United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 15-1696**
	)	**Issued: April 7, 2016**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Atlanta, GA, Employer	)	

Appearances:
Alan J. Shapiro, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 6, 2015 appellant, through counsel, timely appealed the July 1, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.[2]

ISSUE

The issue is whether appellant is entitled to wage-loss compensation for the period June 28 through July 25, 2014.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The case record provided to the Board includes evidence received after OWCP issued its July 1, 2015 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2014).

FACTUAL HISTORY

On June 9, 2013 appellant, then a 46-year-old tractor-trailer operator, injured his low back pulling a fifth wheel pin from beneath his tractor-trailer. By letter dated July 11, 2013, OWCP initially accepted the claim for lumbar sprain/strain (ICD-9 847.2). A July 8, 2013 lumbar magnetic resonance imaging (MRI) scan revealed a disc bulge with desiccation at L4-5 and superimposed right asymmetric mild extrusion. On August 2013 Dr. Radhakrishnan V. Nair, a Board-certified orthopedic surgeon, recommended L4-5 laminectomy, discectomy, and possible interbody fusion.[3] OWCP initially declined the request for surgery as lumbar fusion was not an appropriate treatment for a sprain. Appellant received wage-loss compensation beginning October 29, 2013, and OWCP placed him on the periodic rolls. The employing establishment had been unable to accommodate his work restrictions.

By letter dated February 25, 2014, OWCP referred appellant along with a statement of accepted facts (SOAF), for a second opinion examination with Dr. Raju M. Vanapalli, a Board-certified orthopedic surgeon and OWCP referral physician.

In an undated report received on March 4, 2014, Dr. Stephen A. Dawkins, Board-certified in occupational medicine, requested that appellant's claim be expanded to include "lumbar extruded disc." He and Dr. Nair are noted as colleagues at Caduceus Occupational Medicine where appellant had been a patient since June 9, 2013. Dr. Dawkins noted that appellant injured his lower back after reaching beneath his trailer to pull a pin away from the fifth wheel. It was stuck and appellant had to forcefully remove the pin. Dr. Dawkins noted that appellant was initially diagnosed with a lumbar sprain/strain, which OWCP accepted. However, a subsequent MRI scan revealed an extruded lumbar disc. As such, Dr. Dawkins formally requested that lumbar extruded disc be added to appellant's accepted conditions.

Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon and district medical adviser (DMA), was asked to review the medical record and the report from Dr. Dawkins to determine if any other conditions should be accepted. He recommended expansion of the claim to include degenerative disc disease. On March 6, 2014 OWCP informed appellant that his claim had been expanded to include lumbar degenerative disc disease (ICD-9 722.52).[4]

Dr. Vanapalli examined appellant on March 24, 2014. He diagnosed right side L5 radiculitis, L4-5 right herniated nucleus pulposus, and lumbar sprain/strain. Dr. Vanapalli found that appellant's lumbar sprain had resolved. His report preceded the expansion of the claim.[5] According to Dr. Vanapalli, appellant was unable to resume his regular duties as a tractor-trailer operator. However, appellant could perform full-time, sedentary work with restrictions that

[3] In his August 16, 2013 report, Dr. Nair noted that appellant's lumbar disc "herniation appears secondary to the job[-]related injury…." He further noted that appellant's lumbar degenerative disc disease was unrelated to his workers' compensation injury.

[4] In a report dated March 5, 2014, Dr. Hogshead, the DMA, advised OWCP that the accepted condition could be expanded to include lumbar degenerative disc disease.

[5] The February 25, 2014 SOAF OWCP that was provided to Dr. Vanapalli identified lumbar sprain/strain as the only accepted condition.

included intermittent walking, a two-hour limitation on standing, and a three-hour, 10-pound weight restriction with respect to pushing, pulling, and lifting.

In an April 4, 2014 report, Dr. Nair diagnosed lumbar herniated disc (L5) with right radiculopathy and superimposed degenerative disc disease. He recommended a lumbar laminectomy with discectomy, and possible lumbar fusion with instrumentation. Dr. Nair also advised that appellant had a 20-pound lifting restriction and could perform "Sit down work only."

In two separate decisions dated April 4, 2014, OWCP declined to authorize lumbar disc surgery and lumbar spine fusion. Both decisions correctly noted that appellant's accepted conditions included lumbar sprain and degenerative disc disease. Although appellant's claim had since been expanded, OWCP continued to rely on an October 11, 2013 report from Dr. Nair, who advised that a surgical fusion was not appropriate for lumbar sprain.

On April 21, 2014 appellant advised OWCP that Drs. Dawkins and Nair had released him from their care following OWCP's most recent refusal to authorize lumbar surgery. Appellant's physicians reportedly believed that, absent surgical intervention, there was nothing else they could do for him.

Appellant's counsel requested a hearing regarding OWCP's refusal to authorize surgery.

Dr. Lee A. Kelley, a Board-certified orthopedic surgeon, examined appellant on May 15, 2014. OWCP would later recognize him as appellant's new treating physician. Dr. Kelley noted a June 9, 2013 history of injury when appellant reached underneath his truck to pull out the fifth wheel pin and began experiencing lower back pain. After the initial injury, appellant continued to work. Approximately, one week later, he experienced significant lower back pain after pulling up a dock plate to unload his truck. Dr. Kelley reported that appellant had since undergone epidural steroid injections, physical therapy, and was considered a candidate for lumbar surgery. He also reviewed appellant's July 8, 2013 lumbar MRI scan, which demonstrated a moderately-sized central right disc herniation at L4-5, with right L5 nerve root compression. Based on his physical examination and review of appellant's medical records, Dr. Kelley diagnosed L4-5 disc herniation, which he attributed to the June 9, 2013 on-the-job injury. He further indicated that appellant had not responded to appropriate conservative treatment, and thus, was a candidate for surgical treatment. Appellant's surgical options included laminectomy and disc excision, with or without lumbar fusion. Dr. Kelley expressed a preference for anterior lumbar interbody fusion with complete discectomy. He further advised that appellant remain off work given his diagnosis of symptomatic disc herniation, and current physical findings of significant pain and limitation of motion.

On June 6, 2014 the employing establishment offered appellant a full-time limited-duty assignment as a tool and parts assistant. Appellant was responsible for managing an inventory of parts, tools, and supplies required for motor vehicle maintenance. The physical requirements of the modified assignment included sitting and standing as needed, simple grasping, pushing/pulling, and basic computer skills, including use of a mouse. There was a 10-pound restriction with respect to lifting tools and parts, and there was to be no overhead activity.

Appellant was also permitted to use a step stool if needed. The June 6, 2014 limited-duty assignment was patterned after Dr. Vanapalli's March 24, 2014 findings.

Appellant accepted the limited-duty assignment and returned to work on June 17, 2014. OWCP removed him from the periodic compensation rolls effective that date. However, on June 28, 2014 appellant stopped work again due to his low back condition. He reportedly went to an urgent care center after leaving work early on June 28, 2014. Appellant alleged that some of the automotive parts he was required to handle exceeded the job's 10-pound weight restriction. He also reported difficulty performing other assigned duties, such as opening file cabinet drawers and sweeping.

On June 30, 2014 appellant advised OWCP that the employing establishment told him not to return to work until he could provide medical documentation. He later filed a claim (Form CA-7) for wage-loss compensation for the period June 28 through July 25, 2014.

On July 14, 2014 appellant returned to Dr. Kelley for a follow-up examination. He diagnosed lumbar intervertebral disc displacement without myelopathy (ICD-9 722.10). Dr. Kelley noted that appellant's condition was work related and that he was currently unable to work. Since his last visit on May 15, 2014, appellant reportedly had ongoing center-right lumbosacral pain radiating down his right posterior lower extremity and continuing into the plantar right foot. Dr. Kelley also noted that, although appellant had been advised to remain off work, the employing establishment provided him light-duty work, which appellant attempted for one week. He explained that when appellant returned to work his pain increased. Dr. Kelley noted that appellant continued to complain of severe back and leg pain, primarily in the right leg. Appellant's physician again recommended L4-5 anterior lumbar interbody fusion with hardware and requested authorization from OWCP.

In follow-up treatment notes dated September 4, 2014, Dr. Kelley indicated that appellant remained symptomatic from a central disc herniation at L4-5. He diagnosed work-related lumbar intervertebral disc displacement without myelopathy and continued to recommend surgery. Dr. Kelley also advised that appellant was currently unable to return to work.

By decision dated September 25, 2014, OWCP's Branch of Hearings & Review vacated the April 4, 2014 decisions denying lumbar surgery. The hearing representative determined that further development was necessary to properly address appellant's request for surgery. She noted that the requested surgery was for treatment of L4-5 disc herniation/extrusion, a condition OWCP had not formally accepted. The hearing representative questioned why the DMA had advised OWCP to accept lumbar degenerative disc disease when Dr. Dawkins had requested acceptance of "lumbar extruded disc." She also noted that Dr. Nair had found the lumbar degenerative disc disease was not work related. Under the circumstances, it was unclear why OWCP had accepted lumbar degenerative disc disease rather than lumbar disc herniation/extrusion.[6]

[6] With respect to Dr. Vanapalli's March 24, 2014 second opinion report, the hearing representative noted that he was unaware that lumbar degenerative disc disease was an accepted condition. She also noted that OWCP had not specifically asked him to comment on the recommended surgery.

The hearing representative remanded the case to OWCP with instructions to refer appellant's medical records back to the DMA, along with Dr. Kelley's May 15, 2014 surgery request. On remand, the DMA was instructed to provide medical rationale for his recommendation to include lumbar degenerative disc disease as an accepted condition. Additionally, the DMA was to address whether appellant's L4-5 lumbar disc bulge, as demonstrated on the July 8, 2013 MRI scan, was causally related to the June 9, 2013 work injury. Lastly, the DMA was instructed to address whether Dr. Kelley's proposed surgery was medically warranted to treat appellant's work injury.

On September 30, 2014 OWCP wrote to Dr. Kelley requesting additional information regarding appellant's injury-related condition(s) and whether he was able to resume his regular duties as a driver or any other type of gainful employment in a limited-duty capacity. The claims examiner also prepared a September 30, 2014 memorandum for the DMA in accordance with the hearing representative's September 25, 2014 decision. She specifically asked the DMA to address whether appellant's L4-5 disc bulge was causally related to the June 9, 2013 work injury.

OWCP also issued a September 30, 2014 decision denying compensation for the period June 28 through July 25, 2014. The claims examiner reviewed Dr. Kelley's July and September 2014 reports, including his request for surgery, and noted that the diagnosed condition -- lumbar intervertebral disc displacement -- had not been accepted by OWCP. She also indicated that appellant's limited-duty assignment as a tool and parts assistant was "suitable" based on Dr. Vanapalli's March 24, 2014 report, which represented the weight of the medical evidence. Lastly, the claims examiner noted that appellant had not provided sufficient evidence that his limited-duty assignment was not suitable. She explained that the limited-duty assignment "was deemed suitable and [appellant] stopped work on [June 28, 2014] without providing sufficient medical evidence or a work excuse for [his] continued absence…." Consequently, OWCP found that appellant was not entitled to wage-loss compensation pursuant to 20 C.F.R. § 10.500(a).[7] Appellant's counsel timely requested a hearing.

On October 1, 2014 DMA Dr. Hogshead responded to the claims examiner's September 30, 2014 request for clarification. As to his rationale for recommending acceptance of lumbar degenerative disc disease, the DMA referenced Dr. Dawkins' March 4, 2014 report, noting that appellant's physician "explain[ed] the injury, the symptoms and subsequent MRI scan findings." Regarding the relationship between appellant's L4-5 disc bulge and the June 9, 2013 employment incident/injury, the DMA indicated that one could not state with certainty whether a bulging disc was directly related to a specific circumstance or injury. He explained that it was unlikely one would have MRI scan studies immediately before and immediately after a specific activity or injury. The DMA further explained that under the circumstances, the best one could do was to gather the facts and make an "assumption." Lastly, he indicated that Dr. Kelley's May 15, 2014 request for surgery was reasonable and should be approved.

[7] Compensation for wage loss due to disability is available for periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury. 20 C.F.R. § 10.500(a). An employee is not entitled to compensation for any wage-loss claimed on a Form CA-7 to the extent: (1) evidence contemporaneous with the claimed period establishes that an employee had medical work restrictions in place; (2) light duty within those work restrictions was available; and (3) the employee was previously notified in writing that such duty was available. *Id*.

Dr. Kelley provided follow-up treatment notes dated October 9 and November 13, 2014. He indicated that appellant remained symptomatic from an L4-5 disc herniation and was still awaiting approval for surgery. Dr. Kelley diagnosed lumbar intervertebral disc displacement without myelopathy (ICD-9 722.10) and lumbar intervertebral disc degeneration (ICD-9 722.52). He advised appellant to continue with his current medications and to remain off work.

On January 8, 2015 the claims examiner informed appellant that the DMA had approved Dr. Kelley's request for surgery. On February 2, 2015 OWCP formally authorized lumbar spinal fusion with hardware implementation.[8]

Dr. Kelley saw appellant again on January 22, 2015. He continued to diagnose lumbar intervertebral disc displacement without myelopathy (ICD-9 722.10) and lumbar intervertebral disc degeneration (ICD-9 722.52). Dr. Kelley noted that, since his last examination on November 13, 2014, appellant continued to complain of significant lower back pain, which radiated into the right leg. Appellant also reported significant problems with daily activities, and difficulty bending, twisting, lifting, and any type of prolonged standing. Dr. Kelley indicated that surgery had been approved and he tentatively scheduled the procedure for mid-March 2015. He further indicated that appellant was currently unable to work.

On June 15, 2015 appellant underwent laser disc (L4-5) surgery.

In a July 1, 2015 decision, the hearing representative noted that appellant's June 9, 2013 traumatic injury claim had not been accepted for disc herniation, and therefore, any related disability could not be considered with respect to the claimed recurrence of disability beginning June 28, 2014. Consequently, she affirmed OWCP's September 30, 2014 decision denying wage-loss compensation.

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[9] Recurrence of disability also means an inability to work that takes place 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[10] Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty.[11] A recurrence of disability does not apply when a light-duty assignment is withdrawn for

[8] Appellant later requested alternative laser surgery (percutaneous discectomy) at L4-5, which OWCP denied based on the advice of its DMA. Although laser surgery was not authorized, the option of traditional lumbar spinal fusion remained available.

[9] 20 C.F.R. § 10.5(x).

[10] *Id.*

[11] *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

reasons of misconduct, nonperformance of job duties, or other downsizing or where a loss of wage-earning capacity determination is in place.[12]

Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.[13]

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing that the recurrence is causally related to the original injury.[14] This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.[15] The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.[16]

ANALYSIS

The issue currently before the Board is whether appellant is entitled to disability compensation beginning June 28, 2014. He sustained a work-related lumbar injury on June 9, 2013, which OWCP initially accepted for lumbar sprain/strain. A July 8, 2013 lumbar MRI scan revealed an L4-5 disc bulge with desiccation, and superimposed right asymmetric mild extrusion. As early as August 2013, surgery was recommended to address appellant's L4-5 disc bulge. However, OWCP initially declined to authorize surgery because his claim had only been accepted for lumbar sprain/strain.

In March 2014, appellant's then-treating physician, Dr. Dawkins, requested that the claim be expanded to include "lumbar extruded disc." On March 6, 2014 based on the advice of its DMA, OWCP expanded appellant's claim to include lumbar degenerative disc disease (ICD-9 722.52), but despite its recent acceptance of this new condition, OWCP continued to deny the requested L4-5 surgery.[17] Appellant returned to work in a limited-duty capacity on June 17, 2014, but stopped work again on June 28, 2014 due to his lumbar condition. He then filed a claim for wage-loss compensation.

When Dr. Kelley initially examined appellant on May 15, 2014 he diagnosed L4-5 disc herniation attributable to appellant's June 9, 2013 on-the-job injury. He also recommended surgery and advised that appellant remain off work given his symptomatic disc herniation. On

[12] 20 C.F.R. §§ 10.5(x), 10.104(c) and 10.509; *see id.*, Chapter 2.1500.2b.

[13] *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

[14] 20 C.F.R. § 10.104(b); *see supra* note 11 at, Chapter 2.1500.5 and 2.1500.6.

[15] *See S.S.*, 59 ECAB 315, 318-19 (2008).

[16] *Id.* at 319.

[17] Following remand for further medical development, OWCP ultimately approved the requested L4-5 spinal fusion with hardware.

July 14, 2014 appellant returned for follow up. At that time, Dr. Kelley diagnosed work-related lumbar intervertebral disc displacement and he continued to recommend L4-5 surgery. Additionally, he reported that although appellant was advised to remain off work, the employing establishment provided him light-duty work, which appellant attempted for one week. Dr. Kelley further noted that, when appellant returned to work, his pain increased. He advised that appellant was currently unable to work. Thus, Dr. Kelley examined appellant both before and after his 12 days as a limited-duty tool and parts assistant. His opinion regarding appellant's ability to work differs from Dr. Vanapalli's March 24, 2014 second opinion. However, Dr. Vanapalli had not been fully apprised of appellant's accepted lumbar conditions.

In a September 30, 2014 decision, OWCP denied compensation for the 4-week period ending July 25, 2014 because the L4-5 disc herniation was not an accepted condition. It issued its decision while appellant's case was still under development regarding the central issue of whether his lumbar disc herniation was employment related. As noted, in early 2015, OWCP approved L4-5 disc surgery, but it has continued to deny wage-loss compensation on the basis that his claim has not been accepted for lumbar disc herniation. To date, it is unclear why OWCP accepted lumbar degenerative disc disease rather than L4-5 disc herniation/extrusion. Consequently, the Board finds that the case is not in posture for decision.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to compensation; however, OWCP shares responsibility in the development of the evidence to see that justice is done.[18]

OWCP accepted lumbar degenerative disc disease based on the DMA's March 5, 2014 recommendation. However, it is unclear why Dr. Hogshead, the DMA, recommended accepting lumbar degenerative disc disease rather than lumbar extruded disc, as requested by appellant's then-treating physician, Dr. Dawkins. The DMA's choice of lumbar degenerative disc disease also conflicts with Dr. Nair's August 16, 2013 finding. According to Dr. Nair, appellant's lumbar disc herniation appeared to be secondary to his job-related injury, whereas the lumbar degenerative disc disease was unrelated to appellant's workers' compensation injury. OWCP previously sought clarification from Dr. Hogshead, but he had not adequately responded to the underlying issue. Although Dr. Hogshead recommended approving the requested L4-5 surgery, the DMA was equivocal as to whether appellant's L4-5 disc bulge was employment related, and whether it should be accepted as such. Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[19]

The Board finds that this case must be remanded to refer the case along with a copy of the complete medical record and updated SOAF, to a new second opinion as to whether the L4-5 disc bulge was employment related. After OWCP has developed the medical record it shall issue a *de novo* decision regarding appellant's entitlement to wage-loss compensation for temporary total disability beginning June 28, 2014 due to any accepted conditions.

[18] *William J. Cantrell*, 34 ECAB 1223 (1983).

[19] *Richard F. Williams*, 55 ECAB 343, 346 (2004).

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2015 decision of the Office of Workers' Compensation is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 7, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board