United States Department of Labor
Employees' Compensation Appeals Board

Z.B., Appellant	)	
and	)	**Docket No. 17-1336**
	)	**Issued: January 10, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Knoxville, TN, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 1, 2017 appellant, through counsel, filed a timely appeal from a May 3, 2017 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.

[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 total disability on January 11, 2016 causally related to her accepted May 15, 2008 employment injury.

FACTUAL HISTORY

On May 15, 2008 appellant, then a 48-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, while in the performance of duty, she was attempting to move equipment in front of a feeder and the equipment would not roll, causing her to hurt her back. On July 30, 2008 OWCP accepted the claim for exacerbation of underlying spondylolisthesis, L5-S1. Appellant did not initially stop work, but subsequently filed intermittent claims for wage-loss compensation.

On January 27, 2009 appellant underwent an OWCP-authorized lumbar spine fusion. OWCP placed her on the periodic compensation rolls as of February 15, 2009. Appellant returned to full-duty work on November 17, 2009.

In March 2016, appellant began treating with Dr. Rodney McMillin, a general surgeon. In a report dated March 7, 2016, Dr. McMillin noted that appellant had multiple problems, including back pain above her surgical fusion site and radiating pain and weakness down both legs with walking. On physical examination, he found that her straight leg raise was normal, however, appellant's deep tendon reflexes were problematic and she had trouble walking. Dr. McMillin suspected appellant was struggling with some type of spinal stenosis and recommended reevaluation by her neurosurgeon. He further advised that appellant would likely need a motorized scooter, as she was also morbidly obese and her weight was exacerbating her back condition. Dr. McMillin provided an excuse from work, also dated March 7, 2016, advising that she could not return to work for 12 weeks, from January 12 to April 4, 2016. He further indicated that appellant's activity was restricted to "none."

On March 28, 2016 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence of her May 15, 2008 work injury on January 11, 2016. She explained that, despite receiving treatment, her back pain progressively worsened over the years and on January 11, 2016 she was unable to walk without experiencing extreme pain in her back, lower hips, and legs. Appellant resubmitted the aforementioned March 7, 2016 records from Dr. McMillin in support of her recurrence claim.

By development letter dated April 15, 2016, OWCP advised appellant that the evidence submitted was insufficient to establish her recurrence claim and advised her of the evidence needed. It afforded her 30 days to submit the necessary evidence.

In a May 2, 2016 response, appellant explained that, on January 11, 2016, she was working in the manual section unloading trays of mail from a hamper onto a rack when she began having spasms in her back. She reported difficulty walking and the need to use a walker. Appellant related that Dr. McMillin referred her back to her surgeon, but she was unable to get an appointment because treatment had not been approved by OWCP. She further noted that she was unable to resume work until something was done for her back.

In a May 9, 2016 note, Dr. McMillin opined that appellant had chronic low back pain secondary to lumbar surgery and she continued to experience severe low back pain to the extent that she was unable to walk without a walker. He reported that repeated x-rays showed spondylolisthesis. Dr. McMillin opined that appellant was unable to perform any lifting, twisting, turning, or excessive walking and he also provided a work excuse dated May 9, 2016, indicating that appellant could not work from May 2 to 30, 2016.

By decision dated May 19, 2016, OWCP found that the medical evidence of record failed to establish a recurrence of disability on or about January 11, 2016 causally related to appellant's accepted May 15, 2008 employment injury.

On May 31, 2016 counsel requested a telephonic hearing with a representative from OWCP's Branch of Hearings and Review. During the hearing held on February 16, 2017, appellant explained that following her surgery in 2009, she returned to full-duty work after recovering. She confirmed that she worked full duty for five or six years, but her back condition continued to worsen. Appellant indicated that she ultimately stopped work in January 2016 due to her back pain. Counsel noted that appellant was to be referred for a neurosurgical evaluation and asked that the record remain open for 30 days.

A July 1, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine revealed postsurgical changes at L4-5 and L5-S1 without complications, central canal and neural foramina widely patent at both levels, and minimal degenerative changes elsewhere.

In an August 8, 2016 report and work excuse slip, Dr. McMillin noted that appellant was seen for pain in the lower back which worsened with walking, standing, twisting, turning, and bending. He noted minimal neurological symptoms, with a mostly normal physical examination, aside from tenderness in the paralumbar area. Dr. McMillin found that x-rays revealed one centimeter of spondylolisthesis at L4-5 around the prior surgical site without evidence of neurological impingement. He recommended that appellant see her neurosurgeon for an opinion on whether she needed additional surgery, as he believed her symptoms were related to her January 2009 fusion surgery.

In an August 8, 2016 disability certificate, Dr. Robert Wilson, a Board-certified family practitioner, advised that appellant was under his care and placed her off work for one month. He restricted her activity to "none."

By decision dated May 3, 2017, OWCP's hearing representative affirmed the May 19, 2016 decision. He found that appellant failed to provide medical evidence sufficient to establish a recurrence of disability causally related to the accepted May 15, 2008 employment injury. The hearing representative further explained that there was no physician of record who had offered a sufficiently reasoned opinion explaining how appellant's January 11, 2016 recurrence was causally related to the accepted work injury of May 15, 2008.

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.[3] 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.[4]

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 establish 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.[5]

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 causally related to the employment injury and supports that conclusion with sound medical reasoning.[6]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing January 11, 2016 causally related to her accepted May 15, 2008 employment injury.

In support of her recurrence claim, appellant provided several reports from her treating physician, Dr. McMillin, beginning on March 7, 2016. In that report, Dr. McMillin indicated that appellant had multiple medical problems, including morbid obesity, coronary artery disease, and dyspnea on exertion. He noted that her back pain was her primary problem, but opined that her morbid obesity was exacerbating all of her conditions, including her back pain. The Board notes that OWCP only accepted exacerbation of spondylolisthesis at L5-S1 and has not accepted any of the additional conditions diagnosed by Dr. McMillin. Additionally, the Board has held that pain alone is a symptom, not a medical diagnosis.[7] Therefore, the Board finds that this report is of limited probative value in establishing a recurrence of disability due to the accepted medical condition causally related to the May 15, 2008 employment injury.

[3] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews,* 55 ECAB 719 (2004).

[4] *Id*.

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

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

[7] *See F.U.*, Docket No. 18-0078 (issued June 6, 2018).

Dr. McMillan also provided work excuse notes dated March 7 to August 8, 2016. He did not, however, offer an opinion in these notes regarding whether appellant had a recurrence of disability beginning January 12, 2016 causally related to her accepted employment injury. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[8]

In an August 8, 2016 treatment note, Dr. McMillan indicated that he believed appellant's back pain was related to her old surgery and initial OWCP claim. However, he also noted that she had minimal neurological symptoms, her physical examination was mostly normal, and a recent x-ray did not reveal neurological impingement. This evidence from appellant's treating physician does not support appellant's claim for a recurrence of disability causally related to her accepted work injury. Furthermore, the Board finds that Dr. McMillan's opinion is speculative in nature and the Board has held that speculative and equivocal medical opinions regarding causal relationship have limited probative value.[9]

In an August 8, 2016 disability certificate, Dr. Wilson advised that appellant was under his care and had been excused from work for one month. However, he has not provided a diagnosis or an opinion on causal relationship and, as such, his report is of no probative value.[10]

OWCP received diagnostic reports, to include a July 1, 2016 MRI scan of the lumbar spine, read by Dr. Gash. However, these reports are also insufficient to establish appellant's claim. While they provide findings related to appellant's wrist condition, none of the physicians provided an opinion as to whether her current condition was causally related to the original May 15, 2008 employment injury and resulted in her inability to work on January 12, 2016.[11]

Accordingly, the Board finds that appellant has not met her burden of proof in this case as she has not submitted sufficiently reasoned medical opinion explaining why her recurrence of disability beginning January 11, 2016 was caused or aggravated by the accepted May 15, 2008 injury employment injury.[12] 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.

[8] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[9] *Ricky S. Storms*, 52 ECAB 349, 352 (2001) ("While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.")

[10] *Supra* note 8.

[11] *See id.*

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability on January 11, 2016 causally related to her accepted May 15, 2008 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2019
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