

ISSUE

The issue is whether appellant met his burden of proof to establish a recurrence of disability on June 19, 2014 causally related to his accepted condition.

FACTUAL HISTORY

OWCP accepted that on or before July 1, 2010 appellant, then a 58-year-old housekeeping aid, developed left L4-5 disc herniation as a result of repetitive lifting and bending at work. Appellant did not immediately stop work but began a full-time limited-duty housekeeping position. He subsequently worked intermittently.³

An April 29, 2013 magnetic resonance imaging (MRI) scan of the lumbar spine revealed degenerative discogenic disease of L4-5 and L5-S1, left paracentral disc protrusion at L4-5 compressing the left traversing L5 nerve root, and neural foramen narrowing on the right at L5-S1. Appellant was treated by Dr. Lipping Yao, a Board-certified physiatrist, from May 8 to September 13, 2013 for chronic low back pain, worsening on the left side and radiating to the left leg with left foot numbness. He had a series of lumbar epidural injections and the left leg numbness resolved. On October 7, 2013 Dr. Yao noted that appellant had osteoarthritis of the right knee and indicated that his job required prolonged standing and walking and opined that his right knee pain was work related.

Appellant was treated by Dr. William Monacci, a Board-certified neurologist, on June 21, 2013, for left leg pain due to a herniated disc and recommended an L4-5 discectomy.

On February 14, 2014 OWCP referred appellant for a second opinion evaluation by Dr. Robert Franklin Draper, a Board-certified orthopedist. In a report dated February 25, 2014, Dr. Draper noted appellant's history and advised that he was 70 pounds overweight. He had limited lumbar range of motion, normal gait, intact motor function in the legs, negative straight leg raising bilaterally, intact reflexes, and intact light-touch sensation. Knee examination revealed full extension and some crepitus in the right knee with range of motion. Dr. Draper diagnosed L4-5 lumbar disc herniation and degenerative discogenic disease at L4-5 and L5-S1, preexisting and not work related. He noted appellant's July 1, 2010 back injury had not resolved. Dr. Draper advised that appellant had osteoarthritis of the knees which was preexisting and long-standing. He opined that appellant did not sustain an aggravation of the right knee osteoarthritis. Dr. Draper noted that based upon the accepted conditions appellant was capable of performing light-duty work with permanent restrictions.⁴

³ Appellant received compensation payments *via* the supplemental rolls from December 22, 2013 to June 13, 2014.

⁴ In a work capacity evaluation, Dr. Draper noted pushing, pulling, and lifting were limited to 20 pounds occasionally and 10 pounds frequently, standing limited to two hours of an eight-hour workday, walking limited to two hours of an eight-hour workday and he can sit for six hours of an eight-hour workday.

In a February 28, 2014 report, Dr. Yao diagnosed chronic low back pain and disc herniation and recommended three months of home rest. On March 21, 2014 he diagnosed L4-5 disc herniation and chronic muscle and ligament strain.

In a letter dated March 25, 2014, OWCP provided Dr. Yao a copy of Dr. Draper's February 25, 2014 report and requested that he review and submit comments. In reports dated March 31 and May 30, 2014, Dr. Yao concurred with Dr. Draper and indicated that appellant could try light-duty work.

On June 5, 2014 appellant accepted a job offer for a program support assistant effective June 15, 2014 and returned to work. He worked half days and stopped work on June 15, 2014. On June 5, 2014 the employing establishment offered appellant a permanent limited-duty position effective June 15, 2014. The position was a program support assistant, GS-5/6. The work schedule was Monday through Friday, eight hours a day, 7:30 a.m. to 4:00 p.m. The job duties included assisting veterans with the kiosk check-in, preparing appointment letters, making reminder calls to veterans for upcoming appointments, running errands for staff, directing flow of traffic into the clinic and other administration duties assigned by the business manager. The physical requirements were sitting up to six hours a day, walking and standing up to two hours a day, pushing and pulling 20 pounds occasionally, and lifting 10 pounds frequently. On June 13, 2014 appellant accepted the position and returned to work.

In an e-mail dated June 23, 2014, an employing establishment human resources specialist notified OWCP that appellant submitted a doctor's note stating that he could not work. The specialist indicated that appellant worked one week of half days and advised that he was applying for disability retirement.⁵

In a letter dated June 25, 2014, OWCP noted that appellant returned to work on June 16, 2014 in a permanent light-duty position and continued to work until June 20, 2014 when he stopped completely. It indicated that it had not received a Form CA-2a, notice of recurrence, but it appeared as though appellant was claiming disability due to a material change or worsening of his accepted work-related condition. OWCP requested that appellant submit evidence in support of his claim and respond to a questionnaire.

Appellant submitted a June 20, 2014 report from Dr. Yao who noted that appellant could not perform his light-duty job because it caused increased low back pain. He wore a knee brace for chronic knee pain and the treatment plan was home rest. In a June 20, 2014 prescription note, Dr. Yao diagnosed chronic severe low back and knee pain. Appellant attempted four days of light-duty work and stopped due to pain. He noted that appellant was permanently disabled and was on home rest. On June 20, 2014 Dr. Yao diagnosed bilateral knee pain due to osteoarthritis which may be caused by prolonged standing at his job. Appellant reported that his low back pain increased when he performed his housekeeping job and as a result Dr. Yao recommended home rest. He reported attempting to perform sedentary light-duty desk work but was unable to tolerate the activity. Dr. Yao recommended home rest and disability retirement.

⁵ Appellant was granted disability retirement on November 13, 2014.

On July 10, 2014 appellant filed a Form CA-2a, notice of recurrence, claiming a recurrence of disability on June 16, 2014 for which he stopped work on June 19, 2014. He indicated that after returning to work from the original injury he worked limited duty.

On July 22, 2014 OWCP determined that there was conflict in opinion between Dr. Yao, appellant's treating physician, who indicated that appellant could not work and Dr. Draper, OWCP referral physician, who found that appellant could work with restrictions. To resolve the conflict, on August 8, 2014, OWCP referred appellant to an impartial medical examiner, Dr. Barry A. Ruht, a Board-certified orthopedist.

Dr. Ruht, in a September 18, 2014 report, reviewed the records provided, noted appellant's history, and examined appellant. He opined within a reasonable degree of medical certainty that appellant sustained injuries to the lumbosacral spine on July 1, 2010 and the proposed L4-5 discectomy was reasonable, necessary, and causally related to his July 1, 2010 injury. Dr. Ruht noted full recovery would be anticipated three months postoperatively. Lumbar spine examination revealed tightness, normal motion, intact muscle strength, normal reflexes, and normal sensory examination. Dr. Ruht diagnosed degenerative disc disease of the lumbar spine, chronic low back pain, and mechanical low back pain. He noted the examination was compromised by subjective complaints that were nonphysiological based on previous progress notes and a most recent lumbar MRI scan. Dr. Ruht opined that there was symptom magnification during the examination. He reviewed the job description for a program support assistant and housekeeping position and opined within a reasonable degree of medical certainty that it was suitable for appellant. Dr. Ruht further opined that appellant's return to sedentary to light duties was reasonable and appropriate. In a work capacity evaluation dated September 18, 2014, he noted that appellant could return to work full time with restrictions that would last until appellant underwent an L4-5 discectomy. If appellant refused surgery, then maximum medical improvement had been reached. He restricted appellant to sitting, walking, standing, and reaching up to 6 hours a day (1 hour continuous then a 15-minute break), reaching above the shoulder up to 4 hours, no twisting, bending or stooping, lifting up to 5 hours a day up to 25 pounds and no squatting, kneeling, and climbing. Dr. Ruht noted a supportive orthopedic chair should be considered.

In a decision dated October 14, 2014, OWCP denied appellant's claim for a recurrence of disability. It found that the weight of the evidence rested with the impartial medical examiner, Dr. Ruht who opined that appellant was capable of performing sedentary duties and specifically the position of program support assistant.

On October 29, 2014 appellant requested an oral hearing which was held before an OWCP hearing representative on June 18, 2015. He submitted a letter from the Office of Personnel Management (OPM) dated November 10, 2014 which approved his application for disability retirement. Appellant submitted VA medical records which revealed that the employing establishment performed an ergonomic assessment of appellant's workstation on June 19, 2015 and discussed an appropriate chair with appellant's supervisor.

Appellant was treated by Dr. Renna K. Hanspal, a Board-certified physiatrist, from May 16 to June 25, 2014. Dr. Hanspal noted a May 2014 right knee x-ray revealed moderate osteoarthritis of the medial and patellofemoral compartments. His diagnoses included chronic

bilateral knee pain, chronic radiating low back pain, degenerative joint disease and degenerative disc disease with radiculopathy, chronic right hip pain with degenerative joint disease, chronic neuropathic pain of both feet, and obesity. Appellant reported a history of chronic low back pain since 2010 from an injury at work.

In a February 17, 2015 report, Dr. Yao noted that appellant was on home rest since 2014 due to severe low back pain. Appellant reported that his back pain was stable and home rest was helpful. Dr. Yao noted tenderness at L5 and diagnosed chronic low back pain secondary to disc herniation at L5-S1. On March 27, 2015 Dr. Monacci treated appellant for radiating low back pain which appellant attributed to lifting at work. He diagnosed chronic low back pain syndrome, mechanical in nature, possibly related to lumbar facets. Appellant was also treated by a physician assistant.

Pursuant to OWCP's requests regarding the necessity for the surgery, in a memorandum dated May 21, 2015, an OWCP medical adviser opined that the surgery requested, at L4-5 and L5-S1, was surgically and medically necessary for the accepted condition.⁶

In a decision dated August 11, 2015, an OWCP hearing representative affirmed the decision dated October 14, 2014 denying appellant's claim for a recurrence of disability.

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 resulting from a previous injury or illness without an intervening cause or a new exposure to the work environment that caused the illness. It can also mean 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.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 limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish, by the weight of the reliable, probative, and substantial evidence, a recurrence of total disability and an inability to perform such limited-duty work. 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 limited-duty job requirements.⁸ To establish a change in the nature and extent of the injury-related condition, there must be a probative medical opinion, based on a complete and accurate factual and medical history as well as supported by

⁶ On July 30, 2015 appellant underwent an authorized L4-5 and L5-S1 decompression surgery with pedicle screw fusion and interbody implant at L4-5. He was placed on the periodic compensation rolls beginning August 1, 2015.

⁷ *J.F.*, 58 ECAB 124 (2006). A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties, or other downsizing. 20 C.F.R. § 10.5(x). See also *Richard A. Neidert*, 57 ECAB 474 (2006).

⁸ *A.M.*, Docket No. 09-1895 (issued April 23, 2010); *Terry R. Hedman*, 38 ECAB 222 (1986).

sound medical reasoning, that the disabling condition is causally related to employment factors.⁹ In the absence of rationale, the medical evidence is of diminished probative value.¹⁰ While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, it must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.¹¹

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.¹² The implementing regulations state 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.¹³ 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.¹⁴

ANALYSIS

OWCP accepted that appellant sustained a left L4-5 disc herniation. Appellant accepted a job offer dated June 5, 2014 for a full-time light-duty position program support assistant effective June 15, 2014 and returned to work. He worked half days and stopped work on June 19, 2014. On July 10, 2014 appellant filed a Form CA-2a, recurrence of disability, alleging a recurrence on June 16, 2014 causally related to his accepted work injury.

OWCP reviewed the medical evidence and determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Yao who indicated that appellant was totally disabled and could not work and Dr. Draper, OWCP's referral physician, who noted appellant was capable of returning to work with restrictions. Consequently, it referred appellant to Dr. Ruht to resolve the conflict.

Dr. Ruht noted, in a report dated September 18, 2014, that he had reviewed the records provided and examined appellant. He indicated that the examination was compromised by subjective complaints that were nonphysiological based and reflective of symptom magnification. Dr. Ruht reviewed the job description for a program support assistant and housekeeping position and opined, within a reasonable degree of medical certainty, that appellant could perform sedentary to light duties. He further opined that within a reasonable degree of

⁹ *Mary A. Ceglia*, 55 ECAB 626, 629 (2004).

¹⁰ *Id.*; *Robert H. St. Onge*, 43 ECAB 1169 (1992).

¹¹ *Ricky S. Storms*, 52 ECAB 349 (2001).

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

¹³ 20 C.F.R. § 10.321.

¹⁴ *V.G.*, 59 ECAB 635 (2008).

medical certainty appellant's return to sedentary to light duties was reasonable and appropriate. In a work capacity evaluation dated September 18, 2014, Dr. Ruht noted that appellant could return to work full time with restrictions. He noted that the restrictions would last until appellant underwent an L4-5 discectomy for his accepted condition.

The Board finds that OWCP properly relied on Dr. Ruht's September 18, 2014 opinion in determining that appellant could work eight hours of restricted duties and the program support assistant position was within the restrictions provided. Dr. Ruht's opinion is sufficiently well rationalized and based upon a proper factual background. He also reported accurate medical and employment histories. Accordingly, OWCP properly accorded special weight to the impartial medical examiners' September 18, 2014 findings.¹⁵

Appellant subsequently provided a February 17, 2015 report from Dr. Yao who noted that appellant was on home rest since 2014 due to severe low back pain. However, the Board has held that submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is, generally, insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.¹⁶

Appellant also submitted reports from Dr. Hanspal dated May 16 to June 25, 2014 who offered diagnoses and noted that appellant reported a history of chronic low back pain since 2010 from an injury at work. However, Dr. Hanspal did not specifically address whether appellant had a recurrence of disability on June 16, 2014 causally related to the accepted employment conditions or otherwise provide medical reasoning explaining why any current condition or disability was due to the accepted July 1, 2010 work injury. Likewise, Dr. Monacci's March 27, 2015 report noted appellant's treatment but did not specifically address whether he had a recurrence of disability on June 19, 2014 causally related to the accepted condition. Similarly, other medical reports of record are of limited probative value as they either predate the claimed period of disability or do not specifically address whether appellant's disability beginning June 19, 2014 is causally related to his accepted condition.

Appellant submitted reports from a physician assistant. The Board has held that treatment notes signed by a physician assistant are not medical evidence as they are not considered a physician under FECA.¹⁷

The Board further finds that there is no credible evidence which substantiates that appellant experienced a change in the nature and extent of the light-duty requirements or was required to perform duties which exceeded his medical restrictions. Appellant asserted that his job offer of July 10, 2014 did not state that there would be required twisting, bending, and stooping and appellant was not provided an ergonomic chair as suggested by Dr. Ruht.

¹⁵ *Id.*

¹⁶ See *John D. Jackson*, 55 ECAB 465, 473 (2004).

¹⁷ See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

However, the Board finds that the record is devoid of evidence establishing that there was a change in the nature and extent of the light-duty requirements or that he was required to perform duties which exceeded his medical restrictions. Rather, the record reflects that the job offer conformed to the restrictions of Dr. Draper, the second opinion physician, and Dr. Ruht, the impartial medical examiner. Dr. Ruht indicated that appellant could work eight hours of restricted duty and the support assistant position was within the restrictions of both physicians and did not require twisting, bending, or stooping. He indicated that a supportive orthopedic chair should be considered and the employing establishment performed an ergonomic assessment of appellant's workstation and discussed an appropriate chair with appellant's supervisor. Appellant has not met his burden of proof in establishing a change in the nature and extent of the light-duty requirements after he returned to work.

On appeal appellant reiterated his allegations that the job offer required twisting, bending, and stooping and a supportive orthopedic chair which was not provided. However, as noted above, there is no indication that the job required twisting, bending, or stooping and there is no evidence in the record which substantiates this claim. Additionally, Dr. Ruht indicated that a supported orthopedic chair should be considered and the record supports that the employing establishment performed an ergonomic assessment of appellant's workstation and discussed an appropriate chair with appellant's supervisor.

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 not met his burden of proof to establish a recurrence of disability on June 19, 2014 causally related to his accepted condition.

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2015 Office of Workers' Compensation Programs' decision is affirmed.

Issued: August 26, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board