

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

C.C., Appellant)	
)	
and)	Docket No. 17-1451
)	Issued: August 9, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Bakersfield, CA, Employer)	
)	

Appearances:
Daniel M. Goodkin, 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 June 16, 2017 appellant, through counsel, filed a timely appeal from a March 20, 2017 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 over the merits of this 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 met her burden of proof to establish a recurrence of disability, commencing January 21, 2008, causally related to her accepted October 4, 1982 employment injury.

FACTUAL HISTORY

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

On November 1, 1982 appellant, then a 28-year-old carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a back injury causally related to her federal employment beginning October 4, 1982. She submitted a March 14, 1983 supplemental statement explaining that she felt back pain during the week of September 27, 1982 while performing her federal employment duties, which included lifting and unloading sacks of mail. OWCP assigned this claim File No. xxxxxx059.

On June 24, 1983 OWCP referred appellant for a second opinion evaluation with Dr. Joel D. Mack, a Board-certified orthopedic surgeon. In his July 8, 1983 report, Dr. Mack noted appellant's history of injury and diagnosed chronic lumbosacral strain with minimal radiculopathy. On September 7, 1983 OWCP accepted appellant's claim for lumbosacral strain.

Appellant underwent a lumbar thermogram on June 30, 1983 which was abnormal suggesting involvement of the L4 and L5 nerve fibers. On December 27, 1983 she underwent a computerized tomography (CT) scan which demonstrated a herniated disc at L5-S1. On May 7, 1984 the employing establishment found that appellant was permanently disabled and offered her a permanent limited-duty position as a letter carrier. Appellant underwent a second lumbar thermogram on September 1, 1984 which was abnormal and demonstrated possible L5 nerve irritation.

In a note dated December 15, 1987, appellant's attending physician, Dr. Marshall S. Lewis, an orthopedic surgeon, diagnosed degenerative disc disease at L5-S1 associated with her prior diagnosis as well as possible herniated nucleus pulposus at L5-S1. He repeated these findings and diagnoses on December 16, 1987.

On January 11, 1988 OWCP referred appellant for an additional second opinion evaluation by Dr. Mack. In his February 26, 1988 report, Dr. Mack diagnosed lumbosacral strain with possible minimal disc disease based on her positive straight leg raising. He indicated that appellant had a 20-pound lifting restriction, with no repetitive bending or stooping.

In a report dated April 2, 1992, Dr. Lewis reported that appellant was markedly improved and working 10 hours a day. He noted x-rays showed some mild facet narrowing at L5-S1. Dr. Lewis determined that appellant could work full activities as a flat sorting machine operator.

³ Docket No. 09-1392 (issued January 14, 2010); Docket No. 13-0358 (issued June 18, 2013).

On March 14, 2008 appellant filed an occupational disease claim (Form CA-2) alleging a back injury due to the lifting she performed during her federal employment.⁴ She attributed her condition to a change in her light-duty job requirements from repairing torn mail while sitting, to working in hand case which entailed lifting trays of mail weighing over 25 pounds and sitting on a rest bar. Appellant indicated on the claim form that her work-related diagnoses included herniated disc, lumbar pain, bilateral hip pain, and with left leg numbness and weakness. She further indicated that she became aware of these conditions on January 21, 2008.

In a development letter dated March 19, 2008, OWCP requested additional factual and medical evidence in support of appellant's claim. It afforded appellant 30 days for a response.

By decision dated May 19, 2008, OWCP denied appellant's occupational disease claim, finding that the medical evidence submitted was insufficient to establish causal relationship between appellant's diagnosed condition and her implicated employment duties.

On June 17, 2008 appellant requested a review of the written record by an OWCP hearing representative. By decision dated December 4, 2008, an OWCP hearing representative found that appellant had established the factual portion of her occupational disease claim, but had failed to provide the necessary medical opinion evidence to establish causal relationship between her diagnosed conditions and her federal employment duties.

Appellant subsequently appealed to the Board. By January 14, 2010 decision, the Board affirmed OWCP's May 19 and December 4, 2008 decisions.⁵ The Board found that appellant had not submitted rationalized medical evidence establishing causal relationship between the diagnosed conditions and the accepted employment duties.

Appellant, through counsel, again requested reconsideration on January 5 and October 18, 2011 and March 27, 2012. She submitted additional medical evidence. By decisions dated February 22, 2011, January 11, and June 19, 2012, OWCP denied modification of its prior decision.

Appellant, through counsel, appealed those decisions to the Board. In its June 18, 2013 decision, the Board remanded the case to OWCP for referral to a second opinion physician.⁶

On return of the case record on August 15, 2013 OWCP referred appellant to Dr. Ernest Miller, a Board-certified orthopedic surgeon. It provided Dr. Miller with a statement of accepted facts (SOAF). In his August 29, 2013 report, Dr. Miller provided a medical history, history of injury, and results on examination. He noted that appellant reported injuring her back in 1983 while working as a letter carrier. Dr. Miller reviewed a magnetic resonance imaging (MRI) scan, which demonstrated degenerative disc disease of the lumbar spine and facet arthritis of the lumbar spine. He diagnosed chronic lower back pain from 1983, herniated lumbar disc dating from a 1983

⁴ OWCP assigned that claim File No. xxxxxx312. File Nos. xxxxxx312 and xxxxxx059 have been administratively combined with File No. xxxxxx312 serving as the master file.

⁵ Docket No. 09-1392 (issued January 14, 2010).

⁶ Docket No. 13-0358 (issued June 18, 2013).

employment injury, and chronic lower back pain with acute exacerbation and remissions. Dr. Miller noted that appellant had retired, and he concluded that she would continue to suffer residuals of the 1983 injury, including exacerbations and remissions.

By decision dated February 27, 2014, OWCP denied the March 24, 2008 claim for compensation. It found that the medical evidence did not support the claimed back conditions were causally related to the January 21, 2008 alleged employment factors.

On March 11, 2014 appellant filed a recurrence of disability (Form CA-2a) commencing January 21, 2008 causally related to her September 30, 1982 employment injury. She noted that, following her 1982 injury, she had returned to work in a limited-duty position for four hours a day, but then retired on October 31, 2009. Appellant noted that OWCP's physician found on August 29, 2013 that her current back condition was related to her 1982 employment injury.

Appellant resubmitted Dr. Miller's August 29, 2013 second opinion evaluation. She also provided a March 25, 2010 report from Dr. Pankaj Shukla, a Board-certified internist. Dr. Shukla wrote that appellant had a history of low back pain in January 2008, with severe pain radiating into the legs. He reported that she did not have these symptoms prior to January 2008. Dr. Shukla reviewed appellant's February 1, 2008 MRI scan and found mild-to-moderate lumbar spondylosis with central canal and neural foraminal stenosis.

In a June 16, 2014 development letter, OWCP requested that appellant submit additional medical evidence with respect to her claim for recurrence of disability. It noted that Dr. Shukla indicated that she did not have symptoms prior to January 2008. OWCP afforded appellant 30 days for a response.

Counsel submitted a June 17, 2014 letter, arguing that Dr. Miller supported that appellant had a disabling condition causally related to the 1982 injury. In the alternative, he contended that if Dr. Miller's report was not based on a proper factual background, OWCP was required to undertake further development of appellant's March 14, 2008 occupational disease claim.

By decision dated September 12, 2014, OWCP denied the claim for a recurrence of disability. It found that Dr. Miller had not addressed how the 1982 injury could be the cause of appellant's current condition.

By letter dated November 4, 2014, counsel argued that, while Dr. Miller had referred to a 1983 injury, this was simply a typographical error and he was referring to the 1982 injury. He further argued that, while OWCP had denied the 2008 claim because Dr. Miller had opined that appellant's condition was causally related to the prior injury, it was now denying a recurrence of disability because Dr. Miller had not offered a probative opinion on the issue. Counsel requested a response within 30 days so that appellant could preserve her appeal rights.

OWCP determined that further development of the issue was warranted. On December 19, 2014 it referred appellant and a new SOAF for an additional second opinion evaluation with Dr. Miller. A December 2, 2014 memorandum provided additional questions for Dr. Miller. OWCP inquired whether there was a currently diagnosed condition causally related to the 1982 work injury, whether a current condition was an aggravation of a preexisting condition, and whether appellant still had residuals of the 1982 work injury.

In a January 22, 2015 report, Dr. Miller provided a history, results on examination, and reviewed medical records. He noted that inspection of appellant's lumbosacral spine was unremarkable, but that appellant reported pain over the lumbosacral junction. Appellant had normal range of motion of the lumbar spine, but positive straight leg raising at 70 degrees. Dr. Miller diagnosed chronic lower back pain dating from an industrial injury in 1982 with diagnoses of herniated lumbar disc with sciatica and lower extremity pain. He opined that all of appellant's symptoms, complaints, diagnoses, and need for medical treatment were medically connected to the 1982 injury. As to whether appellant had "objective residuals" related to the 1982 work injury, Dr. Miller responded "yes." He also reported that appellant demonstrated no objective evidence of muscle atrophy, reflex abnormality, muscle weakness, or sensory deficit in her lower extremities.

In a February 19, 2015 supplemental report, Dr. Miller noted that he had received a February 13, 2015 facsimile requesting clarification as to continuing residuals of the 1982 injury, and had been advised that pain was not a compensable diagnosis without objective findings.⁷ He indicated that the question did not define "objective residuals," but certainly residuals would be symptoms and complaints as documented in the medical record. Dr. Miller further wrote that his findings on examination were normal, and his review of the medical record available for review suggested no objective findings other than lumbar spondylosis or degenerative disc disease dating from 1982. He indicated that there were no laboratory studies in the medical records.

In a letter dated March 6, 2015, counsel provided additional medical documents including a negative cervical MRI scan and an electromyogram (EMG). Appellant's April 17, 2014 EMG demonstrated bilateral L4-5 lumbar radiculopathy and bilateral lower extremity sensory neuropathy. Dr. Jian C. Lin, a neurologist, diagnosed thoracic or lumbosacral neuritis or radiculitis on March 7 and May 21, 2014.

The record contains a May 29, 2015 OWCP letter to counsel, noting that Dr. Miller had found no objective residuals related to the 1982 injury. OWCP wrote that the weight of the medical evidence did not warrant reopening the claim.⁸

In an August 18, 2015 letter, counsel again noted the recent MRI scan and electrodiagnostic studies, and additional reports from Dr. Lin. He contended that OWCP had an obligation to secure clarification of the second opinion evaluation. Counsel contended that Dr. Miller did not have the complete medical record including electrodiagnostic testing and could not provide a thorough report.

On January 6, 2016 appellant, through counsel, requested reconsideration of the May 29, 2015 decision. Counsel argued that Dr. Miller did not properly review evidence of objective findings. Appellant resubmitted a May 10, 2014 cervical MRI scan and the EMG.

⁷ The record does not appear to contain a letter requesting clarification from Dr. Miller.

⁸ In a letter dated September 14, 2015, OWCP referred to the May 29, 2015 letter as a decision that the weight of the medical evidence did not support reopening appellant's claim.

In a letter dated February 22, 2016, OWCP advised that the May 29, 2015 letter was not a formal decision. It noted that appellant may pursue appeal rights with respect to the September 12, 2014 decision, and wrote that no action would be taken as the request was not based on an appealable decision.

Thereafter, by decision dated March 24, 2016, OWCP reviewed the merits and denied the recurrence of disability claim.⁹ It noted that the arguments raised in the January 6, 2016 reconsideration request, but found that the medical evidence of record did not establish disability commencing January 21, 2008 causally related to a 1982 work injury.

On April 5, 2016 appellant requested a hearing before an OWCP hearing representative. A hearing was held on January 24, 2017.

By decision dated March 20, 2017, the hearing representative affirmed the March 24, 2016 OWCP decision. She found that the medical evidence of record did not establish 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 which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹⁰

Appellant has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence, a causal relationship between her recurrence of disability and the accepted employment injury.¹¹ This burden includes the necessity of furnishing 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 employment factors and supports that conclusion with sound medical reasoning.¹²

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares

⁹ The decision asserted that the claim had been further reviewed under 5 U.S.C. § 8128, and a new decision was being issued. No further explanation was provided.

¹⁰ 20 C.F.R. § 10.5(x).

¹¹ *J.W.*, Docket No. 17-0715 (issued May 29, 2018); *M.B.*, Docket No. 17-1389 (issued April 6, 2018); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-9 (1982).

¹² See *J.W.*, and *M.B.*, *id.*; *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

responsibility to see that justice is done.¹³ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121¹⁴

ANALYSIS

The Board finds that this case is not in posture for a decision.

OWCP initially accepted that appellant sustained a lumbar strain beginning October 4, 1982 due to her accepted employment duties. Appellant returned to full-duty work in April 1992. She initially filed a new occupational disease claim on March 14, 2008. After development of the medical evidence as directed by the Board and based on the opinion of the second opinion physician, Dr. Miller, OWCP denied appellant's new occupational disease claim, finding that Dr. Miller attributed her current conditions to her 1982 employment injury. Appellant then filed a claim for a recurrence of disability commencing January 21, 2008 causally related to her 1982 employment injury.

OWCP again referred appellant to Dr. Miller. In his January 22, 2015 report, Dr. Miller diagnosed chronic lower back pain dating from an industrial injury in 1982 with diagnoses of herniated lumbar disc with sciatica and lower extremity pain. He opined that all of appellant's symptoms, complaints, diagnoses, and need for medical treatment were medically connected to the 1982 injury. As to whether appellant had "objective residuals" related to the 1982 work injury, Dr. Miller responded "yes." OWCP requested a supplemental report, and Dr. Miller responded on February 19, 2015 noting that his findings on physical examination were normal, and his review of the available medical record did not include objective findings other than lumbar spondylosis or degenerative disc disease dating from 1982. Dr. Miller indicated that there were no laboratory studies in the medical records.

Once OWCP undertakes to further develop the medical evidence, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁵ After undertaking development of the evidence by referring appellant to Dr. Miller for an opinion on ongoing conditions causally related to her 1982 employment injury, it was responsible for obtaining a rationalized medical opinion on this issue. Dr. Miller's reports are inconsistent in diagnosis, but offer support for a finding that appellant had residuals of the 1982 injury. Regarding the issue of recurrence of disability, as his reports do not specifically address whether appellant sustained a recurrence of disability commencing in 2008 causally related to the accepted September 30, 1982 injury, this case must be remanded for further development of the medical evidence.

Accordingly, the Board will remand the case to OWCP. On remand OWCP should further develop the medical evidence to determine whether appellant has any ongoing conditions and disability causally related to her 1982 employment injury, causing recurrence of disability

¹³ See *M.B.*, *supra* note 11; *S.M.*, Docket No. 16-0990 (issued February 8, 2017); *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹⁴ 20 C.F.R. § 10.121.

¹⁵ *J.W.*, *supra* note 11; *A.P.*, Docket No. 17-0813 (issued January 3, 2018).

commencing January 21, 2008.¹⁶ Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 20, 2017 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: August 9, 2018
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

¹⁶*J.W.*, *supra* note 11; *S.M.*, 58 ECAB 166 (2006).