

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

C.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 12-1730
Issued: April 3, 2013**

Appearances:

Jason S. Lomax, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 9, 2012 appellant, through his attorney, filed a timely appeal from a February 16, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his recurrence claim. 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.²

ISSUE

The issue is whether appellant met his burden of proof to establish a recurrence of total disability commencing January 27, 2011 causally related to his May 13, 2008 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the February 16, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant's attorney contends that OWCP's findings of fact and conclusions of law were flawed, in part, due to the lack of weight given to appellant's testimony.

FACTUAL HISTORY

OWCP accepted that appellant, then a 49-year-old part-time flex mail handler, sustained an acute lumbar sprain, a herniated lumbar disc and degenerative disc disease in the performance of duty on May 13, 2008. He underwent back surgery on February 12, 2009 and returned to light duty in a part-time flex mail handler position.³

On February 18, 2011 appellant, through his attorney, filed claims for compensation for periods commencing January 27, 2011. He submitted a January 3, 2011 report from Dr. David R. Kalodner, an osteopath Board-certified in family medicine, who advised that appellant was able to work six hours a day, five days a week with the following restrictions: sitting and standing for four hours a day; no kneeling, bending/stooping, twisting or operating machinery.

In a January 27, 2011 report, Dr. Richard V. Buonocore, a neurosurgeon, advised that appellant had symptoms consistent with a disc herniation and degenerative changes of the lumbar spine. On February 16, 2011 he stated that appellant returned to work, but was unable to perform his duties and presented with chronic back pain. Appellant stated that, with limited activities and light duty, he did not have severe back pain, but whenever he was involved in physically taxing activities, he developed pain in the joints of his back without a radicular component. Dr. Buonocore reviewed x-rays and a magnetic resonance imaging (MRI) scan of the lumbar spine and found no evidence of spondylolisthesis, some degenerative changes of the spine, but no large disc herniation causing compression of the neural elements. He explained that appellant's lumbar surgery required pedicle screw fixation and fusion and, despite successful surgery, he would have persistent pain. Dr. Buonocore opined that appellant was not cleared to return to work, other than possible light duty with frequent rest.

By letter dated March 7, 2011, OWCP notified appellant that it had received evidence indicating the possibility of a recurrence in his case and requested additional evidence in support of his claim.

In a February 22, 2011 report, Dr. Buonocore advised that appellant not to return to work for a period of six months due to his medical condition.

By decision dated June 22, 2011, OWCP denied the claim on the basis that the medical evidence submitted was not sufficient to establish that appellant sustained a recurrence of disability commencing January 27, 2011.

³ On July 25, 2009 appellant, through his attorney, filed a claim for a schedule award. By decisions dated September 29, 2009 and October 18, 2010, OWCP denied the claim on the basis that the medical evidence was insufficient to establish permanent impairment to a scheduled member due to the accepted conditions. Appellant, through his attorney, filed claims for disability for September 15, 16 and 28, 2009. By decision dated January 13, 2010, OWCP denied the claims on the basis that the medical evidence was not sufficient to establish disability for the periods claimed.

On July 20, 2011 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative. In an August 9, 2011 report, Dr. Buonocore indicated that appellant's chief complaint was axial back pain, which was exacerbated by activity. He advised that appellant was able to return to work only in a light-duty capacity with no heavy lifting.

On November 15, 2011 appellant, through his attorney, submitted a notice of recurrence (Form CA-2a) dated February 9, 2011. He stated that he submitted an updated duty status report (Form CA-17), which removed the ability to perform any work while standing or on a machine, to the employing establishment on January 9, 2011. Appellant alleged that his supervisor stated that he could not accommodate the restrictions.

In a telephonic hearing held before an OWCP hearing representative on November 15, 2011, appellant testified that he was working a limited-duty position until January 27, 2011. His job duties included sitting, casing, sorting and piecing mail together with his hands. Counsel argued that appellant sustained a recurrence due to the withdrawal of an accommodating position. Appellant testified that his attorney helped him prepare a Form CA-2a recurrence claim on February 9, 2011, which he then submitted to the employing establishment. The hearing representative held the case open for 30 days for the submission of additional evidence.

Appellant submitted a November 8, 2011 report from Dr. Kalodner, who advised that appellant was able to work full time with the following restrictions: sitting for eight hours per day; walking and simple grasping for four hours per day; no standing, climbing, kneeling, bending/stooping, twisting, pulling/pushing or operating machinery.

By decision dated February 16, 2012, an OWCP hearing representative affirmed the June 22, 2011 decision finding that the evidence did not establish a recurrence of disability commencing January 27, 2011 due to a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the employment-related condition.

LEGAL PRECEDENT

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.⁴ 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 (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁵

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of

⁴ 20 C.F.R. § 10.5(x). See *T.S.*, Docket No. 09-1256 (issued April 15, 2010).

⁵ *Id.*

record establishes that he or she can perform the limited-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 to show that he or she cannot perform such limited-duty work. 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 limited-duty job requirements.⁶

ANALYSIS

OWCP accepted appellant's claim for acute lumbar sprain, herniated lumbar disc and degenerative disc disease. Appellant returned to work following the acceptance of the employment injury in a limited-duty capacity. The issue is whether he established a recurrence of total disability commencing January 27, 2011 causally related to the accepted employment injury. Appellant has the burden of proof to show a change in the nature and extent of his injury-related condition or a change in the nature and extent of his limited-duty job requirements.

On the claim form, appellant indicated that he had presented an updated duty status report (Form CA-17), which removed the ability to perform any work while standing or on a machine, to his employing establishment on January 9, 2011. He contended that his employer could not accommodate the restrictions. During the November 15, 2011 hearing before an OWCP hearing representative, appellant and counsel argued that the January 9, 2011 incident constituted a recurrence of disability due to the withdrawal of an accommodating position. The record contains no supporting documentation or witness statement to establish that appellant's light-duty position was withdrawn on January 9, 2011. Moreover, appellant further testified that he was working a limited-duty position until January 27, 2011. The evidence of record is not sufficient to establish that the employing establishment took any formal action to cause any change in the nature and extent of his light-duty job requirements.

On February 16, 2011 Dr. Buonocore noted that appellant returned to work, but was unable to perform his duties and presented with chronic back pain. He explained that appellant's lumbar surgery required pedicle screw fixation and fusion and despite successful surgery, he would have persistent pain. Dr. Buonocore opined that appellant was not cleared to return to work, other than possible light duty with frequent rest. On February 22, 2011 he advised appellant not to return to work for a period of six months due to his medical condition. On August 9, 2011 Dr. Buonocore opined that appellant was able to return to work only in a light-duty capacity with no heavy lifting. The Board finds no evidence to substantiate that appellant was required to perform duties that exceeded his medical restrictions.⁷ Dr. Buonocore did not address a particular change in the nature of appellant's physical condition arising from the employment injury, which prevented him from performing his light-duty position.⁸ Therefore, his reports are insufficient to establish a recurrence of disability.

⁶ See *A.M.*, Docket No. 09-1895 (issued April 23, 2010). See also *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁷ See *Richard A. Neidert*, 57 ECAB 474 (2006).

⁸ *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); see *Jimmie H. Duckett*, 52 ECAB 332 (2001).

Similarly, Dr. Kalodner's January 3 and November 8, 2011 reports did not provide a well-reasoned medical narrative report explaining how factors of appellant's federal employment materially worsened or aggravated his condition to the point where he could no longer perform the function of his duties causing him to be totally disabled for work. Thus, appellant did not meet his burden of proof with these submissions.

The Board finds that the evidence submitted by appellant lacks adequate rationale to show a change in the nature and extent of his accepted condition or a change in the nature and extent of his limited-duty job requirements. Therefore, appellant did not meet his burden of proof to establish disability as a result of a recurrence.

On appeal, appellant's attorney contends that the findings of fact and conclusions of law contained within OWCP's decision were flawed, in part, due to the lack of weight given to appellant's testimony. For the reasons stated above, the Board finds the attorney's argument is not substantiated.

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 met his burden of proof to establish a recurrence of total disability commencing January 27, 2011 causally related to his May 13, 2008 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the February 16, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2013
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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