

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

L.S., Appellant

and

**DEPARTMENT OF THE ARMY, CIVILIAN
PERSONNEL OFFICE, Fort Ord, CA, Employer**

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**Docket No. 15-0270
Issued: September 1, 2015**

Appearances:
Sylvia R. Johnson, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 10, 2014 appellant, through his representative, filed a timely appeal from an August 26, 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 established a recurrence of disability commencing October 1, 1999.

FACTUAL HISTORY

This case involves several claims that have been combined by OWCP. Under File No. xxxxxx754, OWCP accepted that on September 22, 1978 appellant, then a 44-year-old meat

¹ 5 U.S.C. § 8101 *et seq.*

cutter, sustained a lumbar sprain and ruptured L4 disc when deflecting a falling meat tree.² Appellant underwent an L4 discectomy with exploration at L5 on October 26, 1978. Following the surgery, he remained off work. Appellant received compensation for total disability on the periodic rolls. He returned to work on February 22, 1982 as a meat cutter in his date-of-injury job, with restrictions against heavy lifting. Under File No. xxxxxx167, OWCP accepted that appellant sustained a traumatic aggravation of lumbar disc disease on September 18, 1982 while performing his duties as a meat cutter.

Under the present claim File No. xxxxxx108, OWCP accepted that on August 7, 1985, appellant sustained a lumbar sprain, thoracic sprain, and lumbosacral intervertebral disc degeneration when he arose from a kneeling position. He stopped work at the time of the injury. Appellant remained under medical care, receiving compensation for total disability at the 75 percent rate for claimants with dependents.³

Appellant returned to work on October 2, 1989 in a full-time, permanent position as a clerk typist, with limitations on lifting, stair climbing, and prolonged sitting. Appellant's physicians found that the modified position was within his medical limitations. By notice dated November 28, 1989 finalized December 6, 1989, OWCP found that appellant's actual earnings of \$350.00 a week as a clerk typist fairly and reasonably represented his wage-earning capacity. It reduced his compensation benefits to \$161.50 a week.⁴

Under File No. xxxxxx033, OWCP accepted an August 31, 1990 lumbar strain with lumbosacral intervertebral disc degeneration. Appellant stopped work shortly after the injury. He received compensation for total disability. Following acceptance of the claim, OWCP doubled File No. xxxxxx033 and File No. xxxxxx167, with the present claim. Appellant remained under medical treatment for lumbar pain with radiculopathy into the left lower extremity.

On November 6, 1995 appellant returned to full-time work in his prior position, which had been reclassified as an office automation clerk, but with the same job duties. OWCP advised him on November 16, 1995 that he was no longer entitled to wage-loss compensation as he had returned to work with actual earnings equal to or greater than those of his date-of-injury position. Appellant remained under medical treatment for left-sided lumbar radiculopathy.

Under File No. xxxxxx543, OWCP accepted that appellant sustained an aggravation of preexisting lumbar degenerative disc disease on September 13, 1996 while vacuuming at work.

² File No. xxxxxx754 was before the Board under Docket No. 82-1168. The Board's decision and order issued July 7, 1982, affirmed a November 13, 1981 wage-earning capacity determination. OWCP doubled File No. xxxxxx754 under the present claim, File No. xxxxxx108.

³ Appellant participated in a vocational rehabilitation program in 1988 and 1989.

⁴ On November 1, 1989 OWCP calculated that appellant's actual earnings as a clerk typist of \$350.00 a week were 62 percent of \$563.70, the current pay rate for his job and step when injured. It determined that he was entitled to \$161.50 a week in wage-loss compensation. OWCP began paying compensation at the reduced rate on October 22, 1989.

Appellant stopped work on the date of the injury and returned to his modified position on February 3, 1997.

Beginning in February 1999, appellant's work schedule was reduced to four hours a day. In a March 16, 1999 letter, OWCP advised him that he was entitled to wage-loss compensation beginning February 22, 1999, based on his actual earnings of \$216.20 a week, working four hours a day as an automation clerk. Appellant increased his schedule to six hours a day on April 19, 1999, and resumed full-time modified duty on June 21, 1999. By letter dated July 23, 1999, OWCP advised him that his wage-loss compensation would be reduced to zero as his actual earnings exceeded those of his date-of-injury position.

On January 12, 2000 under File No. xxxxxx108, appellant claimed a recurrence of disability commencing September 17, 1999. He attributed his condition to rising from a chair. The employing establishment indicated that appellant was on modified duty as of September 17, 1999, with limitations on lifting, sitting, and stair climbing.

In a September 28, 1999 report, Dr. Gerald F. Wahl, an attending Board-certified neurologist, related appellant's account of increased back pain after bending forward on September 13, 1999. He held appellant off work, and prescribed medication, and physical therapy.

Appellant used sick leave through September 30, 1999, then filed claims for total disability compensation. OWCP paid total disability benefits beginning October 1, 1999 under File No. xxxxxx033, based on his July 24, 1998 pay rate.

By letter dated February 17, 2000, OWCP advised appellant of the type of additional evidence needed to establish his claim, including medical evidence establishing that the accepted conditions had worsened such that he could not perform his office automation clerk position. It afforded him 30 days to submit such evidence.

By decision dated February 29, 2000, OWCP found that appellant's actual earnings of \$432.40 a week as an office automation clerk beginning on June 21, 1999 fairly and reasonably represented his wage-earning capacity.

By notice dated April 11, 2005, OWCP advised appellant of its preliminary determination that an overpayment of \$78,404.63 was created under File No. xxxxxx108 as he received compensation simultaneously under File No. xxxxxx108 and File No. xxxxxx033 from October 1, 1999 through April 16, 2005 for the same occupational injury. It found that he was not at fault in creating the overpayment. By letter postmarked June 13, 2005, appellant requested a prerecoupment hearing.

By decision dated October 20, 2005, OWCP's Branch of Hearings and Review found that appellant's request for hearing was not made within 30 days from OWCP's decision, and so denied his request for a hearing. Appellant appealed the October 20, 2005 decision to the Board. By decision dated December 29, 2006, the Board found the October 20, 2005 decision was not

properly issued and should be reissued.⁵ OWCP reissued the October 20, 2005 decision on March 29, 2007.

By decision dated July 25, 2007, OWCP finalized the preliminary determination of overpayment, finding that appellant was overpaid \$78,404.63 from October 1, 1999 through April 16, 2005 as he received benefits for the same injury under both the present claim and File No. xxxxxx033. It found that he was not at fault in creating the overpayment, and waived recovery on the basis of financial hardship.

On September 25, 2008 appellant claimed a recurrence of disability commencing October 1, 1999 under File No. xxxxxx108. He attributed his back condition to work factors of his clerical positions on and after October 2, 1989, including walking up and down steps, and moving chairs and tables for conferences.

In a December 11, 2008 letter, OWCP explained that filing the recurrence claim was of no effect, as appellant was already receiving total disability compensation under File No. xxxxxx033 and indicated that he was not entitled to wage-loss compensation under more than one claim for the same period. It noted that the total disability compensation he currently received covered the full amount of wage loss attributable to the accepted injuries.

Dr. Wahl and his associate Dr. Theodore Kaczmar, Jr., an attending Board-certified neurosurgeon, submitted periodic reports from February 11 through August 18, 2009 noting increasing lumbar pain with radiculopathy into both lower extremities, and lumbar stenosis confirmed on imaging studies. Dr. Kaczmar recommended bilateral L3-4 decompression and an L4-5 decompression and reexploration on the left.

In June 12, 2009 and September 9, 2012 letters, appellant's representative contended that appellant's wage-loss compensation should be based on his pay rate as of the claimed October 1, 1999 recurrence of disability. She also asserted that the automation clerk position was "illegal." The representative requested that OWCP adjudicate appellant's September 25, 2008 claim for recurrence of disability.

By decision dated September 19, 2012, OWCP denied appellant's claim for recurrence of disability, finding that he did not submit medical evidence establishing a spontaneous material worsening of the accepted injuries began on October 1, 1999. It noted that he continued to receive total disability compensation under File No. xxxxxx033, as he had since October 1, 1999, as well as appropriate medical benefits.

Appellant disagreed and requested an oral hearing, held June 18, 2014. Appellant's representative represented him at the hearing. She asserted that appellant was entitled an additional \$1,000.00 a month under his combined claims as there was a standing wage-earning capacity determination. Appellant's representative submitted a June 6, 2014 note from Dr. Wahl, opining that appellant never recovered from the L3-4 disc injury accepted under File No. xxxxxx108, and that his subsequent injuries also concerned the L3-4 disc. Dr. Wahl agreed with her statement that appellant's "second injury was [an] aggravation of the first injury."

⁵ Docket No. 06-1199 (issued December 29, 2006).

Appellant's representative also submitted medical reports previously of record, dated from 1978 to 1990. These reports do not address appellant's condition on and after the claimed October 1, 1999 recurrence of disability.

By decision dated and finalized August 26, 2014, an OWCP hearing representative affirmed the September 19, 2012 decision, finding that appellant did not establish a recurrence of disability. The hearing representative found that OWCP correctly determined that appellant could not be compensated simultaneously for the same injury under two claims. The hearing representative noted that October 1, 1999 was the date the overpayment began. The hearing representative found that there was no evidence establishing that appellant's "total disability benefits which were previously paid to him in error should be paid to him again." The hearing representative noted that appellant's representative did not present evidence or a clear argument that appellant's benefits had been underpaid.

LEGAL PRECEDENT

OWCP's implementing regulations define a recurrence of disability as "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has 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 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. 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 This 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 disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.⁸ An award of compensation may not be made on the basis of surmise, conjecture, speculation, or on appellant's unsupported belief of causal relation.⁹

ANALYSIS

OWCP accepted that appellant sustained a series of occupational injuries from 1978 to 1996, causing an L4 disc herniation, lumbar and thoracic strains, and aggravation of preexisting lumbar degenerative disc disease.

⁶ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2.b (June 2013). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

⁷ *Albert C. Brown*, 52 ECAB 152 (2000); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

⁸ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Brusio*, 33 ECAB 1138, 1140 (1982).

⁹ *Patricia J. Glenn*, 53 ECAB 159 (2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

On January 12, 2000 appellant claimed a September 17, 1999 recurrence of disability. He used sick leave through September 30, 1999, then received total disability compensation beginning on October 1, 1999. This resulted in an overpayment of compensation from October 1, 1999 through April 16, 2005, as he received total disability compensation simultaneously under File No. xxxxxx033 and File No. xxxxxx108 for the same lumbar injuries.

Under the present claim, on September 25, 2008, appellant claimed a recurrence of disability commencing October 1, 1999, while he was off work. He attributed the recurrence to work factors on and after October 2, 1989. OWCP explained in a December 11, 2008 letter that appellant was receiving total disability compensation under File No. xxxxxx033, and could not receive additional compensation due to the claimed recurrence. Nevertheless, in June 12, 2009 and September 9, 2012 letters, appellant's representative requested a formal adjudication of the September 25, 2008 recurrence claim, asserting improprieties in the development of his multiple claims.

OWCP denied appellant's claim for an October 1, 1999 recurrence of disability by decisions dated September 19, 2012 and August 26, 2014, finding that the medical evidence did not establish a spontaneous material worsening of his condition on October 1, 1999, while he was off work.

Appellant attributed his back condition to work factors of his clerical positions on and after October 2, 1989, including walking up and down steps, and moving chairs and tables for conferences. In this regard, he implicates new work factors as an intervening cause, breaking the chain of causation from the 1985 injury.¹⁰ Appellant did not claim that he sustained a spontaneous worsening of the accepted injuries on October 1, 1999.

The only medical evidence contemporaneous to the claimed recurrence of disability is the September 28, 1999 report from Dr. Wahl, an attending Board-certified neurologist, who noted appellant's account of increased back pain after bending forward on September 13, 1999. Dr. Wahl did not indicate that the bending incident occurred at work or was otherwise related to appellant's federal employment. Also, he did not mention any incident occurring on October 1, 1999. Similarly, Dr. Wahl's June 6, 2014 note indicates that appellant's second injury was an aggravation of the first injury, but did not specify the date of either incident, or include medical reasoning supporting a causal relationship between the claimed October 1, 1999 recurrence of disability and any work factors. Therefore, his opinion is insufficient to meet appellant's burden of proof.¹¹

Thus, appellant attributed the claimed recurrence of disability to an intervening cause, and the medical evidence does not support a spontaneous worsening of the accepted lumbar injuries on October 1, 1999. Furthermore, even if the medical evidence established work-related

¹⁰ See *Carlos A. Marrero*, 50 ECAB 117 (1998) (the Board found that the claimant's use of an exercise machine constituted an intervening cause of appellant's disability and thus OWCP properly denied his claim for recurrence of disability); *Clement Jay After Buffalo*, 45 ECAB 707 (1994) (the Board found that the claimant's knee injury sustained while playing basketball broke the legal chain of causation from an accepted knee injury sustained in the performance of his duties as a firefighter).

¹¹ *Ronald A. Eldridge*, *supra* note 8.

disability, he would not be entitled to receive wage-loss compensation for a period in which he had previously received wage-loss compensation.¹² Under these circumstances, OWCP properly denied appellant's claim for recurrence of disability.

On appeal, appellant's representative contends that appellant is entitled to additional compensation, based either on his 1978 or 1999 pay rate, or because he was permanently disabled due to a lumbar discectomy. However, she did not present a clear argument or calculation indicating that he was underpaid. Appellant's representative also contends that the Board's decisions in *Patricia Peters*¹³ and *Wallace D. Ludwick*¹⁴ preclude the selection of a federal position as suitable work. The Board notes that the cases cited are not current law on the issue of suitable work. The Board therefore finds appellant's claim for additional compensation was properly denied.

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 established that he sustained a recurrence of disability commencing October 1, 1999.

¹² See *Lawrence J. Dubuque*, 55 ECAB 667 (2004) (when a claimant receives a duplicative compensation payment for a period that he has already received compensation for wage loss, an overpayment of compensation is created).

¹³ 34 ECAB 312 (1982).

¹⁴ 38 ECAB 176 (1986).

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 1, 2015
Washington, DC

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

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

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