United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant **and** **DEPARTMENT OF THE ARMY, THE SURGEON GENERAL WALTER REED ARMY MEDICAL CENTER, Washington, DC, Employer**	)	**Docket No. 17-0626** **Issued: January 22, 2019**

Appearances:
Appellant, pro se
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 January 26, 2017 appellant filed a timely appeal from a December 13, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability commencing December 2, 2014 causally related to her September 5, 2000 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the December 13, 2016 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

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On September 26, 2000 appellant, then a 49-year-old secretary, filed a traumatic injury claim (Form-CA-1) alleging that she sustained a back injury while lifting cases of slides while in the performance of duty on September 5, 2000. She stopped work on September 6, 2000 and has not returned.

On November 3, 2000 OWCP accepted the claim for cervical strain, lumbar strain, and herniated discs at L3-4 and L4-5. It initially paid appellant wage-loss compensation benefits on the supplemental rolls and then subsequently placed her on the periodic rolls. Thereafter, appellant continued to receive medical treatment including: lumbar laminectomies in May 2001; lumbar decompression and fusion in August 2008; and bilateral lumbar laminectomy and fusion in March 2010.

In an April 1, 2011 report, Dr. Brian Haycock, a Board-certified orthopedic surgeon, opined that appellant was capable of performing her date-of-injury position as a secretary with a 50-pound weight restriction. He saw her again on April 14, 2011 and he noted that she still had a fair amount of pain, but did not believe that she needed additional follow up from a surgical standpoint.

By notice dated January 6, 2012, OWCP advised appellant that it proposed to terminate her wage-loss compensation because the residuals of her work injury had ceased. By decision dated February 14, 2012, OWCP terminated appellant's wage-loss compensation benefits effective that date. Appellant subsequently requested a hearing and OWCP's hearing representative, by decision dated August 29, 2012, affirmed the February 14, 2012 termination decision.

In a December 2, 2014 report, Dr. John Ortolani, a neurologist, diagnosed sprain and strain of appellant's lumbar spine and neck and displacement of lumbar intervertebral disc without myelopathy. He opined that appellant was significantly affected by these injuries and noted that she "appears to be permanently disabled." Dr. Ortolani further noted in a January 6, 2015 electromyography (EMG) report that appellant also had severe bilateral lumbar radiculopathy L5-S1, greater on the left side. He noted in a January 13, 2015 report that appellant returned for follow up of a September 5, 2000 lower back work injury. Dr. Ortolani detailed her history of three prior surgeries; that she continued to complain of severe low back and neck pain; and that she had difficulty functioning because of her work injury.

On April 14, 2015 appellant filed a notice of recurrence of disability (Form CA-2a) alleging that she sustained a recurrence of total disability due to her accepted September 5, 2000 work injury as of December 2, 2014. She alleged that she continued to suffer from chronic pain and

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Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id*.

[3] Docket No.14-1636 (issued December 9, 2014).

believed her current condition was related to her September 5, 2000 work injury. Appellant noted that she saw Dr. Ortolani on December 2, 2014 for further testing and that he had referred her for additional surgery.

By development letter dated April 24, 2015, OWCP informed appellant that the evidence submitted was insufficient to establish her recurrence claim and advised her of the evidence required to establish her claim. It afforded her 30 days to provide the requested information.

In an April 30, 2015 response, appellant indicated that all of her injuries were worsening. She explained that she never returned to work after her September 5, 2000 work injury and her current problems stem from that injury. Appellant argued that she could not return to work because she could only perform limited walking, standing, and sitting.

Dr. Ortolani noted in an April 30, 2015 report that he was treating appellant for injuries due to her work-related injury. He indicated that a magnetic resonance imaging (MRI) scan of the lumbar spine documented a herniated disc at L4-5 with foraminal narrowing and nerve root impingement. Dr. Ortolani also noted that a January 6, 2015 electromyography and nerve conduction velocity (EMG/NCV) test revealed severe bilateral lumbar radiculopathy at L5-S1, greater on the left side. He opined that appellant had significant injuries related to the September 5, 2000 work injury and it was medically necessary that she continue to receive neurologic care to control her chronic pain. Dr. Ortolani concluded that she was totally disabled.

By letter dated July 23, 2015, OWCP referred appellant for a second opinion examination with Dr. Richard Smith, a Board-certified orthopedic surgeon.

In a report dated August 27, 2015, Dr. Smith noted appellant's history of injury and treatment, examined appellant, and opined that she was capable of performing sedentary work for eight hours per day with restrictions. In a September 9, 2015 supplemental report, he diagnosed neck and low back pain, postlaminectomy syndrome, postlumbar arthrodesis, and lumbosacral radiculitis. On October 13, 2015 Dr. Smith provided clarification with regard to appellant's work restrictions and noted that she could perform sedentary duty, with the need for a break every two hours.

On October 23, 2015 OWCP expanded the accepted conditions in appellant's claim to include post-laminectomy syndrome; radiculopathy, sprain of back, sprain of neck; and displacement of lumbar intervertebral disc without myelopathy at L3-4, L4-5. It noted that a decision was still pending as to her claimed recurrence of disability, as there was a conflict existing in the medical opinions of Dr. Ortolani and Dr. Smith.

In a November 23, 2015 report, Dr. Ortolani indicated that he continued to treat appellant for her conditions related to her September 5, 2000 work injury and he opined that she was unable to work as a result of the injury.

An April 1, 2016 MRI scan of the lumbar spine revealed: anterolisthesis of L1-2 and diffuse circumferential disc bulge indents; compression of the thecal sac producing mild central stenosis; neural foramina mildly stenosis bilaterally; prior laminectomy and fusion at the L2-3 level, L3-4 level, L4-5 level, and L5-S1 level; and underlying S-type thoracolumbar scoliosis. An April 13, 2016 MRI scan of the cervical spine revealed: diffuse circumferential disc bulge indents

at the C2-3 level, C3-4 level, C4-5 level; diffuse circumstantial disc bulge with broad-based herniation and annular disruption at the C4-5 level; loss of disc height at the C5-6 level, and C6-7 level; anterolisthesis of C7 on T1; disc herniation in combination with hypertrophy of the facets and ligaments flava indents and compresses the thecal sac, producing mild central stenosis with the neural foramina; and bilateral posterolateral disc herniation, which produced bilateral lateral recess stenosis.

On May 24, 2016 OWCP referred appellant to Dr. Gerard M. Gerling, a Board-certified neurologist, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Ortolani, appellant's treating physician, who opined that appellant was totally disabled, and Dr. Smith, OWCP's second opinion physician, who opined that appellant was capable of returning to a limited-duty employment position.

In a May 27, 2016 report, Dr. Ortolani opined again, that appellant was permanently and totally disabled from any gainful employment. He recommended a neurosurgical consultation due to the most recent MRI scan findings.

In a June 14, 2016 report, Dr. Gerling noted appellant's history of injury and treatment. He noted that on physical examination she presented with a stooped gait and a mild tremor of her out stretched hands. However, Dr. Gerling found no spasm of the lumbar or cervical spine muscles, noted appellant's straight leg raising was negative and that she resisted passive movements of her cervical spine. He also found loss of lumbar lordosis on examination, but observed that "her gait was otherwise brisk and normally based. Her reflexes were hypoactive, but symmetrical and she had no focal weakness or muscle atrophy apparent." Regarding a current medical diagnosis, Dr. Gerling explained that he was unable to indicate what the initial injury was that lead to her worsening subjective report of total disability. He further explained that, based upon objective studies and appellant's failure to respond to any form of treatment, a diagnosis could not be related to any demonstrated specific injury. Dr. Gerling advised that "she has never received any explanation as to why the surgeries and other modalities failed. I am unable to state the reason for her current worsening condition or suggest any form of treatment." Regarding whether appellant was capable of performing her date-of-injury position as a secretary, he opined that he was "not able to find any neurological or spinal condition to support appellant's claim of total and worsening disability." Dr. Gerling also indicated that "no treatment she has received has produced any benefit according to her report and this is totally unexplained."

By decision dated June 27, 2016, OWCP denied appellant's claim for a recurrence. It found that the evidence of record was insufficient to establish a recurrence of disability, by way of a material change or worsening, causally related to the accepted September 5, 2000 work injury. OWCP relied upon the findings received from the referee physician, Dr. Gerling, who opined that appellant was not totally disability from all work as a result of the accepted employment-related conditions and he was unable to find a neurological or spinal condition which would explain her current symptoms of increasing disability. It concluded that Dr. Gerling's opinion as to her ability to return to work was entitled to the special weight of the medical evidence.

On September 13, 2016 appellant requested reconsideration. She argued that OWCP failed to expand her claim to include the diagnoses of cervicalgia, lumbago, and postlumbar arthrodesis which Dr. Smith had identified, or explain why they only accepted some of the consequential injuries diagnosed by Dr. Smith. Appellant further contended that a new opinion should be

obtained as to whether or not she had a recurrence, as Dr. Gerling did not answer the specific questions posed to him, his opinion was outside the SOAF, and it was based upon an inaccurate factual history.

In a November 11, 2016 report, Dr. William B. Kuhn, a Board-certified neurosurgeon, noted that appellant was referred by Dr. Ortolani for an evaluation of her neck pain, related to an accident on September 5, 2000. Dr. Kuhn diagnosed degenerative disc disease, low back pain, and lumbar degenerative disc disease.

By decision dated December 13, 2016, OWCP denied modification of its June 27, 2016 decision. It found that the evidence of record was insufficient to establish that appellant was totally disabled due to a material worsening of her work-related condition causally related to her accepted September 5, 2000 work injury as the special weight of the evidence was afforded to the opinion of Dr. Gerling.

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.[4] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[5]

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 establishes that, light duty can be performed, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[6]

An employee who claims a recurrence of disability resulting from an accepted employment injury has the burden of proof to establish that the disability is causally related to the accepted injury. This burden requires 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

[4] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews,* 55 ECAB 719 (2004).

[5] *Id*.

[6] *Shelley A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby,* 51 ECAB 474 (2000); *Terry R. Hedman,* 38 ECAB 222 (1986).

causally related to the employment injury and supports that conclusion with sound medical reasoning.[7]

Furthermore, FECA[8] provides that if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[9] In cases where OWCP has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

ANALYSIS

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

OWCP properly found that a conflict existed between the medical opinions of appellant's attending physician, Dr. Ortolani, and the second opinion physician Dr. Smith as to her ability to return to work. OWCP referred appellant to Dr. Gerling for an impartial medical examination, along with a SOAF, a list of specific questions, and the medical record.

The Board finds that the report of Dr. Gerling is insufficient to carry the special weight of the medical evidence. In his June 14, 2016 report, Dr. Gerling failed to provide sufficient medical rationale to resolve the issue of whether appellant was totally disability from work and had therefore sustained a recurrence of disability on December 2, 2014 due to her accepted September 5, 2000 employment injury. He explained that, based on objective studies and her failure to respond to any form of treatment, he could not identify a diagnosis related to a specific injury, an opinion which contradicts the October 23, 2015 SOAF. The Board has explained that the report of an IME who disregards a critical element of the SOAF and disagrees with the medical basis for acceptance of a condition is defective and insufficient to resolve the existing conflict in the medical opinion.[11] The Board finds that Dr. Gerling did not rely upon the SOAF and as such his report is not based upon an accurate history of injury. Therefore his report is insufficient to resolve the existing conflict in the medical opinion.

The Board has held that, when OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the

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[7] *S.S.,* 59 ECAB 315 (2008).

[8] 5 U.S.C. §§ 8101-8193, 8123(a).

[9] 5 U.S.C. § 8123(a); *Shirley L. Steib,* 46 ECAB 309, 317 (1994).

[10] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber,* 46 ECAB *215, 225 (1994).*

[11] *M.D.*, Docket No. 18-0468 (issued September 4, 2018).

specialist to correct the defect in his original report.[12] If the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed SOAF to another impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.[13]

Following this and such further development deemed necessary, OWCP shall issue a *de novo* decision in this case.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further development consistent with this decision.

Issued: January 22, 2019
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

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[12] *Talmadge Miller,* 47 ECAB 673 (1996)*; Harold Travis*, 30 ECAB 1071, 1078 (1979); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(c)(1)-(2) (September 2010).

[13] *Id.*