

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

M.W., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, ELMIRA-CORNING)
REGIONAL AIRPORT, Rochester, NY,)
Employer)

Docket No. 13-948
Issued: August 28, 2013

Appearances:
James A. Meserve, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 12, 2013 appellant, through her attorney, filed a timely appeal from a February 8, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied in part her 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 the claim.

ISSUE

The issue is whether appellant established that she sustained a recurrence of disability commencing July 30, 2012 causally related to her accepted February 23, 2012 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 23, 2012 appellant, then a 46-year-old transportation security manager, filed a traumatic injury claim alleging that she sustained back, left shoulder, left arm, head and neck injuries when she slipped on ice and fell in the parking lot. Following the work injury, she returned to work and performed light duty consisting of no pulling or lifting greater than five pounds, and no prolonged standing or sitting. Appellant stopped work on July 30, 2012 pending spinal surgery.

The record reflects that on February 24, 2012 a physician's assistant noted that appellant slipped on ice and landed on her shoulder and presented with complaints of cervical and left shoulder pain. In a February 24, 2012 chart note, a nurse practitioner noted a history of a fall in a parking lot and complaints of neck, shoulder, left arm and left knee pain. An assessment of cervicgia, shoulder and upper arm sprain/strain, and knee and leg sprain/strain was provided along with a recommendation that appellant undergo multiple diagnostic testing to ensure that the hardware in her cervical spine did not shift due to injury.²

In a May 1, 2012 report, Dr. Andrew Wensel, a neurosurgeon, noted the history of a fall on February 23, 2012 and that appellant had immediate pain that extended up her neck, down her neck, into her arms and down her legs, which has persisted. He noted that she continued to work after the work injury and has taken a mild amount of pain medications since. Dr. Wensel noted that appellant has significant paresthesias in her arms and legs and presented examination findings. He noted that x-rays from the date of her accident revealed no significant disruption of her C4 to C6 fusion posteriorly and no disruption of the instrumentation anteriorly. However, an April 6, 2012 magnetic resonance imaging (MRI) scan revealed a new extruded fragment adjacent to appellant's C6-7 fusion. Dr. Wensel noted that this was a significant herniated disc that was compressing the spinal cord. He stated that appellant has an acute herniated disc with myelopathy on examination and by history. Cord is compressed and this was an acute onset of symptoms immediately following her fall. Given appellant's prior surgeries, Dr. Wensel recommended decompression fusion from C4 to C7.

On July 30, 2012 a nurse practitioner noted that appellant was temporarily off work.

In an August 7, 2012 report, Dr. Wensel noted that appellant was out of work since July 30, 2012 and had continued neck radiation to left shoulder to left arm to fourth and fifth fingers. He indicated that range of motion in neck was severely limited with positive Spurling's and Hoffman's testing and reduced finger tapping speed and dexterity. An assessment of myelopathy from herniation of C6-7 disc (adjacent level to prior operated level that was required for treating her initial injury) was provided. Dr. Wensel indicated that surgery was needed and that appellant's examination and her pain were worsening.

On August 13, 2012 Dr. Wensel stated that appellant has cervical myelopathy and requires cervical surgery as soon as possible. He noted that she has absent reflexes and could not work prior to surgery and for approximately four to five months after surgery.

² This chart note was co-signed by a physician with an illegible signature.

On August 28, 2012 OWCP formally adjudicated the claim as appellant's medical bills exceeded \$1,500.00. It accepted the claim for sprain of left shoulder and upper arm and sprain of left knee and leg. OWCP noted that appellant has extensive preexisting cervical spine conditions for which she previously underwent surgery. It stated that the requested spinal surgery could not be approved until her physicians provide sufficient explanation as to how the surgery and her cervical disc herniation and cord compression were related to her work injury. Appellant was directed to submit a medical report within 30 days which addressed the deficiencies in the medical evidence.

In a September 4, 2012 report, Dr. Wensel stated that appellant immediately had severe neck pain and symptoms in a radicular pattern after the February 2012 fall and that she started to exhibit signs of myelopathy. He stated that the MRI scan revealed a new herniated disc that was not present or the cause of her prior surgery. Dr. Wensel stated that this was a separate and distinct injury from appellant's previous cervical spine. He stated that the frank compression neurostructure compressive problem with myelopathy resulted from the newly extruded disc fragment at C6-7 which extended down ventral to the cord to the top of T1. Dr. Wensel noted that the MRI scan report found acute findings of a hematoma as well as the disc extrusion, which was evident relating directly to the fall. He stated that this was a new and distinct injury and that appellant needs extension of her previous fusion to the adjacent level. Dr. Wensel indicated that the adjacent level fusion was necessary because of the location of the disc herniation. He noted that appellant has myelopathy and significant neck pain and surgery is necessary.

On September 11, 2012 appellant filed a claim for a recurrence of disability beginning July 30, 2012. She stated that following her February 23, 2012 work injury she returned to work with restrictions but the injury to her spine got worse. Appellant indicated that, due to working, her spine swelled up, causing the herniating disc to pinch off the spinal cord and connecting nerves, which caused numbness and tingling down the entire left side of her body with severe myopathy. She indicated that no other injuries were sustained after she returned to work.

In a September 24, 2012 letter, OWCP requested Dr. Wensel to provide a clear diagnosis of appellant's current condition and provide a rationalized statement to explain whether this diagnosis was related to the February 23, 2012 work injury. Dr. Wensel was also requested to explain why she could not work since July 30, 2012 and whether her current total disability was related to the February 23, 2012 work injury.

A copy of appellant's February 24, 2012 emergency record as well as progress reports dated March 19, April 16, May 24 and June 4, 2012 from Dr. Wensel were received. Dr. Wensel diagnosed cervicalgia; sprain/strain unspecified site shoulder and upper arm; and sprain/strain of unspecified site of knee and leg which he opined were causally related to the work-related injury.

Appellant filed claims for compensation (Form CA-7) for the period September 4, 2012 and continuing. In an October 1, 2012 statement, she indicated that the dates that she saw her physicians.

By decision dated October 9, 2012, OWCP denied appellant's claim for a recurrence of disability beginning July 30, 2012 on the grounds that the medical evidence failed to establish total disability due to the work injury.

On November 7, 2012 appellant requested that an OWCP hearing representative review the written record. OWCP also received additional medical evidence.

In an October 18, 2012 report, Dr. Amanda Hagen, Board-certified in preventative medicine, noted that appellant had two prior nonwork-related cervical fusions, noted the history of injury and that appellant initially complained of neck pain, shoulder pain, left knee pain and numbness of her left upper extremity. She stated that appellant was initially diagnosed with neck strain/cervicalgia and diagnostic testing revealed a cervical disc herniation and that the current hardware was in place. Dr. Hagen referred to Dr. Wensel's reports, in which he identified a new cervical disc herniation at a different level from the one requiring surgery in 2010. She stated that the factors that prevented the claimant from working as of July 30, 2012 were progressive worsening of neck pain, progressive worsening of pain and weakness of her left upper extremity; and stronger narcotic pain medications that were incompatible with working. Dr. Hagen noted that the left arm weakness corresponded to a change in the nature of her diagnosis of cervical disc herniation and cord compression.

An October 9, 2012 chart note from Dr. Wensel diagnosed cervicalgia; sprain and strain shoulder and upper arm; and sprain and strain of knee and leg. He noted that appellant was not working due to marked impairment and awaiting surgery for cervical fusion. Dr. Wensel opined, based on the information he reviewed, that appellant's conditions were work related.

Appellant continued to submit claims for compensation along with progress reports from multiple providers about her conditions.

By decision dated February 8, 2013, an OWCP hearing representative affirmed the October 9, 2012 decision as the medical evidence failed to establish a worsening of the injury-related condition when appellant stopped work on July 30, 2012. The hearing representative found that further development of the record was required as to the issue of whether appellant's cervical disc herniation and need for surgery were causally related to the July 30, 2012 work injury.

LEGAL PRECEDENT

OWCP's implementing regulations define a recurrence of disability as 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.³ If the disability results from new

³ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). See also *Phillip L. Barnes*, 55 ECAB 426 (2004).

exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.⁴

For conditions not accepted by OWCP as being employment related, it is the claimant's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.⁵

ANALYSIS

OWCP accepted appellant's claim for sprain of left shoulder and upper arm and sprain of left knee and leg. Appellant returned to modified work following the February 23, 2012 employment injury. She claimed a recurrence of disability beginning July 30, 2012 and argued that the disability was due to her accepted February 23, 2012 employment injury. The record indicates that appellant is awaiting surgery from a new C6-7 herniation with myelopathy which was found on an April 6, 2012 MRI scan. As previously noted, OWCP's hearing representative remanded the case to OWCP for further development on the issue of whether appellant's cervical disc herniation and need for surgery are causally related to the February 23, 2012 employment injury. The issue on appeal is whether appellant has submitted sufficient medical evidence to establish that her recurrence commencing July 30, 2012 was causally related to her accepted February 23, 2012 employment injury. The Board finds that she has failed to meet her burden of proof.

OWCP requested that Dr. Wensel explain why appellant could not work since July 30, 2012 and whether her current total disability was related to the February 23, 2012 work injury. In numerous progress reports/chart notes, Dr. Wensel opined that appellant's conditions of cervicalgia; sprain/strain unspecified site shoulder and upper arm; and sprain/strain of unspecified site of knee and leg were causally related to the work-related injury. However, he did not address the cause of her disability commencing July 30, 2012 in relationship to the conditions accepted by OWCP as related to the accepted injury.⁶ While Dr. Wensel indicated that appellant was out of work since July 30, 2012 and noted her myelopathy from the C6-7 herniated disc was worsening and she was not working due to marked impairment and awaiting surgery for cervical fusion, he offered no opinion or explanation as to whether her work stoppage was due to a worsening of an injury-related condition. Thus, his reports are of diminished probative value and insufficient to support her recurrence claim.

Dr. Hagen noted Dr. Wensel's reports in which he referenced the new herniation at C6-C7 with myelopathy and attributed appellant's July 30, 2012 work stoppage to her progressive

⁴ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1500.3 (May 1997), *Donald T. Pippin*, 54 ECAB 631 (2003).

⁵ *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁶ The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship. *J.M.*, 58 ECAB 303 (2007); *Ellen L. Noble*, 55 ECAB 530 (2004).

worsening of neck pain, progressive worsening of pain and weakness of her left upper extremity; and stronger narcotic pain medications which were incompatible with working. However, OWCP has not accepted a neck condition. Dr. Hagen has not provided any explanation as to how the worsening of appellant's conditions were caused or aggravated by the accepted employment injury. Rather, she appears to relate the worsening of appellant's conditions and work stoppage to the new herniation at C6-7. Thus, Dr. Hagen's report is therefore of diminished probative value and insufficient to support appellant's claim that her recurrence of disability commencing July 30, 2012 was causally related to her February 23, 2012 work injury.

On appeal appellant's attorney contends that the medical evidence supports that there was a change in appellant's injury-related condition such that she was no longer able to continue in her job. The record establishes that appellant returned to work and performed light duty with restrictions on lifting and pulling no greater than five pounds and no prolonged standing or sitting. She was subsequently diagnosed with a new herniation at C6-7. After the symptoms from cervical myelopathy worsened, appellant stopped work. As previously noted, Dr. Wensel and Dr. Hagen both appeared to relate appellant's cervicgia and work stoppage to the new herniation at C6-7. This condition has not been accepted by OWCP, but OWCP's hearing representative remanded this aspect of the case on February 8, 2013 for further development as to whether appellant's cervical disc herniation was causally related to the accepted work injury. This issue is not before the Board in the present appeal.

As there is no evidence that appellant's accepted employment-related conditions worsened, there is insufficient evidence that to establish a recurrence of disability due to the accepted injury. It is her burden of proof to provide evidence from a qualified physician to support the recurrence of total disability for any period of time. Appellant failed to submit rationalized medical evidence establishing that her claimed recurrence of disability commencing July 30, 2012 was causally related to the accepted employment injury and therefore has failed to meet her burden of proof.

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 a recurrence of disability on and after July 30, 2012 causally related to her accepted February 23, 2012 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated February 8, 2013 is affirmed.

Issued: August 28, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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