

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

C.T., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, McCLELLAN AIR FORCE BASE,
CA, Employer**)

**Docket No. 15-0634
Issued: September 9, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 27, 2015 appellant filed a timely appeal from an August 12, 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 his accepted medical condition.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 14, 2003 appellant, a 49-year-old dentist, filed an occupational disease claim alleging that repetitive twisting and bending in the course of his employment had injured his low back. He underwent a lumbar fusion that same month. In April 2005, OWCP accepted his claim for permanent aggravation of spondylolisthesis at L2-3.

On January 17, 2006 appellant saw Dr. Rupina K. Mann, a Board-certified physiatrist at the occupational medicine clinic. Dr. Mann found that appellant had reached maximum medical improvement. Appellant's gait was normal. He was able to bend forward and touch his toes, though he complained of discomfort. Extension was limited. The left knee jerk was almost absent. No atrophy of the leg muscles was seen. Appellant was able to walk on his heels and toes. Future medical care was described as follows: "This continues to be the same with medical management with pain medications, physical therapy, and as seen fit by the treating physician."

Dr. Mann completed a primary treating physician's progress report on January 17, 2006 releasing appellant from care. It was noted however that appellant would be requiring future medical care.

Appellant saw Dr. Glenn R. Thorp, his Board-certified internist, on October 26, 2006 for a health maintenance visit. He was to return to the clinic in one year for another health maintenance check and as needed.

Appellant returned to Dr. Thorp for a health checkup on September 11, 2007. He had no complaints, with the exception of periodic back pain. "He states that it is better than prior to his lumbar fusion however after twisting motions he does notice periodic leg pain. Currently, his symptoms are quiet." Appellant was noted to have no active medications on file as of September 11, 2007. He was again advised to return for a yearly health check.

Appellant saw Dr. Mann on August 20, 2009 with some questions about his private insurance. Dr. Mann noted that appellant was there to address the issues about the paperwork "otherwise [appellant] is stable and states that he has learn[ed] to adapt to his disability."

On January 21, 2011 appellant wrote to Dr. Thorp asking to initiate therapy: "I am covered by the US Dept of Labor via a workman's comp claim to have treatment paid to Kaiser for tx of my back but have never utilized it. Occupational Medicine performed by post op PT in 2004 and I would like to initiate therapy again." Dr. Thorp made a referral to the occupational medicine department.

Appellant advised on February 17, 2011 that his symptoms were worsening. He began receiving physical therapy for his low back to help decrease pain, improve range of motion, and increase strength. It was noted that if appellant elected to discontinue physical therapy prior to attaining the agreed upon goals and treatment plan of care, he would be considered discharged to a self-management status. Further, he would be discharged from physical therapy services if he was not seen for treatment within 30 days after the last visit.

The last physical therapy note, on October 21, 2011, indicated that appellant's low back pain was much better without right lower extremity radiation. He was watching posture and body mechanics for the low back so as not to aggravate the symptoms. Appellant was to continue with treatment in a month when he returned from a trip abroad.

Appellant saw Dr. Thorp in 2012 and 2013 for his routine health checkup. He had no complaints.

On January 8, 2014 appellant first saw Dr. Peter W. Yip, who was Board-certified in occupational medicine. Dr. Yip related appellant's history and presenting symptoms. Factors that increased pain included driving, prolonged sitting, twisting, and pulling weeds. Factors that decreased pain included physical therapy and medication. Dr. Yip described his findings on physical examination and diagnosed personal history of lumbar fusion and herniation of intervertebral disc. He indicated that he would seek authorization for acupuncture treatment and a water aerobics program. He noted that the stated mechanism was consistent with his clinical examination findings, and no information was presented to indicate a cause other than the alleged employment event or exposure.

Appellant explained that Dr. Yip was unable to obtain authorization for additional medical treatment because OWCP had closed appellant's case due to inactivity. He submitted medical records in an attempt to show that he had been under continuous care for the accepted injury since 2003. Appellant noted that his symptoms had increased, which prompted him to contact the occupational medicine department in the summer of 2013 for other avenues of treatment, "which is when I found out Dr. Mann had retired." He then came under the care of Dr. Yip, whom he first saw in January 2014.

OWCP acknowledged appellant's request to reopen his case. As it appeared appellant was claiming a need for additional medical care for the accepted condition of permanent aggravation of spondylosis at L2-3,² OWCP explained that after being released from care or after not receiving care for a significant period of time, he had to provide evidence to support that his need for treatment was due to a worsening of the accepted medical condition without intervening cause. According to the medical records received by OWCP, he last received medical care for his work-related condition on March 10, 2011. Appellant was found to be permanent and stationary in 2006 and did not receive continuous medical treatment for the accepted condition. There appeared to be a break in treatment from 2006 to 2009 and from 2011 to 2014, with the exception of pain medication, for which there was a refill once a year. OWCP asked appellant to provide, among other things, a physician's medical explanation as to the relationship between his current condition and need for treatment and the original work injury. It advised that the physician must demonstrate that the accepted condition materially worsened, without intervening cause, to the point that appellant required additional medical treatment.

Dr. Yip responded with a report dated July 1, 2014. He noted that appellant had chronic low back pain since his lumbar surgery in 2003 with occasional pain radiating to his right anterior thigh to knee level. Appellant had constant low back pain with waxing and waning severity. He would use Vicodin twice a day and naproxen daily. Appellant awakened with

² The accepted condition was permanent aggravation of spondylolisthesis at L2-3.

much low back pain with spasms in his right leg. Nonetheless, he continued to work as a dentist and tried to remain active, exercising four to five times a week with a stair master for cardio fitness, but no heavy lifting. Appellant felt that his low back pain had progressively worsened over the last year without any new injuries. He had worsening pain and progressively worsening weakness in his low back.

Current objective findings on physical examination were minimal. There was slight tenderness at the left lumbosacral paraspinal with evidence of moderate spasm. There was pain with extension to 20 degrees. There was no reflex at the left patellar tendon.

Dr. Yip opined that appellant's low back pain with lumbar radiculopathy symptoms were definitely related to his original injury. Although appellant's low back pain and lumbar radiculopathy symptoms improved after the lumbar fusion surgery, the symptoms never resolved. He had ongoing and worsening chronic and constant low back pain and on-and-off radiculopathy ever since the original injury. Appellant had received ongoing treatment from the occupational medicine department by Dr. Mann until she retired in 2011. He had documented occupational medicine and physical therapy visits through October 21, 2011. After Dr. Mann retired, appellant had documented treatments from his primary care physician for chronic low back pain management with monthly refills of prescriptions from December 2011 to the present.

In a decision dated August 12, 2014, OWCP denied the claimed recurrence of medical condition. It found that the evidence was not sufficient to establish that appellant required additional medical treatment due to a worsening of his accepted low back condition. OWCP explained that he had not proved that he received continuous treatment for his work-related condition. There were no medical reports from 2006 to 2009 or from 2012 to 2014 to prove that appellant was being treated for his accepted condition during those periods. OWCP advised that his claim remained closed for medical care.

On appeal, appellant argues that he has been continuously treated since his surgery in 2003 by occupational medicine and several other departments, and he requires treatment now more than ever. He submits a newly dated copy of a statement he submitted to OWCP in 2014.

LEGAL PRECEDENT

The United States shall furnish to an employee who is injured while in the performance of duty the services, appliances, and supplies prescribed or recommended by a qualified physician that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability, or aid in lessening the amount of any monthly compensation.³

“Recurrence of medical condition” means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not

³ 5 U.S.C. § 8103(a).

considered a “need for further medical treatment after release from treatment,” nor is an examination without treatment.⁴

An employee has the burden of establishing that he or she sustained a recurrence of a medical condition that is causally related to his accepted employment injury. To meet this burden, the employee must submit medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, supports that the condition is causally related and supports his or her conclusion with sound medical rationale.⁵

ANALYSIS

It appears that appellant was released from care for the accepted condition on January 17, 2006. He saw his treating physiatrist at the occupational medicine clinic, Dr. Mann. Dr. Mann examined appellant and found that he had reached a permanent and stationary status. She completed a primary treating physician’s progress note that day releasing him from care, although it was noted that treatment would continue as seen fit by the treating physician. Appellant had reached maximum medical improvement, or a point at which his recovery had plateaued and continuing active medical attention was no longer expected to improve his status. Further, treatment would continue on an as-needed basis. Appellant would no longer require regular medical appointments.

The medical records submitted show very little activity over the next several years related to the accepted condition. Appellant saw Dr. Thorp, his internist, for a health maintenance visit in 2006 and 2007. On the latter visit, he had no complaints with the exception of periodic back pain. Appellant’s symptoms were noted to be quiet and he was noted to have no active medications on file as of September 11, 2007.

Appellant returned to see Dr. Mann in 2009 with some insurance questions. He was noted to be stable and indicated that he had learned to adapt to his disability.

It was not until 2011 that appellant asked Dr. Thorp to initiate physical therapy once again. He last received physical therapy on October 21, 2011, at which time his low back pain was much better without right lower extremity radiation. According to the records in appellant’s case file he would not receive physical therapy again until 2014.

In light of this evidence, it appears that appellant was released from active care in 2006 and that he received little if any medical attention for his accepted low back condition until 2011, when he asked that physical therapy be initiated again. It also appears that he received little if any medical attention for his accepted low back condition from 2012 to 2014. Appellant contends on appeal that the treatment for his accepted medical condition has been continuous since 2003, but this is not borne out by the record before OWCP. In this regard, he stated that when his symptoms worsened in the summer of 2013, and he contacted the occupational medicine clinic for other avenues of treatment, he found out that Dr. Mann had retired.

⁴ 20 C.F.R. § 10.5(y).

⁵ *O.H.*, Docket No. 15-0778 (issued June 25, 2015).

However, Dr. Mann retired in 2011, according to Dr. Yip, the specialist in occupational medicine who assumed the role of primary treating physician on January 8, 2014.

The release from active treatment in 2006 and the periods of relative inactivity beginning at that time and after 2011 justify OWCP's request that appellant submit a reasoned medical opinion establishing that the additional medical treatment he currently seeks is causally related to an objective worsening of the accepted medical condition without intervening cause. In short, appellant bears the burden of establishing a recurrence of medical condition.

In response to OWCP's request for a reasoned medical opinion, Dr. Yip submitted his July 1, 2014 report. Although he noted that appellant felt that his low back pain had been progressively worsening over the last year, he did not explain whether this worsening was due to the natural progression of the accepted aggravation of spondylolisthesis at L2-3, and if so, what objective evidence documented the source of appellant's complaints. On physical examination appellant had slight tenderness at the left lumbosacral paraspinal with evidence of moderate spasm, while the accepted medical condition was located somewhat higher at the L2-3 level. OWCP must be able to determine whether this worsening was the result of the accepted medical condition or whether it was a reflection of some other low back condition. It must also be able to determine whether this worsening was brought about by some intervening injury or cause.

Dr. Yip reasoned that appellant's current symptoms were related to the original injury because his symptoms never resolved. The evidence must explain why appellant requires renewed active medical treatment after being released from medical care in 2006 and after not receiving active medical treatment since his physical therapy sessions in 2011. Dr. Yip did not address these matters. He stated that appellant received ongoing treatment from Dr. Mann until she retired in 2011, but this does not square with the medical record, which shows that she released appellant from her care in 2006, after which he received little if any care for his accepted medical condition until 2011. The Board has held that medical conclusions based on inaccurate or incomplete histories are of little probative value.⁶

Refills of prescriptions for narcotic pain relievers since December 2011 do not establish the reason appellant needed to renew active medical treatment for his accepted condition in 2013 or 2014. What exacerbated his low back pain, and whether that exacerbation involved the accepted spondylolisthesis at L2-3, remain unknown. More rational is necessary for approving the expenses associated with a resumption of active medical treatment. It will be up to Dr. Yip to provide that basis.

The Board finds that the medical opinion evidence is insufficient to establish a recurrence of medical condition. Accordingly, the Board will affirm OWCP's August 12, 2014 decision.

CONCLUSION

The Board finds that appellant has not established a recurrence of medical condition.

⁶ *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2015
Washington, DC

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

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

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