

loss and medical benefits and this decision was affirmed by an OWCP hearing representative on April 26, 2006. OWCP found that the weight of the medical evidence was represented by Dr. Stanley Askin, a Board-certified orthopedic surgeon selected as a referee physician to resolve a conflict in the medical evidence. The record indicates that from 2006 to 2009 appellant was working in a computer position with the United Parcel Service.

In decisions dated November 20, 2007, December 4, 2009, and October 7, 2011, the Board² reversed the termination because OWCP had not adequately documented its selection of Dr. Askin as the referee physician.

Upon return of the case, OWCP selected Dr. Thomas O'Dowd, a Board-certified orthopedic surgeon, as a referee physician to determine the extent of appellant's work-related condition. In a report dated February 20, 2012, Dr. O'Dowd provided a history and results on examination. He opined that appellant had no continuing disability casually related to the August 15, 2002 employment injury.

On July 20, 2012 appellant filed a Form CA-2a, claim for recurrence of disability, commencing June 9, 2012. He stated that he could not stand or sit for long periods, or lift normal weights.

Appellant submitted a June 12, 2012 report from Dr. Philip Getson, an osteopath, noting that appellant presented with acute back pain, that he was unable to stand erect and that he would undergo a magnetic resonance imaging (MRI) scan. A June 15, 2012 MRI scan of the lumbar spine showed annular bulging at most levels and an L5-S1 disc protrusion.

By decision dated September 24, 2012, OWCP denied appellant's claim for a recurrence of disability as of June 9, 2012.³ It found that the medical evidence was insufficient to establish the claim. Appellant requested a hearing before an OWCP hearing representative, which was held on May 23, 2013.

On October 9, 2012 appellant submitted a September 28, 2012 report from Dr. Getson, who provided results on examination. Dr. Getson stated that appellant was totally disabled due to his lumbar disc disease.

By decision dated October 10, 2012, OWCP terminated compensation for wage-loss and medical benefits. It found Dr. O'Dowd represented the weight of the evidence. Appellant requested a hearing before an OWCP hearing representative, which was held on January 14, 2013. Appellant submitted a report dated January 18, 2013 from Dr. Barry Gleimer, an osteopath, which reported that appellant's private employment involved sitting for eight hours and that he had progressive back pain. Dr. Gleimer opined that appellant was disabled for work.

In a decision dated August 2, 2013, the hearing representative found that OWCP had not met its burden of proof to terminate compensation benefits. He noted that the statement of

² Docket No. 09-0900 (issued December 4, 2009); Docket No. 07-0289 (issued November 20, 2007).

³ The record indicates that OWCP issued a payment for wage-loss compensation from August 21, 2006 to June 8, 2012, with an offset for actual earnings in private employment.

accepted facts (SOAF) had not discussed appellant's employment history, which included private employment since 2006.

With respect to a recurrence of disability, in a decision dated August 9, 2013, an OWCP hearing representative set aside the September 24, 2012 decision. The hearing representative directed OWCP to request an opinion from Dr. O'Dowd regarding a recurrence of disability commencing June 9, 2012.⁴

OWCP prepared a SOAF dated August 19, 2013 and requested a supplemental report from Dr. O'Dowd. In a report dated September 5, 2013, Dr. O'Dowd reviewed appellant's medical history and diagnostic studies. He opined that the August 2002 injury was a lumbar sprain/strain superimposed on chronic, preexisting, mild-to-moderate degenerative joint disease in the lumbar spine. Dr. O'Dowd stated, "It is impossible to postdate [appellant's] symptom complex to a work-related injury in 2002. I personally reviewed the MRI [scan] from 2009, reviewed the report from 2002 and the report from 2012 and there still is little change overtime on these MRI [scans] by report and by my personal review of the study from 2009." He stated that both Dr. Getson and Dr. Gleimer opined that appellant's symptoms were related to long-term sitting with chronic degenerative disc disease and he agreed with this opinion. Dr. O'Dowd concluded, "Therefore, after review of this information and in summary, [appellant] sustained a lumbar strain/sprain in 2002. He has long since recovered from that injury complex and [he] is having underlying persistent symptoms related to his abnormal long-term sitting position at work as clearly referenced by the other physicians and by his mildly progressive degenerative joint disease in his lumbar spine. It is not related to a single episode of trauma in 2002."

By decision dated September 16, 2013, OWCP stated that they were reducing appellant's compensation effective June 9, 2012 based on his actual earnings since August 21, 2006 with the United Parcel Service. It stated that his claim for a recurrence of disability was under development and if it were accepted the wage-earning capacity decision would be modified.

Appellant submitted reports from Dr. Mohsen Kalliny, a Board-certified anesthesiologist. In a report dated September 18, 2013, Dr. Kalliny provided results on examination and recommended appellant schedule medial branch nerve blocks from L4-S1 bilaterally.

By decision dated December 5, 2013, OWCP denied appellant's claim for a recurrence of disability. It found that the weight of the evidence was represented by Dr. O'Dowd. On December 5, 2013 OWCP also issued a notice of proposed termination.

Appellant requested a hearing before an OWCP hearing representative, which was held on May 20, 2014. At the hearing, he indicated that he was off work in 2009 because his back flared up, and he noted that he had been in an automobile accident in 2009. Following the hearing, appellant submitted medical evidence regarding his back treatment from 2009.

⁴ The hearing representative stated June 11, 2012 in her concluding paragraph, but the CA-2a form claim identified June 9, 2012 as the date of a recurrence of disability.

In a report dated January 9, 2014, Dr. Gleimer stated that appellant had some improvement in symptoms, but still had back pain and difficulty sitting, bending, lifting, and twisting. He stated that he would have to review records from 2002, but if appellant had complaints of bilateral or lower extremity radiation back in 2002, and appellant indicated he did, then “it is probable that he did sustain some degree of disc injury and radiculopathy dating back to his 2002 injury. If this is the case, then [appellant] has most certainly had more rapid progression of degeneration in his lumbar spine overtime as a consequence of his initial injury in 2002 than he would have experienced otherwise.”

By decision dated August 5, 2014, an OWCP hearing representative affirmed the December 5, 2013 decision denying a recurrence of disability. The hearing representative found that Dr. O’Dowd represented the weight of the medical evidence.

In a letter dated November 6, 2014, appellant, through counsel, requested reconsideration. He submitted an October 28, 2014 report from Dr. Gleimer. Appellant indicated that he had reviewed a September 12, 2002 MRI scan which showed disc injuries from L3-S1. Dr. Gleimer stated that, as degeneration progresses from the disc injuries over time, the disc spaces narrow and there is increased stress to the facet joints. He stated that there was an acute injury that progressed to a chronic injury. As to sitting, Dr. Gleimer stated that certainly this would cause increased intradiscal pressure and pain, but he did not feel this was a new injury. He opined that appellant’s current disability and symptoms was causally related to the 2002 injury and its progression.

By decision dated February 6, 2015, OWCP reviewed the merits and denied modification. It found that the weight of the evidence was represented by Dr. O’Dowd.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening or new exposure to the work environment that caused the illness.⁵

An employee who claims a recurrence of disability due to an accepted employment injury has the burden of proof to establish by the weight of substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound reasoning.⁶ Where no such rationale is present, medical evidence is of diminished value.⁷

⁵ 20 C.F.R. § 10.5(x); *R.S.*, 58 ECAB 362 (2007).

⁶ *I.J.*, 59 ECAB 408 (2008); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁷ *See Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

ANALYSIS

In the present case, appellant filed a claim for a recurrence of disability. The term “recurrence” implies that a new period of disability is causally related to his August 15, 2002 employment injury. Appellant had been working in private employment since 2006 and has claimed compensation for total disability as of June 9, 2012.⁸ As part of the development of the medical evidence, OWCP requested Dr. O’Dowd to provide an opinion on whether appellant had a recurrence of disability commencing June 2012. The Board notes that although Dr. O’Dowd had initially been selected as a referee physician, for purposes of this recurrence claim he was a second opinion physician.⁹

In a September 5, 2013 report, Dr. O’Dowd determined that appellant did not have a recurrence of disability in June 2012 causally related to the August 15, 2002 work injury. He opined that appellant had a chronic, preexisting degenerative disc disease in the lumber spine. Dr. O’Dowd found that appellant had sustained a lumbar sprain which had long since resolved, and that his current condition was related to the underlying degenerative disc disease. He opined that the degenerative condition had progressed and stated that periods of sitting in appellant’s private employment contributed to the progression. Dr. O’Dowd concluded that appellant did not have a disability commencing June 9, 2012 causally related to the August 15, 2002 injury.

Appellant has submitted reports from Dr. Gleimer with respect to his lumbar condition. In the October 28, 2014 report, Dr. Gleimer opined that appellant had sustained disc injuries at multiple levels due to the August 15, 2002 injury and these had progressed overtime and were the cause of his current symptoms. The Board finds that Dr. Gleimer’s reports are of diminished probative value to the issue represented. The accepted condition in this case was a lumbar sprain. Dr. Gleimer refers to a September 12, 2002 MRI scan and finds all of the multi-level lumbar disc findings are causally related to the August 15, 2002 lifting incident. He does not explain the causal relationship between the diagnosed disc conditions and the August 15, 2002 injury. Dr. Gleimer does not describe the relationship between the MRI scan findings and the employment injury.¹⁰ He acknowledges that sitting in appellant’s private employment would cause pressure on the discs, but then states that it is not a new injury. If appellant’s private employment aggravated the previous injury, the progression of the condition is not due to the accepted condition, but to an independent cause.¹¹

In addition, the reports from Dr. Gleimer and Dr. Kalliny did not discuss the current issue of disability as of June 9, 2012. For the above reasons, the Board finds that the weight of the medical evidence does not establish a recurrence of disability commencing June 9, 2012.

⁸ The Board notes that OWCP has paid compensation commencing June 9, 2012 based on a September 16, 2013 decision that found appellant’s earnings in private employment represented his wage-earning capacity. As appellant had previously filed his recurrence of disability claim, he was not seeking modification of a wage-earning capacity decision.

⁹ See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹⁰ See *R.A.*, Docket No. 10-844 (issued December 22, 2010).

¹¹ See *Gloria J. Duyck*, Docket No. 97-751 (issued January 19, 1999).

On appeal, appellant argues that the SOAF provided to Dr. O'Dowd was improper as it referred to an examination by Dr. Askin, and those reports should have been excluded as he had not been properly selected as an independent medical physician in a prior issue. As the Board explained in *R.A.*,¹² a physician's report should be excluded when there is evidence that OWCP may have influenced the opinion of the physician, such as through leading questions or telephone contact.¹³ The report should not be excluded in cases of procedural defects, such as presented in this case.

Appellant also argues the SOAF failed to provide sufficient detail regarding appellant's private employment. The issue in this case was a recurrence of total disability commencing June 9, 2012 causally related to the employment injury. The August 19, 2013 SOAF provided a proper background for an opinion on this issue.

Appellant argues that Dr. O'Dowd's opinion should not represent the weight of the medical evidence and that the opinion of Dr. Gleimer would create a conflict in the evidence. For the reasons noted above, Dr. Gleimer's opinion was of diminished probative value. Dr. O'Dowd represents the weight of the evidence and OWCP properly denied the claim for a recurrence of disability commencing June 9, 2012.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability commencing June 9, 2012.

¹² Docket No. 10-57 (issued November 19, 2010).

¹³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 6, 2015 is affirmed.¹⁴

Issued: June 3, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁴ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.