

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

E.L., Appellant)	
)	
and)	Docket No. 14-1450
)	Issued: September 11, 2015
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, East Boston, MA,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 9, 2014 appellant, through counsel, filed a timely appeal from a May 20, 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 sustained a recurrence of disability on June 14, 2013 causally related to the accepted October 10, 2010 work injury.

FACTUAL HISTORY

On October 10, 2010 appellant, a 57-year-old transportation security officer (screener), sustained a traumatic injury in the performance of duty while lifting a bag to be searched. The

¹ 5 U.S.C. § 8101 *et seq.*

bag shifted in his hands, causing him to jerk to the side to avoid dropping it. Appellant stopped work and returned to limited duty later that month. OWCP assigned File No. xxxxxx049 and accepted his claim for lumbar sprain.

On August 15, 2012 appellant filed a traumatic injury claim alleging that he experienced pain in his lower back up to his neck, as well as a hernia in his chest, when he tried to grab a beer keg that had fallen off a cart at work on August 14, 2012; OWCP File No. xxxxxx985.² OWCP denied this claim on May 30, 2013. An OWCP hearing representative affirmed on November 27, 2013. Appellant appealed to the Board on February 4, 2014. On appeal, the Board found that, while there was no dispute that appellant tried to grab a falling beer keg at work on August 14, 2012, the medical evidence was insufficient to establish that the incident had caused a back injury.³

On June 17, 2013 appellant filed a claim for a recurrence of total disability beginning June 14, 2013 due to his October 10, 2010 lumbar sprain. He explained that his condition progressively worsened to the point that the employing establishment could no longer accommodate his restrictions.

In May 2013 appellant was diagnosed with lumbar neuritis and lumbosacral disc degeneration. In June 2013 he was diagnosed with depression, facet syndrome, lower back pain, and lumbosacral disc degeneration. On August 26, 2013 Dr. Polly D. Fraga, the attending Board-certified internist, noted that appellant had a number of bulging discs from L2-4 and severe left-sided facet arthropathy at L5, mild at L4.

In a decision dated September 13, 2013, OWCP denied appellant's recurrence claim finding that the medical evidence failed to establish a worsening of the accepted medical condition. It found that Dr. Fraga had not explained how appellant's current disability was due to the original injury, and failed to demonstrate with clinical findings that the accepted condition had materially worsened/changed, without an intervening cause, to warrant total disability.

OWCP received additional medical evidence after its September 13, 2013 decision. The submitted evidence included an October 19, 2010 note by Gail Spellman, a nurse practitioner, describing the history of injury; a November 2, 2012 note by Ms. Spellman describing appellant's fall down a flight of stairs, causing his back to go out again for a couple of days; a November 4, 2012 imaging study ordered by Ms. Spellman showing L5-S1 severe left-sided facet arthropathy and other degenerative changes; and a December 3, 2012 note of Ms. Spellman indicating that she provided appellant with a work note and advice on posture and body mechanics.

A March 11, 2011 report by Dr. Sharon Bassi, a Board-certified physiatrist, noted the history of the October 10, 2010 injury as well as a February 2011 slip and fall incident in which appellant landed on his back. An October 2, 2013 treatment note of Dr. Bassi discussed appellant's back pain.

² Seven kegs of beer were being moved on a cart through the exit lane for screening. When the cart hit the threshold, one of the kegs fell off. Appellant reacted by attempting to grab it before it hit the floor. The case files for OWCP File Nos. xxxxxx049 and No. xxxxxx985 were combined in 2013.

³ Docket No. 14-676 (issued July 16, 2014).

Philip Ruckel, a physician assistant, submitted an August 16, 2012 report, noting a new onset of pain across appellant's shoulders and neck following the beer keg incident at work.

A June 25, 2013 treatment note from Dr. Fraga noted bulging discs at L2-3, L3-4, and L4-5, in addition to minimal canal stenosis at L4-5 with foraminal narrowing and severe left-sided facet arthropathy at L5-S1. An August 26, 2013 follow-up note from Dr. Fraga diagnosed facet syndrome. His September 16, 2013 note discussed further management. A September 26, 2013 note from Dr. Fraga noted appellant's difficulty getting his disability claim approved.

A July 25, 2013 note by Sarah Zappala, a nurse practitioner, followed appellant's progress. In a December 16, 2013 note she delineated restrictions for lower back pain resulting from appellant having lifted a heavy suitcase over three years prior.

In a telephonic hearing held before an OWCP hearing representative on March 11, 2014, counsel agreed that the disability claimed was not caused by the accepted lumbar sprain. Instead, it was his view that the October 10, 2010 work injury resulted in a herniated disc at the L4-5 level encroaching on the L4 nerve root and that this herniated disc appeared to have progressively worsened over time.

In a decision dated May 20, 2014, an OWCP hearing representative affirmed the denial of appellant's recurrence claim. She found that the evidence failed to establish that his recurrent disability beginning June 14, 2013 was causally related to the accepted work injury of October 10, 2010.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁵

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁶

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a light-duty position, or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative, and substantial evidence a recurrence of total disability, and show that he cannot perform such light duty. As part of his burden, the

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f).

⁶ *Id.* at § 10.5(x).

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

ANALYSIS

OWCP accepts that appellant sustained a lumbar sprain in the performance of duty on October 10, 2010 while lifting a bag to be searched. Appellant returned to limited duty later that month. In 2013, he filed a claim alleging that his October 10, 2010 work injury caused total disability for work beginning June 14, 2013. Appellant, therefore, has the burden to show a change in the nature and extent of his accepted lumbar sprain such that he could no longer perform his limited-duty assignment.⁸

Appellant has submitted a number of progress reports, but he has not submitted a physician's opinion on the issue of causal relationship. No physician has addressed his claim that his total disability beginning June 14, 2013 was the result of a worsening of his October 10, 2010 lumbar sprain, without an intervening injury or new exposure to the work environment. In fact, counsel concedes that the disability claimed was not caused by the accepted lumbar sprain.

Dr. Fraga, the attending internist, diagnosed a number of bulging discs from L2-4 and severe left-sided facet arthropathy at L5, mild at L4. She did not attribute appellant's total disability beginning June 14, 2013 to the accepted lumbar sprain in 2010. Dr. Fraga only addressed his difficulty getting approval of his disability claim.

Although Dr. Bassi noted a history of appellant having injured his back while lifting a heavy suitcase over three years prior to her October 2, 2013 report, she did not address whether appellant was disabled as a result of her employment injury during the period in question.

The treatment notes from Mr. Ruckel, the physician assistant, as well as those from Nurse Practitioners Spellman and Zappala are of no probative value as they are not physicians as defined under FECA.⁹

The diagnostic studies do not provide a physician's opinion addressing the issue of disability. Without more, these tests are insufficient to establish employment-related disability.

As the medical opinion evidence does not support that appellant sustained a recurrence of disability on June 14, 2013 causally related to the accepted October 10, 2010 lumbar sprain, the Board will affirm OWCP's May 20, 2014 decision denying appellant's recurrence claim.

⁷ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁸ Appellant does not argue, and the record does not reflect, a change in the nature and extent of his limited-duty job requirements.

⁹ *See e.g., David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

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 not met his burden to establish that he sustained a recurrence of disability on June 14, 2013 causally related to the accepted October 10, 2010 work injury.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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