

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

L.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Edison, NJ, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 15-1042
Issued: September 17, 2015**

Appearances:
Thomas R. Uliase, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 14, 2015 appellant, through counsel, filed a timely appeal from a December 5, 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.²

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability as of January 22, 2014 causally related to her August 11, 2006 and January 14, 2007 employment injuries.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence following the December 5, 2014 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

FACTUAL HISTORY

This case was previously before the Board.³ In an August 27, 2014 decision, the Board affirmed the denial of appellant's recurrence of disability claim for a period commencing March 27, 2013. It found that the medical evidence was insufficient to establish that appellant was unable to work beginning March 27, 2013 as a result of a change in her accepted August 11, 2006 and January 14, 2007 employment injuries. The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The current claim concerns an alleged period of disability commencing January 22, 2014. The relevant facts are summarized below.

OWCP accepted that on August 11, 2006 appellant, then a 42-year-old mail handler, sustained a lumbar sprain and thoracic or lumbosacral neuritis or radiculitis when she worked on the culling belt and grabbed a piece of mail. Appellant stopped work and received compensation benefits (OWCP file number xxxxxx250). OWCP also accepted that on January 14, 2007 she sustained a spinal stenosis as a result of an employment injury (OWCP file number xxxxxx803). Both claims were combined into the present claim (OWCP file number xxxxxx250). On September 11, 2007 appellant was placed on the periodic rolls.

On November 15, 2008 appellant returned to limited duty.

On March 27, 2013 appellant received spinal injections and underwent a medial branch block procedure. She stopped work and filed a recurrence claim for disability compensation commencing March 27, 2013.

By decisions dated June 26 and October 23, 2013, OWCP denied appellant's recurrence of disability claim finding that the medical evidence was insufficient to establish that her disability beginning March 27, 2013 was causally related to a worsening of the August 11, 2006 or January 14, 2007 employment injuries. Appellant filed an appeal to the Board. On August 27, 2014 the Board affirmed the denial of her March 27, 2013 recurrence claim.

On February 6, 2014 appellant filed this recurrence of disability claim alleging that she was unable to work beginning January 22, 2014. She reported that she underwent an authorized procedure of ablation of the nerve root on January 22, 2014. Appellant stated that after the procedure her pain increased and she was unable to return to work. The employing establishment stated that she was out for approved surgery on January 22, 2014 and had been out of work since March 27, 2013. Appellant requested disability compensation from January 22 to February 21, 2014.

The record reflects that the lumbar/sacral joint procedures appellant underwent on January 22, 2014 were authorized by OWCP for the accepted employment-related conditions. These same procedures were again authorized as of February 10, 2014, as well as a procedure for lumbar spine injection.

³ Docket No. 14-989 (issued August 27, 2014).

In February 17 and March 18, 2014 duty status and attending physician's reports, Dr. Mark A.P. Filippone, Board-certified in physical medicine and rehabilitation, reported a diagnosis of lumbosacral radiculopathy and opined that appellant remained totally disabled as of March 27, 2013.

By letters dated February 24 and 28, 2014, OWCP advised appellant that her recurrence of disability claim beginning January 22, 2014 would not be paid in its entirety. The February 24, 2014 letter advised that compensation would be paid for January 22 and 23, 2014, but the February 28, 2014 letter authorized payment for eight hours for her approved surgery on January 22, 2014.

Appellant submitted various physical therapy progress reports dated February 18 and April 1, 2014.

On April 1, 2014 appellant stated that her claim for disability was due to her approved surgery. She reported that she was still out of work. Appellant explained that her physical therapy and surgeries were needed because of her work-related back condition. She stated that her work-related conditions were continuously present and resulted in her injections in January and February 2014.

In a decision dated April 23, 2014, OWCP denied appellant's recurrence of disability claim finding that the medical evidence was insufficient to establish that she was unable to work due to a material change or worsening of her accepted August 11, 2006 and January 14, 2007 employment injuries. The decision noted, however, that appellant would be compensated for up to four hours of disability for the authorized procedure of January 22, 2014. The record does not reflect that she received any compensation for January 22, 2014, or any date thereafter.

On May 1, 2014 OWCP received appellant's request for a hearing. Appellant submitted attending physician and duty status reports dated April 22 to August 11, 2014 where Dr. Filippone noted that she suffered from lumbosacral radiculopathy and remained totally disabled since March 27, 2013. Dr. Filippone checked a box marked "yes" that her condition was caused or aggravated by her employment.

In a May 13, 2014 magnetic resonance imaging (MRI) scan report, Dr. Stephen J. Conte, a Board-certified diagnostic radiologist, related appellant's complaints of low back pain to her employment. He observed grade 1 retrolisthesis posterior aspect of L5 on S1, slightly reduced with flexion and no change in extension. Dr. Conte also reported slight narrowing of the disc spaces at L1-2, L2-3, and L5-S1 and osteoarthritis. He reviewed a previous June 2, 2011 MRI scan and stated that the degree of posterior lateral bulging of appellant's annulus had increased in size when compared to the previous study. Dr. Conte stated that these findings were not present in the prior June 2, 2011 examination.

On May 15, 2014 appellant underwent a functional capacity evaluation by Carl A. Gargiulo, a physical therapist, who noted that her musculoskeletal examination was essentially within normal limits and that her perceived level of disability was in the mild-to-moderate range. Dr. Gargiulo concluded that she was capable of returning to work with restrictions of standing up

to three hours, lifting up to 40 pounds, and repetitive lifting up to 30 pounds from floor to above shoulder level.

Appellant was also examined by Dr. Marc A. Cohen, a Board-certified orthopedic surgeon, who in a June 23, 2014 report, described her employment injuries and related her complaints of continued pain in her lower back and right leg. Dr. Cohen reviewed the May 13, 2014 MRI scan and noted disc bulging and protrusions, herniated disc with annular tear at L4-5, and herniated disc at L5-S1. Upon examination of the lumbar spine, he observed normal gait and paravertebral spasm and tenderness in the right sciatic notch. Range of motion revealed pain from forward flexion to neutral. Straight leg raise testing was positive. Dr. Cohen diagnosed lumbar disc herniation worsening at L4-5 and L5-S1 and lumbosacral radiculopathy. He noted that appellant appeared to be managing her complaints with a conservative program of physical therapy and pain management.

In a June 24, 2014 report, Dr. A.R. Sayed Bakhaty, a pain medicine specialist, noted appellant's complaints of residual localized right side lower back pain. Upon examination of her lumbar spine, he observed tenderness and spasm along paraspinal muscles L3 through S1 to the right less than previously reported and localized over the mid and lower lumbar facet joint and tenderness to percussion of the lumbar spinous process L3 through S1 maximum. Range of motion demonstrated mild restriction by 20 degrees to forward bending and extension and lateral bending lacked 5 degrees due to pain. Dr. Bakhaty diagnosed multiple injuries and persistent, recurrent complaints most marked at the lower back on the right, post status lumbar discectomy at L3-4 and L4-5, persistent recurrent residual right sided localized axial facet related pain, recurrent disc herniation at L4-5 and L5-S1 with recurrent lower back pain, and lumbar radiculopathy. He opined that within a reasonable degree of medical probability all of appellant's diagnoses were "causally and directly related to the accident on January 14, 2007 exacerbating previous injury in August 2006 resulting in permanent injuries, recurrent, persistent, complaint at the lower back." Dr. Bakhaty reported that she responded well to previous surgery, but opined that her injuries were rather permanent in nature and would most likely require additional treatment.

On July 3, 2014 Dr. Filippone reexamined appellant and performed lower extremity electromyography (EMG) and nerve conduction velocity (NCV) studies. He related that she continued to complain of low back pain radiating into the lower extremities bilaterally. Dr. Filippone explained his examination findings and reported that all NCV studies were normal with no nerve conduction evidence or suggestion of polyneuropathy. He reported that the needle EMG examination, however, demonstrated abnormal findings of the L3-4 and L5-S1 lumbosacral radiculopathy. Dr. Filippone opined that all of the electrodiagnostic study abnormalities were "directly and solely the result of the injuries that [appellant] sustained while at work." He recommended that appellant continue to follow-up with pain management and stated that she remained totally disabled.

In a September 9, 2014 attending physician report and prescription note, Dr. Filippone reported that appellant was under his care and noted a diagnosis of lumbosacral radiculopathy. He checked a box marked "yes" that he believed that her condition was caused or aggravated by an employment activity. Dr. Filippone reported that appellant was totally disabled from

March 27, 2013 to September 21, 2014 and could return to full-time limited duty on September 22, 2014. He provided a duty status report with work restrictions.

On September 22, 2014 appellant accepted a job offer for limited duty as a mail handler.

In an October 16, 2014 duty status report, Dr. Filippone limited appellant to intermittent lifting up to 45 pounds and pushing and pulling up to 70 pounds for eight hours a day, kneeling, bending, stooping, and twisting as needed.

On October 10, 2014 a hearing was held. Appellant and her counsel participated. She stated that she had just returned to modified duty on September 22, 2014 after stopping work on October 23, 2013. Appellant explained that around November 2013 she was experiencing a lot of back spasms and tightness in her back so her doctor recommended that she obtain a nerve ablation on January 22, 2014. She stated that after the procedure she was bedridden for about one week because of severe pain in her back. On February 12, 2014 appellant underwent a second ablation procedure. She reported that she did not have any other injuries to her lower back.

In a decision dated December 5, 2014, an OWCP hearing representative affirmed the April 23, 2014 denial decision. He determined that appellant did not submit rationalized medical evidence that established that she was unable to work due to a worsening of her accepted conditions. The hearing representative noted that she had undergone authorized ablation of the right facet nerve at L4-S2 on January 22, 2014 and ablation of the medial branch L3 to S1 on February 12, 2014. He also noted that OWCP had advised appellant that wage-loss compensation would be paid for authorized treatment on January 22 and February 12, 2014, but he concluded that she had not established recurrence of disability as of January 22, 2014.

LEGAL PRECEDENT

An employee seeking benefits under FECA bears the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. For each period of disability claimed, the employee must establish that he or she was disabled for work as a result of the accepted employment injury. Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of reliable, probative, and substantial medical opinion evidence.⁴ Such medical evidence must include findings on examination and the physician's opinion, supported by medical rationale, showing how the injury caused the employee disability for his or her particular work.⁵

Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.⁶ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly

⁴ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

⁵ *Dean E. Pierce*, 40 ECAB 1249 (1989).

⁶ *Laurie S. Swanson*, 53 ECAB 517, 520 (2002); *see also Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.⁷

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain, lumbosacral neuritis or radiculitis, and spinal stenosis as a result of August 11, 2006 and January 14, 2007 employment incidents. Appellant stopped work and on November 15, 2008 returned to limited duty. She stopped work again on March 27, 2013.⁸ On February 6, 2014 appellant filed a recurrence of disability claim beginning January 22, 2014. The Board finds that the medical evidence in this case insufficient to meet her burden of proof to establish a recurrence of disability beginning January 22, 2014 causally related to her August 11, 2006 and January 14, 2007 employment injuries.

The Board has found that when an employee claims that he or she has experienced a recurrence of total disability after returning to a light-duty position, he or she must demonstrate either a change in the nature and extent of his or her injury-related condition, or a change in the nature and extent of the light-duty job requirements.⁹ Appellant does not allege and the record does not show a change in her light-duty job requirements. Rather, she attributes her disability beginning January 22, 2014 to her August 11, 2006 and January 14, 2007 employment injuries. Accordingly, appellant has the burden of proof to provide medical evidence that establishes she was disabled as of January 22, 2014 because of a worsening of her accepted work-related conditions.¹⁰

In duty status and attending physician reports dated February 17 to August 11, 2014, Dr. Filippone noted a diagnosis of lumbosacral radiculopathy and indicated that appellant remained totally disabled as of March 17, 2013. He also checked a box marked “yes” that her condition was caused or aggravated by her employment. When a physician’s opinion on causal relationship consists only of checking “yes” to a form question, without any explanation or rationale, that opinion is of diminished probative value.¹¹ Accordingly, these reports are insufficient to establish appellant’s claim.

On July 3, 2014 Dr. Filippone reexamined appellant and performed EMG/NCV studies on her lower extremities. He provided examination findings and reported that all NCV studies

⁷ *Amelia S. Jefferson, supra* note 4.

⁸ Although appellant also filed a recurrence of disability claim beginning March 27, 2013, the Board only has jurisdiction over the December 5, 2014 hearing representative decision, which denied her recurrence of disability claim beginning January 22, 2014. Thus, the issue before the Board is whether she met her burden of proof to establish that she sustained a recurrence of disability on January 22, 2014 causally related to her August 11, 2006 and January 14, 2007 employment injuries.

⁹ *K.J.*, Docket No. 10-457 (issued September 15, 2010).

¹⁰ *D.B.*, Docket No. 13-717 (issued July 24, 2013).

¹¹ *D.D.*, 57 ECAB 734, 738 (2006); *Deborah L. Beatty*, 54 ECAB 340 (2003).

were normal, but that the EMG examination revealed abnormal findings of lumbosacral radiculopathy at the L3-4 and L5-S1 levels of her spine. Dr. Filippone opined that all of the electrodiagnostic study abnormalities were “directly and solely the result of the injuries that [appellant] sustained while at work.” He recommended that appellant continue with pain management and found that she remained totally disabled. The Board notes that although Dr. Filippone examined her and found her totally disabled, he did not provide medical rationale to explain how her accepted lumbar condition changed or worsened to the extent that she was no longer able to work limited duty. The Board has found that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.¹²

Dr. Bakhaty’s June 24, 2014 report reviewed appellant’s history and examination. He diagnosed multiple injuries and persistent, recurrent complaints most marked at the right side of the lower back. Dr. Bakhaty identified appellant as status post lumbar discectomy at L3-4 and L4-5, with persistent recurrent residual right-sided pain and recurrent disc herniations at L4-5 and L5-S1 with recurrent lower back pain, and lumbar radiculopathy. He opined that all of her diagnoses were causally and directly related to the accident on January 14, 2007 which exacerbated a previous injury in August 2006. Dr. Bakhaty also failed to explain, based on objective medical evidence and rationale, how appellant’s current back conditions worsened so that she was unable to work.

Appellant also submitted a June 23, 2014 report by Dr. Cohen. Dr. Cohen reviewed her history and conducted an examination. He observed paravertebral spasm and tenderness in appellant’s right sciatic notch and pain from forward flexion to neutral. Straight leg raise testing was positive. Dr. Cohen diagnosed lumbar disc herniation worsening at L4-5, L5-S1 and lumbosacral radiculopathy. The Board notes that Dr. Cohen did not discuss appellant’s claimed inability to work beginning January 22, 2014 as a result of her employment injuries. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee’s condition is of limited probative value on the issue of causal relationship.¹³ Likewise, Dr. Conte’s May 13, 2014 MRI scan report also provides no opinion on appellant’s disability or whether her inability to work resulted from her accepted injuries.

The May 15, 2014 FCE and various physical therapy progress notes also fail to establish appellant’s recurrence claim as physical therapists are not considered physicians under FECA.¹⁴ Therefore, their opinions are of no probative value.

On appeal, counsel alleges that appellant provided sufficient evidence to establish an overall worsening of her low back condition which required additional medical treatment in the form of lumbar injections beginning January 22, 2014. He further contends that she did not have

¹² *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *T.M.*, Docket No. 08-975 (issued February 6, 2009).

¹³ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

¹⁴ Section 8102(2) of FECA provides that the term “physician” includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB 238 (2005).

to return to work to establish recurrence of injury. As explained above, however, the medical reports submitted failed to contain rationalized medical opinion explaining how appellant's inability to work resulted from a change or worsening of her accepted lumbar condition. Because appellant has not submitted sufficiently reasoned medical opinion explaining why her recurrence of disability resulted from her accepted employment injuries, she did not meet her burden of proof to establish her claim.

The Board does find, however, that upon return of the case record OWCP should determine whether appellant has received wage-loss compensation for disability incidental to her medical treatments on January 22 and February 12, 2014, for the employment-related authorized services. The Board has long recognized that under section 8103 of FECA¹⁵ payment of expenses incidental to the securing of medical services encompasses payment for loss of wages incurred while obtaining medical services.¹⁶ An employee is entitled to disability compensation for loss of wages incidental to treatment for an employment injury.¹⁷ While OWCP has indicated that some wage loss would be payable for the dates in question, the record is unclear as to the hours and dates for which compensation has been authorized, and whether appellant has received any wage-loss compensation.

Appellant may submit new evidence or argument as part of a formal 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 disability beginning January 22, 2014 causally related to her August 11, 2006 and January 14, 2007 employment injuries. Upon remand of the case, OWCP shall decide her entitlement to wage-loss benefits incidental to her specific medical treatments of January 22 and February 12, 2014.

¹⁵ 5 U.S.C. § 8103.

¹⁶ *Daniel Hollars*, 51 ECAB 355 (2000).

¹⁷ *Id.*, see also *Henry Hunt Searls, III*, 46 ECAB 192 (1994); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.19 (February 2013).

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2014 merit decision of the Office of Workers' Compensation Programs is affirmed in part and remanded for further consideration.

Issued: September 17, 2015
Washington, DC

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

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

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