

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

C.M., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Louisville, KY, Employer**)

**Docket No. 14-1552
Issued: October 22, 2014**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 30, 2014 appellant, through counsel, filed a timely appeal from the May 13, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met her burden of proof to establish that she sustained a recurrence of total disability on or after March 13, 2013 due to her July 22, 2011 work injury.

FACTUAL HISTORY

OWCP accepted that on July 22, 2011 appellant, then a 47-year-old housekeeping aide, sustained a lumbar sprain due to lifting trash out of a trash can and placing it on the floor.

¹ 5 U.S.C. §§ 8101-8193.

Appellant stopped work on July 22, 2011 and returned to work on July 29, 2011 in a limited-duty position. She intermittently received compensation on the daily rolls for periods of disability.

Appellant stopped work on March 12, 2013 and filed a claim (CA-2a form) on April 5, 2013 alleging that she sustained a recurrence of total disability on March 12, 2013 due to her July 22, 2011 work injury. She indicated that she still experienced pain in her low back and the back of her right leg.²

In a March 12, 2013 report, Dr. Stanley W. Collis, a Board-certified orthopedic surgeon who served as an OWCP referral physician, described appellant's medical history, including the occurrence of her July 22, 2011 lumbar sprain. He noted that appellant had scoliosis in her dorsal spine and that she underwent fusion of her dorsal spine with use of Harrington rods approximately 30 years ago. Appellant reported experiencing severe back pain four days prior. On examination, she had good reflexes and there was no muscle weakness in her legs, but she had muscle spasms, guarding and limited motion in her lower back. Dr. Collis diagnosed preexisting postspinal fusion for scoliosis of the dorsal spine mid fixation with rods, preexisting arthritis and some degenerative disc lesion in the lumbar area, acute back pain, which by history began approximately three or four days ago, and work-related aggravation of preexisting condition by the incident at work on July 22, 2011. He did not think that the muscle spasms, guarding and limited motion in appellant's lower back were all due to the July 22, 2011 injury. Dr. Collis felt that appellant could not return to her regular duties as a housekeeper, but indicated that, after resting for approximately a month, she could return to work that avoided a lot of bending, lifting, pushing or pulling.³ He stated, "In my opinion, the patient's problem is due to the preexisting conditions, namely the extensive surgery she had in the dorsal area when she was 10 years old and also due to some degenerative arthritis and hypertrophic arthritis in the lumbar area, which were preexisting to the above [July 22, 2011] incident at work. Also, if her history is correct in that she did not have any problem with her back since the surgery, then I have to assume the work-related incident aggravated her preexisting condition and probably is of a permanent nature."

In a March 19, 2013 report, Dr. John R. Johnson, an attending Board-certified orthopedic surgeon, stated that appellant had been on the waiting list for surgery for her stenosis at L3-4 through L4-5, but noted that about two or three days prior she started experiencing weakness involving the upper extremities. Appellant was weak in her biceps on both sides and she could not abduct her arms past about 90 degrees. In an April 1, 2013 note, Dr. Johnson stated, "It is my medical opinion that [appellant] should remain out of work until April 30, 2013 (subject to change). Patient is being scheduled for spinal surgery, unable to sit, stand, bend or twist repetitively."⁴

² Appellant also filed claim for compensation (CA-7 forms) alleging that she had work-related disability beginning March 12, 2013 and continuing.

³ Dr. Collins provided work restrictions, including no lifting, pushing or pulling more than 25 pounds, which would apply in one month.

⁴ A May 6, 2013 document from Norton Neurospine Care indicated that the surgery for stenosis was rescheduled to May 8, 2013.

In an April 17, 2012 report, Dr. Raghunath S. Gudibanda, an attending Board-certified pain management physician, noted administering a lumbar interlaminar epidural steroid injection at L5-S1 interlaminar space.

In an April 11, 2013 note, Dr. Johnson stated, “It is my medical opinion that [appellant] should remain out of work until April 30, 2013 (subject to change). The patient is being scheduled for spinal surgery. At this time [appellant] is totally disabled from any and all work.” An April 30, 2013 report, designated as reviewed by Dr. Martin C. Ozor, an attending Board-certified family practitioner, contained the diagnoses of spinal stenosis of lumbar region with neurogenic claudication and lumbar spondylosis with myelopathy.⁵

In a May 13, 2013 decision, OWCP denied appellant’s claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability on or after March 13, 2013 due to her July 22, 2011 work injury. It stated that some of the submitted evidence indicated that appellant was scheduled for surgery for spinal stenosis, but noted that there was no evidence that this condition was related to the July 22, 2011 lumbar sprain.

Appellant submitted records from her ultimate May 8, 2013 surgery, posterior instrumentation and fusion at L3 through L5 using a medium Infuse brand bone graft and local bone with Alphatec brand pedicle screw instrumentation. The surgery, which was performed by Dr. Johnson, was necessitated by the condition of spinal stenosis at L3-4 and L4-5 and was not authorized by OWCP.

In a June 13, 2013 progress report, Dr. Johnson stated that appellant returned postoperatively from her L3 through L5 posterior decompression instrumentation fusion. Appellant reported that she was very happy with her results and x-ray testing showed the surgical instrumentation to be in good position and alignment. Dr. Johnson indicated that he reviewed the “do’s and don’ts” with appellant and that she should return in three months.

In a June 25, 2013 decision, OWCP affirmed its May 13, 2013 decision noting that appellant had not submitted medical evidence showing that she sustained a recurrence of total disability on or after March 13, 2013 due to her July 22, 2011 work injury. The record did not contain a rationalized medical report showing that appellant’s work stoppage on March 12, 2013 was due to her July 22, 2011 work injury.

Appellant requested a telephonic hearing before an OWCP hearing representative regarding the denial of her recurrence of disability claim. During the hearing held on October 29, 2013, she testified that she continued to suffer residuals of her July 22, 2011 lumbar sprain.

Appellant submitted diagnostic testing of her cervical spine from March 19, 2013 and progress notes dated between March 19 and November 5, 2013 from Norton Neurospine Care, including progress reports of Dr. Johnson. The notes detailed her progress after her May 8, 2013

⁵ The record also contains x-rays of appellant’s chest from April 25, 2013.

surgery and denoted periods of disability due to this surgery. Appellant also resubmitted previously submitted medical reports.

In a January 15, 2014 decision, OWCP's hearing representative affirmed OWCP's June 25, 2013 decision noting that none of the medical reports of record contained a rationalized medical report showing that appellant sustained a recurrence of total disability due to her accepted July 22, 2011 lumbar sprain.

In a progress note dated January 16, 2014, Dr. Johnson stated that appellant was doing very well following her L3-4 decompression instrumentation fusion surgery secondary to spinal stenosis.⁶ He stated, "[S]he worked for many years as a housekeeper do[ing] a lot of bending, lifting and twisting and this certainly was much more contributory toward her spinal stenosis below the scoliosis...." Dr. Johnson indicated that he had explained to appellant the "do's and don'ts" and that she would return in six months. Appellant was able to ambulate on an independent basis and she reported that her numbness and tingling were gone and that she was happy with her results. In another progress note dated January 16, 2014, Dr. Johnson stated that appellant was over one year status post C4 vestibrectomy shovel surgery. Appellant had a surgical plate removed and reported that she was doing well. Dr. Johnson noted that she was grossly neurologically intact in her upper extremities and that she would return in nine months.

In a May 13, 2014 decision, OWCP affirmed its January 15, 2014 decision denying appellant's claim for a recurrence of total disability beginning March 12, 2013. It noted that the new medical evidence from Dr. Johnson did not show that she sustained a recurrence of total disability due to her accepted July 22, 2011 lumbar sprain.

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 job requirements.⁷

⁶ It was noted that x-ray testing of the lumbar spine showed instrumentation to be in good position and that there was a solid arthrodesis.

⁷ *S.F.*, 59 ECAB 525 (2008); *Terry R. Hedman*, 38 ECAB 222 (1986). 20 C.F.R. § 10.5(x) provides:

"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 (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."

ANALYSIS

OWCP accepted that on July 22, 2011 appellant sustained a lumbar sprain due to lifting trash out of a trash can and placing it on the floor. Appellant stopped work on July 22, 2011 and returned to work on July 29, 2011 in a limited-duty position. She stopped work on March 12, 2013 and filed a claim on April 5, 2013 alleging that she sustained a recurrence of total disability on March 12, 2013 due to her July 22, 2011 work injury.

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability on or after March 13, 2013 due to her July 22, 2011 work injury.

Appellant submitted records from her May 8, 2013 surgery, posterior instrumentation and fusion at L3 through L5. The surgery was performed by Dr. Johnson, a Board-certified orthopedic surgeon, who submitted reports indicating that appellant was disabled for about five weeks prior to the May 8, 2013 surgery and for several months after the surgery. The Board finds, however, that the submission of these records do not establish appellant's claim for a recurrence of total disability beginning March 12, 2013 because the medical evidence of record does not show that this surgery was necessitated by the July 22, 2011 work injury. Rather, the medical evidence of record shows that the surgery, which was not authorized by OWCP, was performed due to the nonwork-related condition of spinal stenosis. Dr. Johnson did not clearly indicate that any of the recommended periods of disability were due to the July 22, 2011 work injury.⁸

In a progress note dated January 16, 2014, Dr. Johnson stated that appellant was doing very well following her L3-4 through L4-5 decompression instrumentation fusion surgery secondary to spinal stenosis. Although he suggested that there was some relationship between appellant's housekeeper duties and her scoliosis condition,⁹ he did not provide a clear opinion in this regard. Dr. Johnson did not provide an opinion that appellant sustained a recurrence of total disability on or after March 13, 2013 due to her July 22, 2011 work injury.

In a March 12, 2013 report, Dr. Collis, a Board-certified orthopedic surgeon who served as an OWCP referral physician, described appellant's medical history, including the occurrence of her July 22, 2011 lumbar sprain. He noted that appellant reported experiencing severe back pain four days prior and that, on examination, she had muscle spasms, guarding and limitation of motion in her back. Although Dr. Collis indicated that appellant should take off work for a month, the Board finds that this report does not establish appellant's claim because it does not contain a rationalized opinion that she had a recurrence of total disability on or after March 12, 2013 due to her July 22, 2011 work-related lumbar sprain. Dr. Collis appeared to attribute appellant's medical problems to nonwork-related causes by stating, "In my opinion, the patient's

⁸ In an April 17, 2012 report, Dr. Gudibanda, an attending Board-certified pain management physician, detailed his performance of a lumbar interlaminar epidural steroid injection at L5-S1 interlaminar space. There is no indication that this procedure was carried due to the July 22, 2011 work injury.

⁹ Dr. Johnson stated, "[S]he worked for many years as a housekeeper do[ing] a lot of bending, lifting and twisting and this certainly was much more contributory toward her spinal stenosis below the scoliosis...."

problem is due to the preexisting conditions, namely the extensive surgery she had in the dorsal area when she was 10 years old and also due to some degenerative arthritis and hypertrophic arthritis in the lumbar area, which were preexisting to the above [July 22, 2011] incident at work.” Although he also suggested that the muscle spasms, guarding and limited back motion he observed had some relationship to appellant’s July 22, 2011 injury, he did not provide a clear opinion in this regard.¹⁰ The Board has held that a medical opinion which is equivocal in nature is of limited probative value regarding a given medical question.¹¹ Dr. Collis did not provide a clear opinion that appellant sustained a recurrence of total disability due to her July 22, 2011 work injury.¹²

Appellant did not submit any medical evidence showing that her work stoppage on March 12, 2013 was due to her July 22, 2011 work injury. She did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after March 13, 2013 due to her July 22, 2011 work injury. 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 that she sustained a recurrence of total disability on or after March 13, 2013 due to her July 22, 2011 work injury.

¹⁰ For example, Dr. Collis stated, “Also, if her history is correct in that she did not have any problem with her back since the surgery, then I have to assume the work-related [July 22, 2011] incident aggravated her preexisting condition and probably is of a permanent nature.”

¹¹ See *Leonard J. O’Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956) (finding that an opinion which is equivocal is of limited probative value regarding the issue of causal relationship).

¹² The Board notes that appellant has not alleged that there was change in the nature and extent of her light-duty job requirements such that she became totally disabled on or after March 12, 2013.

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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