

ISSUE

The issue is whether appellant met his burden of proof to establish a recurrence of disability on or after June 18, 2011, causally related to his December 27, 2010 employment injury.

FACTUAL HISTORY

On January 4, 2011 appellant, then a 53-year-old agricultural adviser, filed a traumatic injury claim (Form CA-1) alleging that, during training on December 27, 2010, he struck his forehead on an armored Humvee door. As a result of the impact, he cut his forehead and fell onto his left shoulder and back. Appellant sought immediate medical treatment and indicated he received nine stitches to close the gash on his forehead. He returned to work on December 28, 2010 in a full-time, light-duty capacity. Appellant worked in that capacity until June 18, 2011, when he stopped work completely. On September 20, 2011 OWCP accepted the claim for an open scalp wound without complications. In December 2011, it expanded the claim to include open dislocation 5th cervical vertebra and closed dislocation 6th cervical vertebra.

On October 24, 2013 appellant filed a notice of recurrence (Form CA-2a) for lost wages beginning June 18, 2011. He stated that he returned to light-duty work with limited computer usage after the injury and that this light-duty work continued until the end of his tour as an agricultural adviser in Iraq. It was appellant's responsibility to complete his projects which were planned before the accident. He indicated that the pain never went away and that the current pain to his neck, upper left arm, and back were worse than his original injury. Appellant submitted multiple medical reports and records from 2011 through 2013, previously of record, which contained several references to appellant's back and neck pain, along with several requests for surgical authorization.

In an April 2, 2014 letter, OWCP informed appellant that the evidence of record failed to support that his work stoppage was due to a spontaneous change/worsening of his accepted conditions. Appellant was afforded 30 days to provide additional factual and medical evidence to support his claimed recurrence of disability. OWCP additionally noted that his tour as an agricultural adviser ended on June 18, 2011, the date of the alleged recurrence, and that he was working in a limited-duty capacity. It indicated that it appeared that appellant was claiming a return/increase in disability due to the withdrawal of his light-duty assignment made specifically to accommodate his work-related condition following his original injury, but noted that he did not submit any supporting documentation.

Appellant subsequently submitted multiple requests for authorization for medical treatment and diagnostic testing, claims for compensation (Form CA-7) for leave without pay from June 18, 2011 onwards, and requests for information regarding unemployment benefits.

Appellant also submitted medical evidence from Dr. Matthew J. Espenshade, an orthopedic surgeon, dated October 16, 2013 through September 17, 2014. In his October 16, 2013 report, Dr. Espenshade noted that he had been treating appellant since August 10, 2011 for his December 27, 2010 work injury when he struck his arm and forehead on a Humvee door. He had a large laceration that was repaired and his neck was also injured. Dr. Espenshade noted

appellant's medical course of treatment and diagnosed, as part of the injury, cervical spinal stenosis, brachial neuritis/radiculitis, cervical intervertebral disc displacement without myelopathy, and cervical degenerative disc disease. Cervical surgery was recommended. In an April 8, 2014 report, Dr. Espenshade indicated that appellant's spinal stenosis, brachial neuritis/radiculitis, cervical disc displacement without myelopathy, and degenerative disc disease were all related to his neck injury in Iraq.

In an April 21, 2014 report, Dr. Sandra Fowler, a family practitioner, indicated that appellant had persistent left shoulder pain from a "2011" work-related injury and had been restricted to light-duty work by Dr. Espenshade. She noted that appellant had neck pain and significant weakness on his left side with some neurological changes. Dr. Fowler's assessment included left shoulder pain, neck pain, and radiculopathy, and it also noted that, according to Dr. Espenshade's records, appellant had C5-6 nerve damage.

OWCP subsequently received medical evidence from Dr. Jeffrey Finn, a physiatrist, dated September 3, 2014 through February 25, 2015. In his September 3, 2014 report, Dr. Finn indicated that appellant had chronic neck pain and chronic or recurrent left cervical radicular symptoms. He also has known stenosis and protrusion of a disc to the left at C5-6. Diagnoses of cervicalgia, cervical disc herniation, and recurrent cervical radiculopathy were provided. On September 17, 2014 and February 25, 2015 Dr. Finn provided cervical epidural steroid injections. In an April 29, 2015 report, he reported appellant's responses with the epidural steroid injections. Dr. Finn diagnosed cervicalgia, radiculopathy, cervical spondylosis, degenerative disc disease, and foraminal stenosis.

Appellant also provided medical evidence from Dr. Peter M. Brier, an internist, dated February 16 through June 17, 2015. In his February 16, 2015 report, Dr. Brier diagnosed cervical syndromes, not elsewhere classified, which he opined may be related to appellant's service in Iraq. He also diagnosed chronic pain syndrome and long-term use of medications. In a June 17, 2015 report, Dr. Brier noted that appellant's pain had worsened and that he remained totally disabled from work. An assessment was made of cervical syndromes not elsewhere classified, chronic pain syndrome, and shoulder disorders.

In a November 20, 2014 letter, T.J., an employing establishment program manager, indicated that appellant was employed under a schedule B hiring authority position when he was injured. She indicated that he was not separated from the employing establishment because of his injury, rather his position ended.

By decision dated September 29, 2015, OWCP denied appellant's claim for a recurrence of disability beginning June 18, 2011. It found that he had not established that he was disabled from work due to a material change/worsening of his accepted work-related conditions.

On April 18, 2016 appellant, through counsel, requested reconsideration. An April 29, 2016 cervical spine x-ray and an April 29, 2016 cervical magnetic resonance imaging (MRI) scan were received.

In support of the reconsideration request, appellant submitted medical reports from Dr. John P. Kelleher, a neurosurgeon, dated March 31, April 29, and May 27, 2016. In his

May 27, 2016 final report, Dr. Kelleher indicated that on December 27, 2010 appellant was assisting in military training overseas in Iraq and was hit in the head during a drill. Since then, appellant had developed increased left-sided neck pain with radiation to the left shoulder. He also complained of pain in his biceps area and numbness on his left hand. X-rays of the cervical spine showed degenerative disease throughout the cervical spine and a cervical spine MRI scan showed degenerative disease, worse at the C5-6 area with moderate central and bilateral foraminal stenosis. A prior electromyography (EMG) showed chronic C6 radiculopathy. Dr. Kelleher recommended a cervical discectomy and fusion.

Appellant submitted medical reports from Dr. Brier dated February 23, March 23, June 7, and September 23, 2016. In a March 23, 2016 letter, Dr. Brier noted the history of the December 27, 2010 work injury. He indicated that appellant had suffered a severe whiplash injury and that it was typical of such an injury for pain and stiffness to develop in the neck and left shoulder. Dr. Brier opined that the pain occurred as a direct result of his injury and became chronic. He noted that the objective testing documented nerve damage and disc disease in his neck. Dr. Brier indicated that, while appellant has spondylosis in his neck, which was a byproduct of arthritis, appellant never had any symptoms prior to the accident. He opined that appellant was disabled and unable to work due to this problem. Dr. Brier also noted appellant's medical course and opined that the documented nerve damage at the C5-6 level with radiculopathy was directly related to the accident that occurred on December 27, 2010. He explained that appellant's pain and problems were consistent with severe whiplash injury and had caused nerve damage related to disc disease and spondylosis which were preexisting, but asymptomatic. In his June 7, 2016 report, Dr. Brier diagnosed other specified dorsopathies, cervical region; headache; chronic pain syndrome; and nicotine dependence, unspecified, in remission. He indicated that appellant had cervical myelopathy secondary to cervical spondylosis and may need surgery. Dr. Brier opined that appellant was unable to work because of pain and disability. He further opined that appellant's conditions were secondary to the accident he had while training for work in Iraq.

Medical reports from Dr. Finn dated September 23, November 3, 10, and 18, 2015, February 24, and May 25, 2016 were received by OWCP. Dr. Finn provided cervical epidural steroid injections. He noted that appellant had a history of an injury at work and diagnosed cervicalgia; cervical herniated nucleus pulposus and degenerative disc disease with disc osteophyte complex; cervical radiculitis, left side; and left shoulder pain.

By decision dated July 15, 2016, OWCP denied modification of its September 29, 2015 decision. It found that appellant was working full-time, limited duty in a temporary appointment on the date the temporary appointment was terminated and that termination of a temporary appointment was not considered a recurrence of disability under FECA. Based on the medical reports from Drs. Espenshade, Finn, Brier, and Kelleher, it indicated that appellant would be referred to a second opinion physician to determine if the additional conditions noted were causally related to the accepted work-related injury of December 27, 2010.

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 resulted from a previous

injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁴ Recurrence of disability 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁵ Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty.⁶ A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties or other downsizing or where a loss of wage-earning capacity determination is in place.⁷

Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.⁸

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establish that the recurrence is causally related to the original injury.⁹ This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.¹⁰ The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.¹¹

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.¹²

ANALYSIS

On December 27, 2010 appellant struck his forehead on an armored Humvee door. OWCP initially accepted the claim for an open scalp wound without complications, but later

⁴ 20 C.F.R. § 10.5(x).

⁵ *Id.*

⁶ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

⁷ 20 C.F.R. §§ 10.5(x), 10.104(c) and 10.509; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b.

⁸ *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

⁹ 20 C.F.R. § 10.104(b); *see supra* note 6 at Chapter 2.1500.5 and 2.1500.6.

¹⁰ *See S.S.*, 59 ECAB 315, 318-19 (2008).

¹¹ *Id.* at 319.

¹² *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

expanded the claim to include open dislocation 5th cervical vertebra and closed dislocation 6th cervical vertebra as accepted conditions. Following the December 27, 2010 employment incident, appellant worked full-time, light duty until his temporary assignment expired on June 18, 2011. Several years later he filed a recurrence claim (Form CA-2a) for lost wages dating back to June 18, 2011. The issue is whether appellant has established a recurrence of disability on or after June 18, 2011 causally related to his accepted December 27, 2010 work injury.

Appellant has not alleged a change in the nature and extent of his light-duty job requirements as he worked until his temporary position expired on June 18, 2011.¹³ Although withdrawal of a light-duty position may establish a recurrence of disability, the termination of a temporary appointment, when the employee was a temporary employee at the time of injury, does not in itself establish a recurrence of disability.¹⁴ Appellant must therefore provide medical evidence to establish that he was disabled for the light-duty position.¹⁵

As noted, OWCP accepted the claim for open scalp wound without complications, open dislocation 5th cervical vertebra, and closed dislocation 6th cervical vertebra. There is no medical evidence indicating that appellant's accepted scalp wound precluded him for working on or after June 18, 2011. Appellant sought treatment from several physicians regarding his neck and arm conditions. However, none of his physicians have provided the necessary rationale as to why appellant was able to work until June 18, 2011, and how his increased disability and/or accepted conditions had materially worsened, without intervening cause, due to the December 27, 2010 work injury.

In his October 16, 2013 and April 8, 2014 reports, Dr. Espenshade noted the history of the work injury and recommended cervical surgery. While he opined that appellant's conditions of spinal stenosis of the cervical spine; brachial neuritis or radiculitis; displacement cervical intervertebral disc without myelopathy; and cervical degenerative disc disease were causally related to his accepted work injury. However, Dr. Espenshade did not provide any opinion that appellant was disabled as a result of his December 27, 2010 work injury. As his reports contain no rationale explaining why appellant was disabled beginning June 18, 2011, Dr. Espenshade's opinion is insufficient to support that appellant sustained a worsening of his work-related condition.¹⁶

Medical reports from Dr. Fowler were also submitted in support of appellant's claim for recurrence of disability. In an April 21, 2014 report, Dr. Fowler noted that appellant's left shoulder pain arose from the workers' compensation injury from "2011." She did not provide any opinion that appellant was totally disabled. Rather, Dr. Fowler merely reported that he was

¹³ The records indicate that appellant was in a scheduled B hiring authority position and his position ended on June 18, 2011.

¹⁴ See *supra* note 6 at Chapter 2.1500.3(c)(1) (June 2013); see also *Shelly A. Paolinetti*, 52 ECAB 291 (2001).

¹⁵ See *Jackie D. West*, 54 ECAB 158 (2002).

¹⁶ See *Sedi L. Graham*, 57 ECAB 494 (2006) (medical form reports and narrative statements merely asserting causal relationship generally do not discharge a claimant's burden of proof).

given light duty from Dr. Espenshade. She also failed to provide an opinion of whether he sustained a recurrence of disability. Although Dr. Fowler noted that appellant's left shoulder pain arose from the work injury, an increase in pain alone does not constitute objective evidence of disability.¹⁷ As she failed to attribute any disability to appellant's work injury or explain how his employment-related condition changed such that he was unable to work, her reports are insufficient to meet his burden of proof.¹⁸

Dr. Finn's medical reports were also provided in support of this claim. His reports, however, fail to provide an opinion pertaining to appellant's disability or work restrictions. As Dr. Finn failed to attribute any disability to appellant's work injury, or explain how his employment-related condition changed such that he was unable to work, his reports are insufficient to meet appellant's burden of proof.¹⁹

Medical notes from Dr. Brier were also provided in support of appellant's recurrence claim. In his February 16, 2015 report, Dr. Brier diagnosed cervical syndromes, not elsewhere classified, which he opined may be related to appellant's service in Iraq. He also assessed chronic pain syndrome and shoulder disorders, but no work restrictions were provided. In a March 23, 2016 letter, Dr. Brier opined that appellant was disabled and unable to work due to this medical condition. He also opined that the documented nerve damage at the C5-6 level with radiculopathy was directly related to the accident that occurred December 27, 2010. Dr. Brier explained that appellant's pain and problems were consistent with a severe whiplash injury and had caused nerve damage related to disc disease and spondylosis which were preexisting, but asymptomatic. Although he generally supported that appellant's continued symptoms and disability were a result of his employment injury, Dr. Brier failed to address why appellant's complaints and diagnosed conditions were not caused by his preexisting disc disease and spondylosis.²⁰ A well-rationalized opinion is particularly warranted when there is a history of preexisting condition.²¹ Moreover, Dr. Brier did not provide adequate bridging evidence to show a spontaneous worsening of the accepted conditions. Rather, he correlated in general terms that appellant's nonaccepted current conditions were caused by the work-related injury.²² In his June 7, 2016 report, Dr. Brier diagnosed other specified dorsopathies, cervical region; headache and chronic pain syndrome and nicotine dependence, unspecified, in remission. He indicated that appellant had cervical myelopathy secondary to cervical spondylosis and may need surgery. Dr. Brier opined that appellant was unable to work because of pain and disability and that appellant's conditions were secondary to the accident he had while training for work in Iraq. However, he failed to explain how appellant's employment-related condition changed such that

¹⁷ See *supra* note 6 at Chapter 2.1500.6.a(2).

¹⁸ See *K.W.*, 59 ECAB 271 (2008).

¹⁹ *Id.*

²⁰ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

²¹ *Id.*

²² *J.H.*, Docket No. 14-775 (issued July 14, 2014).

he was unable to work as of June 18, 2011. Thus, Dr. Brier's reports are insufficient to meet appellant's burden of proof.²³

Dr. Kelleher's notes were also submitted into the record. He noted the history of the work injury and indicated that appellant had developed increased left-sided neck pain with radiation to the left shoulder, pain in his biceps area and numbness on his left hand. However, Dr. Kelleher did not provide an opinion that appellant was totally disabled, nor did he provide an opinion that appellant had sustained a recurrence of disability. Although he noted that appellant had developed increased pain, an increase in pain alone does not constitute objective evidence of disability.²⁴ As Dr. Kelleher failed to attribute any disability to appellant's work injury or explain how his employment-related condition changed such that he was unable to work, his reports are insufficient to meet his burden of proof.²⁵

The remaining medical evidence is also insufficient to establish appellant's claim for recurrence of disability. The diagnostic reports of record are insufficient to establish appellant's claim as the physicians interpreted diagnostic imaging studies and provided no opinion on disability or the cause of appellant's injury.²⁶

On appeal counsel contends that the decision is contrary to fact and law. The Board finds that because appellant was a temporary employee, he was not entitled to disability compensation at the time his appointment ended, irrespective of whether he was performing modified duty.²⁷ Appellant worked in his position through June 18, 2011 when the term appointment ended. 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.²⁸ A recurrence of disability also does not include work stoppage caused by the termination of temporary employment.²⁹ In this case, both the employing establishment and appellant stated that he was a temporary employee and that his term appointment terminated on June 18, 2011.³⁰ The evidence of record does not establish that he was off work due to a medical disability.

Appellant did not submit any medical reports from a physician who, on the basis of a complete and accurate factual and medical history, concluded that he was totally disabled on or

²³ See *supra* note 19.

²⁴ See *supra* note 6 at Chapter 2.1500.6.a(2).

²⁵ See *supra* note 19.

²⁶ *J.P.*, Docket No. 14-87 (issued March 14, 2014).

²⁷ *S.E.*, Docket No. 15-0888 (issued September 14, 2016), *M.S.*, Docket No. 11-1184 (issued December 12, 2011).

²⁸ *Hubert A. Jones*, 57 ECAB 467 (2006); *John W. Normand*, 39 ECAB 1378 (1988).

²⁹ See *D.M.*, Docket No. 11-194 (issued October 5, 2011). An employee generally will not be considered to have experienced a compensable recurrence of disability as defined in 20 C.F.R. § 10.5(x) merely because his or her employer has eliminated the employee's light-duty position in a reduction-in-force or some other form of downsizing. See 20 C.F.R. § 10.509.

³⁰ *E.H.*, Docket No. 11-1427 (issued May 16, 2012).

after June 18, 2011 due to his accepted December 27, 200 work injury. He has failed to establish by the weight of the reliable, probative, and substantial evidence, a change in the nature and extent of the injury-related condition resulting in his inability to perform his employment duties on or after June 18, 2011. As appellant has not submitted sufficient medical evidence showing that he sustained a recurrence of disability due to his accepted employment injury, the Board finds that he has not met his burden of proof.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish a recurrence of disability on or after June 18, 2011, causally related to his December 27, 2010 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 23, 2018
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