United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 18-0616**
	)	**Issued: January 11, 2019**
DEPARTMENT OF VETERANS AFFAIRS, ALBANY VETERANS HOSPITAL, Albany, NY, Employer	)	

Appearances:
Thomas S. Harkins, 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 January 30, 2018 appellant, through counsel, filed a timely appeal from an August 16, 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 commencing August 13, 2014, causally related to her accepted April 17, 2014 employment injury.

FACTUAL HISTORY

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

On April 24, 2014 appellant, then a 63-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that, on April 17, 2014, she sustained a lower back strain when she slipped on gravel/dirt on an elevator floor, twisting her lower back while in the performance of duty. She did not stop work.

OWCP accepted the claim on June 10, 2014 for back sprain, lumbar region.

On August 13, 2014 appellant stopped work and did not return. That same date, she filed a notice of recurrence (Form CA-2a) alleging a return/increase of disability. Appellant explained that her symptoms had worsened despite medical treatment and she experienced an increase in lower back spasms, as well as leg weakness and numbness. Her supervisor indicated that appellant was working in full-time capacity with no restrictions during the time of the alleged recurrence.

On September 3, 2014 appellant filed claim for compensation (Form CA-7) for leave without pay beginning August 13, 2014 and continuing.

In support of her disability claim, appellant submitted medical reports documenting treatment for left L5 radiculopathy, L4-5 disc rupture, and L5 nerve root compression, which she related to the April 17, 2014 employment incident.[4] She further asserted that her work-related lumbar injury resulted in numbness and weakness in her lower extremities, causing her to fall on July 5, 2014. This resulted in a right ankle injury, which she also related to the April 17, 2014 employment injury.

By decisions dated November 7, 2014 and August 6, 2015, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish disability

[3] Docket No. 16-0064 (issued June 1, 2016), *petition for recon. denied,* Docket No. 16-0064 (issued December 2, 2016).

[4] In a July 16, 2014 diagnostic report, Dr. Gary Wood, a Board-certified diagnostic radiologist, reported that a computerized tomography (CT) myelogram of the lumbar spine revealed multilevel degenerative changes of the lumbar disc spaces and facet joints. He explained that the combination of findings suggested mild compressive changes related to the L4 and L5 nerve roots between the regions of the lateral recesses and neural foramen at the levels of L3-4 and L4-5.

beginning August 13, 2014 and continuing due to a material change/worsening of her accepted work-related conditions.[5]

Appellant, through counsel, appealed to the Board on October 14, 2015. By decision dated June 1, 2016, the Board affirmed OWCP's August 6, 2015 decision, finding that the evidence of record was insufficient to establish a recurrence of total disability on or after August 13, 2014 causally related to her April 17, 2014 employment injury.[6] The Board explained that the evidence did not establish that the acceptance of the claim should be expanded to include the additional conditions of left L5 radiculopathy, L4-5 disc rupture, L5 nerve root compression, or a consequential right ankle injury. The Board further found that the evidence of record was insufficient to establish total disability as a result of the accepted back strain injury.

On May 24, 2017 appellant, through counsel, requested reconsideration before OWCP. Counsel argued that the medical evidence submitted established that appellant was disabled from her work-related injury beginning August 13, 2014 and further established that the acceptance of her claim should be expanded to include the additional conditions of lumbosacral radiculopathy, L4-5 disc protrusion, L5 nerve root compression, and a right ankle injury. He noted submission of medical reports dated February 14, March 9, 15, 2017 in support of appellant's claim for total disability.

In a February 14, 2017 medical report, Dr. Sheldon B. Staunton, a Board-certified neurologist, reported that, on April 17, 2014, appellant slipped while she was on an elevator and twisted her back. He referenced his prior reports where he diagnosed left L5 radiculopathy, ruptured L4-5 disc, and L5 nerve root compression based on diagnostic reports and examination findings pertaining to the lumbar spine. Dr. Staunton opined that the April 14, 2017 employment incident was the sole cause of appellant's ruptured disc and disability. He reported that appellant's injury was an almost classical type of presentation for a disc rupture. Dr. Staunton explained that appellant had no history of back problems and suddenly twisted her back and developed pain, resulting in the disc pushing out and compressing the nerve, which created pain down her leg. He diagnosed failed back syndrome, which occurred when the disc ruptures and pinched the nerve root against the bone of the vertebrae, creating damage to the nerve. Dr. Staunton reported that there were a number of delays in reaching appellant's diagnosis and her treatment was mishandled as a back strain. He noted that those initially treating her completely overlooked her leg pain, which does not result from a back strain. Dr. Staunton noted that waiting to have surgery following the injury increased the risk of damage as experienced by appellant. He noted that it was not uncommon to develop neuritic nerve pain as a result of the nerve damage. Dr. Staunton concluded that appellant's pain was permanent and she was totally disabled as a result of her employment injury.

In a March 9, 2017 medical report, Dr. Charles J. Buttaci, a doctor of osteopathic medicine, reported that appellant was a nurse practitioner who had previously suffered a back injury a few years back. He noted a May 8, 2015 surgical procedure wherein she underwent bilateral L4-5

[5] The Board notes that appellant underwent right ankle surgery on February 2, 2015 and a lumbar laminectomy on May 8, 2015. The surgeries were not authorized by OWCP.

[6] *Supra* note 3.

hemilaminectomies, right L4-5 discectomy, and a right L3-4 partial hemilaminectomy. Dr. Buttaci reported that appellant continued to experience residual pain in her low back, buttocks, and neuropathy-like symptoms in the lower limbs. He reviewed a December 15, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine, which revealed degenerative disc disease throughout L4-5 disc osteophyte complex and epidural fibrosis. Dr. Buttaci diagnosed left sacroiliac joint sprain/strain, peripheral neuropathy, history of lumbar laminectomy sciatica, and history of right foot and ankle surgery.

In a March 15, 2017 medical report, Dr. David J. Dixon, a Board-certified orthopedic surgeon, reported that he began treating appellant on January 20, 2015 for a right ankle injury. He provided an extensive medical history summarizing appellant's treatment, diagnostic reports, and physical examination findings from the time of the April 17, 2014 injury. Dr. Dixon reported that on April 17, 2014 appellant sustained an injury to her back where she fell onto her backside upon exiting an elevator. Appellant fell directly on her back in a twisting type of fall and at that time developed significant pain radiating down her left lower extremity. Dr. Dixon noted that she continued to experience severe back pain which radiated into both lower extremities, more prominent on the left, causing her to seek treatment with Dr. Staunton and Dr. Buttaci. He reported that on July 5, 2015 appellant twisted her right ankle and sustained an inversion sprain because of weakness and numbness in her left leg.

On January 7, 2015 appellant underwent a right ankle MRI scan, which revealed a split tear of the peroneus brevis tendon associated with full thickness tearing of her calcaneofibular and anterior talofibular ligaments. Dr. Dixon reported that the numbness, tingling, and weakness in her legs developed after the April 17, 2014 injury when she fell at the Veterans Administration (VA) hospital when getting out of the elevator. He explained that this caused her to turn her right ankle and fall on July 5, 2014, resulting in a right ankle inversion sprain. Dr. Dixon opined that appellant's right ankle injury was related to the April 17, 2014 incident due to weakness and numbness in her lower extremities through the sciatic nerve, thus causing instability in her ankle. Appellant underwent surgical repair of her right ankle on February 6, 2015. On May 8, 2015 she underwent lumbar surgery in the form of hemilaminectomies, but continued to have pain, numbness, and giving way in the legs. Dr. Dixon explained that Dr. Buttaci was treating appellant for her back injury and felt that she had peripheral neuropathy and left sacroiliac sprain chronic in nature and chronic permanent nerve injury. He found that appellant had a permanent disability which precluded her from returning to gainful employment. Dr. Dixon opined that this permanent disability was associated with her work-related lumbar injuries which subsequently developed into a lower extremity nerve injury, resulting in instability and pain in her ankle and injury to her right ankle.

By decision dated August 16, 2017, OWCP denied modification of its prior decision, finding that the medical evidence of record was insufficient to establish disability commencing August 13, 2014 due to a material change/worsening of the accepted employment injury.

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 compensable injury or illness and without an intervening injury or new exposure in the work

environment.[7] This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations and which is necessary because of a work-related injury or illness is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.[8]

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.[9]

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing 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. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.[10] Where no such rationale is present, the medical evidence is of diminished probative value.[11]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing August 13, 2014, causally related to her accepted April 17, 2014 employment injury.[12]

OWCP accepted appellant's claim for lumbar sprain. Appellant did not stop work until August 13, 2014 when she claimed a recurrence of total disability. On June 1, 2016 the Board affirmed OWCP's August 6, 2015 decision, finding that the evidence of record failed to establish total disability on or after August 13, 2014 as a result of the April 17, 2014 employment incident. In its decision, the Board addressed the prior medical reports of record, which failed to establish disability causally related to appellant's accepted lumbar sprain. The Board also found that the

[7] 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

[8] *Id.*

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

[10] *See C.C.*, Docket No. 18-0719 (issued November 9, 2018); *see also Ronald A. Eldridge*, 53 ECAB 218 (2001).

[11] *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

[12] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

medical evidence did not establish a consequential right ankle injury as a result of the work-related back sprain, nor did the evidence establish that the claim should be expanded to include any other lumbar condition. With respect to findings made in the Board's decision, those matters are *res judicata* absent any further review by OWCP under section 8128 of FECA.[13] The Board will, therefore, not review the evidence addressed in the prior appeal.

Following the Board's June 1, 2016 decision, appellant, through counsel, requested reconsideration and argued that the medical evidence submitted established a work-related disability beginning August 13, 2014 and further established that the claim should be expanded to include the additional conditions of lumbosacral radiculopathy, L4-5 disc protrusion, L5 nerve root compression, and right ankle injury. Counsel submitted three medical reports in support of appellant's claim, citing Dr. Staunton's February 14, 2017 report, Dr. Buttaci's March 9, 2017 report, and Dr. Dixon's March 15, 2017 report. The Board finds that the additional medical evidence of record is insufficient to establish appellant's claim for a recurrence of disability.[14]

In a February 14, 2017 medical report, Dr. Staunton opined that the April 17, 2014 employment incident was the sole competent producing cause of appellant's disc rupture, resulting in total disability. The Board notes that Dr. Staunton's opinion that appellant was totally disabled as a result of her left L5 radiculopathy, ruptured L4-5 disc, and L5 nerve root compression was previously addressed and found to be conclusory without sufficient explanation as to how the April 17, 2014 employment incident caused these injuries.[15] The Board finds that his supplemental report fails to rectify the deficiencies of his prior reports by adequately describing the mechanism of injury pertaining to these additional lumbar injuries which he relates to appellant's disability.[16]

In his February 14, 2017 report, Dr. Staunton reported that appellant had no history of back problems when she suddenly twisted her back, causing the disc to push out and put compression on the nerve which accounted for pain in her leg. The Board notes that an increase in pain alone does not constitute objective evidence of disability.[17] Dr. Staunton diagnosed failed back syndrome which occurs when the disc ruptures and pinches the nerve root against the bone of the vertebrae, resulting in damage to the nerve. The Board notes that, while Dr. Staunton explained that nerve damage was the resulting consequence of a ruptured disc, he failed to discuss how the April 17, 2014 fall was sufficient to have caused the underlying disc injury.[18] Dr. Staunton failed to adequately describe the mechanism of injury pertaining to this claim, namely, how twisting her back while falling would cause a disc rupture.[19] He further failed to address appellant's

[13] *See H.G.*, Docket No. 16-1191 (issued November 25, 2016); *Robert G. Burns*, 57 ECAB 657 (2006).

[14] *R.M.*, Docket No. 11-1921 (issued April 10, 2012).

[15] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[16] *K.J.*, Docket No. 17-1971 (issued March 5, 2018).

[17] *See* FECA Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6.a(2) (June 2013).

[18] *S.W.*, Docket No. 08-2538 (issued May 21, 2009).

[19] *D.H.*, Docket No. 14-1852 (issued January 27, 2015).

degenerative lumbar spine conditions as revealed on diagnostic testing. It is unclear whether these additional lumbar conditions were caused by the April 17, 2014 employment incident rather than the natural progression of a preexisting degenerative condition.[20] Without explaining how, physiologically, the movements involved in the employment incident caused or contributed to the diagnosed conditions, Dr. Staunton's opinion is of limited probative value.[21] As previously noted in the Board's prior decision, he did not document a spontaneous worsening of appellant's lumbar sprain resulting in total disability on August 13, 2014.[22] As Dr. Staunton did not relate appellant's disability to the accepted condition of lumbar strain, his report fails to establish a work-related recurrence of disability.[23]

The Board finds that Dr. Buttaci's March 9, 2017 medical report is also insufficient to establish appellant's claim. While Dr. Buttaci discussed appellant's history of injury pertaining to the lumbar spine and subsequent May 8, 2015 surgery, he failed to provide an opinion regarding the cause of her alleged disability. Dr. Buttaci did not establish that the claim should be expanded to include additional conditions or that appellant was disabled due to the accepted lumbar sprain.[24] As such, his report is insufficient to support a spontaneous worsening of appellant's work-related condition on or after August 13, 2014.[25]

The Board finds that Dr. Dixon's March 15, 2017 medical report fails to establish a consequential right ankle injury and total disability as a result of the April 17, 2014 employment incident.[26]

In his report, Dr. Dixon opined that appellant's work-related back injury caused weakness and numbness in her lower extremities through the sciatic nerve, thus causing instability in her ankle. This instability resulted in appellant's fall on July 5, 2014 when she turned her right ankle and sustained an inversion sprain and tear of the peroneus brevis tendon. The Board notes that the basic rule respecting consequential injuries is that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury

[20] *K.S.*, Docket No. 14-0275 (issued June 13, 2014).

[21] *See L.M.*, Docket No. 14-0973 (issued August 25, 2014); *R.G.*, Docket No. 14-0113 (issued April 25, 2014); *K.M.*, Docket No. 13-1459 (issued December 5, 2013); *A.J.*, Docket No. 12-0548 (issued November 16, 2012).

[22] *J.H.*, Docket No. 12-1848 (issued May 15, 2013).

[23] *Id.*

[24] For conditions not accepted by OWCP as being employment related, it is the employee's burden of proof to provide rationalized medical evidence sufficient to establish causal relationship, not OWCP's burden to disprove such relationship. *P.P.*, Docket No. 16-1232 (issued December 23, 2016). *See also P.O.*, Docket No. 14-1675 (issued December 3, 2015).

[25] *Deborah L. Beatty*, 54 ECAB 334 (2003).

[26] *D.M.*, Docket No. 12-1298 (issued November 7, 2012); *N.F.*, Docket No. 12-0095 (issued August 1, 2012).

likewise arises out of the employment, unless it is the result of an independent intervening event.[27] While Dr. Dixon opined that appellant's disability was associated with her work-related back injury, he failed to provide a fully rationalized opinion explaining how the alleged consequential conditions were related to the initial April 17, 2014 injury, which was only accepted for lumbar strain.[28] The Board finds that the evidence does not establish that the claim should be expanded to include the L5 radiculopathy, L4-5 disc rupture, and left L5 nerve root compression in order to relate any new ankle injury to the initial April 17, 2014 employment incident. While Dr. Dixon provided extensive detail pertaining to appellant's medical history, his report fails to establish a consequential right ankle injury as a result of the accepted April 17, 2014 lumbar sprain.[29] As Dr. Dixon failed to establish a consequential right ankle injury causally related to the accepted lumbar sprain, his report is insufficient to establish appellant's claim for total disability.[30]

The Board finds that the medical evidence submitted failed to establish total disability commencing August 13, 2014 due to residuals of the accepted injury. Thus, the Board finds that appellant has not established by the weight of the reliable, probative, and substantial evidence, a change in the nature and extent of the injury-related condition resulting in her inability to perform her employment duties.[31]

Appellant may submit new evidence 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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing August 13, 2014, causally related to her accepted April 17, 2014 employment injury.

[27] Once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent, nonindustrial cause. *See Kathy A. Kelley*, 55 ECAB 206 (2004); *Carlos A. Marerro*, 50 ECAB 170 (1998).

[28] *P.O.*, *supra* note 24.

[29] *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).

[30] *Id.*

[31] *K.P.*, Docket No. 15-1711 (issued January 14, 2016).

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 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