

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

G.A., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, East Orange, NJ, Employer)

**Docket No. 15-120
Issued: April 22, 2015**

Appearances:

*Thomas R. Uliase, 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 H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 20, 2014 appellant, through counsel, filed a timely appeal from a July 28, 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 to review the merits of this case.

ISSUE

The issue is whether appellant has established a recurrence of disability as of March 21, 2011.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case was before the Board on a prior appeal. In a decision dated April 2, 2013, the Board reviewed a December 15, 2011 OWCP decision denying authorization for spinal surgery.² The Board found that OWCP did not abuse its discretion in denying authorization for removal of partial lumbar vertebra.³ In that decision the Board discussed evidence of record that is relevant to the current issue of a recurrence of disability. The Board set forth the relevant background below.

OWCP accepted that on January 9, 2008 appellant, then a 50-year-old nursing assistant, sustained injuries when she turned to change a patient. The claim was accepted for lumbosacral sprain, cervical spasm, and displacement of cervical and lumbar intervertebral discs without myelopathy. Appellant returned to light duty and worked intermittently until she stopped working on March 21, 2011. She filed a Form CA-2a, notice of recurrence of disability, commencing March 21, 2011.⁴ On the form appellant stated that she suffered pain every day and her condition had worsened.

In an emergency room report dated March 21, 2011, Dr. Purabi Simon, an osteopath, stated that appellant had a history of chronic low back pain and had back pain after work yesterday. He diagnosed low back strain.

In a report dated March 22, 2011, Dr. Allen Glushakow, a Board-certified internist, reported a date of injury of January 8, 2008, indicated that appellant reported severe left-sided sciatica, and noted that she had been treated at the hospital on March 21, 2011. He provided results on examination and diagnosed lumbar radiculopathy L4-5 with herniated disc. Dr. Glushakow stated that L4-5 endoscopic surgery on the left would be scheduled. In an attending physician's form report (Form CA-20) dated March 29, 2011, he diagnosed lumbar radiculopathy and herniated disc, checking a box "yes" that the conditions were employment related. Dr. Glushakow indicated that appellant was to be off work until April 26, 2011.

By report dated April 14, 2011, an OWCP medical adviser, Dr. Andrew Merola, a Board-certified orthopedic surgeon, stated that the proposed surgery was part of a transforaminal decompression of the neurological elements and was irrelevant. He explained that he found no intrinsic bony lesions or neurological compression.

OWCP found a conflict in the medical evidence between Drs. Glushakow and Merola regarding the proposed surgery. It referred appellant for a referee examination by Dr. Howard Pecker, a Board-certified orthopedic surgeon. In a report dated May 27, 2011, Dr. Pecker provided a history and results on examination. He noted that there were no positive neurological findings and indicated that there were signs of symptom magnification. Dr. Pecker concluded

² Docket No. 12-884 (issued April 2, 2013).

³ The Board also indicated that OWCP improperly found that the surgical procedures for decompression of the spinal cord and spinal injections as they had been authorized on March 4, 2011 and no conflict had existed regarding these procedures.

⁴ The claim was filed on March 30, 2011 but OWCP did not initially issue a decision on the claim.

that removal of part of the lumbar vertebra was not medically necessary for the accepted conditions. He completed an OWCP-5c form report finding that appellant was capable of performing her regular duty.

By decision dated June 14, 2011, OWCP denied authorization for spinal surgery. Appellant continued to receive treatment from Dr. Glushakow. In reports dated October 4 and November 1, 2011, Dr. Glushakow reported that she stated that she was unable to work due to left-sided sciatica.

In a report dated April 26, 2013, Dr. Glushakow noted that an April 5, 2013 magnetic resonance imaging (MRI) scan showed a large herniated L4-5 disc, worse on the left. He also indicated that appellant had an L5-S1 herniated disc. Dr. Glushakow provided results on examination and stated that surgery was discussed. Appellant underwent lumbar surgery on May 29, 2013.

By decision dated August 12, 2013, OWCP denied appellant's claim for a recurrence of disability commencing March 21, 2011. It found that the medical evidence was insufficient to establish the claim.

Appellant requested a hearing before an OWCP hearing representative. In a report dated July 3, 2014, Dr. Glushakow stated that she sustained a work-related injury and was treated for a herniated L4-5 disc as well as cervical problems. He indicated that appellant underwent physical therapy and a number of epidural blocks, but her condition did not improve. Dr. Glushakow stated that his reports indicated that she went to the emergency room on March 21, 2011 with sciatica, and his report on March 22, 2011 showed that she continued to have lumbar spasms. According to his notes from 2012 showed that appellant had little change with regard to limitation of motion and spasms. Dr. Glushakow noted an August 20, 2009 MRI scan showing a herniated L4-5 disc. He stated that there was no question that beginning on March 21, 2011 appellant "had increased disability and worsening of her back condition." Dr. Glushakow diagnosed herniated cervical disc C4-5, and herniated lumbar discs at L4-5 and L5-S1, stating that he felt that her condition was casually related to the January 9, 2008 employment injury.

By decision dated July 28, 2014, the hearing representative affirmed the August 12, 2013 decision. She found that the medical evidence was insufficient to establish a recurrence of disability as of March 21, 2011.

LEGAL PRECEDENT

OWCP 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.”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 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.⁶ 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.⁷

ANALYSIS

The issue presented was whether appellant has established a recurrence of disability as of March 21, 2011. As noted above, it is appellant’s burden of proof to establish the recurrence. She has alleged that there was a change in the nature and extent of her employment-related condition. The medical evidence of record, however, does not contain a medical report with sound medical reasoning that is sufficient to meet appellant’s burden of proof.

Appellant was initially treated on March 21, 2011 at a hospital emergency room with a diagnosis of a low back strain. The physician, Dr. Simon, does not address the issue of a recurrence of disability related to the January 9, 2008 employment injury.

Dr. Glushakow treated appellant on March 22, 2011, providing a diagnosis of lumbar radiculopathy L4-5 with herniated disc. He noted that she had been seen at the hospital the previous day. Dr. Glushakow did not provide an opinion that appellant had a change in the nature and extent of an employment-related condition resulting in disability for work. In a form report dated March 29, 2011, he checked a box “yes” that diagnosed conditions were employment related, without further explanation. The checking of a box “yes” in a form report, without additional explanation or rationale, is of little probative value.⁸ Subsequent treatment reports from Dr. Glushakow, such as those dated October 4 and November 1, 2011, state only that appellant reported that she was unable to work. 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

⁵ 20 C.F.R. § 10.5(x).

⁶ *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁷ *Maurissa Mack* 50 ECAB 498 (1999).

⁸ *See Barbara J. Williams*, 40 ECAB 649, 656 (1989).

not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁹

More than three years after the claimed recurrence of disability, Dr. Glushakow provided a July 3, 2014 report, stating that there was no question that beginning on March 21, 2011 appellant “had increased disability and worsening of her back condition.” The opinion, however, is not supported with sound medical reasoning or explanation. Dr. Glushakow refers to an August 20, 2009 MRI scan, but this does not establish a recurrence of disability on or after March 21, 2011. To establish a recurrence of disability, he must discuss a change in the nature and extent of the employment-related condition, supporting the opinion with sound medical reasoning. The Board finds that the reports from Dr. Glushakow do not establish a recurrence of disability commencing March 21, 2011.

As indicated in the factual history, the record contains a May 27, 2011 report from referee physician Dr. Pecker. The conflict in the case, as discussed in the Board’s prior decision, was with respect to surgery.¹⁰ Dr. Pecker was not asked for an opinion as to a recurrence of disability on March 21, 2011 and did not address the issue. The Board notes, however, that, with respect to the claim for a recurrence of disability, his report does not support appellant’s claim. Dr. Pecker noted a lack of neurological findings, symptom magnification, and opined that she was not disabled.

On appeal, appellant’s counsel argues that Dr. Glushakow provides an opinion that is sufficient to establish the claim. For the reasons noted above, the Board finds that the reports from Dr. Glushakow are not sufficient to meet her burden of proof in this case.

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 a recurrence of disability commencing March 21, 2011.

⁹ See *S.E.*, Docket No. 14-1125 (issued October 1, 2014).

¹⁰ Dr. Pecker would be considered a second opinion physician with respect to medical issues other than the proposed surgery. See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 28, 2014 is affirmed.

Issued: April 22, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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