

FACTUAL HISTORY

This case has previously been before the Board. In a July 5, 2013 decision, the Board set aside a January 30, 2013 OWCP decision denying reconsideration.² The Board found that, while the basis for OWCP's January 30, 2013 decision was not clear, OWCP did not evaluate the probative value of the evidence submitted or make findings on appellant's claim for recurrence. The Board further found that appellant had filed a March 29, 2012 request for reconsideration, but OWCP had delayed a decision on this beyond 90 days, which had jeopardized her right for review of the merits of the case by this Board. The Board remanded the case to OWCP to conduct a merit review of her recurrence claim and to consider the evidence that had been submitted with her request. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

The relevant facts are as follows: on March 5, 2010 appellant, a 58-year-old tax consultant, sustained a traumatic injury in the performance of duty while moving 70 laptops from the basement, packing them three to a box and taking them to the mailroom. OWCP accepted her claim for a temporary aggravation of preexisting lumbar spinal stenosis. Appellant stopped work and received compensation for temporary total disability beginning April 25, 2010.

On October 18, 2010 appellant returned to work for four hours a day. On January 31, 2011 she increased her workday to five hours. On March 28, 2011 appellant accepted a full-time limited-duty position as a stakeholder relationship tax consultant.

Appellant again stopped work on July 11, 2011. On July 29, 2011 she filed a recurrence of disability and claim for compensation alleging a recurrence on May 5, 2011 that caused her to stop work on July 11, 2011. Appellant explained that her back became more painful on May 4, 2011 while she was typing on her laptop. She got out of her seat several times that day to stand up. Appellant took medication and tried heat and cold that evening, but she had a flare up the following morning. She could not straighten up. Appellant stated: "My back was so painful I had to call my daughter to take the bus to my job and drive my car to take me to my doctor appointment." She also stated: "I believe my condition is related to the original injury because the sitting, reaching and repetitive getting up and down at work has aggravated my back."

On May 10, 2011 Dr. Daryl J. Melzer, a Board-certified internist, diagnosed an exacerbation of low back pain, degenerative disc disease and lumbar radiculopathy and took her off work for two days.

On May 16, 2011 Dr. Dale E. Bauwens, an attending Board-certified orthopedic surgeon, noted that appellant had a flare up of back and leg pain that caused her to miss several days of work. He continued her on the limitations under which she was currently working. On May 23, 2011 Dr. Bauwens advised that appellant was off work that day due to back pain. He excused her from work from June 21 to 22, 2011 with a diagnosis of low back pain and sciatica. On June 13, 2011 Dr. Bauwens indicated that appellant had continued complaints of lumbar radiculitis. He told her she should consider applying for medical retirement as he did not think

² Docket No. 13-852 (issued July 5, 2013).

her symptoms were going to change. Dr. Bauwens indicated that he would continue her on limitations.

On June 14, 2011 appellant notified the employing establishment that she applied for disability retirement. She continued to work eight hours a day with intermittent time off for illness, medical appointments and family medical leave.

On July 11, 2011 Dr. Bauwens stated: “[Appellant] tells me today [that] she can no longer work. [She] explained that her pain and stress levels were so high, she was convinced that she could not manage work and decided to apply for medical retirement.” Dr. Bauwens described his findings on physical examination, including range of motion, diffuse lumbar tenderness, left sciatic notch tenderness and positive straight leg raising. He found no measurable motor, sensory or reflex deficit. Dr. Bauwens recommended medical retirement.

In an August 23, 2011 report, Dr. Bauwens discussed his findings on examination, which were essentially the same as the last several months. Based on appellant’s chronic complaints of low back pain, her inability to deal with the pain and her inability to function in an effective manner with her current symptoms, he indicated that she should seek medical retirement. Dr. Bauwens continued to provide intermittent treatment, noting appellant’s condition was unchanged.

By decision dated September 1, 2011, OWCP denied appellant’s recurrence claim. It found that the evidence did not establish that the claimed recurrence of disability resulted from the accepted work injury or that her accepted work injury materially changed or worsened and rendered her totally disabled from her limited-duty job effective October 18, 2010. Appellant’s entitlement to medical treatment remained unaffected.

Appellant requested a telephonic hearing before an OWCP hearing representative. On October 18, 2011 Dr. Bauwens stated that appellant remained disabled from her work based on the chronicity of her back problems and failure to respond to any other treatment. He continued to provide impressions of chronic low back pain.

During the December 22, 2011 hearing, appellant testified that she became unable to work in July 2011 due to sitting stating: “When I was working the four or five hours I never felt comfortable. But when I started working the eight hours the sitting became really bad for me.” She noted that she had undergone a cervical fusion in 2001 and an L4-5 laminectomy in 2003.

On January 4, 2012 Dr. Bauwens related appellant’s March 5, 2010 history of injury and medical treatment. He noted that diagnostic testing in 2010 confirmed degenerative disc disease, facet arthropathy and foraminal encroachment at L4-5 and L5-S1. Dr. Bauwens stated that appellant continued to have chronic pain, radicular symptoms and numbness and tingling. It was his opinion that she had preexisting asymptomatic degenerative changes in her lumbar spine that became symptomatic in March 2010 when lifting computers at work. Other medical reports for continued treatment by Dr. Bauwens discussed appellant’s continued condition and treatment. They did not discuss disability subsequent to July 11, 2011.

In a February 14, 2011 report, Dr. Steven J. Donatello, a Board-certified pain management specialist, noted the history of injury and appellant’s medical course. Examination

findings were noted and diagnosis of lumbago, lumbosacral disc degeneration, sciatica and brief depressive reaction was provided.

By decision dated February 29, 2012, the hearing representative affirmed the September 1, 2011 decision. She noted that the full-time work appellant performed after March 28, 2011 was within the medical limitations recommended by her treating physician. The hearing representative further noted that none of Dr. Bauwens' reports provided objective findings to support a worsening of appellant's accepted condition or an increase in her disability for work. When appellant told him that she was no longer able to work because her pain and stress levels were too high, his findings on examination were essentially the same as his prior findings. The hearing representative reviewed the medical evidence, including Dr. Bauwens January 4, 2012 report and a February 14, 2011 report from Dr. Donatello. She found that appellant had not submitted sufficient medical evidence to support that her disability from work after July 11, 2011 was causally related to and necessitated by the March 5, 2010 work injury.

On March 21, 2012 Dr. Bauwens advised that appellant was not fit for work due to her back and leg pain.

On April 2, 2012 OWCP received appellant's reconsideration. Appellant submitted a copy of Dr. Bauwens January 4, 2012 report. Her representative argued that, based on this new evidence, OWCP's decision should be vacated.

OWCP also received a copy of Dr. Donatello February 14, 2011 report as well as additional treatment notes from Dr. Bauwens. In an August 15, 2012 report, Dr. Bauwens stated that there has been no significant change in his recommendations. He opined that appellant remained impaired from her regular work activities.

Appellant took disability retirement effective April 7, 2012.

Following the Board's decision, OWCP acknowledged appellant's reconsideration request of March 29, 2012 along with all the medical evidence received. This included numerous reports from Dr. Bauwens, which noted her continued treatment of her work-related condition. It additionally acknowledged an October 9, 2012 operative report pertaining to hallux rigidus, right first metatarsophalangeal, a September 27, 2012 report of work status, an April 10, 2012 Form SF-40 and a March 30, 2012 letter from the Office of Personnel Management.

By decision dated August 23, 2013, OWCP denied appellant's reconsideration request. It found that the evidence was insufficient to establish that she sustained a recurrence of disability or a material worsening of her condition on or about May 5, 2011 as a result of her March 5, 2010 work injury.

LEGAL PRECEDENT

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."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

ANALYSIS

OWCP accepted that appellant sustained temporary aggravation of preexisting spinal stenosis in the lumbar region on March 5, 2010. Appellant was off work and eventually returned to work part time with restrictions. Her work hours gradually increased until she was working full time, eight hours a day with restrictions on or after March 28, 2011. Appellant continued to work full-time modified duty until July 11, 2011, when she stopped work. She filed a claim for medical retirement as well as a claim for recurrence of disability from May 5, 2011. Appellant must demonstrate either that her condition has changed such that she could not perform the activities required by her modified job or that the requirements of the modified job changed.

The Board finds that the record contains no evidence that the modified job requirements were changed or withdrawn. The evidence does support that the work appellant performed from March 28, 2011 was within the medical limitations recommended by Dr. Bauwens. She worked in the position from March 28, 2011 until she stopped work on July 11, 2011 due to her own belief that she could no longer perform the position because her pain and stress levels were too high. Prior to stopping work, appellant saw Dr. Bauwens on June 13, 2011. This report noted that she had continued complaints of lumbar radiculitis and her symptoms were unchanged. While Dr. Bauwens thought appellant should consider applying for medical retirement, he stated that she could continue on limitations. In his July 11, 2011 report, he noted that she told that him she could no longer work because of her pain and stress levels. While Dr. Bauwens

³ 20 C.F.R. § 10.5(x).

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

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

recommended medical retirement, he provided no opinion that appellant could no longer perform the modified job or that her condition had changed.

The Board further finds that the medical record lacks a well-reasoned narrative from appellant's physicians relating her claimed recurrent disability to her accepted employment injury. There is no evidence that appellant incurred a material worsening of her condition as a result of the alleged recurrence of disability on or about May 5, 2011. As noted, Dr. Bauwens reported on June 13, 2011 that her symptoms were unchanged and that she could continue on limitations. In his July 11, 2011 report, Dr. Bauwens stated that appellant advised him that she could no longer work because of her pain and stress levels. His findings on examination were essentially the same as in prior examinations. While Dr. Bauwen's opined in this report, as well as in other reports, that appellant should medically retire, he merely noted that she felt she was unable to work because of her pain. He continued to advise her condition of chronic lower back pain and chronic lumbar radiculitis was unchanged.

When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a probative medical opinion on the issue of disability or a basis for payment of compensation.⁶ In his January 4, 2012 report, Dr. Bauwens stated that appellant continued to have chronic pain, radicular symptoms and numbness and tingling. While his report supported that she suffered an aggravation of a preexisting condition as a result of her work injury of March 5, 2010, he did not provide any opinion as to whether she had incurred a material worsening of her condition as a result of the alleged recurrence of disability on or about May 5, 2011. Additional evidence from Dr. Bauwens noted appellant's treatment, but showed no evidence of disability or an increase in severity of the accepted condition. While he opined that she remained impaired from her regular work activities in his August 15, 2012 report, he failed to provide any objective evidence to support disability from performing the modified position or to support a material worsening of appellant's accepted condition. Dr. Bauwens specifically stated that there has been no significant change in his recommendations. Dr. Donatello's February 14, 2011 report provides several diagnoses, but fails to confirm or discuss whether appellant experienced an increase in severity of the accepted condition. His report, as well as the October 9, 2012 surgical report, also discuss conditions that are not accepted as work related. Thus there is no evidence of record to support a worsening of appellant's back condition to support total disability or any objective findings on examination to support a worsening of her back condition on or about May 5, 2011 causally related to her March 5, 2010 work injury, which would prevent her from working in the March 28, 2011 modified position.

On appeal, counsel argues that OWCP's decision is contrary to fact and law. However, it is not enough that appellant believes that her pain and discomfort prevent her from performing her modified job. The medical opinion evidence must soundly explain how a work stoppage for which she seeks compensation was a result of an objective change in the nature and extent of her accepted condition. As noted, the medical evidence of record does not support that appellant sustained a material worsening of her condition on or about May 5, 2011 as a result of her

⁶ *G.T.*, 59 ECAB 447 (2008).

March 5, 2010 work injury or that the modified job requirements were changed or withdrawn. As such, there is no merit to counsel's argument.

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 failed to meet her burden of proof to establish that she sustained a recurrence of disability causally related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 26, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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