United States Department of Labor
Employees' Compensation Appeals Board

W.S., Appellant	)	
and	)	**Docket No. 15-0602**
	)	**Issued: August 11, 2016**
DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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 January 26, 2015 appellant, through counsel, filed a timely appeal from a December 2, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 a recurrence of disability commencing July 3, 2010 causally related to his August 25, 1988 employment injury.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.

On September 14, 1988 appellant, then a 33-year-old heavy mobile equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that on August 25, 1988 he injured his lower back, left arm, neck, shoulder, and groin area while pushing a heavy engine in a buggy. He filed a second traumatic injury claim (Form CA-1) alleging that on September 13, 1988 he injured his lower back, neck, left shoulder, and arm, upper back, and groin area while pushing and pulling an engine on a buggy. OWCP accepted subluxations at T1, T2, T4, L3, L4, and L5, which resolved as of January 15, 1992 and conversion disorder. By letter dated November 12, 1991, it placed appellant on the periodic rolls for temporary total disability.

By decision of March 27, 2009, OWCP adjusted appellant's compensation benefits effective February 2, 2009, based upon a determination that the position of part-time clerk fairly represented his wage-earning capacity. In this part-time position, appellant was working four hours per day based on work restrictions of a second opinion physician. An OWCP hearing representative affirmed the wage-earning capacity determination on December 9, 2009.

In a March 2, 2011 decision, the Board reversed the December 9, 2009 decision on the issue of loss of wage-earning capacity (LWEC).[3] The Board found that OWCP had failed to meet its burden of proof to establish that the part-time clerk position was suitable work as appellant had not worked in the part-time clerk position for more than 60 days at the time of the LWEC decision.

In a second appeal, the Board issued an order reversing a March 14, 2011 LWEC decision.[4] The Board again found that OWCP had failed to meet its burden of proof to reduce appellant's wage-loss compensation effective February 2, 2009 as OWCP had failed to follow its procedures when it determined that his part-time position working 20 hours per week fairly and reasonably represented his wage-earning capacity.

The facts and the circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.[5] As noted, the employing establishment had offered appellant a part-time, modified clerk position working four hours per day. The position required no pulling, pushing, lifting, kneeling, squatting, or climbing. It did not require walking, sitting, standing, twisting, bending/stooping, reaching above the shoulder, or operating a motor vehicle for more than 10-minute intervals. The employing establishment noted that the salary was $16.55 per hour and that the hours were 12:30 p.m. to 3:30 p.m., but also specifically noted work would be performed four hours per day. Appellant initially refused the position on November 4, 2008, but subsequently accepted the position and returned to work on January 26, 2009.

[3] Docket No. 10-891 (issued March 2, 2011).

[4] Docket No. 12-190 (issued June 12, 2012).

[5] On January 8, 2010 OWCP granted appellant a schedule award for 13 percent left lower extremity impairment and 4 percent right lower extremity impairment. The period of the award was from October 25, 2009 to October 2, 2010.

In a July 9, 2009 letter, the employing establishment informed OWCP that appellant had not worked since March 31, 2009 and had therefore abandoned his position. The letter noted that appellant had informed his supervisor that he was having a heart procedure, but no medical evidence was submitted. Appellant subsequently informed the employing establishment that he was undergoing carpal tunnel surgery and eye surgery.

By letter dated March 21, 2011, the employing establishment informed OWCP that appellant abandoned his light-duty job as he had not reported to work since July 3, 2010.

In a July 22, 2011 note, Loni Banks, a nurse practitioner, noted that appellant was disabled from working for the period July 27, 2011 to January 1, 2012 due to his work injury.

In an August 9, 2011 work capacity evaluation form (Form OWCP-5c), Dr. James Alexander, a treating physician, diagnosed closed lumbar dislocation vertebra and closed thoracic lumbar dislocation. He opined that appellant had permanent restrictions "and should not have returned to work."

In an August 10, 2011 letter, the employing establishment informed OWCP that appellant had been absent without leave from the employing establishment since July 2010. It noted that his removal was the result of his abandonment of his light-duty job and subsequent disciplinary actions and that it was unrelated to his disability or employment injury.

On September 6, 2011 OWCP received a copy of a July 6, 2011 letter from the employing establisment to appellant. The letter proposed removal from his employment position due to his "failure to follow proper leave procedures" and because no valid excuse was provided for his "absence and continuous unauthorized absences since December 6, 2010." It noted that the medical evidence he had submitted was insufficient to support his disability claim and that he had been carried in an absent without leave (AWOL) status until December 6, 2010. Appellant was provided with his rights and afforded 15 days to reply before a final decision on his removal would be issued.

On September 10, 2011 appellant was terminated from his position with the employing establishment due to his continous, unauthorized absence since December 6, 2010 and his failure to follow the proper leave procedure which required valid medical evidence supporting the period of his absence.

On January 24, 2012 OWCP received a June 28, 2011 disability note which indicated that appellant required pulmonary rehabilitation and cardiac evaluation before being released to return to work. The signature on the form is illegible, but it listed Dr. Shualt Z. Istanbouy, Board-certified internist with subspeciality certifications in critical care medicine and pulmonary disease, of SI Respiratory Disease Consultants, LLC.

In a July 31, 2012 work capacity evaluation form (Form OWCP-5c), Dr. Alexander diagnosed closed lumbar dislocation vertebra and closed thoracic lumbar dislocation. He opined that appellant had permanent restrictions "and should not return to work." Dr. Alexander responded to questions posed by OWCP on July 31, 2012 and referenced the work capacity evaluation form. He noted a preexisting, nonindustrial disability of coronary artery disease. Dr. Alexander checked a box marked "yes" to the question of whether the ICD-9-CM diagnosis

was established and whether 1988 was an appropriate date for connection to the diagnosed condition.

On October 24, 2012 appellant filed a claim for recurrence of disability for the period February 2, 2009 to the present.

By letter dated July 22, 2013, OWCP provided appellant with the definition of a recurrence and noted the medical evidence required to support his recurrence claim. It also requested evidence regarding the allegation that he had abandoned his light-duty job. Appellant was afforded 30 days to provide the requested information.

In a July 16, 2013 work capacity evaluation form (Form OWCP-5c), Dr. Alexander diagnosed closed lumbar dislocation vertebra and closed thoracic lumbar dislocation. He opined that appellant had permanent restrictions and was disabled from working.

In a September 18, 2013 letter, appellant's wife informed her husband's counsel that appellant's attempted return to work in January 2009 resulted in high blood pressure, several angioplasties, and a triple bypass open heart surgery in May 2010. She related that following his recovery from the heart surgery appellant's family physician opined that he was disabled from working which was attributable to the accepted employment injury.

In an October 7, 2013 letter, counsel sent a letter of correspondence to the Secretary of Labor to allege that OWCP, as a matter of policy, violated the orders of this Board and violated its own regulations. He argued in the letter that appellant had not abandoned his light-duty job as it was a make-shift job. Counsel noted that the position required appellant to relocate from his home in Illinois and move back to Texarkana, Texas which cost appellant "a great deal of money" and that due to health problems and financial stress he moved back to Illinois in the summer of 2010. He requested OWCP to provide wage-loss compensation retroactively for the period February 2 to October 25, 2009 and on and after October 3, 2010.

By decision dated February 28, 2014, OWCP denied appellant's claim for a recurrence of disability commencing July 3, 2010 causally related to his accepted August 25, 1988 employment injury. It found that the evidence of record contained insufficient medical evidence to support disability on or after July 3, 2010.

By letter dated March 5, 2014, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on September 9, 2014.

In a July 21, 2014 work capacity evaluation form (Form OWCP-5c), Dr. Alexander diagnosed closed lumbar dislocation vertebra and closed thoracic lumbar dislocation. He opined that appellant had permanent restrictions and was disabled from work.

In a July 22, 2014 report, Ms. Banks provided physical examination findings and diagnosed thoracic and lumbar disc degeneration. She noted that appellant was unable to perform usual physical activities for his age group and that his physical difficulties impacted his work capability.

By decision dated December 2, 2014, an OWCP hearing representative affirmed the February 28, 2014 decision denying appellant's recurrence claim. The hearing representative

found that the evidence of record failed to establish that appellant had to cease work on July 3, 2010, due to a change in the nature and extent of his employment or his light-duty job requirements.

LEGAL PRECEDENT

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 of record establishes that he or she can perform the light-duty position, the employee has the burden of proof to establish, by the weight of the reliable, probative, and substantial evidence, a recurrence of disability and to show that he or she cannot perform such light duty.[6] As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[7] This term 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, (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.[8]

A recurrence of disability is defined as the 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.[9] The Board has held that whether a particular injury causes an employee to be disabled for work is a medical question that must be resolved by competent and probative medical evidence.[10] The weight of medical opinion is determined on the report of a physician, who provides a complete and accurate factual and medical history, explains how the claimed disability is related to the employee's work and supports that conclusion with sound medical reasoning.[11]

ANALYSIS

OWCP accepted that appellant sustained subluxations of T1, T2, T4, L3, L4, and L5, on August 25, 1988, which resolved as of January 15, 1992 as well as a conversion disorder due to the August 25, 1988 work injury. Appellant returned to a part-time, sedentary position on January 26, 2009. The employing establishment terminated him from employment for cause effective December 6, 2010. OWCP denied appellant's claim for a recurrence of disability commencing July 3, 2010 and that decision was affirmed by an OWCP hearing representative on

[6] *K.C.*, Docket No. 08-2222 (issued July 23, 2009); *Richard A. Neidert*, 57 ECAB 474 (2006).

[7] *C.S.*, Docket No. 08-2218 (issued August 7, 2009); *Joseph D. Duncan*, 54 ECAB 471 (2003); *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[8] 20 C.F.R. § 10.5(x).

[9] *Id*. *See S.F.*, 59 ECAB 525 (2008); *Albert C. Brown*, 52 ECAB 152 (2000); *Terry R. Hedman*, *supra* note 7.

[10] *See R.C.*, 59 ECAB 546 (2008); *Carol A. Lyles*, 57 ECAB 265 (2005); *Donald E. Ewals*, 51 ECAB 428 (2000).

[11] *See C.S.*, *supra* note 7; *Sandra D. Pruitt*, 57 ECAB 126 (2005).

December 2, 2014. The issue on appeal is whether appellant has met his burden of proof to establish a recurrence of disability commencing July 3, 2010.

The Board finds that appellant failed to meet his burden of proof to establish a recurrence of disability commencing July 3, 2010 as he failed to submit sufficient medical evidence explaining how the claimed period of disability was causally related to his accepted work injury.

In support of his claim, appellant submitted work capacity evaluation forms dated August 9, 2011, July 31, 2012, July 16, 2013, and July 21, 2014 completed by Dr. Alexander, who diagnosed closed lumbar dislocation vertebra and closed thoracic lumbar dislocation. Dr. Alexander indicated on the forms that appellant had permanent work restrictions precluding his ability to return to work and that appellant should not have returned to the part-time, sedentary employment position. He also responded to questions posed on a form noting that the diagnoses were established in 1988 in connection with the August 25, 1988 work injury. However, none of the form reports submitted by Dr. Alexander explain how appellant's conditions, restrictions, and disability were caused by the accepted employment injury. Moreover, his medical reports did not contain a history of the work injury or a description of the limited-duty job appellant had been performing prior to the claimed recurrence.[12] Rather, Dr. Alexander merely concluded without explanation that appellant was permanently disabled from all work. It is well established that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value.[13] While Dr. Alexander found that appellant was incapable of any type of work, he did not explain how his disability from work was caused by the August 25, 1988 employment injury. The Board has found 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.[14] The Board therefore finds that Dr. Alexander's submissions are insufficient to establish appellant's recurrence claim.

The record also contains disability notes dated July 22, 2011 and July 22, 2014 from Ms. Banks, a nurse practitioner. Nurse practitioners are not considered physicians as defined under FECA.[15] These reports are not probative medical evidence supportive of a claim for federal workers' compensation.

The record also contains a June 28, 2011 disability note indicating that appellant required pulmonary rehabilitation and cardiac evaluation before being released to return to work. However, this note attributes appellant's disability to conditions not accepted by OWCP. Thus, it is insufficient to establish his recurrence claim.

[12] *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

[13] *Douglas M. McQuaid*, 52 ECAB 382 (2001).

[14] *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Willie M. Miller*, 53 ECAB 697 (2002); *Michael E. Smith*, 50 ECAB 313 (1999).

[15] *See* 5 U.S.C. § 8101(2); *M.B.*, Docket No. 12-1695 (issued January 29, 2013) (regarding nurse practitioners); *Lyle E. Dayberry*, 49 ECAB 369, 372 (1998) (regarding physician assistants).

Appellant failed to submit sufficiently rationalized medical evidence establishing that his disability on and after July 3, 2010 resulted from the residuals of his accepted injury.[16] The Board therefore finds that he has not met his burden of proof.[17]

On appeal, counsel contends that OWCP's decision was contrary to fact and law. Based on the findings and reasons set forth above, the Board finds the attorney's arguments are not substantiated.

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 has failed to establish a recurrence of disability commencing July 3, 2010, causally related to his August 25, 1988 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 2, 2014 is affirmed.

Issued: August 11, 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

[16] *Cecelia M. Corley*, 56 ECAB 662 (2005).

[17] *Tammy L. Medley*, 55 ECAB 182 (2003).