United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 18-1494**
	)	**Issued: April 12, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Baltimore, MD, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 31, 2018 appellant, through counsel, filed a timely appeal from a June 18, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the 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 this case.[3]

[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.*

[3] The Board notes that following the June 18, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of total disability for the period August 10 through September 18, 2017 causally related to her accepted June 29, 2013 employment injury.

FACTUAL HISTORY

On September 10, 2013 appellant, then a 41-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 29, 2013 she felt and heard a "pop" followed by immediate pain in her neck, back, and shoulder when she lifted a box weighing 20 pounds and placed it under a cart while in the performance of duty.[4] OWCP accepted the claim for displacement of cervical intervertebral disc without myelopathy and sprain of ligaments of cervical spine. Appellant stopped work on June 29, 2013 and returned to modified duty on December 6, 2013. As of January 13, 2014, she was sent home by the employing establishment because no limited-duty work was available. On August 14, 2014 appellant returned to a full-time, limited-duty position, but immediately stopped work.[5]

On December 10, 2014 appellant underwent an OWCP-authorized C3-4 discectomy, arthrodesis, and interbody fusion. She returned to a full-time modified position on January 26, 2016.

On August 30, 2017 OWCP received claims for compensation (Form CA-7) for leave without pay (LWOP) commencing August 10, 2017. The time analysis forms (Form CA-7a) indicated that appellant stopped work after working 5.96 hours on August 10, 2017 and that she was placed off work by her physician as of August 16, 2017.

In an August 15, 2017 report, Dr. Hugo E. Benalcazar, a Board-certified neurological surgeon, noted that appellant had worsening neck and low back pain. He diagnosed cervical disc disorder with radiculopathy and low back pain and ordered diagnostic testing.

In a development letter dated September 1, 2017, OWCP indicated that it appeared that appellant was claiming disability due to a material change or worsening of her accepted work-related conditions. It noted that she had returned to work in a full-time, limited-duty capacity on August 14, 2014 and worked until August 11, 2017, when she stopped work completely.[6] OWCP

[4] Under OWCP File No. xxxxx184, appellant has an accepted claim from a September 22, 2000 employment injury for several conditions, including displacement of cervical intervertebral disc without myelopathy. On August 29, 2011 she underwent a three-level anterior cervical discectomy and fusion.

[5] In a preliminary notice dated June 16, 2014, OWCP advised appellant that she had been offered a suitable work position as a city carrier. It advised that if she did not accept the position in 30 days her wage-loss and schedule award compensation could be terminated pursuant to 5 U.S.C. § 8106(c)(2). On July 31, 2014 OWCP further advised appellant that she had another 15 days to accept the suitable work position or have her compensation terminated. By decision dated August 20, 2014, it terminated appellant's wage-loss compensation, effective August 14, 2014, based on a refusal of suitable work under 5 U.S.C. § 8106(c)(2). By decision dated February 20, 2015, an OWCP hearing representative reversed the termination of appellant's benefits, finding that she had not "neglected suitable work" offered by the employing establishment.

[6] The record indicates that appellant returned to full-time modified work on January 26, 2016.

advised appellant that no evidence had been submitted with her claim to establish disability during the claimed time period. It provided appellant with the definition of a recurrence and the evidence required to establish such a claim. OWCP afforded appellant 30 days to provide the requested evidence.

In response, OWCP received additional evidence from Dr. Benalcazar. This included an August 15, 2017 note excusing appellant from work and an August 15, 2017 duty status report (Form CA-17) placing appellant off work until September 5, 2017.

In a September 14, 2017 report, Dr. Benalcazar provided a history of appellant's accepted June 29, 2013 employment injury indicating that she had picked up an extremely heavy small box and then fell over and dropped it to the floor because of the weight. He noted that appellant had a previous anterior cervical discectomy and fusion surgery in August 2011 and was seen within two days of the June 29, 2013 injury when a magnetic resonance imaging (MRI) scan showed herniations in additional disc spaces. Dr. Benalcazar noted that the August 29, 2017 MRI scan showed very minimal degenerative disc disease at C2-3 and C7-T1, which appeared unchanged since the March 31, 2016 MRI scan study, and extensive changes from C3-7 with no significant change in the overall imaging appearance of the spinal canal or neural foramen at those levels. He opined that appellant's disability was caused by the recurrence of herniated discs in her neck due to her employment injury when she lifted a heavy object. In a September 15, 2017 note, Dr. Benalcazar returned appellant to work on September 18, 2017 with restrictions.

By decision dated October 20, 2017, OWCP denied appellant's claim for a recurrence of disability. It found that appellant had not provided the factual information requested and the record contained no medical evidence explaining how her alleged total disability for the claimed period was due to the accepted June 29, 2013 employment injury.

On November 3, 2017 OWCP received counsel's request for an oral hearing before an OWCP hearing representative, postmarked November 1, 2017.

In a November 28, 2017 report, Dr. Benalcazar repeated the same history of injury as reported in his September 14, 2017 report. He also reiterated his opinion that appellant's disability had been caused by the recurrence of herniated discs in her neck due to the injury at work lifting a heavy object. Dr. Benalcazar opined that appellant was able to perform the duties contained in the current September 27, 2017 job offer. He completed a return to work note and a duty status report also dated November 28, 2017.

In a December 8, 2017 form report, Dr. Benalcazar diagnosed cervical disc disorder with radiculopathy and opined that appellant was totally disabled for the period August 10 through September 18, 2017 due to her "work injury." He noted that appellant had a previous occurrence of this condition or similar condition on June 29, 2013.

A telephonic hearing was held before an OWCP hearing representative on April 17, 2018. Appellant testified that, prior to August 11, 2017, she was working a modified job and that her work stoppage started midday on August 10, 2017. She also testified that she could not say that something happened, rather she did not feel right and that something was off in her neck and down her arms. Appellant indicated that she went directly to the doctor and that she was kept off work for one month. She explained that she had a spontaneous worsening of her condition and that the

time off helped with her recovery. Appellant noted that she returned to modified work for a two-hour workday schedule on September 18, 2017 and gradually increased her hours to full-time hours in early 2018.

By decision dated June 18, 2018, an OWCP hearing representative affirmed OWCP's October 20, 2017 decision. The hearing representative found that Dr. Benalcazar's reports were of limited probative value and insufficient to meet appellant's burden of proof.

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 resulting from a previous injury or illness without an intervening cause or a new exposure to the work environment that caused the illness. It can also mean 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.[7]

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-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 an inability to perform such limited-duty work. As part of this burden of proof, 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 limited-duty job requirements.[8] To establish a change in the nature and extent of the injury-related condition, there must be a probative medical opinion, based on a complete and accurate factual and medical history as well as supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[9] In the absence of rationale, the medical evidence is of diminished probative value.[10] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, it must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[11]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability for the period August 10 through September 18, 2017 causally related to her

[7] *See F.C.*, Docket No. 18-0334 (issued December 4, 2018); *J.F.*, 58 ECAB 124 (2006). 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. 20 C.F.R. § 10.5(x). *See also Richard A. Neidert*, 57 ECAB 474 (2006).

[8] *See R.C.*, Docket No. 18-1695 (issued March 12, 2019); *A.M.*, Docket No. 09-1895 (issued April 23, 2010); *Terry R. Hedman*, 38 ECAB 222 (1986).

[9] *See F.C., supra* note 7; *Mary A. Ceglia*, 55 ECAB 626 (2004).

[10] *Id.; Robert H. St. Onge*, 43 ECAB 1169 (1992).

[11] *See F.C., supra* note 7; *Ricky S. Storms*, 52 ECAB 349 (2001).

accepted June 29, 2013 employment injury. Appellant has not alleged a change in her light-duty job requirements. Instead, she attributed her inability to work due to a change in the nature and extent of her employment-related conditions. Appellant therefore has the burden of proof to provide medical evidence to establish that she was disabled due to a worsening of her accepted work-related conditions.[12]

In support of her recurrence claim, appellant submitted reports from Dr. Benalcazar. In his September 14, November 28, and December 8, 2017 reports, Dr. Benalcazar opined that appellant's disability was caused by the recurrence of her herniated cervical disc conditions due to her employment injury. He noted that the August 29, 2017 MRI scan showed very minimal degenerative disc disease at C2-3 and C7-T1 and extensive changes from C3-7, with no significant change in the overall appearance at those levels. However, OWCP has not accepted degenerative disc conditions as causally related to the accepted injury. Where an employee claims that a condition not accepted by OWCP was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury.[13]

The Board finds that Dr. Benalcazar has not provided medical reasoning explaining why appellant's current condition or disability, commencing August 10, 2017 was due to the accepted June 29, 2013 employment injury.[14] Dr. Benalcazar did not relate appellant's disability to the conditions from the accepted June 29, 2013 employment injury which included cervical spine sprain, and displacement of cervical intervertebral disc without myelopathy. Thus, his reports are of limited probative value to establish appellant's claim that her recurrence of disability is due to her accepted employment injury.[15] The Board also finds that Dr. Benalcazar opinions regarding the cause of appellant's disability were of limited probative value as he provided a medical history, which was inconsistent with the history provided by appellant regarding the June 29, 2013 injury. Dr. Benalcazar reported that she had picked up a small box that was extremely heavy and that she fell. However, appellant has explained that her injury occurred when she lifted a box weighing 20 pounds and placed it under a cart. She did not report a fall. As the reports from Dr. Benalcazar failed to provide an accurate factual and medical history and sound medical reasoning explaining how her employment-related conditions worsened such that she was unable to work as of August 10, 2017, Dr. Benalcazar's reports are insufficient to meet her burden of proof.[16]

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.

[12] *See D.H.*, Docket No. 18-0129 (issued July 23, 2018); *D.L.*, Docket No. 13-1653 (issued November 22, 2013); *Cecelia M. Corley*, 56 ECAB 662 (2005).

[13] *See C.S.*, Docket No. 17-1686 (issued February 5, 2019); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[14] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *Mary A. Ceglia*, *supra* note 9.

[15] *G.T.*, Docket No. 18-1369 (issued March 13, 2019).

[16] *See D.H., supra* note 12; *K.W.*, 59 ECAB 271 (2008).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability for the period August 10 through September 18, 2017 causally related to her accepted June 29, 2013 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the June 18, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2019
Washington, DC

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

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

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