

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

C.L., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, San Diego, CA, Employer)

Docket No. 16-0246
Issued: August 11, 2016

Appearances:

Sally F. LaMacchia, Esq., for the appellant¹
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 November 24, 2015 appellant, through counsel, filed a timely appeal of a June 2, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

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.*

ISSUE

The issue is whether appellant has established a recurrence of disability commencing November 7, 2007.

FACTUAL HISTORY

Appellant, then a 47-year-old nurse, injured her lower back on August 18, 1985 while moving a patient from a bed into a chair. She filed a traumatic injury claim (Form CA-1) on August 21, 1985, which OWCP accepted for herniated disc at L5-S1.³ OWCP authorized surgery for a lumbar laminectomy on October 18, 1985. Appellant retired from the employing establishment in January 1987.

In a February 17, 2002 notice of recurrence (Form CA-2a), not received by OWCP until September 12, 2006, appellant alleged that she sustained a recurrence of disability. She stated on the claim form that the recurrence of disability commenced approximately two months previously.

By decision dated November 2, 2006, OWCP denied appellant's claim for a recurrence of disability due to the absence of medical and factual evidence establishing that the claimed recurrence was related to the original work-related injury. Appellant requested a review of the written record before an OWCP hearing representative.

In a report dated October 6, 2006, Dr. Janet Dunlap, Board-certified in orthopedic surgery, noted that appellant had injured her lower back in 1985 and had undergone surgery to repair a herniated disc at L5-S1. She advised that appellant had been mostly asymptomatic, with the exception of occasional back pain, until recently. Dr. Dunlap advised that appellant had developed moderately severe to severe low back pain and numbness with radiation to the left lower extremity at the L5 level and exhibited symptoms of left L5 radiculopathy. Appellant underwent x-rays which showed grade 2 spondylolisthesis at L4-5, but with stability on flexion and extension views, spondylosis, severe disc degeneration at L5-S1 and a mild degenerative scoliosis.

Dr. Dunlap also administered a magnetic resonance imaging (MRI) scan, which indicated left L5-S1 defects with mild postsurgical fibrosis, severe disc degeneration at L5-S1 and L4-5, and anterolisthesis at L4-5 with neuroforaminal stenosis. She scheduled appellant for left-sided L4-5 and L5-S1 decompression fusion surgery. Dr. Dunlap opined that appellant's current condition was related, both directly and indirectly, to her previous work injury. She noted that appellant's 1985 left L5 laminectomy surgery resulted in surgical changes noted on the MRI scan. Dr. Dunlap also reported that appellant had developed adjacent, segmented degeneration with instability, greatest at L4-5, second at L5-S1, manifested as significant facet osteoarthropathy and disc degeneration. She advised that the changes at L5-S1 were related to the original injury and surgery and opined that the changes at L4-5 were related to both the

³ The original Form CA-1 is not contained in the instant record. The information regarding the filing of appellant's claim in August 1985 is included in the statement of accepted facts.

natural aging process/degenerative changes in addition to an aggravation caused by undergoing the L5 hemilaminectomy.

Dr. Dunlap concluded that, based on the history appellant related, appellant never fully recovered from the original disability, despite returning to her usual job for a short period. She noted that appellant had experienced persistent numbness in the left lower extremity in addition to intermittent low back pain, but that she had sustained no subsequent injuries and had displayed no other factors which would have caused her recurrence. Dr. Dunlap summarized that appellant had two overlapping problems: progressive, degenerative changes at the L5-S1 level related to her previous injury, and the surgical treatment for it and the development of adjacent segment degeneration, which was due to the natural aging or degenerative process together with some aggravation due to the previous decompressive surgery.

In a November 7, 2006 statement, appellant advised that she underwent a second surgical procedure on her lower back on October 30, 2006. She asserted that she had been experiencing extreme pain and numbness from her left hip to her toes.

By decision dated February 26, 2007, an OWCP hearing representative vacated the November 2, 2006 decision and remanded the case for further development to include referral for a rationalized medical opinion from an appropriate specialist.

OWCP referred appellant for a second opinion examination with Dr. Thomas J. Sabourin, Board-certified in orthopedic surgery. In a report dated July 10, 2007, Dr. Sabourin detailed appellant's history and opined that she had two separate problems -- a residual issue at L5-S1 where she had disc narrowing leading to a small decrease in the left ankle reflex, and a sudden onset of a new disc problem at L4-5. He further opined that the 1985 injury and subsequent surgery resulted in no substantial change in the typical progression of the underlying degenerative process. Dr. Sabourin found appellant's current L4-5 disc condition to be the natural progression of the degeneration, which had occurred over time, and was unrelated to the original August 1985 employment injury in which she herniated the L5-S1 disc. Although appellant did receive treatment for her L4-5 lesion, she would not have needed the October 2006 surgery if she had only experienced residuals from the 1985 work-related injury at L5-S1.

By decision dated July 24, 2007, OWCP denied appellant's claim for a recurrence of disability. It found that Dr. Sabourin's referral opinion represented the weight of the medical evidence. Appellant thereafter requested reconsideration of her claim. By decisions dated February 29 and September 18, 2008, OWCP denied modification of the prior decisions.

By letter dated March 12, 2009, counsel again requested reconsideration.

In a November 6, 2007 report, received by OWCP on March 16, 2009, Dr. Dunlap noted that appellant had undergone her second surgery, an L3-S1 fusion procedure one year ago. She reported that appellant's fusion appeared to be solid and that her condition had plateaued and was permanent. Dr. Dunlap advised that appellant had a well-healed midline lumbar incision, decreased lumbar range of motion, and that x-rays showed a solid-appearing fusion at L3-S1. She reiterated that appellant's 1985 lower back injury and her surgery at L4-5 and L5-S1 resulted in the progression of her condition and the need for subsequent surgery in October 2006.

Dr. Dunlap asserted that appellant's 1987 retirement was medically significant in that it highlighted the natural progression of her previous postoperative condition following her work injury.

While Dr. Dunlap advised that appellant was currently disabled due to the 1985 work injury and the aftereffects of the surgery, she outlined work restrictions for activities which required bending, twisting, or lifting over 15 pounds, on a permanent basis. She opined that these work restrictions and disability had been in place since appellant's October 30, 2006 surgery.

In a December 17, 2008 report, received by OWCP on May 11, 2009, Dr. Sidney H. Levine, Board-certified in orthopedic surgery, noted the history of injury and reiterated the diagnoses of postsurgical degenerative spondylosis L3-4 and grade 2 degenerative spondylolisthesis at L4-5. He advised that appellant had achieved a relatively good result from her October 2006 surgery. Dr. Levine opined that her current lumbar condition was causally related to the 1985 work injury, for which she underwent her 1985 lumbar laminectomy and disc excision at L5-S1. He noted that appellant's subsequent employment of eight years following her 1985 injury also contributed to the deterioration at the L4-5 as well as the L3-4 level. Dr. Levine advised that these findings were significantly greater than would normally be anticipated with the degenerative process caused by increased stress at the level above the surgery. He therefore opined that a small percentage of the need for appellant's October 2006 surgery was brought about as a result of the 1985 work injury. Dr. Levine concluded that, as a result of the 1985 injury and subsequent surgery, appellant did have work restrictions that precluded her from returning to her former type of work activity. He reiterated that her subsequent employment did cause further disability, resulting in the need for fusion as did the progression of the natural degenerative process.

On remand, OWCP reviewed the merits of the claim. By decision dated June 11, 2009, it denied appellant's request for reconsideration finding that it did not raise any substantive legal questions or include relevant and pertinent new evidence sufficient for further merit review. Appellant appealed to the Board. In a June 7, 2010 decision,⁴ the Board set aside OWCP's June 11, 2009 decision, finding that OWCP abused its discretion by failing to consider Dr. Levine's December 17, 2008 report.

By decision dated August 19, 2010, OWCP denied modification of its previous decisions, finding that appellant did not establish a recurrence of disability as of July 15, 2006. It denied appellant's claim for recurrence of disability commencing July 15, 2006 based upon the report of the second opinion physician, Dr. Sabourin, who found that her L4-5 disc condition, for which she underwent surgery in 2006, was the natural progression of the underlying degenerative disease and not related to the accepted August 1985 employment injury in which she herniated the L5-S1 disc. Appellant appealed to the Board.

In an October 1, 2011 decision,⁵ the Board set aside the August 19, 2010 decision, finding that Dr. Levine's opinion on causal relationship was in conflict with that of Dr. Sabourin.

⁴ Docket No. 09-1905 (issued June 7, 2010).

⁵ Docket No. 11-0193 (issued October 1, 2011).

Dr. Levine supported causal relationship to the 1985 accepted injury, while Dr. Sabourin ruled out such causal relationship. The Board remanded the case to OWCP for referral to an impartial medical specialist. The facts of this case as set forth in the Board's June 7, 2010 and October 1, 2011 decisions and are incorporated herein by reference.

In order to resolve the conflict in medical evidence, OWCP referred appellant to Dr. Norman Kane, Board-certified in orthopedic surgery and an impartial medical examiner, for a referee medical examination. In a report dated March 13, 2012, Dr. Kane advised that appellant did require surgical intervention to her lower back in 1985 as a result of the 1985 injury, and subsequently required fusion surgery in October 2006 from L3 to S1 as a result of a degenerative process that occurred at the level above the L5-S1 laminectomy, specifically the L4-5. He opined that the October 2006 surgery was warranted.

Dr. Kane further explained that, due to the fact that appellant's lower back symptoms had progressed, she became symptomatic as a result of increased stress at the L4-5 level, which developed as a result of the original injury at the L5-S1 level. He opined that the October 2006 lower back surgery in 2006 was directly related to the original 1985 work injury. In his review of the facts, Dr. Kane noted that following her 1985 laminectomy appellant returned to work and, in fact, continued working until 1992 at Camp Pendleton in the nursery. He advised that she last worked at Camp Pendleton in 1992 and retired in 1994.

On March 23, 2012 OWCP expanded the acceptance of appellant's claim for herniated disc at L5-S1 and the subsequent decompression and fusion at L3-S1 surgery on October 30, 2006 based on Dr. Kane's March 13, 2012 report.

On December 13, 2012 appellant submitted a claim for compensation (Form CA-7) for wage loss from February 2, 1987 to February 4, 2013.

By letter dated April 16, 2013, OWCP advised appellant that it required additional evidence to establish disability from work during the entire period claimed for wage loss from February 2, 1987 to February 4, 2013. It noted that the medical evidence of record indicated that she had been released to regular duty prior to her retirement in early 1987. OWCP further noted that, although she might have had residuals of her original injury, it appeared that appellant was also being accommodated at the time of her injury. It therefore found that she was entitled to disability compensation for the period beginning with her October 30, 2006 surgery to the period when she was released to light duty in November 2007. OWCP asked appellant to provide medical evidence to support her claim if she believed she was entitled to the period prior to surgery and any period after November 2007. It afforded her 30 days to submit additional evidence.

By letter dated July 15, 2014, the employing establishment advised OWCP that as of November 6, 2007 modified duty would have been available for appellant, consistent with her work restrictions. It noted that, since she had worked in nursing and patient care services, a modified-duty position as a constant observer, also known as 1:1 Sitter, would have been provided. The employing establishment advised that the job duties of this position included maintaining visual contact with the patient at all times, documenting a constant observation worksheet every hour, remaining at the patient's bedside when family members or visitors are

present, documenting interventions which are allowed within physical limitations/restrictions, and notifying the registered nurse immediately if the patient has a change in behavior or status. It asserted that the position required no direct contact with patients, unless they were within the parameters of the employee's physical limitations/restrictions.

In a July 17, 2014 decision, OWCP found that appellant was not entitled to wage-loss compensation for the period November 7, 2007 to February 4, 2013 and continuing. It noted that the position of assignment employee, also known as 1:1 Sitter, would have been available and offered to the claimant had she not voluntarily retired on January 3, 1986. OWCP therefore found that there was insufficient evidence of record to support there was an absence of light-duty work with the employing establishment which would have accommodated Dr. Dunlap's November 6, 2007 work restrictions, effective November 6, 2007. It therefore denied appellant's claim for disability compensation for the period November 6, 2007 through February 4, 2013 and continuing because the medical evidence of record failed to establish that she was temporarily and totally disabled during this period, and because the factual evidence of record established that light-duty work would have been available to her effective November 7, 2007 had she not voluntarily retired on January 3, 1986.

On July 29, 2014 appellant requested an oral hearing before an OWCP hearing representative, which was held on March 17, 2015.

The record reflects that appellant received one retroactive wage-loss compensation payment on October 17, 2014 for the period October 30, 2006 to November 6, 2007. Appellant's claim was not placed on the periodic rolls for compensation payments.

By decision dated June 2, 2015, an OWCP hearing representative affirmed the July 17, 2014 decision. She noted that the Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA and that, whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable, probative, and substantial medical evidence. OWCP's hearing representative found that the contemporaneous case record indicated that appellant was returned to full duty after her injury and voluntarily retired from her federal employment shortly thereafter. She further found that appellant reported that she continued working until 1994, for a different employer. The hearing representative found that there was no indication after that date that appellant sought to work in any capacity, nor was there any contemporaneous medical evidence that she retired in 1987 or in 1994 due to disability from her injury. She determined that appellant voluntarily retired in 1987 and was thus not working in 2006 at the time of her claimed recurrence. OWCP's hearing representative concluded that there was no basis to pursue alternative work for appellant or to provide ongoing disability benefits once she was no longer totally incapacitated due to her October 30, 2006 surgery.

LEGAL PRECEDENT

Appellant has the burden of proof to establish the recurrence of disability causally related to her accepted employment injury. To meet her burden, she must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history,

concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale.⁶ Where no such rationale is present, the medical evidence is of diminished probative value.⁷

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁸ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁹

ANALYSIS

Counsel argues on appeal that the medical evidence does not establish that appellant's conditions resolved or that her disability is no longer work related. She contends that OWCP terminated appellant's disability benefits as of November 6, 2007, after paying compensation for over one year. Therefore OWCP had the burden to show that the work-related disability had ceased. Counsel also alleges that the employing establishment was required to inform appellant in writing that modified or light duty was available for her within her restrictions. She further contends that appellant's retirement from the employing establishment as of 1987 was not relevant to the issue of whether she was entitled to continuing compensation as of November 6, 2007, particularly in light of the fact that she retired due to medical reasons and because the employing establishment did not fully develop a suitable work offer. The Board finds that appellant has not established a recurrence of disability commencing November 7, 2007, causally related to her accepted injury.

Regarding counsel's contention that the burden of proof was on OWCP to terminate benefits, the Board has held that when OWCP accepts that an employee sustained an employment-related injury and the employee files a Form CA-7 with supporting medical evidence to establish a period of disability, the employee retains the burden of proof to establish continuing disability until OWCP advises the employee that it has placed the claim on the periodic rolls and that CA-7 forms with supporting evidence are no longer needed.¹⁰ In the present case, appellant's claim was never placed on the periodic rolls. Rather, she received one retroactive payment on November 6, 2007 for wage-loss compensation resulting from her authorized surgery. Contrary to counsel's contentions, this is a recurrence claim based upon appellant's filing of a Form CA-7 wage-loss claim, not a termination of benefits matter. The

⁶ *Ronald A. Eldridge*, 53 ECAB 218, 220 (2001).

⁷ *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Albert C. Brown*, 52 ECAB 152, 155 (2000).

⁸ *See I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

⁹ *See I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹⁰ *J.N.*, Docket No. 10-0606, (issued April 20, 2011); *See also* Federal (FECA) Procedure Manual, Part 2 -- *Burden of Proof for Terminating Benefits*, Chapter 2.812.3 (May 2012). Having accepted a claim and initiated payments, OWCP may not terminate *periodic* compensation without a positive demonstration by the weight of evidence that entitlement to benefits has ceased.

burden therefore remains with appellant to establish additional disability commencing November 7, 2007.

OWCP accepted appellant's claim for herniated disc at L5-S1 and authorized surgery for a lumbar laminectomy on October 18, 1985 as a result of the August 18, 1985 employment injury. Subsequently, in April 2013, it accepted her claim for recurrence of herniated disc at L5-S1 and the subsequent decompression and fusion at L3-S1 surgery on October 30, 2006. OWCP paid wage-loss benefits during the period of appellant's recovery from her 2006 surgery. In her December 13, 2012 CA-7 claim, appellant did not attribute the increase in her lower back pain to any event, but rather a continuation of the August 18, 1985 work-related condition. She has the burden of providing sufficient evidence, including rationalized medical evidence, to establish the causal relationship asserted.¹¹ The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA.¹² Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable, probative, and substantial medical evidence.¹³ In the present case, OWCP's hearing representative noted that the contemporaneous case record demonstrated that appellant was returned to full duty after her injury and voluntarily retired from her federal employment shortly thereafter on civil service retirement. No medical records were received in the claim after 1990 until 2006, when she filed her recurrence claim.

While OWCP accepted that appellant sustained a worsening in her back condition, necessitating her October 2006 surgery, it approved payment for compensation for total disability from the date of surgery until November 6, 2007, the date of Dr. Dunlap's report. It, however, denied compensation thereafter finding that she would have been accommodated at work but for her voluntary retirement in 1987. In her November 6, 2007 report, Dr. Dunlap noted that appellant's L3-S1 fusion appeared to be solid and that x-rays showed a solid-appearing L3-S1 fusion. She reiterated that her 1985 lower back injury and her surgery at L4-5 and L5-S1 resulted in the progression of her condition and the need for subsequent surgery in October 2006.

While Dr. Dunlap advised that appellant was currently disabled due to the 1985 work injury and the aftereffects of the surgery, she indicated that appellant's disability was only partial as she outlined work restrictions against activities which required bending, twisting, or lifting over 15 pounds, on a permanent basis. She opined that these work restrictions and disability had been in place since appellant's October 30, 2006 surgery.

Dr. Levine advised in his December 17, 2008 report that, as a result of the 1985 injury and subsequent surgery, appellant had work restrictions that precluded her from returning to her former type of work activity. He reiterated that her subsequent employment did cause further

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

¹² *John I. Echols*, 53 ECAB 481 (2002); *John W. Normand*, 39 ECAB 1378 (1988). Disability is defined to mean the incapacity because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total. See 20 C.F.R. § 10.5(f).

¹³ See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

disability, resulting in the need for fusion as did the progression of the natural degenerative process.

The employing establishment has reported that work within appellant's restrictions would have been available in November 2007, but for the fact that appellant had voluntarily retired in 1987. Appellant has not submitted any medical evidence which establishes that she was totally disabled as of November 6, 2007 due to her accepted work injury.

The Board finds that appellant has not submitted sufficient medical evidence to establish a recurrence of a medical condition related to her accepted injury of August 18, 1985 commencing November 7, 2007. Therefore, OWCP's June 2, 2015 decision denying the claimed recurrence is proper under the law and facts of the case.

CONCLUSION

The Board finds that appellant has not met her burden to establish that she was entitled to compensation for a recurrence of disability after November 6, 2007.

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2015 decision of the Office of Workers' Compensation Programs 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

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