which demonstrated diffuse degenerative disc disease throughout the lumbar spine most severe at the L4-5 level. OWCP accepted the May 25, 2004 injury for sprain/strain of the lumbosacral joint or ligament on March 24, 2005. Appellant returned to work on October 6, 2004. She filed recurrence claim injury on March 7, 2006. On May 31, 2006 OWCP instructed appellant to file a traumatic injury claim for the March 7, 2006 injury. The Board has no record of this claim.

On June 8, 2006 appellant, then a 63-year-old distribution clerk, filed a traumatic injury claim on January 28, 2006 alleging that she injured her lower back in the performance of duty. In a report dated May 1, 2006, Dr. Melgar, a physician specializing in occupational medicine, diagnosed acute exacerbation of chronic back pain. She found that appellant could return to modified work on May 1, 2006 and that she was permanently precluded from engaging in her usual and customary occupation. Dr. Melgar completed a form report on May 1, 2006 and

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<sup>2</sup> Docket No. 10-2021 (issued May 5, 2011).

<sup>3</sup> There is information in this file that this was not appellant's first back injury, but that OWCP accepted appellant sustained a back strain in claim number xxxxxx124 prior to 1997. Appellant stated on November 14, 2001 that she had been on limited duty for some years.

diagnosed acute exacerbation of chronic back pain. She stated that appellant's permanent restrictions were effective September 25, 2000 and included no lifting of more than 10 pounds, standing and walking for one half-hour per hour, no twisting and no bending. Dr. Melgar discharged appellant from her care. OWCP accepted her claim for sprain and strain of the lumbar spine on July 27, 2006. In the acceptance decision, it stated, "This claim has now been closed for the above accepted injury because your attending physician, Dr. Melgar, indicated in her May 1, 2005 medical report that you returned to baseline for this injury, you were discharged from care and returned to your regular duty."

Appellant filed a notice of recurrence of disability on September 3, 2009 alleging a change in her light-duty assignment. On the reverse of the form, her supervisor stated that there were no necessary tasks meeting her medical restrictions after September 4, 2009. On May 8, 2009 an internist, whose signature is illegible, provided appellant's restrictions due to back strain including lifting and carrying up to five pounds, sitting, standing and walking for one half-hour per hour, reaching above the shoulder for four hours, driving for two hours, operating machinery for four hours and temperature extremes for five hours. In a letter dated September 4, 2009, the employing establishment requested additional medical documentation supporting appellant's work restrictions.

Appellant filed a claim for compensation requesting wage loss from September 11 through 25, 2009. In a letter dated October 7, 2009, OWCP informed her that she was not entitled to compensation as she no longer suffered residuals due to the January 28, 2006 injury. It stated that while appellant's claim was accepted on July 27, 2006 for lumbar sprain, the claim was closed on the same day because the medical evidence established that appellant had a preexisting back condition and had returned to baseline. OWCP stated that appellant had no residuals of the January 28, 2006 injury and that her light-duty position was based on restrictions due to other medical conditions which were not necessarily work related. It stated that her claim for compensation was not payable.

On January 27, 2010 OWCP denied appellant's claim for recurrence. Appellant requested an oral hearing before an OWCP hearing representative. Her attorney appeared and requested 30 days to submit additional information on May 4, 2010. By decision dated July 6, 2010, the hearing representative affirmed OWCP's January 27, 2010 decision finding that appellant had not submitted the necessary medical evidence. As stated above, the Board issued a decision remanding the case for combination of the claims and determination of the accepted conditions on May 5, 2011.

Appellant filed a claim for a new occupational disease on September 18, 2010 which she alleged resulted in a lumbosacral sprain, sprain of the sacroiliac joint and lumbosacral radiculitis. She stated that she first became aware of her condition on July 26, 2010. Appellant noted her first back claim number xxxxxx124 and that this claim had been closed.

Dr. Michael Hebrard, a Board-certified physician specializing in physical medicine and rehabilitation, examined appellant on July 26, 2010 and listed her dates of injury including August 5, 1997. He stated that her first injury was the result of lifting and resulted in sprain of the sacroiliac joint. On physical examination Dr. Hebrard found no deep tendon reflexes in the right ankle and sensory examination decreased to light touch along the lateral aspect of the right

leg and dorsal aspect of the right foot. He also found positive straight leg raising on the right as well as palpable spasm along the lumbar musculature. Dr. Hebrard diagnosed lumbosacral sprain, sprain of the sacroiliac joint and lumbosacral radiculitis of the right L5-S1 nerve distribution. He reviewed appellant's accepted employment injuries beginning in 1997 and stated, "With these multiple traumas and injuries to the low back it is apparent that [appellant] has had this chronic recurrent aggravation of her preexisting condition. It is the opinion of the undersigned that she continues to suffer from residuals from her lumbosacral spine which cause sciatic neuropathy right greater than left..." Dr. Hebrard further stated, "Given the documentation and the fact that [appellant] has had accepted claims to her lumbar spine and multiple injuries of trauma due to repetitive pushing, pulling and doing her job as a distribution clerk, it is the opinion of the undersigned that, if not for the job injuries, her back pain would not be as severe at this particular time, therefore, with a reasonable degree of medical certainty her ongoing complaints of pain are still industrially related and are a result of dysfunction to her low back."

OWCP referred appellant for a second opinion evaluation on October 27, 2010. The statement of accepted facts described her series of accepted back injuries beginning on November 2, 2001 and stated, "A history of preexisting, nonindustrial chronic back pain is also noted."

On September 13, 2010 Dr. Hebrard diagnosed sprain of the lumbar regions, sprain of the sacroiliac region, sciatic neuropathy on the right and lumbosacral radiculitis. He opined that appellant had reached maximal medical improvement. Dr. Hebrard provided work restrictions of lifting up to 10 pounds, no repetitive twisting, turning and bending at the waist and no repetitive stair-climbing.

In a report dated November 10, 2010, Dr. J. Hearst Welborn, Jr., a Board-certified orthopedic surgeon, described appellant's symptoms of low back pain, bilateral leg numbness and pain into her feet as well as her statement that she did not have low back pain until she began working at the employing establishment. He noted that she began performing light-duty work in 2011 lifting up to five pounds and that the employing establishment withdrew her light-duty position in 2009. Dr. Welborn performed a physical examination finding limited range of motion of the lumbosacral spine, abnormal squatting and positive straight leg raising on the right and left. He diagnosed degenerative disc disease of the lumbar spine and lumbar strain. Dr. Welborn opined that appellant's lumbar strain had resolved. He stated:

"[Appellant's] diagnoses of degenerative disc disease of the lumbar spine and lumbar strain (resolved) are related to her repetitive motions of lifting and bending and working as a postal clerk. The diagnosis of disc disease is related by aggravation as she has a diagnosis of preexisting, nonindustrial chronic back pain in the [statement of accepted facts]. [Appellant's] aggravation would have been temporary while she was working. Since she has not worked since 2009 this temporary aggravation has stopped and she has returned to her baseline of preexisting low back pain and there is no basis for a repetitive injury claim."

Dr. Welborn found that appellant had no work-related restrictions, but could not perform her position of distribution clerk due to her preexisting condition of lumbar disc disease.

OWCP denied the September 18, 2010 occupational disease claim on November 24, 2010 finding that the weight of the medical evidence established that appellant's lumbar spine degenerative disc disease was a preexisting condition only temporarily aggravated by her employment. It noted that she had not worked since September 24, 2009.

Dr. Joel Weddington, a Board-certified orthopedic surgeon, examined appellant on November 29, 2010 on referral from Dr. Hebrard. He stated that she provided medical evidence that her back problems back to 1994 were industrial related. Dr. Weddington stated that the medical evidence supported that appellant's back condition was not preexisting her initial work injury. He opined that her conditions were industrial related.

In a report dated January 10, 2011, Dr. Hebrard stated that preinjury appellant was not treated for low back pain. He disagreed with Dr. Welborn's conclusions noting that, prior to her accepted employment injuries, she had no pain. Dr. Hebrard opined that appellant's current back condition arose out of performance of her work duties and was causally related to her employment. On May 9, 2011 he diagnosed lumbar strain and lumbar radiculopathy. Dr. Hebrard found that appellant had reached maximum medical improvement.

On July 29, 1994 appellant had filed a notice of traumatic injury alleging on that date she developed a low back ache. She submitted medical evidence dated August 15, 1995 supporting an industrial injury in 1992 due to lifting resulting in limited duty as well as a motor vehicle accident in 1995.

In a decision dated June 28, 2011, OWCP denied appellant's claim for compensation from September 11 to 25, 2009 finding that Dr. Welborn's report was entitled to the weight of the medical evidence and that her statements that she did not have back pain prior to her employment injuries could not overcome the weight of this report.

Appellant requested an oral hearing of the November 24, 2010 decision and by decision dated June 28, 2011, the hearing representative found that the weight of the medical evidence rested with the second opinion physician and established that any aggravation of her preexisting degenerative disc disease had resolved.<sup>4</sup>

Counsel requested an oral hearing regarding the June 28, 2011 decision, denying appellant's claimed recurrence on July 7, 2011. Appellant testified that the employing establishment withdrew her light-duty position. The employing establishment responded on November 14, 2011 and stated that under the National Reassessment Process (NRP) there were no available necessary tasks within her medical restrictions on September 3, 2009.

By decision dated January 3, 2012, the hearing representative found that OWCP properly determined that appellant had not established a recurrence of disability on September 3, 2009 or entitlement to compensation beginning September 11, 2009.

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<sup>4</sup> As appellant did not file an appeal with the Board within 180 days of this decision, the Board does not have jurisdiction to consider this issue on appeal. 20 C.F.R. § 501.3(e).

## LEGAL PRECEDENT -- ISSUES 1 & 2

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. 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.<sup>5</sup> 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 establish 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.<sup>6</sup> This burden includes the necessity of 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 employment factors and supports that conclusion with sound medical reasoning.<sup>7</sup>

FECA Bulletin No. 09-05 outlines procedures when light-duty positions are withdrawn under NRP. If the claimant has been on light duty due to an injury-related condition without an LWEC rating, or OWCP has set aside the LWEC rating, payment for total wage loss should be made based on the Form CA-7 as long as the following criteria are met: (1) the current medical evidence in the file (within the last 6 months) establishes that the injury-related residuals continue; (2) the evidence of file supports that light duty is no longer available; and (3) there is no indication that a retroactive LWEC determination should be made. Retroactive LWEC determinations should not be made in NRP cases without approval from the District Director. FECA Bulletin No. 09-05 states that, if the medical evidence is not sufficient, OWCP should request current medical evidence from the employing establishment and the claimant.<sup>8</sup>

## ANALYSIS -- ISSUES 1 & 2

The record supports that the employing establishment withdrew appellant's limited duty under NRP effective September 4, 2009. Appellant filed a claim for wage loss beginning that September 11, 2009. OWCP denied this claim but did not discuss FECA Bulletin No. 09-05 or properly consider the evidence in light of the guidelines provided.

Generally, a withdrawal of limited duty constitutes a recurrence of disability under OWCP regulations. As there is no LWEC in place, OWCP should consider whether the medical

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<sup>5</sup> 20 C.F.R. § 10.5(x).

<sup>6</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>7</sup> *See Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

<sup>8</sup> *M.B.*, Docket No. 12-435 (issued July 3, 2012); FECA Bulletin No. 09-05 (issued August 18, 2009).

evidence established that appellant had continuing injury-related residuals at the time of the withdrawal. If it finds the medical evidence insufficient, OWCP should request additional evidence or refer appellant to an appropriate specialist to address residuals due to the accepted condition.

The medical evidence in the record supported appellant's continued work restrictions due to the accepted condition of back strain on May 8, 2009, within six months of the September 4, 2009 withdrawal of light duty. However, in the decisions previously before the Board, OWCP found that as Dr. Melgar opined that appellant had returned to "baseline" her ongoing back condition and restrictions were not work related. The Board disagreed with these decisions noting that the factual record was not complete and that there was evidence that appellant's "baseline" was due to a previous employment-related injury, which was not contained in the record on appeal. On remand, OWCP combined several of appellant's back claims including the November 2, 2001 injury previously alluded to in the record. The Board notes that a review of the record associated with the November 2, 2001 injury supports that this was not her first accepted back injury and that her work restrictions dated from a 1997 injury which has not yet been combined with her current claims. Appellant submitted reports from Dr. Hebrard referencing her August 5, 1997 employment injury. Dr. Hebrard opined that her multiple traumas and injuries to the low back resulted in chronic recurrent aggravation of her preexisting condition and residuals from her lumbosacral spine, which cause sciatic neuropathy. He further opined that, due to appellant's multiple accepted back injuries as a result of pushing, pulling and doing her job as a distribution clerk, her back pain was more severe and her ongoing complaints of pain work related.

OWCP undertook further development of appellant's claim by referring her for a second opinion with Dr. Welborn. It presented him with a statement of accepted facts which described her series of accepted back injuries beginning on November 2, 2001 and stated, "A history of preexisting, nonindustrial chronic back pain is also noted." The Board finds this statement is not supported by the record currently on appeal. The record does not contain medical evidence predating appellant's 2001 injury which supports a nonemployment-related back injury. Instead, the record suggests that appellant sustained an employment-related back injury in 1997, which has not yet been combined with her current files. Appellant has also submitted several statements denying any back pain prior to her first accepted employment injury.

In his November 10, 2010 report, Dr. Welborn mentioned appellant's statement that she did not have low back pain until she began working at the employing establishment. He diagnosed degenerative disc disease of the lumbar spine and lumbar strain. Dr. Welborn offered an opinion that appellant's current condition was not work related relying on the statement of accepted facts to conclude that since she had not worked since 2009 her temporary aggravation had stopped and she returned to her baseline of preexisting nonemployment-related low back pain. Dr. Welborn's opinion is entitled to weight only if the factual record establishes that she had a preexisting back condition, which was not related to her employment. The record currently does not support this interpretation of the facts. In order to determine whether appellant had disability or residuals as a result of her accepted employment injuries at the time of the removal of light duty in 2009, OWCP must base its statement of accepted fact on a review of all of appellant's back claims including the 1997 claim which is not currently before the Board.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>9</sup> On remand, OWCP should double this case file assigned claim number xxxxxx187 with the 1997 and any other injury claim appellant has filed for her back, in accordance with its procedures.<sup>10</sup> Its procedure manual provides that cases must be doubled when a new injury is reported for an employee who previously filed an injury claim for a similar condition or to the same part of the body.<sup>11</sup> OWCP should develop the factual evidence, prepare an accurate statement of accepted facts and refer appellant to a second opinion physician to determine whether the employing establishment withdrawal of her light-duty work assignment on September 4, 2009 constituted a recurrence of disability under any of her accepted claims. Following this and any other further development as OWCP deems necessary, an appropriate final decision in light of FECA Bulletin No. 09-05<sup>12</sup> should be issued on appellant's claim for compensation.<sup>13</sup>

### **CONCLUSION**

The Board finds that this case is not in posture for decision as to whether appellant sustained a recurrence of disability on September 4, 2009 or lost wages on or after September 11, 2009 due to the withdrawal of her light-duty assignment. On remand, OWCP should combine the appropriate claim files, undertake additional development of the medical evidence and issue a *de novo* decision.

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<sup>9</sup> *Claudio Vazquez*, 52 ECAB 496 (2001).

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c)(1) (February 2000).

<sup>11</sup> *Id.*

<sup>12</sup> *Supra* note 9.

<sup>13</sup> *T.M.*, Docket No. 09-1090, 09-2226 (issued March 8, 2010); *T.D.*, Docket No. 07-2331 (issued June 19, 2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 3, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this opinion of the Board.

Issued: September 12, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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