United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
	)	
and	)	**Docket No. 18-1640**
	)	**Issued: May 3, 2019**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Cumberland, MD, Employer	)	
	)	

Appearances:
Appellant, pro se
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 August 27, 2018 appellant filed a timely appeal from an August 8, 2018 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]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the August 8, 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 his burden of proof to establish a recurrence of disability commencing June 11, 2018 causally related to his accepted March 20, 2018 employment injury.

FACTUAL HISTORY

On March 21, 2018 appellant, then a 36-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on March 20, 2018 he experienced intense pain in his lower back when he lifted upwards during a forced cell move exercise while in the performance of duty. OWCP accepted the claim for lumbar spine strain. Appellant stopped work on March 21, 2018 and returned to full-duty work on March 27, 2018.

On June 12, 2018 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence of disability as of June 11, 2018 due to his March 20, 2018 employment injury. He related that while exercising, he felt the same pull in his lower back as he felt during his March 20, 2018 injury.

In a June 13, 2018 development letter, OWCP informed appellant that the evidence of record was insufficient to support his recurrence claim. It advised him of the medical and factual evidence required to establish his claim. OWCP afforded appellant 30 days to respond.

In a June 25, 2018 response to OWCP's development letter, appellant related that the recurrence occurred outside of work while he was exercising at the YMCA on June 10, 2018. He noted that his symptoms were currently continuously present, but in a diminished intensity. Appellant noted that he was able to perform his full employment duties.

In a June 10, 2018 emergency room report, Dr. Ronald C. Kinsey, Board-certified in emergency medicine, reported appellant's history of back pain that began that day while playing basketball. Appellant noted that he had a similar, more minor injury about four months prior. Dr. Kinsey presented examination findings and noted that x-ray findings were normal, with no change from prior x-rays from March 2018. He diagnosed intractable back pain and muscle spasms.

Dr. H. Stanley Lambert, a Board-certified diagnostic radiologist, provided an impression that appellant's June 10, 2018 x-ray of the lumbar spine was within normal limits. Normal intervertebral discs were seen with no compression fracture or spondylolisthesis.

In a June 15, 2018 report, Lucinda R. Everett, a certified registered nurse practitioner, provided an assessment of strain of muscle, fascia, and tendon of lower back.

In an undated letter, which OWCP received on June 26, 2018, Dr. Rishi Bhatnagar, a Board-certified orthopedic surgeon, indicated that appellant was seen on March 21, 2018 for acute low back pain which occurred on March 20, 2018 while at work. Appellant was standing up with weight on his shoulders and had immediate pain in his lower back. Dr. Bhatnagar indicated that appellant's x-rays were normal and diagnosed lumbar radiculopathy and strain of the lumbar region. He noted that appellant could return to work on March 27, 2018. Appellant had not returned for his scheduled three-week follow-up appointment nor did he attend physical therapy.

Dr. Bhatnagar indicated that appellant returned to the office on June 18, 2018 with low back pain, worse than his previous back pain, which he indicated had previously resolved. Appellant recounted that he was playing basketball and jumping up in the air when the recurrence occurred. He noted falling to the ground and again having difficulty bending forward. Dr. Bhatnagar provided examination findings and diagnosed lumbar strain. He indicated that he could not say that appellant's most recent injury was a work injury, but it was a reoccurrence of the previous injury. Dr. Bhatnagar noted that if the recent lumbar sprain did not resolve with the prescribed medications and physical therapy, then further diagnostic testing would be needed.

By decision dated August 8, 2018, OWCP denied appellant's claim for a recurrence of disability as of June 11, 2018 because appellant had not met his burden of proof to establish disability due to a material change/worsening of his accepted work-related condition.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[3] For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.[4] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.[5]

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[6] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[7] An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.[8] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.[9]

OWCP's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition,

[3] *See T.A.*, Docket No. 18-0431 (issued November 7, 2018).

[4] *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

[5] *See K.C.*, Docket No. 17-1612 (issued October 16, 2018).

[6] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

[7] *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

[8] *See D.G.*, Docket No. 18-0597 (issued October 3, 2018).

[9] *See D.R.*, Docket No. 18-0232 (issued October 2, 2018).

which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment.[10]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability commencing June 11, 2018 causally related to his March 20, 2018 employment injury.

OWCP accepted appellant's claim for lumbar spine strain as a result of the March 20, 2018 employment injury. Appellant returned to full duty without restrictions on March 27, 2018. He subsequently filed a claim for recurrence of disability commencing June 11, 2018. The record does not contain a sufficiently rationalized medical opinion to establish that appellant was disabled from work commencing June 11, 2018 causally related to his March 20, 2018 employment injury, without intervening injury.

In a June 10, 2018 emergency room report, Dr. Kinsey reported that appellant felt severe back pain while playing basketball outside of work while he was exercising at the YMCA. He diagnosed intractable back pain and muscle spasms. The Board has held that pain is generally considered a symptom and not a firm medical diagnosis.[11] Similarly, a back **s**pasm has been found to be a symptom, not a diagnosis.[12] Dr. Kinsey's report did not provide a firm medical diagnosis[13] or offer an opinion as to whether appellant was disabled from work on or after June 10, 2018. For each period of disability claimed, the employee must establish that he was disabled for work as a result of the accepted employment injury without intervening injury.[14] Dr. Kinsey's report is insufficient to establish that appellant was disabled from work as of June 11, 2018 due to his accepted employment injury.[15]

In his undated report, Dr. Bhatnagar reported that appellant's work-related back condition had resolved and that a reoccurrence of back pain occurred when appellant was playing basketball and jumping up in the air. He provided examination findings and diagnosed lumbar strain. While Dr. Bhatnagar opined that appellant had a reoccurrence of the same injury, he also failed to provide a medical explanation as to how appellant's accepted conditions had resulted in a recurrence of

[10] 20 C.F.R. § 10.5(x).

[11] *R.R.*, Docket No. 18-1093 (issued December 18, 2018).

[12] *Id*.

[13] The description of low back pain and muscle spasms is not a firm medical diagnosis. *See T.M.*, Docket No. 14-1922 (issued December 1, 2015); *L.G.*, Docket No. 10-0732 (issued October 7, 2010).

[14] *See supra* note 9.

[15] *See R.W.*, Docket No. 17-0720 (issued May 21, 2018); *R.A.*, Docket No. 14-1327 (issued October 10, 2014).

disability without intervening injury.[16] Without such an explanation, Dr. Bhatnagar's report is insufficient to establish a recurrence of disability, as alleged.[17]

The remainder of the medical evidence is insufficient to establish appellant's claim. In a June 10, 2018 report, Dr. Lambert read the lumbar spine x-ray as normal. This report is insufficient to establish appellant's claim for a recurrence of disability, as it does not specifically address how any condition on or after June 11, 2018 was causally related to the original employment injury without intervening injury.[18] The Board has held that reports of diagnostic tests lack probative value as they do not provide an opinion on causal relationship between appellant's employment incident and a diagnosed condition.[19]

OWCP also received a June 15, 2018 report from Ms. Everett, a certified registered nurse practitioner, which documented appellant's back symptoms. The Board has held that treatment notes signed by nurse practitioners[20] have no probative value as these providers are not considered physicians under FECA.[21] Thus, Ms. Everett's' treatment note is of no probative medical value in establishing appellant's claim.

Based on the medical evidence of record, the Board finds that appellant has not established an employment-related disability commencing June 11, 2018.

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.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability commencing June 11, 2018 causally related to the accepted March 20, 2018 employment injury.

[16] *E.B.*, Docket No. 17-1467 (issued July 26, 2018); *see S.E.*, Docket No. 08-2214 (issued May 6, 2009); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

[17] *See E.M.*, Docket No. 17-1683 (issued January 4, 2019).

[18] The Board has held that diagnostic studies lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions. *See J.S.*, Docket No. 17-1039 (issued October 6, 2017).

[19] *T.H.*, Docket No. 18-1736 (issued March 13, 2019).

[20] *See N.W.*, Docket No. 17-1415 (issued November 7, 2017); *Paul Foster*, 56 ECAB 208 (2004) (a nurse practitioner is not a physician pursuant to FECA).

[21] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law); *A.L.*, Docket No. 16-1707 (issued August 17, 2017) (nurse practitioners are not considered physicians as defined under FECA).

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 3, 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