United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 13-1639**
	)	**Issued: March 11, 2014**
DEPARTMENT OF THE NAVY, NAVAL SUBMARINE BASE, Groton, CT, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2013 appellant, through counsel, filed a timely appeal from a May 30, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 established a recurrence of total disability on September 28, 2012 causally related to a November 27, 2007 employment injury.

On appeal, appellant's attorney asserts that the May 30, 2013 decision is against fact and law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On November 27, 2007 appellant, then a 46-year-old crane operator, filed a traumatic injury claim alleging that he injured his lower back when he was knocked back by equipment while at work. The claim was accepted for bilateral lumbar radiculitis. On July 24, 2008 appellant underwent lumbar surgery at L5-S1. He returned to full-time modified duty on December 17, 2008 and had further surgery at L5-S1 on April 2, 2009 and September 16, 2010. OWCP accepted the recurrences of total disability. Appellant returned to full-time modified duty after each procedure. His hours were reduced to six per day on November 2, 2011 and he received compensation for two hours daily thereafter. On January 9, 2012 appellant underwent authorized surgery at the L4-5 level.

In an April 18, 2012 report, Dr. Michael J. Halperin, an attending Board-certified orthopedic surgeon, advised that appellant could return to work for eight hours a day with standing, walking and sitting limited to two hours at a time; driving limited to one hour at a time for a total of three hours; lifting limited to 10 pounds frequently and 20 pounds occasionally with a 40-pound limitation of pushing and pulling. He further restricted appellant to occasional bending, squatting, kneeling, use of stairs, reaching, twisting and crawling and advised that he could not use ladders. Dr. Halperin indicated that appellant's treatment and medication did not limit his ability to work.

On May 23, 2012 the employing establishment offered appellant a modified position. The duties consisted of administrative supervisory skills for the crane operators. The physical restrictions were within those provided by Dr. Halperin with no lifting and no extended standing or sitting and walking and stretching as needed. Appellant accepted the position on May 29, 2012 and returned to modified duty for four hours daily that day. He received compensation based on a four-hour workday thereafter.[2]

On October 3, 2012 appellant filed a recurrence claim. He indicated that he stopped work on September 28, 2012 due to low back, hip and leg pain and per physician's orders.[3] Appellant submitted a September 26, 2012 report in which Dr. Michael Karnasiewicz, a Board-certified neurosurgeon, described his medical history and noted his complaints of radiating low back pain with left lower extremity numbness, leg weakness and gait instability. Back range of motion was limited due to pain and straight leg raising was positive bilaterally. Dr. Karnasiewicz diagnosed failed low back syndrome with mechanical pain emanating from the L4-5 segment.

In reports dated October 2, 2012, Dr. Halperin noted appellant's complaint that he was having difficulty ambulating and sitting in a chair due to pain. Physical examination demonstrated a positive straight leg raise test and diffuse tenderness to palpation of the lumbar spine. Dr. Halperin diagnosed multilevel degenerative disc disease and spinal stenosis status post multiple surgical procedures. He recommended a functional capacity evaluation (FCE) and

[2] An overpayment in compensation in the amount of $279.88 was deducted from appellant's continuing compensation.

[3] Appellant also submitted Form CA-7, claims for compensation, beginning on September 28, 2012.

stated, "I told [appellant] that the maximum we could give him off of work would be a total of one week" and advised that appellant was totally disabled until October 8, 2012.

By letter dated October 12, 2012, OWCP informed appellant of the type of evidence needed to support his recurrence claim. In an October 23, 2012 statement, appellant indicated that, on his last visit to physical therapy, he experienced severe pain and back spasms and that he was then taken off work by Dr. Halperin. Dr. Jorge Dabdoub, a general practitioner, advised on October 2, 20102 that appellant should be off work until October 10, 2012 due to an acute exacerbation of lumbar discogenic pain and lumbar radiculitis. In an October 2, 2012 report, Dr. John Paggioli, Board-certified in anesthesiology and pain medicine, noted appellant's report that he could not continue working because getting up and down from his computer was too painful. He described appellant's pain management and diagnosed lumbar postlaminectomy syndrome and lumbar radiculitis.

An emergency room report, signed by Katherine Stephenson, a nurse practitioner, dated October 10, 2012 noted appellant's complaint of unbearable back pain, worse with movement and left leg numbness. Appellant was discharged home with diagnoses of acute or chronic low back pain and lumbar radiculopathy. Ms. Stephenson indicated that he should be off work until cleared by his orthopedist.

In reports dated October 30, 2012, Dr. Halperin noted that appellant did not have the recommended FCE and indicated that he felt he could not work due to pain. He stated that there was no medical contraindication to appellant's working but that because he was adamant that he could not work, an FCE would be helpful. On a form report Dr. Halperin indicated that appellant was totally disabled, pending an FCE.

By decision dated December 3, 2012, OWCP denied the recurrence claim for total disability compensation. Appellant continued to receive wage-loss compensation for four hours a day and medical benefits. On December 12, 2012 his attorney requested a hearing.

In a January 22, 2013 report, Dr. Halperin noted that appellant had continued complaints of back pain. He stated that in his October 30, 2012 report he meant to say that he thought appellant capable of doing some form of light work, "but I do not think he is capable of doing his previous job as a crane operating supervisor." Dr. Halperin continued that he could not explain specifically why appellant had so much pain and diagnosed chronic lower back pain, failed back syndrome and multilevel lumbar spondylosis. He advised that appellant was disabled until he had an FCE. In reports dated January 29 and March 13, 2013 report, Dr. Paggioli indicated that appellant's work status was unchanged and provided an update on his pain management.

At the hearing, held on March 19, 2013, appellant described his medical and surgical history. He testified that his workload had increased before he stopped work in September 2012 and that it was not just a desk job but that he had to go out on piers to check on work.

By decision dated May 30, 2013, an OWCP hearing representative found that the evidence was insufficient to establish a change in the nature and extent of the injury-related condition or a change in the nature and extent of appellant's light-duty requirements and affirmed the December 3, 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.[4] 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 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 light-duty position or the medical evidence establishes that the employee 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 to show that he or she cannot perform such light duty.[6]

ANALYSIS

The Board finds that appellant has not established a recurrence of total disability on September 28, 2012 causally related to the November 7, 2007 employment injury, accepted for bilateral lumbar radiculitis, because he did not establish that the nature and extent of his injury-related condition changed on September 28, 2012 so as to prevent him from continuing to perform his limited-duty assignment. Appellant, who was working a modified position for four hours a day and receiving wage-loss compensation for four hours a day, stopped work on September 28, 2012, stating that he could no longer work due to back, hip and leg pain and per his doctor's orders.

A partially disabled claimant who returns to a light-duty job has the burden of proving that he or she cannot perform the light duty, if a recurrence of total disability is claimed.[7] The issue of whether an employee has disability from performing a modified position is primarily a medical question and must be resolved by probative medical evidence.[8] A claimant's burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally

[4] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[5] *Id.*

[6] *J.F.*, 58 ECAB 124 (2006); *Carl C. Graci*, 50 ECAB 557 (1999); *Mary G. Allen*, 50 ECAB 103 (1998); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

[7] *See William M. Bailey*, 51 ECAB 197 (1999).

[8] *Cecelia M. Corley*, 56 ECAB 662 (2005).

related to the employment injury and supports that conclusion with sound medical rationale. Where no such rationale is present, the medical evidence is of diminished probative value.[9]

The medical evidence in this case includes reports from Dr. Karnasiewicz and Dr. Paggioli who did not offer an opinion on whether appellant could continue working. A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.[10] Their reports are therefore insufficient to meet appellant's burden of proof.

While Dr. Dabdoub advised on October 2, 2012 that appellant should be off work until October 10, 2012 due to an acute exacerbation of lumbar discogenic pain and lumbar radiculitis, he did not provide physical examination findings or other objective information to support his opinion. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion are facts that determine the weight to be given each individual report.[11] Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled from work.[12] Thus, Dr. Dabdoub's opinion is also insufficient to meet appellant's burden.[13]

Appellant submitted reports dated from October 2, 2012 to January 22, 2013, in which Dr. Halperin, an attending orthopedist, provided physical examination findings of tenderness to palpation of the lumbar spine and a positive straight leg raise. On October 2, 2012 Dr. Halperin indicated that the maximum he would take appellant off work was one week and on October 30, 2012 indicated that appellant felt he could not work due to pain. Although he recommended that appellant undergo an FCE and advised on October 30, 2012 that he was totally disabled pending the FCE, the record does not contain a request for authorization of this test. On January 22, 2013 Dr. Halperin indicated that he meant to indicate in his October 30, 2012 report that, while appellant was capable of some light-duty work, he could not perform the duties of a crane operating supervisor. He continued to advise that appellant was totally disabled until he had an FCE. Dr. Halperin, however, exhibited no knowledge of the job requirements of the crane operating supervisor position or provided an explanation as to why appellant could not perform the duties of this sedentary position.

It is appellant's burden of proof to submit the necessary medical evidence to establish a claim for a recurrence.[14] The record does not contain a medical report providing a reasoned medical opinion that his claimed recurrence of total disability was caused by the November 27,

[9] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[10] *T.F.*, 58 ECAB 128 (2006).

[11] *John D. Jackson*, 55 ECAB 465 (2004).

[12] *Laurie S. Swanson*, 53 ECAB 517 (2002).

[13] The Board also notes that appellant submitted an October 10, 2012 emergency room report signed by Ms. Stephenson, a nurse practitioner. A nurse practitioner is not a physician under FECA. *L.D.*, 59 ECAB 648 (2008).

[14] *Beverly A. Spencer*, 55 ECAB 501 (2004).

2007 employment injury.[15] Furthermore, appellant has not shown a change in his light-duty requirements. While he testified at the hearing that his work duties had increased, he submitted no evidence to support this allegation. Appellant therefore did not meet his burden of proof to establish disability as a result of a recurrence.

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 establish that he sustained a recurrence of total disability on September 28, 2012.

ORDER

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

Issued: March 11, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[15] *Cecelia M. Corley*, *supra* note 8.