United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 17-0715**
	)	**Issued: May 29, 2018**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, L.B. PEARSON INTERNATIONAL AIRPORT, Mississauga, ON, CANADA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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 February 9, 2017 appellant, through counsel, filed a timely appeal from a December 16, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

[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.

Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[3]

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of disability commencing December 11, 2015 causally related to his accepted May 17, 2015 employment injury.

FACTUAL HISTORY

On May 17, 2015 appellant, then a 35-year-old customs and border patrol officer, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his back when the chair he attempted to sit down in broke, causing him to fall to the ground. As he fell to his right side, he felt a sharp pain and heard a pop in his lower back. Appellant stopped work on May 17, 2015. OWCP accepted the claim for thoracic or lumbosacral neuritis or radiculitis, lumbar sprain, and lumbago and paid wage-loss compensation and medical benefits.[4] He returned to work on November 16, 2015 in a full-time limited-duty capacity. Appellant worked until December 11, 2015, when he began working a reduced schedule of three days a week.

On December 30, 2015 appellant filed a claim for compensation (Form CA-7) and Form CA-7a (time analysis form) for wage loss from November 15 through December 23, 2015.

In a January 14, 2016 development letter, OWCP advised appellant that, since he previously resumed full-time work, his claim for total wage loss would be considered a claim for recurrence of disability, due to a change or worsening of his accepted work-related conditions. Appellant was requested to submit additional factual and medical information, including a narrative report from his physician which explained how his disability was due to the original injury and which demonstrated with clinical findings that the accepted condition materially worsened/changed, without intervening cause, to the point that he was disabled from work. He was afforded 30 days to submit the requested information.

On February 5, 2016 appellant filed a claim for a recurrence of disability (Form CA-2a). He indicated that his recurrence was due to the need for further medical treatment. Appellant explained that he had requested lumbar surgery authorization prior to his return to work, but he returned to work out of necessity, his limitations were extreme and he had not stopped treatment. He related that his condition declined due to the full-time hours he worked. Appellant's supervisor indicated that appellant had attempted to work full 40-hour weeks with accommodations, but

[2] 5 U.S.C. § 8101 *et seq.*

[3] The record provided to the Board includes evidence received after OWCP issued its December 16, 2016 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence. 20 C.F.R. § 501.2(c)(1).

[4] A July 1, 2015 magnetic resonance imaging (MRI) scan of the lumbar spine revealed broad-based annular bulge at L4-5 with facet hypertrophy with mild canal stenosis. Early neural formainal narrowing more of the left was noted. No acute compression disease or deformity was noted. The L5-S1 disc space was unremarkable.

claimed that full-time work was too difficult and requested leave without pay for two days, Tuesdays and Thursdays, a week.

In a March 9, 2016 statement, appellant related that physical therapy and spinal injections were unsuccessful and that he needed back surgery. He noted that OWCP had not responded to his doctor's surgical requests. Appellant asserted that he never recovered from the original injury and explained that he had resumed limited-duty work to maintain his housing allowance. He returned to work on November 16, 2015 in a light-duty capacity with restrictions, but alleged full time hours were "too much" and that his physician had reduced his work schedule, allowing him to work no more than three days per week.

Medical reports from Dr. Roger Warren Rogers, an osteopathic orthopedic surgeon, dated June 23, July 10, October 5, November 11, and December 11, 2015, and January 18 and February 22, 2016 were received. In his November 11, 2015 report, Dr. Rogers noted that appellant reported continued, significant low back pain and bilateral lower extremity symptoms, right greater than left, continued difficulty performing his activities of daily living, and the desire to proceed with L4-5 partial discectomy surgery.[5] An assessment of lumbar disc herniation, lumbar radiculopathy, lumbar spinal stenosis, and lumbar spondylosis was provided. Dr. Rogers indicated that appellant could return to full-time work on November 16, 2015 for no more than 8 hours a day for 40 hours a week with restrictions of no standing greater than 10 minutes at a time, no sitting greater than 30 minutes without the ability to change positions, no lifting more than 15 pounds, and limited trunk twisting and bending. Appellant was told to continue with home exercise and follow-up in four weeks or sooner, if he received approval for surgery. In a November 11, 2015 note, Dr. Rogers diagnosed lumbar disc herniation and advised that appellant could return to work 8 hours a day 40 hours a week on November 16, 2015 with restrictions. A November 11, 2015 attending physician's report (Form CA-20) was also provided.

In a December 11, 2015 report, Dr. Rogers noted that appellant had returned to work with light duty with restrictions, but reported similar complaints without significant relief. Appellant indicated that he wished to proceed with surgery and wait for surgical approval. Dr. Rogers provided an assessment of lumbar disc herniation, lumbar radiculopathy, lumbar spinal stenosis, and lumbar spondylosis. Appellant was advised to continue with his work restrictions and follow-up in four weeks or sooner if he received approval for back surgery. A December 11, 2015 attending physician's report (Form CA-20) was also provided.

In a December 21, 2015 note, Dr. Rogers diagnosed low back pain/lumbar disc herniation and indicated that appellant could return to work with restrictions. He altered appellant's restrictions to reflect a limited work schedule of eight hours per day for three days a week.

On December 31, 2015, and January 14 and February 16, 2016 appellant filed a Form CA-7 for intermittent leave without pay from November 15, 2015 to January 23, 2016.

In a January 18, 2016 report, Dr. Rogers continued to diagnose lumbar disc herniation, lumbar radiculopathy, lumbar spinal stenosis, and lumbar spondylosis and opined that appellant could continue with his previous work restrictions. In his January 18, 2016 note, Dr. Rogers

[5] Appellant had been scheduled for surgery pending insurance authorization.

advised that appellant could continue on the limited work schedule of no more than eight hours per day for no more than three days per week.

On February 22, 2016 Dr. Rogers reported that appellant could continue with his previous work restrictions and work a limited schedule of no more than eight hours per day and no more than three days a week.

In a March 4, 2016 attending physician's report, Dr. Rogers diagnosed lumbar disc herniation and radiculopathy lumbar region stemming from the May 17, 2015 work injury. He opined that appellant was partially disabled from May 21, 2015 to the present. Dr. Rogers indicated that on February 22, 2016 appellant was advised that he could work no more than three days a week for eight hours a day.

By decision dated March 11, 2016, OWCP denied appellant's claim for a recurrence of disability commencing December 11, 2015. It found that there was no medical evidence of record with objective medical findings or medical rationale which supported that appellant suffered a spontaneous change in the accepted medical condition such that he required a reduction in the number of days he was able to work.

In a March 30, 2016 medical report, Dr. Rogers continued to diagnose lumbar disc herniation, lumbar radiculopathy, lumbar spinal stenosis, and lumbar spondylosis. Appellant reported that he did not feel he could return to work five days a week in his current state, as he had previously attempted this and after working a full day, he felt that he was unable to work the following day. Dr. Rogers had appellant continue his work restrictions with working no more than eight hours a day no more than three days a week. In the corresponding March 30, 2016 note, he indicated that appellant could work within his previous restrictions on a limited work schedule of no more than eight hours per day and no more than three days a week.

In an April 4, 2016 report, Dr. Nizar Souayah, a Board-certified neurologist acting as an OWCP medical adviser, opined that the request for L4-5 lumbar discectomy was not medically necessary. Specifically, there was no clear evidence of consistent neurological examinations which supported the lumbar L4-5 radiculopathy diagnosis, there were no electromyogram findings which supported radiculopathy, and appellant had not exhausted all conservative therapies.

In April 7 and 28, and June 9 and 15, 2016 reports, Dr. Rogers indicated that appellant had lumbar disc herniation and was awaiting surgery approval. He noted that appellant could continue with work restrictions provided on March 30, 2015 and work a limited work schedule of no more than eight hours a day three days a week. In his June 9, 2016 report, Dr. Rogers provided diagnoses of lumbar disc herniation, lumbar radiculopathy and lumbar spondylosis, which he opined were causally related to the May 17, 2015 employment incident as appellant did not have symptoms of significant back pain or any lower extremity radicular-type symptoms prior to this injury. He noted that appellant felt unable to work consecutive days, but that he had been able to work every other day. Accordingly, Dr. Rogers continued appellant on his work restrictions and limited-duty work schedule.

In a June 21, 2016 report, Dr. Michael R. Stoffman, a neurosurgeon, noted appellant's history of injury. He opined that, as a result of the work injury, appellant sustained an L4-5 disc

herniation with compression on the exiting L5 nerve roots bilaterally resulting in low back pain and bilateral leg pain. Dr. Stoffman recommended updated diagnostic testing to make a final determination regarding a left L5-S1 microdiscectomy,[6] which he opined was also causally related to the work injury. He also agreed with appellant's limited-duty work schedule of three days a week, eight hours a day.

On June 10, 2016 OWCP referred appellant to Dr. Donald Paarlberg, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 28, 2016 report, Dr. Paarlberg noted the history of appellant's May 17, 2015 injury and medical treatment. He reviewed the case record and diagnosed herniated disc L4-5 with bilateral leg pain, which he opined was causally related to the May 17, 2015 employment incident. Dr. Paarlberg indicated that appellant had objective findings of limited range of motion on physical examination, positive straight leg raise, and positive MRI scan findings that were due to appellant's current work-related disability. He noted that appellant was gainfully employed working part time with restrictions and that further treatment would be an updated MRI scan followed by surgical intervention. The record indicates that appellant thereafter underwent a lumbar spine MRI scan on July 7, 2016. Dr. Paarlberg evaluated this new MRI scan and related that it showed an L4-5 central and left disc herniation causing anterior impression onto the thecal sac asymmetrically to the left. He noted that this appeared to be mildly larger than seen on appellant's July 2015 scan. Dr. Paarlberg concluded that appellant should be reevaluated by Dr. Stoffman as to whether surgical intervention would be appropriate. On September 28, 2016 he completed a work capacity evaluation (Form OWCP-5c) wherein he indicated that appellant could work four hours a day with restrictions.

In a July 26, 2016 report, Dr. Stoffman reviewed the July 7, 2016 MRI scan of the lumbar spine and indicated that appellant had a large symptomatic left L4-5 disc herniation for which surgery was indicated. An assessment of low back pain and lumbar radiculopathy was provided.

In July 21 and September 1, 2016 reports, Dr. Rogers continued to provide assessments of lumbar disc herniation, lumbar radiculopathy, lumbar spondylosis, and lumbar spinal stenosis. He also continued appellant on his previous work restrictions and limited work schedule of no more than eight hours a day for three days a week.

In an August 25, 2016 report, Dr. Anthony M. Leone, an orthopedic surgeon, noted the history of appellant's May 17, 2015 work injury, reviewed medical records and appellant's position description of customs and border protection officer. He diagnosed L5-S1 disc derangement with disc protrusion/herniation which he believed was causally related to the work injury.[7] Dr. Leone noted that appellant was currently working. However, given the size of the disc herniation, which had apparently increased based on the more updated MRI scan, he opined that appellant could not return to full-duty work until surgery had been performed and the herniation removed. Dr. Leone set forth what duties of his position appellant could not perform

[6] This appears to be a typographical error and should reflect a left L4-5 microdiscectomy.

[7] Given Dr. Leone's description of the disc herniation based on MRI scan, it appears he was referring to the L4-5 disc herniation.

and set forth limitations. He indicated that the only thing which prevented appellant from returning to full-duty work was the disc herniation, which a discectomy would resolve.

In a September 16, 2016 fitness-for-duty evaluation, Dr. Danielle Grandrimo, an internist and medical review physician, found appellant unfit for duty for the position of customs and border protection officer. This was primarily based on Dr. Leone's August 25, 2016 report.

In a September 23, 2016 electrodiagnostic report, Dr. James Czymy, a physiatrist, diagnosed a bilateral L5 radiculopathy.

Appellant continued to submit Form CA-7 claims for leave without pay.

In an October 31, 2016 report, Dr. Jafar Siddiqui, a physiatrist and pain medicine specialist, provided an impression of low back pain with radiation into the bilateral lower extremities related to lumbar disc herniation, lumbar radiculopathy and myofascial pain syndrome. By checking a box marked "yes" Dr. Siddiqui indicated that the incident appellant described was the competent medical cause of his diagnosed condition.

On November 11, 2016 counsel requested reconsideration.

By decision dated December 16, 2016, OWCP denied modification of its March 11, 2016 decision. It noted that the medical evidence submitted subsequent to the March 11, 2016 decision provided medical diagnoses which were not accepted as resulting from the May 17, 2015 work-related injury.[8]

LEGAL PRECEDENT

An employee 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.[9] OWCP's procedures discuss the evidence necessary if recurrent disability for work is alleged within 90 days of return to duty. It is noted that the focus is on disability rather than causal relationship of the accepted condition to the work injury.[10]

The Board has held that if recurrent disability from work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and demonstrate objective medical findings that form the basis for the renewed disability for work.[11] When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he hurt too much to work, without

[8] By decision dated July 18, 2015, OWCP denied authorization for the L4-5 lumbar discectomy.

[9] *W.D.*, Docket No. 09-0658 (issued October 22, 2009); *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013).

[11] *See G.P.*, Docket No. 14-1150 (issued September 15, 2014); *R.C.*, Docket No. 14-0201 (issued May 8, 2014); *J.F.*, 58 ECAB 124 (2006).

objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[12]

If an employee claims that a condition not accepted or approved by OWCP was due to his or her employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[13] To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual, and medical background, supporting such a causal relationship.[14] Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[15] The physician's opinion must be based on a complete factual and medical background of the claimant, 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 claimant.[16]

ANALYSIS

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

OWCP accepted appellant's May 17, 2015 claim for the conditions of thoracic or lumbosacral neuritis or radiculitis, lumbar sprain, and lumbago and paid wage-loss compensation and medical benefits. Appellant returned to full-time limited-duty work on November 16, 2015. He worked until December 11, 2015, after which he worked a reduced schedule of three days a week, eight hours per day. OWCP denied appellant's claim for a recurrence of disability commencing December 11, 2015.

Appellant does not allege and the record does not reflect that his light-duty job requirements had changed. Rather, he attributed his disability from work to his accepted employment injuries worsening and the need for surgical intervention. As noted above, when the claim for recurrence is within 90 days of a return to work, the focus is on disability, rather than causal relationship. Regarding disability, the medical evidence must provide a description of the job duties appellant cannot perform and objective evidence supporting a finding of disability.[17]

The Board notes that appellant's treating physician, Dr. Rogers' reduction of appellant's work schedule in his reports commencing December 21, 2015 and onwards were initially not based on objective medical findings, but rather were based on appellant's pain complaints, which are

[12] *See S.E.*, Docket No. 14-1125 (issued October 1, 2014).

[13] *Jaja K. Asaramo,* 55 ECAB 200 (2004).

[14] *Jennifer Atkerson,* 55 ECAB 317 (2004).

[15] *Elizabeth Stanislav,* 49 ECAB 540, 41 (1998).

[16] *Gary L. Fowler,* 45 ECAB 365, 371 (1994).

[17] *See supra* note 11.

insufficient to establish a recurrence of disability. Pain complaints, without objective medical findings are insufficient to establish a recurrence of disability.[18]

OWCP's medical adviser, Dr. Souayah reviewed the record on April 4, 2016 and opined that appellant's L4-5 diagnosis was not clearly established.

In his June 9, 2016 report, Dr. Rogers opined that the diagnosed lumbar disc herniation, lumbar radiculopathy and lumbar spondylosis were causally related to the May 17, 2015 employment incident. Dr. Rogers, as well as Drs. Stoffman, Leone, and Grandimo reported that appellant could not perform full-time work activities.

OWCP referred appellant to Dr. Paarlberg for a second opinion evaluation. Dr. Paarlberg related that appellant did have a disability due to a medical condition that was causally related to his May 17, 2015 employment injury. Following appellant's July 7, 2016 MRI scan Dr. Paarlberg diagnosed L4-5 central and left disc herniation causing anterior impression onto the thecal sac asymmetrically to the left. He noted that appellant had increasing herniation which was causing his left leg pain. Dr. Paarlberg also completed a Form OWCP-5c indicating that appellant could only perform limited duty, for four hours a day.

OWCP referred appellant to Dr. Paarlberg to determine appellant's diagnosis and disability status. Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[19] Dr. Paarlberg's opinion supports that appellant sustained employment-related disability. As OWCP did not specifically request that Dr. Paarlberg address appellant's disability status since December 11, 2015, he did not address the exact period of disability resulting from the accepted work injury.[20]

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.[21] After undertaking development of the evidence by referring appellant to Dr. Paarlberg for an opinion on any employment-related periods of disability, it was responsible for obtaining a rationalized medical opinion on this issue. As noted, however, Dr. Paarlberg did not fully address the issue of disability. Accordingly, the Board will remand the case to OWCP. On remand OWCP should further develop the medical evidence to determine whether appellant was disabled from work commencing December 11, 2015 as a result of his employment injury.[22] Following this and such further development as OWCP deems necessary, it shall issue an appropriate decision.

[18] *See G.W.*, Docket No. 16-1316 (issued March 10, 2017); *see also V.T.*, Docket No. 14-1251 (issued April 28, 2015); *William A. Archer*, 55 ECAB 674 (2004).

[19] *See A.A.*, 59 ECAB 726 (2008); *Phillip L. Barnes*, 55 ECAB 426 (2004).

[20] *See A.D.*, Docket No. 17-1984 (issued March 19, 2018).

[21] *See A.P.*, Docket No. 17-0813 (issued January 3, 2018).

[22] *S.M.*, 58 ECAB 166 (2006).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 16, 2016 is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 29, 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