

FACTUAL HISTORY

On June 1, 2000 appellant, then a 48-year-old cemetery caretaker, injured his upper back when he lifted a landscaping timber. OWCP initially accepted cervical strain and later expanded the claim to include aggravation of multilevel degenerative disc disease and disc herniation at C7-T1. Appellant stopped work on June 2, 2000 and returned to restricted work on June 5, 2000.² On August 25, 2002 he was transferred from a maintenance worker to a motor vehicle dispatcher under a term appointment effective August 25, 2002. On August 22, 2004 appellant's term appointment as a motor vehicle dispatcher was extended to August 24, 2005. He was granted disability retirement on September 18, 2004.

Appellant was treated by Dr. Paul DiMartino, a Board-certified orthopedist, from October 30, 2000 to October 4, 2001 for a neck injury sustained in the June 1, 2000 lifting incident at work. Dr. DiMartino diagnosed cervical herniated nucleus pulposus at C7-T1 and C8 radiculopathy. On February 27, 2001 he performed an authorized anterior cervical discectomy at C7-T1, anterior cervical fusion with fibula allograft at C7-T1 and diagnosed herniated nucleus pulposus C7-T1. In reports dated July 5 and October 4, 2001, Dr. DiMartino noted that appellant could work with permanent restrictions. A September 29, 2000 cervical spine magnetic resonance imaging (MRI) scan showed disc bulges at C6-7 and C6-T1 with some slight spinal narrowing. An October 18, 2000 electromyogram (EMG) revealed left carpal tunnel syndrome and evidence suggestive of left C7 or C8 radiculopathy.

In a June 15, 2004 report, Dr. DiMartino noted that an MRI scan revealed no evidence of a fusion and opined that there was a nonunion at C7-T1. He advised that appellant was filing retirement disability. A June 15, 2004 MRI scan of the cervical spine revealed a narrow spinal cord but no cord compression and areas of spondylosis with mild foraminal narrowing but no disc protrusion.³

A notice of personnel action dated September 24, 2004, noted that appellant retired on disability effective September 18, 2004.

Appellant filed a CA-7, claim for compensation, alleging that he sustained wage loss beginning September 18, 2004 as a result of separation from the employing establishment. The employing establishment noted on the CA-7 that appellant was granted disability retirement on September 18, 2004.

The claim was dormant for a number of years until OWCP received an inquiry from appellant in July 2008. OWCP then developed the matter as a claim for a recurrence of disability and requested additional evidence.

² Appellant filed a claim for a right shoulder injury sustained on December 11, 1997 while using a jack hammer. His claim was accepted for right shoulder sprain and internal derangement with partial thickness tear of the right rotator cuff with surgery. This was developed in File No. xxxxxx718 which was combined with the present claim.

³ On July 29, 2004 appellant filed a CA-2a, claim for a recurrence of disability, alleging that on May 24, 2004 he experienced recurrent neck pain causally related to his accepted condition. He stopped work on May 24, 2004 and returned to work the next day. On November 4, 2004 OWCP accepted the claim.

In reports dated September 3 and 7, 2010, Dr. DiMartino noted appellant's complaints of neck and arm pain with numbness in the right arm and shoulder. He noted that motor strength and sensation were intact in the lower and upper extremities and diagnosed diffuse degenerative disease. On November 5, 2008 appellant was treated by Dr. Michael D. Barth, a Board-certified orthopedist, for neck pain made worse by physical therapy. In a February 2, 2009 report, Dr. Barth noted appellant's complaints of lower cervical and upper thoracic spine pain radiating into his arms stemming from a work-related accident. He diagnosed degenerative disc disease with acute herniated nucleus pulposus. Appellant also submitted a physical therapy note as well as medical reports that were previously of record.

The employing establishment noted that on August 24, 2002 appellant changed jobs from a maintenance worker to a motor vehicle dispatcher which was a term appointment with an initial termination date of August 24, 2004. On August 24, 2004 the appointment was extended to August 24, 2005. The employing establishment noted that, when appellant worked as a motor vehicle dispatcher on August 24, 2002, he retained his pay which lasted until his retirement. It further noted that from May 29 until September 18, 2004 appellant worked eight hours of regular pay on September 7, 2004 and five hours of overtime. It was noted that appellant's position was available until the end of his appointment on August 24, 2005 with no evidence it would have been terminated early. Evidence from the employing establishment included an August 25, 2002 notification of personnel action which advised that appellant was transferred from a maintenance worker to a motor vehicle dispatcher under a term appointment effective August 25, 2002 and was entitled to pay retention. In an August 22, 2004 notification of personnel action, appellant's term appointment as a motor vehicle dispatcher was extended to August 24, 2005, with retained pay. Also submitted were job descriptions for a maintenance worker and motor vehicle dispatcher.

In a decision dated February 10, 2011, OWCP denied appellant's claim for a recurrence of disability commencing September 18, 2004.

Appellant requested an oral hearing which was held on December 8, 2011. He testified that his job as a cemetery caretaker was physically demanding and he was unable to perform his regular job. Appellant stated that the employing establishment proposed to terminate him for medical inability to perform his job. He indicated that on July 31, 2002 he was given the option of disability retirement or a position as a dispatcher which was a two-year appointment. Appellant accepted the job as a dispatcher and asserted that the employing establishment would not permit him to continue working the temporary job after the term ended. He indicated that the extension of the term appointment for another year until 2005 was not offered to him until he applied for disability retirement and that he never received the personnel action form. Appellant further testified that the employing establishment offered to extend his term another year until his disability retirement paperwork was finalized. His attorney asserted that the Agency Certification of Reassignment and Accommodation Effort form submitted with the disability retirement application noted that appellant could not be reassigned and, therefore, accommodation was not possible when the term position expired in 2004. Appellant submitted a July 31, 2002 proposed removal which advised that he would be removed from his job as a cemetery caretaker based on the medical inability to perform the essential functions of his position. The employing establishment advised that, in lieu of the proposed removal, he was

offered a two-year term position as a motor vehicle dispatcher or he could file for retirement disability. Also submitted was a September 9, 2004 letter granting disability retirement.

In a decision dated February 8, 2012, an OWCP hearing representative affirmed OWCP's decision dated February 10, 2011.

LEGAL PRECEDENT

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 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.⁴

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."⁵

Causal relationship is a medical issue,⁶ and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁷

ANALYSIS

OWCP accepted appellant's claim for cervical strain, aggravation of multilevel degenerative disc disease and disc herniation at C7-T1 and authorized a discectomy and fusion which was performed on February 27, 2001. On August 25, 2002 appellant was transferred from a maintenance worker to a motor vehicle dispatcher under a term appointment and was provided work within his restrictions. On August 22, 2004 his term appointment as a motor vehicle dispatcher was extended to August 24, 2005. Appellant was granted disability retirement on September 18, 2004. Thereafter he asserted a recurrence of disability. In the instant case, appellant has not submitted sufficient evidence to support 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.

⁴ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ *J.F.*, 58 ECAB 124 (2006); *Elaine Sneed*, 56 ECAB 373, 379 (2005); 20 C.F.R. § 10.5(x).

⁶ *Mary J. Briggs*, 37 ECAB 578 (1986).

⁷ *See Gary L. Fowler*, 45 ECAB 365 (1994).

Appellant submitted reports from Dr. DiMartino but these reports are insufficient to establish a recurrence of work-related disability beginning September 18, 2004. Certain of these reports predate the period of claimed recurrent disability and do not otherwise support that appellant would be unable to perform the duties of his position at the time of his retirement due to his accepted conditions. In reports dated September 3 and 7, 2010, Dr. DiMartino noted appellant's complaints and symptoms and diagnosed diffuse degenerative disease. However, Dr. DiMartino failed to note a specific date of a recurrence of disability or provide medical rationale explaining how these symptoms and diagnosed conditions were causally related to the accepted injury or note a particular change in the nature of appellant's physical condition, arising from the employment injury, that prevented him from performing his light-duty position.⁸ Additionally, the Board notes that the record is void of any evidence that appellant sought medical treatment from June 15, 2004 until November 5, 2008 for the work-related condition. There is no medical evidence contemporaneous to the alleged date of recurrence, September 18, 2004, which references a specific date of a recurrence of disability or note a spontaneous change in the nature of appellant's physical condition.

Dr. Barth treated appellant on November 5, 2008, for neck pain worsened by physical therapy. In February 2, 2009 report, he noted that appellant presented with lower cervical and upper thoracic spine pain radiating into his arms stemming from a work-related accident. Dr. Barth diagnosed degenerative disc disease with acute herniated nucleus pulposus. However, he did not list a specific date of a recurrence of disability nor did he note a particular change in the nature of appellant's physical condition which prevented him from performing his light-duty position on September 18, 2004.

Other medical reports such as reports of diagnostic testing do not address how appellant was unable to perform the duties of his motor vehicle dispatcher position beginning September 18, 2004, when he voluntarily retired, due to a spontaneous change in his accepted conditions. Appellant also submitted physical therapy notes. The Board has held that treatment notes signed by a physical therapist are not considered medical evidence as these providers are not a physician under FECA.⁹

The Board further finds that there is no credible evidence which substantiates that appellant experienced a change in the nature and extent of the light-duty requirements or was required to perform duties which exceeded his medical restrictions. Appellant asserted that on July 31, 2002 he accepted a job as a dispatcher and indicated that the employer would not permit him to continue working the temporary job after the term ended. His attorney asserted that his light-duty job as a dispatcher was withdrawn as the Agency Certification of Reassignment and Accommodation Effort form noted that he could not be reassigned. However, the Board finds that the record contains no evidence substantiating that appellant's job was withdrawn prior to his voluntary retirement or that he was required to perform duties which exceeded his medical

⁸ It does not appear that appellant claimed any wage loss until November 7, 2007.

⁹ See *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 the 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).

restrictions. Rather, the record reflects that the employing establishment provided appellant jobs within his restrictions. On August 22, 2004 the employing establishment extended his term appointment as a motor vehicle dispatcher to August 24, 2005 and on September 18, 2004 he was granted disability retirement. It noted that appellant's position as a dispatcher was available until the end of his appointment on August 24, 2005 and there was no evidence it would have been terminated early or that appropriate light duties would not have been made available. Rather, the evidence reflects that he worked until he voluntarily retired on September 18, 2004.

Appellant has not met his burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty requirements after he returned to work.

On appeal, appellant, through his attorney, asserts that appellant's light-duty position as a dispatcher was temporary and was withdrawn such that his recurrence of disability commencing September 18, 2004 should be accepted. As noted above, the Board notes there is no evidence that his light-duty job was withdrawn on September 18, 2004. Rather, the evidence supports that on August 22, 2004 appellant's term appointment as a motor vehicle dispatcher was extended to August 24, 2005 and that he continued to work until he voluntarily retired on September 18, 2004. While the employing establishment may have provided appellant a temporary position after his injury, the record indicates that it made appropriate light duty available before he retired.

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 in establishing that he sustained a recurrence of disability on September 18, 2004 causally related to his accepted conditions.

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board