

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

R.A., Appellant)
and) Docket No. 13-1650
U.S. POSTAL SERVICE, NORTH METRO) Issued: February 10, 2014
POST OFFICE, Duluth, GA, 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
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 1, 2013 appellant, through his attorney, filed a timely appeal from a May 3, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that he did not establish a recurrence of disability. 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.

ISSUE

The issue is whether appellant sustained a recurrence of disability on September 22, 2010 causally related to his August 19, 2004 employment injury.

FACTUAL HISTORY

On August 19, 2004 appellant, then a 42-year-old mail processor, sustained a low back strain in the performance of duty. OWCP accepted the claim for lumbar strain. Appellant

¹ 5 U.S.C. § 8101 *et seq.*

worked limited duty until October 26, 2004 and returned to regular employment on February 1, 2005. He returned to working in a limited-duty capacity on March 22, 2005. On September 22, 2010 the employing establishment sent appellant home because there was no work available.

Appellant filed a claim for compensation beginning September 25, 2010. In a report dated October 18, 2010, Dr. Shevin D. Pollydore, a Board-certified physiatrist, diagnosed discogenic low back pain with disc bulges and an annular tear at L4-5 by magnetic resonance imaging (MRI) scan study. He listed work restrictions consistent with a prior functional capacity evaluation.²

On October 28, 2010 appellant filed a notice of recurrence of disability beginning September 23, 2010 due to being sent home from work as a result of the National Reassessment Program (NRP).

By decision dated December 23, 2010, OWCP denied appellant's claim after finding that he had not submitted medical evidence showing that he was disabled from September 25 to October 10, 2010.

On January 15, 2011 appellant requested an oral hearing before an OWCP hearing representative regarding OWCP's December 23, 2010 decision.

In a decision dated January 24, 2011, OWCP denied appellant's claim for compensation from October 9 to 22, 2010 as he had not submitted supporting medical evidence as requested.

In a report dated January 5, 2011, received by OWCP on April 25, 2011, Dr. Pollydore related that he began treating appellant after an August 19, 2004 employment injury. Appellant's back pain began "slowly over time with repetitive lifting...." Dr. Pollydore diagnosed discogenic back pain with multiple disc bulges, an annular tear at L4-5 and lumbar facet pain. He noted that a computerized tomography discogram revealed degenerative changes particularly at L3-4 and L4-5. Dr. Pollydore found that appellant's injuries were permanent and provided work restrictions. He stated, "In my medical judgment [appellant's] current symptoms and impairment are directly related to his work[-]related repetitive injury dated August 19, 2004."

In a decision dated May 16, 2011, an OWCP hearing representative set aside the December 23, 2010 decision. She noted that OWCP had further developed the issue of whether appellant sustained a disc tear due to his work injury by obtaining a July 18, 2006 report from Dr. Harold Alexander, a Board-certified orthopedic surgeon and OWCP referral physician. The hearing representative found, however, that Dr. Alexander's opinion was insufficient to resolve the issue of causal relationship of the disc tear and remanded the case for OWCP to further develop the evidence.

² In reports dated October 18, 2010 and January 3, 2011, Dr. Pollydore diagnosed discogenic back pain with disc bulges and an annular tear at L4-5 and lumbar facet pain. He provided work restrictions consistent with those of a prior functional capacity evaluation.

On May 19, 2011 OWCP referred appellant to Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated June 14, 2011, Dr. Doman opined that appellant had “no objective findings to support the diagnosis of lumbar strain.” He asserted that the strain had resolved by November 19, 2004. Dr. Doman found that appellant had no residuals of his August 19, 2004 employment injury. In a supplemental report dated July 5, 2011, he advised that the annular tear and disc bulges were unrelated to the August 19, 2004 work injury.

OWCP determined that a conflict existed between Dr. Doman and Dr. Pollydore regarding whether appellant had any current work-related condition and whether had residuals of his lumbar strain. It referred appellant to Dr. C. Thomas Hopkins, Jr., a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion. In a report dated October 13, 2011, Dr. Hopkins discussed appellant’s history of injury and reviewed the medical evidence of record. On examination he found a negative straight leg raise with low back pain at 60 degrees. Dr. Hopkins further found a normal sensory and motor examination of the lower extremities with full range of motion. He opined that appellant had no objective findings of his lumbar strain and that “any strain that he sustained would have resolved within several months after his initial complaint.” Dr. Hopkins further determined that the multiple disc bulges and annular disc tear appeared due to age and were unrelated to employment. He advised that appellant could perform medium work and indicated that “any activity that requires excessive amount of lifting can aggravate that condition although it is unrelated to any work.” Dr. Hopkins explained that he saw no “objective pathology on any portion of the examination that reveals any work[-]related injury secondary to [appellant’s] complaints of 2004. I see no evidence that further treatment is indicated.”

By decision dated November 8, 2011, OWCP denied appellant’s compensation for wage loss from September 25 to October 10, 2010. It found that the medical evidence established that he had no residuals of his work injury and terminated authorization for medical benefits.

In a decision dated April 30, 2012, an OWCP hearing representative affirmed the April 30, 2012 decision. He found that Dr. Hopkins’ opinion established that the August 19, 2004 lumbar strain had resolved and that the disc bulges and annular tear at L4-5 were not due to the accepted work injury. The hearing representative thus concluded that appellant had not established an employment-related recurrence of disability beginning September 22, 2010.

On April 2, 2013 appellant, through his attorney, requested reconsideration. In a report dated January 24, 2013, Dr. Pollydore diagnosed discogenic low back pain with disc bulges and an annular tear at L4-5 and lumbar facet pain. He listed work restrictions.

By decision dated May 3, 2013, OWCP denied modification of the April 30, 2012 decision.

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 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.³

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 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 To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.⁵

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁶

ANALYSIS

Appellant filed a notice of recurrence of disability beginning September 22, 2010 after the employing establishment withdrew his limited-duty job pursuant to the NRP.⁷ OWCP determined that a conflict arose between Dr. Pollydore, his attending physician and Dr. Doman, a referral physician, regarding whether he had any further disability due to his August 19, 2004 employment injury and whether he sustained an annular disc tear due to his employment injury. It referred appellant to Dr. Hopkins for an impartial medical examination.

Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁸ The Board finds that the opinion of Dr. Hopkins, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized

³ 20 C.F.R. § 10.5(x).

⁴ See *Albert C. Brown*, 52 ECAB 152 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ See *Maurissa Mack*, 50 ECAB 498 (1999).

⁶ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

⁷ While OWCP did not refer to the provisions of FECA Bulletin 09-05, it fulfilled the requirements of the bulletin by its development of the current medical evidence and referring appellant for an impartial medical examination.

⁸ *J.M.*, 58 ECAB 478 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

and based on a proper factual and medical history. Dr. Hopkins accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.⁹ In a report dated October 13, 2011, he reviewed the medical evidence of record, including the results of diagnostic studies. On examination, Dr. Hopkins noted normal sensory and motor findings and a negative straight leg raise with no loss of motion. He determined that appellant had no objective findings of the accepted condition of lumbar strain and that the strain resolved no later than several months after the 2004 injury. Dr. Hopkins provided rationale for his opinion by noting that the examination revealed no objective findings of the employment injury. He further determined that the annual tear and disc bulges seen on MRI scan study were age related and not due to the employment injury. As Dr. Hopkins' report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.¹⁰ OWCP properly relied upon his report to find that appellant did not establish that he sustained a recurrence of disability on September 22, 2010 causally related to his August 19, 2004 work injury.

Subsequent to Dr. Hopkins' October 13, 2011 evaluation, appellant submitted a report dated January 24, 2013 from Dr. Pollydore, who diagnosed discogenic low back pain with disc bulges, lumbar facet pain and an annular tear at L4-5. Dr. Pollydore provided work restrictions. The Board notes that he was on one side of the conflict in medical opinion. A medical report from a physician on one side of a conflict resolved by an impartial medical examiner is generally insufficient to overcome the weight accorded the report of an impartial medical examiner or create a new conflict.¹¹ In this regard, Dr. Pollydore essentially reiterated his prior opinion on causal relation.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of disability on September 22, 2010 causally related to his August 19, 2004 employment injury.

⁹ See *Manuel Gill*, 52 ECAB 282 (2001).

¹⁰ See *J.M.*, *supra* note 8; *Katheryn E. Demarsh*, 56 ECAB 677 (2005).

¹¹ *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2014
Washington, DC

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

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

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