

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

M.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Miami, FL, Employer**

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**Docket No. 16-0077
Issued: June 1, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 20, 2015 appellant filed a timely appeal from a September 11, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established a recurrence of disability beginning October 24, 2013 due to the accepted July 26, 2012 employment injury; and (2) whether appellant met his burden of proof to establish an additional condition of disc herniation causally related to the accepted work injury of July 26, 2012.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On July 26, 2012 appellant, then a 48-year-old automation clerk, filed a traumatic injury claim (Form CA-1) alleging that he sustained spasms or pain in his lower back as a result of bending down to pick up a tray of mail.

In a diagnostic report dated August 14, 2012, Dr. Geoffrey Tashjian, a Board-certified radiologist, examined the results of a magnetic resonance imaging (MRI) scan of appellant's lumbar spine. He noted shallow left paracentral disc herniation at L5-S1, mild disc bulging and a posterior annular tear at L4-5, and mild disc desiccation at L3-4 with a disc bulge and a left foraminal annular tear. Dr. Tashjian stated that each of these impressions were indeterminate in age.

By decision dated August 14, 2012, OWCP accepted his claim for sprain of the lumbar region. Appellant worked intermittently on light and full duty until he returned to full-duty work on October 16, 2012.

On April 9, 2013 appellant filed a recurrence of total disability (Form CA-2a) as of March 17, 2013. OWCP initially denied appellant's claim for recurrence on May 21, 2013, and subsequently affirmed its denial of recurrence by decision dated August 9, 2013. In a February 7, 2014 decision, the Board affirmed OWCP's decision that appellant had not met his burden of proof to establish a recurrence of disability on March 17, 2013 causally related to the accepted work injury of July 26, 2012. The law and facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

On July 16, 2013 Dr. Mitchell R. Pollak, a Board-certified orthopedist, noted that appellant continued to experience pain in the lumbar region. On examination, he noted spasms and tenderness throughout the paravertebral muscles, extending throughout the lumbar region and into the sacroiliac joints of the pelvis. Dr. Pollak further noted a reduced range of motion with pain in flexion, extension, bilateral bending, and bilateral rotation.

In a report dated August 7, 2013, Dr. Pollak stated that appellant continued to experience pain in his lumbar spine. Appellant stated that there had been 90 percent improvement overall. Dr. Pollak opined that appellant had reached maximum medical improvement.

On October 29, 2013 Dr. Pollak noted that appellant had a recent exacerbation of pain in his lumbar spine. He stated that appellant's condition was aggravated by activities of daily living. Dr. Pollak administered a paravertebral injection at L5 with no complications.

On October 29, 2013 appellant filed a recurrence of total disability (Form CA-2a) commencing on October 24, 2013. He stated that he had flare-ups on March 25 and June 20, 2013, which were treated with injections and therapy. Appellant noted that he had muscle spasms in the same area as the original injury, and was in extreme pain such that he was unable to perform his job. He stopped work on March 25, 2013, but later returned to full duty after treatment. Appellant again stopped work on June 20, 2013 and returned to full duty after treatment. The employing establishment noted that he was on annual leave at the time of the

recurrence, and that he had called the employing establishment on October 19, 2013 to tell his supervisor that he had hurt his back while on vacation.

In a statement dated November 5, 2013, appellant noted that he had reinjured his back while on annual leave.

By letter dated November 18, 2013, OWCP informed appellant of the evidence needed to support his claim for recurrence of disability. It requested that he submit a narrative medical report from his treating physician detailing his current condition; a description of work duties he would not be able to perform; a rationalized medical opinion as to the relationship between his current condition and the accepted original injury, including an explanation of how his disability was due to the original injury with material worsening without an intervening cause; and the recommended course of treatment. OWCP further noted that, if the evidence established that appellant's disability was due to a new work-related injury or illness, a new claim would need to be filed or created. It also requested that he respond to its inquiries.

In a progress note dated November 11, 2013, Dr. Pollak stated that appellant still experienced pain in the lower back, but that there had been 70 percent improvement overall after an injection and physical therapy.

By letter dated November 26, 2013, Dr. Pollak stated:

“This is to inform you that [appellant] is a current patient in our office and has been treating with us since his original injury date of July 26, 2012. His initial complaint was back pain. After physical therapy treatments, rest, restrictions of activities an MRI [scan] of the [l]umbar spine was ordered on August 14, 2012. The results showed a herniation at L5-S1, disc bulging with a posterior annular tear at L4-5 and disc desiccation at L3-4 with a disc bulge and left foraminal annular tear. [Appellant] had reached MMI as of May 6, 2013, but his original injury can cause occasional exacerbations of symptoms and he will most likely continue to suffer these exacerbations. He has since returned to our office with the same symptoms on multiple occasions for treatment for his condition. [Appellant's] most recent exacerbation has warranted another MRI [scan] to be ordered which shows similar results as the previous scan with additional findings of stenosis of L4-5. His herniation is a permanent injury and will require treatment during flare-ups as well as modifications of any activities.”

In a progress note dated November 27, 2013, Dr. Pollak reported that appellant stated there had been a greater than 90 percent improvement in his condition.

In a duty status report (Form CA-17) dated December 3, 2013, Dr. Pollak released appellant to return to work on November 29, 2013 with restrictions. These restrictions included: lifting no more than 10 to 20 pounds for four to six hours per day, bending/stooping for no more than four to six hours per day, twisting for no more than four to six hours per day, pulling/pushing for no more than four to six hours per day, and operating machinery for no more than four to six hours per day.

On November 30, 2013 appellant responded to OWCP's inquiries. He stated that nothing out of the ordinary occurred when he reinjured his back -- the pain merely increased as the day progressed. Appellant noted that he had not sustained any other injuries, on or off the job, since his original injury.

By decision dated January 2, 2014, OWCP denied appellant's claim for a recurrence of disability. It found that the reports of Dr. Pollak did not contain a well-rationalized opinion to support how the accepted employment incident caused appellant's current diagnoses, nor did they contain a well-rationalized opinion to support that as of October 24, 2013, he had a material worsening of his accepted lumbar sprain such that he was disabled from work. OWCP noted that this decision did not affect appellant's eligibility for medical benefits for his accepted conditions.

On January 22, 2014 appellant requested an oral hearing before an OWCP hearing representative.

In a report dated February 3, 2014, Dr. Pollak noted that appellant described a recent exacerbation of pain in his lower back.

In a duty status report dated March 3, 2014, Dr. Pollak released appellant to full duty without restrictions.

On June 12, 2014 Dr. Pollak stated that appellant described a recent exacerbation of pain in his lower back. On examination, he noted spasm and tenderness, with restricted range of motion. In a follow-up report dated June 16, 2014, Dr. Pollak noted 70 percent improvement overall.

In a duty status report dated June 12, 2014, Dr. Pollak recommended that appellant work limited duty with restrictions on all activities other than simple grasping and fine manipulation.

The hearing was held before an OWCP hearing representative on August 6, 2014. At the hearing, a representative for appellant argued that OWCP should have updated appellant's list of accepted conditions to include a herniated disc. The hearing representative clarified that appellant was requesting a recurrence of disability for the period after his vacation in October 2013 and explained the medical evidence necessary to establish a claim for recurrence. He stated that as a hearing representative, he did not have the authority to update appellant's list of accepted conditions under this claim. The hearing representative held the record open for 30 days for the submission of additional evidence.

By letter dated September 3, 2014, appellant's representative at the hearing clarified that his argument in favor of the acceptance of appellant's recurrence claim was that "it is impossible for [appellant] to substantiate that his recurrence was causally related to the accepted injury because the district office failed to accept the appropriate diagnoses at the time of initial adjudication." He noted that he had inquired as to whether OWCP hearing representatives had the authority to expand a claim to include additional conditions and reverse a denial of recurrence, and that he had received a reply from a deputy director that hearing representatives do have this authority, contrary to what the hearing representative claimed at the August 6, 2014 hearing. Appellant's representative stated that the issues of a recurrence of disability and the

acceptance of an additional condition were “so intertwined that they cannot be viewed separately.”

Appellant also submitted progress notes from Dr. John E. Vinsant, Jr., a Board-certified orthopedic surgeon, from the years 2010, 2011, 2012, and 2014. These reports discussed conditions and recovery related to a December 13, 2011 automobile incident.

By decision dated October 8, 2014, the hearing representative affirmed OWCP’s decision dated January 2, 2014. He found that appellant had not presented any medical evidence establishing a herniated disc due to the July 26, 2012 incident which had now materially worsened and caused a recurrence of disability.

By letter dated June 11, 2015, received on June 15, 2015, appellant’s representative requested reconsideration of the October 8, 2014 decision. With his request, appellant submitted a medical report dated October 27, 2014 from Dr. Pollak who noted:

“[Appellant] is seen in follow-up at this time. He continues to describe exacerbation of his back pain. [Appellant] continues to be treated from an injury on July 26, 2012, that resulted in a lumbar disc herniation at the L4-5 level with lumbar disc injuries also noted at L3-4 and L5-S1. He continues to experience episodes of exacerbation and remissions.”

By letter dated April 2, 2015, Dr. Pollak stated:

“Dear sirs: I am writing to you on behalf of my patient, [appellant.] I wish to clarify my understanding of [appellant’s] injuries.

“[Appellant] was performing his usual duties at the U.S. Postal Service on July 26, 2012 when he experienced an acute onset of back pain upon lifting. [Appellant] was referred by his [employing establishment] for emergency care at the time of injury. The emergency care provider diagnosed a work-related back sprain and that diagnosis and was accepted by the Department of Labor.

“Following this injury, [appellant] came under my care and, due to his ongoing symptoms, I referred him to undergo an MRI [scan] of the lumbar spine. This study was performed on August 14, 2012 and interpreted by [Dr. Tashjian] to demonstrate [disc herniation, disc bulge, disc desiccation, and a left foraminal annular tear....]

“I have completed multiple medical reports for the Department of Labor and I described [appellant’s] diagnosis due to the accepted injury as a lumbar disc injury with muscle tear. I was completely unaware that the Department of Labor did not recognize my diagnoses of disc injury and muscle tear to be attributable to the work injury of July 26, 2012. The Department of Labor never wrote or contacted me to question this diagnosis. The Department of Labor paid for all my examinations and treatment for this diagnosis.

“I want to make clear to you my belief that the [findings listed above] as demonstrated by MRI [scan] are fully or at least partially attributable to the work-related event of July 26, 2012. My reasons for this belief are:

1. [Appellant] was performing the full duties of his position without restrictions to his back up until the time of the July 26, 2012 injury.
2. [Appellant’s] symptomology remained at a severe level several weeks subsequent to the lifting event, necessitating the MRI [scan] referral, when one would expect the symptoms of mere back sprain to be resolving.
3. [Appellant’s] history, symptoms and physical findings were all consistent with an acute severe back injury. I reviewed [appellant’s] medical records and x-ray reports from two prior auto[mobile] accidents that I understand were provided to the Department of Labor. These primarily involved injuries to the upper body, but a lumbar spinal x-ray was included. The findings on the MRI [scan] done just 19 days after the accepted work-related injury differ from the earlier reported injuries and x-ray findings, indicative of an acute injury to the lumbar discs.

“I believe the Department of Labor has erred in merely accepting a lumbar sprain as the diagnosis attributable to the July 26, 2012 injury in that the diagnosis of herniation cannot be accurately made until an MRI [scan] is performed. That having been said, [appellant] has demonstrated his desire to work and returned to work as soon as he was medically released to do so....

“It is my belief that [appellant] experienced an exacerbation of his symptoms on October 24, 2013 (as he did on prior occasions as well) attributable to his underlying injuries of July 26, 2012. I examined [appellant] at the time of this recurrence and his physical findings were consistent with the prior back injury. [Appellant] provided a history of no new intervening incident or injury that caused this exacerbation.

“I understand that the Department of Labor has denied [appellant’s] claimed exacerbations as not being established to be causally related to the accepted “back sprain” of July 26, 2012. I would like to reiterate that this diagnosis was based on a one-time examination by an emergency physician, in contrast to multiple examinations, MRI [scan] evaluation by a [B]oard[-]certified orthopedic surgeon. This is not a complicated case. [Appellant] had an injury to his back that resulted in disc herniation with episodes of exacerbations.”

By decision dated September 11, 2015, OWCP reviewed the merits of appellant’s claim and denied modification of its October 8, 2014 decision. It stated that Dr. Pollak “failed to clearly provide an affirmative opinion that [appellant] sustained a recurrence of disability to the July 26, 2012 injury and failed to clearly explain how [his] disability for work was caused by the

July 26, 2012 injury.” OWCP noted that his April 2, 2015 letter was not sufficiently rationalized to establish his recurrence claim.

LEGAL PRECEDENT -- ISSUE 1

Under FECA,² the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.³ Disability is not synonymous with a physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA.⁴

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 compensable injury or illness and without an intervening injury or new exposure in the work environment.⁵ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee’s physical limitations and which is necessary because of a work-related injury or illness is withdrawn or altered so that the assignment exceeds the employee’s physical limitations.⁶

OWCP’s procedures state that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁷

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the 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 a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to

² 5 U.S.C. §§ 8101-8193.

³ See *Prince E. Wallace*, 52 ECAB 357, 358 (2001).

⁴ *Cheryl L. Decavitch*, 50 ECAB 397, 401 n.5 (1999); *Maxine J. Sanders*, 46 ECAB 835, 840 (1995).

⁵ 20 C.F.R. § 10.5(x); see *S.F.*, 59 ECAB 525, 531 (2008). See 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(c)(5) (October 2009).

the employment injury and supports that conclusion with medical reasoning.⁸ Where no such rationale is present, the medical evidence is of diminished probative value.⁹

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for lumbar sprain on August 14, 2012. On October 29, 2013 appellant filed a claim for recurrence of disability commencing October 24, 2013. OWCP denied this recurrence claim in decisions dated January 2 and October 8, 2014, and September 11, 2015.

The Board finds that appellant has not submitted sufficient evidence to establish a recurrence of disability commencing October 24, 2013 causally related to the July 26, 2012 work injury. The record does not contain sufficient contemporaneous medical evidence establishing that appellant suffered a recurrence of disability on October 24, 2013, along with medical opinion evidence linking this recurrence to the accepted July 26, 2012 work injury, and noting regarding the beginning and ending dates of appellant's alleged recurrence of disability.

In a report dated October 29, 2013, Dr. Pollak noted that appellant had a recent exacerbation of pain in his lumbar spine. By letter dated November 26, 2013, he stated:

"This is to inform you that [appellant] is a current patient in our office and has been treating with us since his original injury date of July 26, 2012. His initial complaint was back pain. After physical therapy treatments, rest, restrictions of activities an MRI [scan] of the lumbar spine was ordered on August 14, 2012. The results showed a herniation at L5-S1, disc bulging with a posterior annular tear at L4-5 and disc desiccation at L3-4 with a disc bulge and left foraminal annular tear. [Appellant] had reached MMI as of May 6, 2013, but his original injury can cause occasional exacerbations of symptoms and he will most likely continue to suffer these exacerbations. He has since returned to our office with the same symptoms on multiple occasions for treatment for his condition. [Appellant's] most recent exacerbation has warranted another MRI [scan] to be ordered which shows similar results as the previous scan with additional findings of stenosis of L4-5. [Appellant's] herniation is a permanent injury and will require treatment during flare-ups as well as modifications of any activities."

In Dr. Pollak's April 2, 2015 letter, he stated, "It is my belief that [appellant] experienced an exacerbation of his symptoms on October 24, 2013 (as he did on prior occasions as well) attributable to his underlying injuries of July 26, 2012. I examined [appellant] at the time of this recurrence and his physical findings were consistent with the prior back injury. [Appellant] provided a history of no new intervening incident or injury that caused this exacerbation."

The Board finds that Dr. Pollak's reports are insufficient to establish that appellant sustained a recurrence of disability commencing October 24, 2013 as a result of the accepted disc

⁸ *Ronald A. Eldridge*, 53 ECAB 218, 221 (2001).

⁹ *Mary A. Ceglia*, Docket No. 04-113 (issued July 22, 2004).

herniation related to the July 26, 2012 employment incident. Dr. Pollak did not specify the exact starting and ending dates of appellant's recurrence of total disability -- he provided only the date upon which appellant's recurrence allegedly began. As such, the Board finds that Dr. Pollak's reports of record are insufficient to establish a recurrence of total disability.

LEGAL PRECEDENT -- ISSUE 2

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.¹⁰ To establish a causal relationship between a claimed condition and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.¹¹ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹² Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹³ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant has not submitted sufficient evidence to establish an additional condition of disc herniation causally related to the accepted work injury of July 26, 2012. To establish an additional condition under a claim, an appellant must provide sufficient evidence to demonstrate that the additional condition is causally related to the accepted work injury. Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹⁵

Dr. Pollak's April 2, 2015 letter is not fully rationalized. While it contains an affirmative opinion that appellant's diagnosed disc herniation is related to the July 26, 2012 injury, the letter does not contain sufficient medical rationale explaining his opinion that appellant's disc herniation is causally related to the accepted injury. Dr. Pollak based his opinion partly on the rationale that appellant "provided a history of no new intervening incident or injury that caused this exacerbation." As noted above, neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or

¹⁰ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹¹ *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

¹² *D.E.*, 58 ECAB 448 (2007); *Mary J. Summers*, 55 ECAB 730 (2004).

¹³ *Phillip L. Barnes*, 55 ECAB 426 (2004); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹⁴ *V.W.*, 58 ECAB 428 (2007); *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁵ *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149, 155-56 (2006); *D'Wayne Avila*, 57 ECAB 642, 649 (2006).

aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁶ Appellant's statement that he had not experienced any intervening injuries is not sufficient to establish the causal relationship between his originally accepted work injury and the additional claimed condition of disc herniation.

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 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 beginning October 24, 2013 due to the accepted July 26, 2012 employment injury. The Board further finds that appellant did not meet his burden of proof to establish an additional condition of disc herniation causally related to the accepted work injury of July 26, 2012.

ORDER

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

Issued: June 1, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁶ V.W., 58 ECAB 428 (2007); *Ernest St. Pierre*, 51 ECAB 623 (2000).