United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 15-1079**
	)	**Issued: September 2, 2015**
DEPARTMENT OF THE NAVY, NAVAL SUBMARINE BASE, Groton, CT, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 April 15, 2015 appellant, through counsel, filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs (OWCP) dated December 17, 2014 and February 25, 2015. Pursuant to the Federal Employees' Compensation Act[1] (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 that he sustained a recurrence of total disability on September 28, 2012 causally related to a November 27, 2007 employment injury.

On appeal counsel asserts that the December 17, 2014 and February 25, 2015 decisions are contrary to law and fact.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board. In a March 11, 2014 decision, the Board found that appellant failed to establish that he sustained a recurrence of total disability on September 28, 2012 and affirmed a May 30, 2013 OWCP decision.[2] The law and facts of the previous Board decision are incorporated herein by reference.

In the interim, appellant continued to submit medical reports. Dr. Michael J. Halperin, an attending Board-certified orthopedic surgeon, submitted a June 25, 2013 treatment note in which he advised that appellant had failed back syndrome. He recommended a functional capacity evaluation (FCE) and advised that appellant was totally disabled until the FCE was done. On July 5, 2013 Dr. Halperin indicated that he could not provide a definitive diagnosis as to why appellant could not work, noting appellant's complaint that he could not work due to pain. He again recommended an FCE.

On September 23, 2013 Dr. Michael E. Karnasiewicz, an attending Board-certified neurosurgeon, noted appellant's complaint of severe radiating back pain. He provided physical examination findings and advised that appellant had terrible mechanical low back pain and should continue pain management. On June 4, 2013 Dr. John Pagglioli, Board-certified in anesthesiology and pain medicine, described appellant's pain management and diagnosed post-laminectomy syndrome and lumbar radiculitis.

A November 14, 2013 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated diffuse spondylosis status post fusion and discectomy at L5-S1, a bulging disc and small protrusion at L3-4, and right protrusion at L4-5 with annular tearing.

In November 2013 OWCP referred appellant to Dr. Steven A. Silver, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a December 10, 2013 report, Dr. Silver noted the history of injury and his review of the medical record. Physical examination demonstrated straight leg raising positive at 80 degrees bilaterally, weakness of dorsiflexion of the right and left big toes and right ankle, and decreased sensation along the dorsum and plantar aspect of the right foot. Dr. Silver diagnosed status post lumbar decompression at L5-S1; status post repeat lumbar decompression at L5-S1 with foraminotomy and facetectomy and L5-S1 interbody fusion; status post removal of hardware at L5-S1, with exploration of fusion mass and L4-5 hemilaminectomy; status post repeat L4-5 laminectomy; and lumbar decompression with

[2] Docket No. 13-1639 (issued March 11, 2014). On November 27, 2007 appellant, then a 46-year-old crane operator, filed a traumatic injury claim alleging that he injured his lower back when he was knocked back by equipment while at work. The claim was accepted for bilateral lumbar radiculitis. On July 24, 2008 appellant underwent lumbar surgery at L5-S1. He returned to full-time modified duty on December 17, 2008 and had further surgery at L5-S1 on April 2, 2009 and September 16, 2010. OWCP accepted the recurrences of total disability. Appellant returned to full-time modified duty after each procedure. His hours were reduced to six per day on November 2, 2011, and he received compensation for two hours daily thereafter. On January 9, 2012 appellant underwent surgery at the L4-5 level. On May 29, 2012 he returned to modified duty for four hours daily. Appellant received compensation based on a four-hour workday thereafter. On October 3, 2012 he filed a recurrence claim. Appellant continues to receive four hours of daily compensation.

chronic lumbar low back pain. In response to specific OWCP questions, he advised that all surgical procedures were causally related to the November 2007 employment injury, and "his current difficulties and need for treatment bear a direct relationship to his November 27, 2007 injury and are directly caused by it." Dr. Silver continued that appellant had continuing residuals of the 2007 injury, based on symptoms and physical examination findings. He indicated that he had reviewed the duties of the supervisory crane operator position and advised that appellant was unable to perform these duties and requirements, noting that he had undergone four operative procedures to his lower back, none of which had been successful.[3] Dr. Silver concluded that appellant's prognosis was poor. In an attached work capacity evaluation, he indicated that appellant had permanent restrictions, including that he was unable to lift greater than 10 pounds and was unable to sit more than one hour daily.

On March 14, 2014 Dr. Pagglioli advised that appellant's work status should be based on Dr. Halperin's opinion. He continued to submit treatment describing appellant's pain management.

In correspondence received by OWCP on October 10, 2014, appellant, through counsel, timely requested reconsideration of the last merit decision which was the Board's decision dated March 11, 2014. Counsel asserted that the opinion of Dr. Silver established causation and documented appellant's inability to work on his executed OWCP Form 5.

In a merit decision dated December 17, 2014, OWCP denied modification finding that appellant submitted insufficient medical evidence in support of his burden to establish continued disability. It noted that it was appellant's burden to establish continuing disability by submitting well-reasoned medical evidence from a treating physician. OWCP found that the opinion from Dr. Silver, an OWCP referral physician, did not "substitute or outweigh" Dr. Pagglioli's opinion, which was insufficient to establish that appellant sustained a recurrence of total disability.

On February 20, 2015 appellant, through counsel, again requested reconsideration and submitted additional medical evidence. In a January 14, 2015 form report, Dr. Halperin advised that appellant was totally disabled. In a January 26, 2015 report, he reiterated that he had requested an FCE and that until it was authorized, he would keep appellant off work. Dr. Halperin concluded that appellant had been totally disabled from work since October 2, 2012 due to injuries that occurred on November 27, 2007. Dr. Pagglioli reiterated his diagnoses and described appellant's pain management on January 22, 2015.

In a merit decision dated February 25, 2015, OWCP found that the medical evidence from Dr. Halperin and Dr. Pagglioli was insufficient to support appellant's recurrence claim and denied modification of the prior decisions.

[3] The physical requirements of the supervisory crane operator position appellant was performing at the time he stopped work in September 2012 were: stand/walk one hour at a time for a total of four hours per day; sit for one hour at a time for a total of four hours a day; drive car/truck for one hour at time for a total of three hours per day; occasionally bend, squat, kneel, climb stairs, reach, twist, crawl in confined spaces, with lifting/carrying limited to 10 pounds frequently and 20 pounds occasionally, and pushing and pulling to a maximum of 40 pounds. No ladders.

LEGAL PRECEDENT

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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[4] This term also means an inability to work 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 (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), 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 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.[6]

ANALYSIS

The Board finds this case is not in posture for decision. In a comprehensive December 10, 2013 report, Dr. Silver, an OWCP referral physician, noted the history of injury and his review of the medical record. Examination findings included a straight leg raising positive at 80 degrees bilaterally, weakness of dorsiflexion of the right and left big toes and right ankle, and decreased sensation along the dorsum and plantar aspect of the right foot. Dr. Silver diagnosed: status post lumbar decompression at L5-S1; status post repeat lumbar decompression at L5-S1 with foraminotomy, and facetectomy and L5-S1 interbody fusion; status post removal of hardware at L5-S1, with exploration of fusion mass and L4-5 hemilaminectomy; status post repeat L4-5 laminectomy; and lumbar decompression with chronic lumbar low back pain. He advised that all surgical procedures and appellant's current condition and need for treatment were directly caused by the November 27, 2007 injury, based on appellant's symptoms and examination findings. Dr. Silver indicated that he had reviewed the duties of the supervisory crane operator position that appellant was performing when he stopped work,[7] and advised that he was unable to perform these duties and requirements, noting that the four operative procedures appellant had to his lower back had not been successful. He concluded that appellant's prognosis was poor. Dr. Silver also provided a work capacity evaluation in which he reported that appellant had permanent restrictions, including that he was unable to lift greater than 10 pounds and was unable to sit more than one hour daily.

[4] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[5] *Id.*

[6] *J.F.*, 58 ECAB 124 (2006); *Carl C. Graci*, 50 ECAB 557 (1999); *Mary G. Allen*, 50 ECAB 103 (1998); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

[7] *Supra* note 3.

Although OWCP briefly mentioned Dr. Silver's report in its December 17, 2014 decision, it stated that, as the burden was on appellant to establish continuing disability, Dr. Silver's opinion was insufficient to substitute or outweigh the reports of appellant's attending physicians. It found the reports from the attending physicians insufficient to meet appellant's burden to establish that he sustained a recurrence of total disability on September 28, 2012. OWCP did not mention Dr. Silver's report in the February 25, 2015 decision.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. Once it has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible. OWCP has an obligation to see that justice is done.[8] Moreover, its procedures provide that in a decision denying a claim, OWCP should identify and discuss all evidence which bears on the issue at hand and should summarize the relevant facts and medical opinions.[9]

Dr. Silver's report is certainly relevant to the issue of whether appellant sustained a recurrence of total disability on September 28, 2012 and is supportive of his recurrence claim. OWCP, however, did not discuss the physician's findings and conclusions in either the December 17, 2014 or February 25, 2015 merit decision.

The case is remanded to OWCP for consideration and review of all the evidence in the record including Dr. Silver's report. Following this and any further development deemed necessary, OWCP shall issue a *de novo* merit decision which includes findings of fact and a clear and precise statement regarding whether all evidence of record establishes that appellant sustained a recurrent of total disability on September 28, 2012.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant established a recurrence of total disability on September 28, 2012.

[8] *A.A.*, 59 ECAB 726 (2008).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.144.4.f (February 2013); *see Avalon C. Bailey*, 56 ECAB 223 (2004).

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2015 and December 17, 2014 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: September 2, 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