United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 13-1653**
	)	**Issued: November 22, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Albany, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2013 appellant, through her attorney, filed a timely appeal from a May 30, 2013 merit decision of the Office of Workers' Compensation Programs' (OWCP) hearing representative which denied her recurrence claim. 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.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability beginning August 14, 2012 as a result of her accepted March 26, 2010 employment injury.

On appeal, appellant's counsel alleged that the decision was contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on March 26, 2010 appellant, then a 50-year-old nurse, strained her left lower back as a result of repetitively lifting and turning patients throughout her work shift. Appellant stopped work. OWCP accepted her claim for sciatica, aggravation of preexisting degenerative disc disease, L4-5 and L5-S1, and bilateral facet arthropathy, L4-5 and L5-S1. On May 20, 2010 appellant returned to full-time light duty.

On August 22, 2012 appellant filed a recurrence claim alleging that she continued to feel pain since the March 26, 2010 employment injury. She explained that the pain was the same as the original injury but now it was severely limiting and had worsened over the last six months to the point that she had difficulty walking. Appellant reported that she remained in a light-duty position since returning to work with restrictions related to lifting, strolling, pushing and pulling. She indicated that she stopped work on August 14, 2012 and requested disability compensation. The employing establishment alleged that appellant was filing a consequential injury claim due to exacerbation of her back condition from an unrelated illness. It requested that the claim be further developed in order to determine if the total disability was due to a consequential injury or an intervening, nonwork-related health condition.

In July 2 and August 14, 2012 reports, Dr. Kristine Campagna, a Board-certified family practitioner with a specialty in sports medicine, conducted a follow-up examination of appellant's back pain as a result of a work-related injury. Appellant stated that her back pain was worsening and described the pain as radiating down the posterior and anterior left thigh. Dr. Campagna reported that appellant should not return to work because of pain as of August 13, 2012. She stated that appellant's pain had exacerbated to the point that she had difficulty ambulating and it was harder for her to work. Examination of appellant's back revealed pain and tenderness of the lumbar paraspinal muscles and normal reflexes. Dr. Campagna diagnosed lumbar radiculopathy and joint pain, localized in the left hip.

In an August 13, 2012 hospital discharge report, Dr. John Krisa, a Board-certified family practitioner, related appellant's complaints of swelling and erythema in the left axillary region. He diagnosed left axillary/breast cellulitis and abscess secondary to methicillin sensitive staphylococcus aureus status post incision and drainage.

In an August 23, 2012 initial consultation report, Dr. Martin Ferrillo, Board-certified in physical medicine and rehabilitation, examined appellant for complaints of left-sided lower back pain with left-sided sciatica. He related that appellant had worked for the employing establishment for approximately five years and repeatedly injured her lower back and suffered from left-sided sciatica over the course of her job. Dr. Ferrillo also noted a date of injury of March 26, 2010. He reported that despite working light duty appellant's pain gradually worsened even though she was seen by specialists and was taken out of work because of her left leg pain. Upon examination, Dr. Ferrillo observed good range of motion in the bilateral upper and lower extremities with preserved strength with the exception of the left hip where he noted some reduced range of motion. Patrick's testing was not producing groin or hip pain. Examination of the thoracic spine revealed preserved range of motion with no obvious asymmetry, tenderness, muscle spasm or tenderness to palpation. Examination of the lumbar spine demonstrated markedly reduced range of motion with forward flexion to only 40 degrees

and extension to 10 degrees. Dr. Ferrillo also observed left-sided only lumbar facet loading tenderness and marketed tenderness at the lumbosacral junction on the left-hand side. Straight leg raise testing was negative. Dr. Ferrillo diagnosed lumbar intervertebral disc degeneration, lumbago, lumbar spondylosis without myelopathy, neuralgia neuritis and radiculitis and other back symptoms. He explained that appellant had lumbar degenerative disc disease and was suffering from a combination of lumbar stenosis with left-sided radicular symptoms affecting the left side of the lumbar spine. Dr. Ferrillo recommended more diagnostic tests and lumbar epidural steroid injections.

In an August 23, 2012 disability note, Dr. Ferrillo stated that appellant would remain out of work until further notice.

By letter dated September 26, 2012, OWCP advised appellant that the evidence submitted was insufficient to establish that she sustained a recurrence on August 14, 2012 and was disabled from work. It requested additional evidence to establish her claim.

In a September 24, 2012 report, Dr. Darryl DiRisio, a Board-certified neurological surgeon, related appellant's complaints of major hip and groin pain radiating into the anterior part of her thigh. Upon examination, he did not observe much pain in her hip and groin upon movement. Dr. DiRisio reported that hip x-rays revealed definite significant degenerative changes on the left side. He opined that appellant had lumbar spondylosis and hip pain and recommended that appellant return to his office in three months.

On October 4 and 11 2012 appellant underwent left lumbar epidural steroid injections to treat her cervical spondylosis and other back symptoms.

In an October 4, 2012 disability note, Dr. Ferrillo stated that appellant should remain out of work until further notice.

In an October 12, 2012 statement, appellant reported that she had not had any further injury outside of her employment prior to the date of recurrence. She explained that she never had a complete recovery from her initial injury and that her symptoms had worsened over the past six months previous to the date of recurrence. Appellant listed the dates of medical treatment she received beginning March 31, 2010.

On October 22, 2012 the employing establishment responded to OWCP's development letter. It noted that appellant was hospitalized for left axillary/breast cellulitis and requested further development to determine if appellant's inability to work was due to an intervening, nonwork-related health condition. The employing establishment also provided appellant's light-duty assignment, effective October 7, 2011.

In an October 26, 2012 report, a nurse practitioner related appellant's complaints of low back pain at the iliac crest left-sided radiating to her groin and hip down her leg to her foot. She noted that appellant had a history of left lumbar facets. Upon examination of her spine, the nurse practitioner observed extreme tenderness over the left sacroiliac (SI) joint area and severely limited range of motion with pain. Straight leg raise testing was negative bilaterally and supine straight leg raise testing was negative bilaterally. Examination of appellant's hips revealed no pain with internal and external rotation of her right and left hips. Patrick's test was positive on

the left and negative on the right. The nurse practitioner diagnosed sacral disorder, neuralgia neuritis and unspecified radiculitis. She checked "yes" that appellant's complaints were consistent with her history of injury and illness.

In a decision dated November 30, 2012, OWCP denied appellant's claim finding insufficient evidence to establish that she sustained a recurrence of disability beginning August 14, 2012. It determined that the evidence failed to establish a factual basis of how the August 14, 2012 recurrence occurred and the medical evidence failed to explain how and whether the alleged recurrence was causally related to the March 26, 2010 employment injury.

On December 11, 2012 appellant, through her attorney, appealed the November 30, 2012 decision and requested a telephone hearing, which was held on March 19, 2013. Appellant described the light-duty assignments she worked at the employing establishment and the medical treatment she received following the March 26, 2010 employment injury. She related that she never recovered from her injury and always had severe sciatica in her left upper and lower leg. Appellant stated that in 2012 her back and leg pain worsened severely and that she had cellulitis, which was unrelated to her back injury. She was sick in the hospital for about a week and reported that after her stay at the hospital the pain in her left leg and lower back was so severe that she could not walk anymore. Appellant explained that she was sure that her current condition was related to what originally happened because she never had a problem like this before. She reported that her doctors informed her that her current condition was an exacerbation of her already degenerative disc disease and that something was pressing on a nerve somewhere, which worsened her sciatica. Appellant reviewed the various doctors who treated her and expressed her discouragement that none of the treatment she received was able to permanently relieve her lower back and left leg pain.

In reports dated from December 17, 2012 to March 21, 2013, a nurse practitioner related appellant's history of low back and left leg pain and noted improved pain after a December 13, 2012 joint injection. Examination of the low back revealed tenderness across appellant's low back at the paraspinous area, especially on the left side and tenderness over the SI joint. Range of motion was moderately limited and straight leg raise testing was negative bilaterally. The nurse practitioner diagnosed lumbar intervertebral disc degeneration, neuralgia neuritis and radiculitis unspecified, other back symptoms and sacral disorder. She indicated that appellant was not working and checked "yes" that appellant's complaints were consistent with her history of injury.

In a January 30, 2013 report, Dr. Ferrillo stated that he was treating appellant for neuralgia, lumbago and sacral disorder of her back. He reported that her prognosis was good and she could return to light duty on February 1, 2013 with restrictions of no pushing or pulling greater than five pounds on a consistent basis and no standing more than 10 minutes on a consistent basis. Dr. Ferrillo also noted that appellant could use a cane to ambulate.

In a February 1, 2013 return to work slip, an unknown provider with an illegible signature stated that appellant could return to limited duty.

In a March 28, 2013 report, Dr. Ferrillo stated that appellant had been his patient since August 23, 2012 and had been out of work. He noted that he performed an initial consultation on

August 23, 2012 and provided a work note for appellant to remain out of work until her treatment was completed. Dr. Ferrillo reported that she suffered from sciatica and aggravation of preexisting degenerative disc disease at L4-L5 and L5-S1, bilateral facet arthropathy at L4-L5 and L5-S1, lumbago, lumbar spondylosis and sacral disorder. He stated that appellant had been bedridden for five days and in the hospital for five days due to severe pain. Dr. Ferrillo explained that she had difficulty walking and sitting and standing for long periods of time due to her low back pain and severe sciatica. He opined that this condition was an exacerbation of sciatic and aggravation of preexisting degenerative disc disorder after extended period of limited mobility secondary to her illness.

In a decision dated May 30, 2013, an OWCP hearing representative affirmed the November 30, 2012 decision denying her recurrence claim finding insufficient medical evidence to establish that she was disabled from work as a result of the accepted March 26, 2010 employment injury.

LEGAL PRECEDENT

OWCP regulations define the term 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 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 when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his 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.[2] OWCP's procedure manual provides that a recurrence of disability also includes worsening of disability due to an accepted consequential injury.[3]

Where an employee, who is disabled from the job he or she held when injured returns to a light-duty position or the medical evidence 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 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.[4] This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the disabling condition is causally related to the employment injury. The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[5]

[2] 20 C.F.R. § 10.5(x).

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

[4] *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (March 2011).

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[6] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[7]

ANALYSIS

OWCP accepted that appellant aggravated her preexisting degenerative disc disease and sustained sciatica as a result of a March 26, 2010 employment injury. Appellant stopped work and returned to light duty on May 20, 2010. On August 22, 2012 she submitted a recurrence of disability claim alleging that she never fully recovered from her original injury and that the pain continued to worsen. OWCP denied her recurrence claim finding insufficient evidence to establish that she sustained a recurrence of disability causally related to the March 26, 2010 employment injury.

Appellant has not alleged a change in her light-duty job requirements. Instead, she attributed her inability to work to a change in the nature and extent of her employment-related back and left leg conditions. Appellant, therefore, has the burden of proof to provide medical evidence to establish that she was disabled due to a worsening of her accepted work-related conditions. The Board finds that she has not met her burden of proof to establish her claim.

Appellant submitted medical reports and disability slips from Dr. Ferrillo. In an August 23, 2012 initial consultation report, he reviewed appellant's history and noted a March 26, 2010 injury at work. Dr. Ferrillo related that appellant suffered from lower back pain and left-sided sciatica over the course of her job. He conducted an examination and explained that appellant had lumbar degenerative disc disease and was suffering from a combination of lumbar stenosis with left-sided radicular symptoms affecting the left side of the lumbar spine. In a March 28, 2013 report, Dr. Ferrillo noted that appellant had been in the hospital for five days due to severe pain and that she experienced difficulty walking, sitting and standing. He opined that this was an exacerbation of sciatic and aggravation of preexisting degenerative disc disorder after extended period of limited mobility secondary to her illness. In August 23 and October 4, 2012 disability slips, Dr. Ferrillo excused appellant from work until further notice.

The Board notes that Dr. Ferrillo excused appellant from work beginning August 23, 2012 and explained that her degenerative disc condition was worsening. He also, however, described an incident when she was hospitalized for five days due to an unrelated illness and noted that the exacerbation of her condition occurred after this extended period of limited mobility. Although Dr. Ferrillo documents the worsening of her condition, he does not explain how this worsening of appellant's conditions was spontaneous in nature or causally related to the accepted employment injury. Instead, he also relates the exacerbation of her condition to her limited mobility and hospitalization resulting from an unrelated illness. The Board finds that

[6] *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

[7] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

Dr. Ferrillo offered no medical rationale explaining whether appellant's work stoppage was due to a worsening of her employment-related condition or an unrelated illness. Thus, his reports are of diminished probative value and insufficient to support her claim that her recurrence of disability was causally related to her March 26, 2010 employment injury.[8]

Appellant was also examined by Dr. Campagna. She related that appellant's back pain had worsened to the point that she had difficulty ambulating and doing work. Dr. Campagna conducted an examination and diagnosed tenderness of the lumbar paraspinal muscles and normal reflexes. She reported that appellant could not return to work as of August 13, 2012 because of pain. Although Dr. Campagna excused her from work beginning August 13, 2012, she did not provide any explanation on the cause of appellant's inability to work other than back pain.[9] Similarly, Dr. DiRisio's September 24, 2012 report is also insufficient to establish appellant's claim as there is no opinion regarding the cause of appellant's lumbar and hip pain.

Appellant also submitted various reports from a nurse practitioner dated from October 26, 2012 to March 21, 2013 regarding her treatment for back pain and sciatica. These reports are of limited probative value, however, because nurse practitioners are not considered physicians under FECA.[10]

Appellant has the burden of proof to provide evidence from a qualified physician to support the recurrence of total disability for any period of time. In this case, none of the medical reports submitted by appellant contained a rationalized opinion to explain why she could no longer perform her light-duty position as a result of the worsening of her accepted conditions. Because she has failed to submit such rationalized medical evidence establishing that her claimed recurrence of disability beginning August 14, 2012 was causally related to the accepted employment injury appellant 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 did not meet her burden of proof to establish a recurrence of disability beginning August 14, 2012 causally related to the March 26, 2010 employment injury.

[8] When a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA. *A.M.*, Docket No. 09-1895 (issued April 23, 2010); *see also M.W.*, Docket No. 13-948 (issued August 28, 2013).

[9] *T.S.*, Docket No. 13-227 (issued April 9, 2013); *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

[10] Section 8101(2) provides as follows: the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). *See also R.M.*, 59 ECAB 690 (2008).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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