

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of disability commencing December 20, 2008 causally related to her accepted November 29, 2005 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as presented in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On November 29, 2005 appellant, then a 49-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her lower back and left arm during the course of her federal employment. In an accompanying statement she indicated that while she was pulling mail a ledge slipped causing her to fall backward and hit her lower back and left arm against a metal case. Appellant did not stop work, but she began working in a modified-duty position on November 30, 2005.

In a May 22, 2006 note, Dr. Hien T. Nguyen, appellant's treating Board-certified family practitioner, indicated that appellant could work light duty with no lifting more than 10 pounds, no bending, no mail carrying, and no driving. He continued to submit notes indicating ongoing treatment of appellant and listing similar restrictions.

On July 28, 2006 the employing establishment offered appellant a limited-duty position as a rural carrier, with lifting limited to less than 10 pounds and reaching above the shoulder limited to two hours. Appellant accepted the offered position on August 19, 2006 and returned to work. The position was effective August 16, 2006.

On May 9, 2008 OWCP accepted appellant's claim for contusion of ribs and aggravation of sciatica.

Appellant worked in a limited-duty capacity for several years, but in August 2008, she stopped work entirely. She received continuation of pay from August 2 to December 19, 2008. Appellant thereafter filed a recurrence of disability (Form CA-2a) alleging disability commencing December 20, 2008.

In an October 8, 2008 report, Dr. Jeff Jacobson, a Board-certified neurosurgeon, indicated that appellant had persistent back and leg pain. He noted that he could find no anatomical correlation for her complaints. Dr. Jacobson noted that appellant did have mild degeneration of the disc, which was appropriate for her age. He opined that she should resume physical therapy and continue with an aggressive home exercise program.

In progress notes dated from October 21, 2008 through January 16, 2009, Dr. Nguyen noted that appellant complained of persistent lower back pain radiating down her left leg. He noted that she reported difficulty walking long distances and going up and down steps.

³ Docket No. 14-1281 (issued November 6, 2014).

Dr. Nguyen diagnosed back pain/radicular symptoms, well-controlled hypertension, and hyperlipidemia. On January 30, 2009 he responded to OWCP's questions by noting that appellant's diagnoses were low back pain, sciatica, and limb pain. Dr. Nguyen opined that the residuals from her employment injury had not resolved, that she had not reached maximum medical improvement, and that she was totally disabled from all work activities. On February 23, 2009 he indicated that appellant had chronic lower back pain due to work-related injury in 2005 and was unable to work commencing September 2008 due to chronic lower back pain/radiculopathy. Dr. Nguyen also excused her from work in notes dated March 12 and April 10 and 24, 2009.

On April 16, 2009 OWCP denied appellant's recurrence claim. It determined that the medical evidence of record failed to demonstrate a relationship between any disability on or after December 20, 2008 and her November 29, 2005 employment injury.

Appellant, through counsel, requested reconsideration on May 11, 2009.

In a September 3, 2009 report, Dr. Robert W. Freeman, a physician Board-certified in pain management, noted that appellant had been his patient since November 4, 2008, that her diagnoses were chronic low back pain, status post trauma, and mild lumbar disc disease at L5-S1 by magnetic resonance imaging (MRI) scan. He discussed her employment injury and noted that she had progressive disability since the time of the trauma. Dr. Freeman indicated that appellant stopped working when she noted that her leg began to give out on her. He noted that sitting, standing, or walking more than 15 minutes at a time and climbing may increase dysfunction and pain. Dr. Freeman also noted that twisting, bending, and reaching above appellant's shoulders were activities to be minimized. He opined that the results of her trauma appeared to have stabilized, but that unfortunately backs do not improve with age, but rather deteriorated. Dr. Freeman opined that the injury had accelerated the deterioration of appellant's back.

Appellant continued to submit multiple notes from Dr. Nguyen. Dr. Nguyen submitted pairs of notes on multiple dates from February 23, 2009 through February 9, 2011. The first of these notes indicated that appellant had chronic lower back pain due to a work-related injury in 2005 and that she was unable to work, commencing September 2008, due to chronic lower back pain/radiculopathy. The second note indicated that she may return to work for financial reasons, not medical reasons. In these notes, Dr. Nguyen indicated that appellant had a limitation of working five hours a day on a trial basis, and that her limitations included no bending or standing or lifting more than 10 pounds. He also recommended that her progress be reviewed on a weekly basis by Dr. Freeman.

In a March 9, 2010 report, Dr. Talal Ghazal, a physician Board-certified in pain management, noted that a lumbar spine MRI scan performed on September 23, 2008 showed a mild central disc protrusion at L5-S1 with associated disc desiccation, which was consistent with the MRI scan performed in November 2007. He also noted that appellant had a computerized tomography scan of the lumbar spine with contrast on August 19, 2009 which showed multilevel degenerative disc changes, mild facet arthrosis, and thickening of the ligamentum flavum, most pronounced at L3-4, L4-5, and L5-S1, with no broken vertebrae. Dr. Ghazal described appellant's her job duties and her injury. He noted that the following activities could increase dysfunction and pain: sitting, standing, or walking for more than 15 minutes at a time, climbing,

and twisting motion. Dr. Ghazal also noted that twisting bending and reaching above the shoulder should be minimized and recommended a dorsal spinal cord stimulator.

Appellant, through counsel, requested reconsideration by letter received by OWCP on April 20, 2010. She again requested reconsideration on May 27, 2010.

In an October 6, 2010 decision, OWCP reviewed appellant's claim on the merits, since it had not issued a decision within 90 days of receipt of the reconsideration request, but denied modification of its prior decision. It found that she had not established that her work injury of November 29, 2005 contributed to her claimed disability for work after December 20, 2008.

Dr. Nguyen continued to submit dual notes, dated from November 17, 2010 through May 4, 2012, indicating both that appellant was disabled, but that she may return to work for financial reasons.

By letter dated July 14, 2011 and received by OWCP on July 18, 2011, appellant, through counsel, filed a request for reconsideration and submitted additional evidence.

In a March 21, 2011 report, Dr. Ghazal listed appellant's diagnoses as of January 25, 2011 as chronic axial low back pain with left lumbosacral radiculopathy, MRI scan evidence of lumbar disc protrusion at L5-S1 with S1 nerve root abutment, mild facet joint arthropathy of the lumbar spine, and status post spinal cord stimulator system implantation on June 29, 2010. He noted that there was apparently some confusion because he had not included the word "sciatica" or "sciatica pain" as part of his prior diagnoses. Dr. Ghazal explained that sciatica was an older generic term for pain in the buttocks region which starts in the back and radiates down the legs. He also noted that, concerning the cause of the sciatica, appellant did not have pain in her back radiating down her left leg before November 29, 2005 when a heavy object, weighing approximately 200 pounds, fell on her and she fell on a table injuring her back. Dr. Ghazal noted that her pain had been constant since the incident.

Counsel submitted letters to OWCP reminding it of the requests for reconsideration dated February 8, 2012 and January 15, 2013. However, no action was taken by OWCP on appellant's claim. By letter dated January 17, 2014, received on January 21, 2014, counsel asked OWCP to immediately process the request for reconsideration.

By decision dated April 16, 2014, OWCP denied reconsideration of its October 6, 2010 decision. It considered counsel's letter January 21, 2014 to be a request for reconsideration, found that it was filed more than one year after the October 6, 2010 merit decision, and determined that appellant's reconsideration request was untimely. OWCP denied her reconsideration request as it was untimely filed and failed to establish clear evidence of error.

Appellant appealed to the Board on May 12, 2014. On November 6, 2014 the Board issued an Order Remanding Case. The Board determined that appellant's request for reconsideration was received by OWCP on July 18, 2011, that she had submitted new evidence at that time, and that OWCP should consider her reconsideration request as timely. The Board

remanded the case for OWCP to consider appellant's request under 20 C.F.R. §§ 10.606, 10.608, and 10.609.⁴

By letter dated February 24, 2015, counsel asked that OWCP issue a decision pursuant to the Board's remand order. On December 15, 2015 he again asked OWCP to rule, noting that it had been over a year since the Board's order. On May 13, 2016 counsel asked OWCP to issue a decision and noted that appellant had waited more than one year for further development of her claim.

By decision dated August 25, 2016, OWCP denied modification of its prior decisions, finding that the evidence of record did not establish a recurrence of disability, commencing December 20, 2008.

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 has resulted from a previous injury or illness, without an intervening injury or new exposure to the work environment that caused the illness.⁵ The 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 reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁶

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 total disability and show that she cannot perform such light duty. 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 job requirements.⁷ The burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the disabling condition is causally related to the employment injury. The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated, or aggravated by the accepted injury.⁸

⁴ *Id.*

⁵ 20 C.F.R. § 10.5(x). *See T.S.*, Docket No. 09-1256 (issued April 15, 2010).

⁶ *Id.*

⁷ *S.F.*, 59 ECAB 525 (2008); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁸ *M.P.*, Docket No. 15-0361 (issued September 27, 2016).

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁹ 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.¹⁰

ANALYSIS

OWCP accepted that on November 29, 2005 appellant sustained a contusion of her ribs and aggravation of her sciatica due to an employment incident on that date. Appellant returned to modified work the following day. On July 28, 2006 the employing establishment made an offer for her to return to work as a rural carrier, with limitation of lifting no more than 10 pounds and reaching above the shoulder limited to two hours. This position was within the work restrictions set by appellant's treating physician, Dr. Nguyen. Appellant returned to work in this limited capacity until August 2008, when she stopped work. She filed claims for compensation commencing December 20, 2008.

The Board finds that appellant failed to meet her burden of proof to establish a recurrence of disability on or after December 20, 2008. In support of her recurrence claim, appellant submitted multiple notes from Dr. Nguyen. In some of these notes, Dr. Nguyen indicated that she was unable to work commencing September 2008 due to chronic lower back pain/radiculopathy, however, he also indicated that for financial reasons she could return to work. He set forth limitations, including not lifting more than 10 pounds. On most dates Dr. Nguyen submitted a pair of statements, giving both options. In a January 30, 2009 response to OWCP's queries, he indicated that appellant's diagnoses were low back pain, sciatica, and limb pain. Dr. Nguyen opined that she was totally disabled from all work activities. However, he failed to provide any explanation as to why appellant could no longer perform her limited-duty position. Dr. Nguyen's opinions were devoid of findings on examination or any explanation as to why she was no longer able to perform her limited-duty work. Medical conclusions unsupported by rationale are of little probative value.¹¹ Although the notes of Dr. Nguyen generally supported appellant's claim for recurrence, his opinions were conclusory and contained no rationalized explanation as to how or why her conditions caused disability or remained symptomatic.¹²

The remaining physicians also failed to provide a well-rationalized opinion indicating that appellant could not perform her limited-duty employment. Dr. Jacobson, in an October 8, 2008 report, noted that she had persistent back and leg pain, but that there was no anatomical correlation for this. He did not provide any opinion with regard to her ability to perform her

⁹ See *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

¹⁰ See *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹¹ *Willa M. Frazier*, 55 ECAB 379 (2004); *Jimmy H. Duckett*, 52 ECAB 332 (2001).

¹² See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

limited work duties. In a September 3, 2009 report, Dr. Freeman opined that appellant's work injury accelerated and focused the deterioration of her back. He noted that certain activities could increase dysfunction and pain, including standing sitting, or walking for more than 15 minutes at a time or climbing. However, Dr. Freeman also never provided an explanation as to why appellant could not perform her limited-duty position. Furthermore, his opinion is speculative, and is therefore of diminished probative value.¹³

Finally, although Dr. Ghazal discussed appellant's pain in his reports of March 9, 2010 and March 21, 2011, he did not provide an opinion as to her ability to perform her limited-duty work assignment. The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify her disability and entitlement to compensation.¹⁴

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish 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.¹⁵ In the case at hand, appellant has not submitted medical evidence sufficient to show that the claimed recurrence of disability was causally related to the accepted employment-related conditions of contusion of ribs and aggravation of sciatica.

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 failed to meet her burden of proof to establish a recurrence of disability on or after December 20, 2008 causally related to her accepted November 29, 2005 employment injury.

¹³ *Ricky S. Storms*, 52 ECAB 349, 352 (2001) (the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, but must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty); *see also D.D.*, 57 ECAB 734, 739 (2006).

¹⁴ *Y.A.*, Docket No. 16-0258 (April 13, 2016).

¹⁵ *L.B.*, Docket No. 15-1017 (issued September 19, 2016); *see also S.S.*, 59 ECAB 315 (2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 25, 2016 is affirmed.

Issued: May 26, 2017
Washington, DC

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

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

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