

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

D.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bristol, PA, Employer**

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**Docket No. 15-1122
Issued: September 15, 2015**

Appearances:

*Thomas R. Uliase, Esq., 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 21, 2015 appellant, through counsel, filed a timely appeal from a December 9, 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 that she sustained a recurrence of disability commencing January 18, 2011 causally related to her February 8, 2010 employment injury.

On appeal counsel asserts that the opinion of the impartial physician, Dr. Ronald N. Rosenfeld, a Board-certified orthopedic surgeon, is of insufficient medical rationale to carry the weight of the medical evidence.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On February 8, 2010 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim alleging that she injured her back when she slipped on ice and fell while delivering mail that day. She returned to modified duty on February 17, 2010. On April 29, 2010 OWCP accepted sprain of back, thoracic region; sprain of back, lumbar region; and sprain of trapezius, bilateral. Appellant subsequently returned to full duty.

In October 2010, OWCP referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a November 19, 2010 report, Dr. Smith reported that appellant had a benign examination and advised that she could perform her regular job duties and needed no further therapy. In correspondence dated November 30, 2010 and February 4, 2011, OWCP asked him if appellant's employment injury aggravated, accelerated, exacerbated, or precipitated any preexisting conditions, and, if so, whether the aggravations were temporary or permanent.

On February 1, 2011 appellant filed a claim for a recurrence of disability. She stated that she had ongoing back spasms and lower back pain, and that on January 12, 2011 they became so severe that she took medication which relieved some pain, but by January 18, 2011 the pain became too much so she sought medical treatment for therapy and was told that she needed another magnetic resonance imaging (MRI) scan. Appellant stopped work on January 18, 2011 and never returned.

On January 13, 2011 Dr. Ashok Thanki, a Board-certified neurosurgeon, reported complaints of low back and right lower extremity pain. He stated that an MRI scan study demonstrated a herniated disc and spondylosis at L3-4 and L4-5. Dr. Thanki performed a lower extremity electrodiagnostic study which, he reported, was within normal limits.

In treatment notes dated January 13 to February 18, 2011, Dr. John Pickard, an osteopath, described appellant's treatment and therapy. He indicated that she complained of severe, constant pain in the upper and lower back, and that she had difficulty sleeping. On duty status reports dated January 31 and February 18, 2011, Dr. Pickard advised that appellant could not work due to lumbar disc disease. In a narrative report dated February 15, 2011, he noted that she had been treated at his practice since February 12, 2010. Dr. Pickard reported that a January 28, 2011 MRI scan of the lumbar spine demonstrated disc degeneration, bulging at L4-5 and L5-S1, and moderate narrowing at the L5-S1 neural foramen. He described appellant's treatment and therapy. Dr. Pickard diagnosed lumbosacral neuritis and lumbar disc bulging, and opined that her condition was a result of a February 8, 2010 employment injury that was aggravated on approximately December 30, 2010.

In letters dated February 22 and March 2, 2011, OWCP informed appellant of the evidence needed to support her recurrence claim. In correspondence dated March 2, 2011, the employing establishment challenged the claim, stating that on January 11, 2011 she called out on sick leave and stated that she injured her back while removing snow from her car before she came to work.

By report dated March 6, 2011, Dr. Arnold T. Berman, an OWCP medical adviser and a Board-certified orthopedic surgeon, noted his review of the medical record. He recommended that the claim not be expanded to include lumbar neuritis.

In a narrative report dated March 11, 2011, Dr. Pickard reported that on January 12, 2011 he removed appellant from work because her back pain had significantly increased. He diagnosed a lumbar disc bulge at L4-5 with posterior annular tearing, a broad-based central disc protrusions, and lumbar neuritis. Dr. Pickard continued to submit reports describing appellant's treatment and continued to advise that she was totally disabled.

OWCP determined that a conflict in medical opinion had been created regarding the accepted conditions and the nature and extent of appellant's disability, and referred her to Dr. Donald F. Leatherwood, II, a Board-certified orthopedic surgeon, for an impartial evaluation.² In an April 14, 2011 report, Dr. Leatherwood described the history of injury, appellant's complaints of thoracic and low back pain, and his review of medical records. He provided physical examination findings and advised that, with regard to the lumbosacral spine, she had no objective evidence of a continuing disability and was fully recovered from the employment injury. Dr. Leatherwood concluded that appellant needed no restrictions and there was no need for further medical care, medications, or therapy. He recommended additional studies with regard to her thoracic region.

In a supplemental report dated May 1, 2011, Dr. Smith advised that the soft tissue sprains appellant sustained on February 8, 2010 had resolved without residuals. He opined that her degenerative disc abnormalities were not caused, aggravated, or accelerated by the work incident and, while there may have been a temporary exacerbation, this had resolved at the time of his November 19, 2010 examination.

A May 21, 2011 MRI scan of the thoracic spine demonstrated degenerative disc disease in the mid-thoracic spine with a small disc herniation at T4-5 and a right herniation at T7-8. On June 17, 2011 Dr. Leatherwood noted his review of the May 21, 2011 MRI scan and report. He advised that this demonstrated basically degenerative changes which caused small disc herniations and, although appellant's fall at work could have caused the condition, at the present time it would not be responsible for her symptoms. Dr. Leatherwood concluded that she had recovered from the employment injury.

On July 14, 2011 OWCP proposed to terminate appellant's medical benefits and deny that she sustained a recurrence of disability of January 18, 2011. Counsel opposed the proposed termination and requested that the accepted conditions be expanded to include lumbar radiculopathy, lumbar and thoracic herniations, and aggravation of degenerative disc disease. Appellant submitted an August 1, 2011 statement in which she advised that she did not tell the employing establishment that she hurt her back clearing snow from her car but that her back was hurting and she did not want to hurt it anymore by clearing snow.

² The record includes the necessary OWCP ME023 form and four screen shots describing properly bypassed physicians.

Dr. Pickard continued to submit treatment notes describing appellant's condition and treatment.

In separate decisions dated August 18, 2011, OWCP terminated appellant's medical benefits, effective that day, and denied that she sustained a recurrence of disability beginning January 18, 2011. It found the weight of the medical evidence rested with the opinion of Dr. Leatherwood, the impartial physician.

Appellant, through counsel, timely requested a hearing and submitted an August 15, 2011 narrative report from Dr. Pickard. Dr. Pickard described the employment injury and noted that appellant tolerated back pain until January 12, 2011 when she felt the pain had significantly increased to the point that she could no longer work. He noted his review of medical records, including x-rays, MRI scans, and Dr. Leatherwood's reports. Dr. Pickard advised that appellant had been evaluated on August 8, 2011 and complained of mid and low back pain, aggravated by bending and activities of daily living. He described physical examination findings of moderate spasm in the thoracic spine and mild spasm in the lumbar spine with decreased range of motion in all planes. Dr. Pickard disagreed with Dr. Leatherwood's conclusions, opining that appellant's thoracic and lumbar conditions were a direct result of the employment injury of February 8, 2010 when she incurred significant injuries. He also submitted additional treatment notes.

On November 22, 2011 an OWCP hearing representative found that the reports of Dr. Smith and Dr. Leatherwood were not sufficiently rationalized to constitute the weight of medical opinion, that OWCP failed to properly identify the conflict in medical opinion, and that the conflict statement and the questions to Dr. Leatherwood were leading and prejudicial. The case was remanded to OWCP to exclude Dr. Leatherwood's reports and refer appellant for a new second opinion evaluation with a Board-certified orthopedic surgeon, to be followed by a *de novo* decision on whether the claim should be expanded, whether appellant sustained a recurrence of disability in January 2011, and whether she continued to have residuals of the accepted conditions. Medical benefits were reinstated.

A December 12, 2011 electrodiagnostic study of the lower extremities demonstrated bilateral lumbar radiculopathy.

OWCP referred appellant to Dr. Steven J. Valentino, a Board-certified osteopath specializing in orthopedic surgery. In a December 21, 2011 report, Dr. Valentino noted the history of injury and appellant's complaints of upper and lower back pain. He reviewed medical records and provided physical examination findings. Dr. Valentino diagnosed resolved sprains of the thoracic region, the lumbar region, and bilateral trapezius. He opined that appellant did not sustain a recurrence of disability in January 2011, stating that soft tissue injuries of this type would resolve in two to three months. Dr. Valentino further indicated that there was no evidence of ongoing disability, stating that she had significant positive Waddell's signs which were indicative of symptom embellishment. In an attached work capacity evaluation, he advised that appellant had no limitations.

Dr. Pickard continued to submit weekly treatment notes and, on a duty status report dated December 8, 2011, advised that appellant was totally disabled. On January 20, 2012 he advised that she could not work due to thoracic and lumbar disc disease.

OWCP determined that a conflict in medical evidence had been created between appellant's attending physicians and Dr. Valentino regarding whether her work stoppage in January 2011 was caused by the February 8, 2010 injury, whether she still had residuals of the work injury, and what were the injury-related diagnoses. In February 2012, it referred appellant to Dr. Ronald B. Greene, a Board-certified orthopedic surgeon, for an impartial evaluation.³ The record includes an OWCP ME023 and a number of bypass screen shots.

In a February 28, 2012 report, Dr. Greene noted the history of injury, appellant's complaints of radiating back pain, bilateral lower extremity numbness, and pain between the shoulders. He reviewed medical records including imaging studies and provided physical examination findings. Dr. Greene advised that on February 8, 2010 appellant sustained a lumbar sprain and strain and a thoracic intrascapular sprain and strain with secondary strain of the trapezius muscles. He opined that there was no objective medical evidence to support additional diagnoses, noting that the MRI scan studies of the thoracic and lumbar spines demonstrated no nerve root compression and showed age-related degenerative changes. Dr. Greene opined that the February 8, 2010 fall caused an aggravation of appellant's lumbar degenerative disc disease and that, although symptomatic, her pain could be controlled with medication and a back brace. He further advised that she did not sustain a recurrence of disability in January 2011 and had no need for continuing physical therapy. Dr. Greene concluded that appellant had recovered from all accepted conditions except the aggravation of degenerative arthritis at L3-4 and L4-5, which was the only residual of the February 8, 2010 work injury. He advised that she could return to work for eight hours a day with physical restrictions.

In a March 19, 2012 decision, OWCP denied that appellant sustained a recurrence of disability on March 19, 2012. On March 19, 2012 it also accepted temporary aggravation of degenerative arthritis at L3-4 and L4-5. Appellant, through counsel, timely requested a hearing and submitted a copy of a January 28, 2011 MRI scan study of the lumbar spine that demonstrated disc degeneration and bulging at L4-5 and L5-S1 with moderate narrowing the right L5-S1 neural foramen. Dr. Pickard submitted additional treatment notes describing her condition.

By decision dated October 12, 2012, OWCP's hearing representative found that Dr. Greene was not properly selected as an impartial specialist as the record was devoid of any required documentation. The case was remanded to OWCP to select another impartial specialist, following procedures ordered by the Board.

Dr. Pickard continued to treat appellant. In November 2012, OWCP referred appellant to Dr. Robert E. Liebenberg, a Board-certified orthopedic surgeon, for an impartial evaluation. The record includes an ME023 form and screen shots of bypassed physicians.

³ Appellant was initially referred to Dr. Stanley Askin. Counsel informed OWCP that Dr. Askin had recently examined appellant's husband, and the impartial evaluation was rescheduled with Dr. Greene.

In a January 22, 2013 report, Dr. Liebenberg noted appellant's description of the employment injury and her complaint of radiating low back pain and pain in the upper back between her shoulders. He reviewed the medical evidence and provided physical examination findings. Dr. Liebenberg diagnosed pain syndrome involving the thoracic and lumbar spine associated with degenerative disc disease, and sprain of trapezius and lumbar spine, resolved. He disagreed with Dr. Greene's conclusion that appellant suffered an aggravation of degenerative disc disease on February 8, 2010. Dr. Liebenberg advised that there was no need for continued therapy, and that there was no evidence that an aggravation of degenerative disc disease occurred in January 2011. He advised that appellant could perform her usual job without restrictions.

In separate decisions dated February 12, 2013, OWCP found the weight of the medical evidence rested with the opinion of Dr. Liebenberg and terminated appellant's medical benefits effective that day and denied that she sustained a recurrence of disability beginning January 18, 2011.

Appellant, through counsel, timely requested a hearing from both decisions. In treatment notes dated January 29 to March 8, 2013, Dr. Pickard described her treatment and advised that she was unable to perform her preinjury job.

In an August 8, 2013 decision, the hearing representative affirmed the February 12, 2013 decision that terminated medical benefits. However, she set aside the February 12, 2013 decision denying a January 2011 recurrence and directed OWCP to seek a supplemental report from Dr. Liebenberg regarding whether appellant sustained a recurrence of disability.⁴

In a September 10, 2013 report, Dr. Liebenberg advised that appellant did not experience a recurrence of disability on January 18, 2011 due to the accepted conditions. He indicated that she told him that she stopped work due to pain but not because of an injury. Dr. Liebenberg stated that, although appellant had ongoing degenerative disc disease, a review of the medical records proceeding and subsequent to the claimed recurrence, did not reveal any significant difference in symptoms or signs, and that there were no objective differences on imaging studies of significance. He concluded that, to a reasonable degree of medical certainty, she did not sustain a recurrence of disability on January 18, 2011.

On September 26, 2013 OWCP wrote Dr. Liebenberg notifying him that a temporary aggravation of preexisting degenerative arthritis of the lumbar spine had been accepted and asked him to address whether appellant experienced a recurrence of disability due to any employment-related condition. Dr. Liebenberg did not respond.⁵

In a December 16, 2013 decision, OWCP found that the weight of the medical evidence rested with Dr. Liebenberg's opinion and denied that appellant sustained a recurrence of disability on January 18, 2011.

⁴ Appellant did not file an appeal with the Board regarding the hearing representative's finding that OWCP properly terminated appellant's medical benefits.

⁵ Dr. Liebenberg's office indicated that he was retiring.

Appellant, through counsel, timely requested a hearing. In an April 2, 2014 decision, the hearing representative found the case not in posture for decision and vacated the December 16, 2013 decision. She found that OWCP did not obtain sufficient clarification from Dr. Liebenberg and therefore, a new referee examination was in order.

On April 10, 2014 OWCP referred appellant, along with a medical conflict statement, a set of questions, a statement of accepted facts, and the medical record, to Dr. Ronald N. Rosenfeld, for an impartial evaluation. An OWCP ME023 form and bypass log were found in the record. The latter indicated that two physicians were bypassed, and reasons for the bypasses were provided.

In a May 7, 2014 report, Dr. Rosenfeld noted the history of injury, his review of the conflict statement, statement of accepted facts, and medical record. He described appellant's complaints of lower back and left shoulder blade pain, and pain that radiated into both lower legs. Dr. Rosenfeld noted that she maintained that there had been no significant change in her symptoms since their onset in 2010. He described physical examination findings, noting that appellant walked without the use of any external ambulatory supports and was not wearing braces. Dr. Rosenfeld indicated that she was tender to palpation at multiple locations, including the intrascapular paraspinal muscles, the midline lumbar area at approximately L4-5, and over the posterior superior iliac spine on the left. He found no palpable muscle spasm at any location. Voluntary cervical range of motion was unrestricted, and Spurling's and foraminal compression tests were negative. Shoulder range of motion was well maintained bilaterally. Appellant reported lower back pain at the end range of movement of the lumbar spine, especially on forward flexion. Hip rotation was diminished and produced complaints of groin pain. Dr. Rosenfeld advised that, on questioning, appellant indicated that her hip motion had been restricted for years. She refused to perform squatting maneuvers. Heel and toe walking were performed without difficulty or sign of motor weakness, and straight leg raising was negative at 70 degrees although appellant did report some posterior thigh tightness bilaterally.

Dr. Rosenfeld found that deep tendon reflexes and motor strength appeared fully intact in all extremities. Sensory examination was reported to be decreased for light touch and pinprick over the lateral aspect of the left calf. No other sensory deficits were found. Appellant's circumferential mid-calf measurements were bilaterally equal, and there was no evidence of muscle atrophy, fasciculation, or clonus. Dr. Rosenfeld indicated that the remainder of her physical examination was noncontributory. He discussed the conflict in medical evidence and accepted conditions. Dr. Rosenfeld advised that there was no clinical evidence on examination of the accepted thoracic, lumbar, and trapezius sprains. In regard to the temporary aggravation of spinal arthritis, he advised that there was no evidence on physical examination or review of diagnostic studies to indicate that the aggravation persisted, opining that appellant's ongoing complaints of back pain would not be the result of a temporary aggravation of underlying arthritis. Dr. Rosenfeld further opined that the cause of her current left-sided complaints was undetermined but did not seem to be related to the February 8, 2010 injury, noting that her initial complaints were right-sided. He advised that there did not appear to be a specific event that occurred in January 2011 to explain appellant's increased complaints such that she could not continue to work, noting that she had been working since shortly after the February 2010 injury.

Dr. Rosenfeld voiced his agreement with Dr. Valentino's opinion that appellant did not sustain a recurrence of disability in January 2011 as a result of the February 8, 2010 injury and that she was capable of returning to her previous duties without limitation as regard to the injuries sustained on February 8, 2010. He concluded that all accepted conditions had healed and appellant had recovered from the injuries sustained on February 8, 2010, based upon the history provided by appellant, the objective findings noted during his physical examination, and his review of the medical record.

By decision dated May 22, 2014, OWCP found the weight of the medical evidence rested with the opinion of Dr. Rosenfeld and denied that appellant sustained a recurrence of disability on January 18, 2011. Appellant, through counsel, timely requested a hearing.

The hearing was held on October 27, 2014. Counsel asserted that Dr. Rosenfeld was not properly selected as the referee physician because the record did not contain bypass screen shots. He also maintained that Dr. Rosenfeld's report was not sufficiently reasoned to constitute the weight of the medical evidence, such that a conflict remained.

On December 9, 2014 an OWCP hearing representative found that OWCP followed proper procedure in selecting Dr. Rosenfeld under its Medical Management Application (MMA), noting that the record contained a properly executed OWCP ME023 form and that the record provided sufficient reasons for the physicians who were bypassed. He afforded special weight to the opinion of Dr. Rosenfeld, finding that the physician provided sufficient supportive medical rationale regarding his conclusion that appellant did not establish a recurrence of disability on January 18, 2011, and affirmed the May 22, 2014 decision.

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.⁶ 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.⁷

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

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

⁷ *Id.*

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.⁸

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁹ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁰ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹

ANALYSIS

The Board finds that appellant did not establish that she sustained a recurrence of disability on January 18, 2011 causally related to a February 8, 2010 employment injury. The accepted conditions in this case are sprain of back, thoracic region; sprain of back, lumbar region; sprain of trapezius, bilateral, and temporary aggravation of degenerative arthritis at L3-4 and L4-5.

Following an involved history described above, in April 2014 OWCP determined that a conflict in medical evidence had been created between the opinions of appellant's attending physicians and Dr. Valentino regarding whether appellant's work stoppage in January 2011 was caused by the February 8, 2010 injury, whether she still had residuals of the work injury, and what were the injury-related diagnoses. OWCP ultimately referred appellant, along with a medical conflict statement, a set of questions, a statement of accepted facts, and the medical record, to Dr. Rosenfeld, for an impartial evaluation.

Contrary to the arguments of counsel on appeal, the Board finds that Dr. Rosenfeld's detailed and well reasoned May 7, 2014 report is entitled to the special weight afforded an impartial medical examiner.¹² In his report, Dr. Rosenfeld advised that there did not appear to be a specific event that occurred in January 2011 to explain appellant's increased complaints such that she could not continue to work, noting that she had been working since shortly after the February 2010 injury. He voiced his agreement with Dr. Valentino's opinion that appellant did

⁸ *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).

⁹ 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

¹⁰ 20 C.F.R. § 10.321.

¹¹ *V.G.*, 59 ECAB 635 (2008).

¹² *Id.*

not sustain a recurrence of disability in January 2011 as a result of the February 8, 2010 injury and that she was capable of returning to her previous duties without limitation as regard to the injuries sustained on February 8, 2010. Dr. Rosenfeld concluded that all accepted conditions had healed and appellant had recovered from the injuries sustained on February 8, 2010, based upon the history provided by her, the objective findings noted during his physical examination, and his review of the medical record. Based on this report, the Board finds that appellant has not met her burden of proof to establish a recurrence of disability on January 18, 2011.

Appellant submitted no additional medical evidence after Dr. Rosenfeld's report.

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 did not establish that she sustained a recurrence of disability on January 18, 2011 causally related to her February 8, 2010 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 15, 2015
Washington, DC

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

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

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