

**United States Department of Labor
Employees' Compensation Appeals Board**

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| A.A., Appellant |) | |
| |) | |
| and |) | Docket No. 19-0957 |
| |) | Issued: October 22, 2019 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Manistee, MI, Employer |) | |
| |) | |

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 1, 2019 appellant, through counsel, filed a timely appeal from a January 29, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (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 The Board notes that, following the January 29, 2019 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.*

³ 5 U.S.C. § 8101 *et seq.*

ISSUES

The issue is whether appellant has met her burden of proof to establish a recurrence of disability commencing December 8, 2017 causally related to her accepted September 19, 2016 employment injury.

FACTUAL HISTORY

On September 23, 2016 appellant, then a 24-year-old sales, service, and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on September 19, 2016 she injured her lower back when bending down to retrieve flats while in the performance of duty. OWCP accepted the claim for an aggravation of lumbar intervertebral disc displacement at L4-5.⁴

Appellant stopped work on September 21, 2016 and received wage-loss compensation from OWCP for temporary total disability. She returned to modified employment on March 18, 2017.

In an emergency department report dated August 30, 2017, Dr. Rick L. Holland, Board-certified in emergency medicine, evaluated appellant for low back pain that had begun when she woke up that morning and increased after she got up from a chair after extended sitting while at work. He noted that she had a history of low back pain treated with a rhizotomy in February 2017. Dr. Holland diagnosed acute low back pain and lumbar radiculopathy and provided restrictions.

A magnetic resonance imaging (MRI) scan obtained September 22, 2017 revealed a moderate disc herniation at L4-5 on the right causing mild central canal stenosis and seeming to abut the right L5 nerve root.

On October 24, 2017 appellant filed a notice of recurrence (Form CA-2a) of the need for medical treatment beginning August 30, 2017 causally related to her accepted employment injury. She related that she got up from a seated position and felt a pull in her back. Appellant asserted that objective testing confirmed that she had again herniated her disc.

In an emergency department report dated December 7, 2017, Dr. Holland evaluated appellant for severe pain in her low back. He related, “[Appellant] says that she has degenerative disc or herniated disc, which occurred in 2015 at ‘some type’ of a work injury. She reinjured her back in September of this year. [Appellant] now has a flare-up of low back pain, which radiates into the right buttock area.” Dr. Holland diagnosed an acute flare of chronic back pain.

In a December 8, 2017 duty status report (Form CA-17), a physician assistant found that appellant’s restrictions had increased such that she could only stand and walk for one hour per day and perform no bending, stooping, or twisting.

⁴ By decision dated November 22, 2016, OWCP initially denied appellant’s claim as the medical evidence was insufficient to show that she sustained a medical condition causally related to the accepted employment incident. By decision dated March 8, 2017, it vacated the November 22, 2016 and accepted the claim for an aggravation of an L4-5 herniated disc.

On December 22, 2017 appellant filed claims for compensation (Form CA-7) requesting intermittent wage-loss compensation for disability beginning December 9, 2017.⁵

In a development letter dated January 19, 2018, OWCP advised appellant of the definition of a recurrence of disability and the type of evidence necessary to establish that she had sustained a recurrence of employment-related disability. It afforded her 30 days to submit additional evidence.

Thereafter, appellant submitted an emergency department report dated January 10, 2018 from Dr. Matt Flannigan, an osteopath. Dr. Flannigan indicated that she had experienced chronic pain in her low back after a September 2016 injury at work. He diagnosed acute low back pain with right sciatica and provided her with a two-day work note.

A nurse practitioner provided reports dated December 20, 2017 and February 2, 2018. A physician assistant provided progress reports dated February 1 and 9, 2018.

A February 2, 2018 MRI scan of the lumbar spine revealed a moderate disc protrusion at L4-5 on the right side.

On February 6, 2018 Dr. Kenneth M. Louis, a Board-certified neurosurgeon, diagnosed low back pain, lumbar disc disease, and right hip pain. He discussed possible surgery.

On February 5, 2018 E.V., appellant's supervisor, related that from March 18 to December 8, 2017 she had worked as an assistant supervisor performing a modified job. On December 5, 2017 she returned to her prior position as a sales associate clerk, and submitted a December 8, 2017 duty status report (Form CA-17) after "aggravating her injury again." E.V., advised that management had offered appellant employment in accordance with her work restrictions.

In a February 8, 2018 response to OWCP's development letter, appellant specified that she had sustained a recurrence of disability on August 30, 2017 rather than December 8, 2017. She related that she had reinjured her back twisting and turning on a route and had immediately sought treatment at the emergency department.

On February 15, 2018 Dr. Mark D'Angelo, an osteopath, evaluated appellant for right hip pain and a bulging disc. He obtained a history of her sustaining an injury at work when she experienced back pain after bending down. Dr. D'Angelo diagnosed right hip bursitis "which could stem from [appellant's] low back injury" and lumbar intervertebral disc displacement. In a separate report of even date, he evaluated appellant for right knee pain which he noted that she possibly related to a 2016 fall. Dr. D'Angelo diagnosed internal derangement of the right knee, a tear of the right medial meniscus, and a tear of the right lateral meniscus.

In a progress report dated March 8, 2018, Dr. D'Angelo again diagnosed right hip bursitis and lumbar intervertebral disc displacement. He asserted that the pain in appellant's low back had begun after a September 19, 2016 employment injury.

⁵ Appellant submitted reports from a licensed clinical social worker, who evaluated her for depression and anxiety.

In a March 9, 2018 duty status report (Form CA-17), Dr. Brian McComb, an osteopath, provided work restrictions.

By decision dated April 13, 2018, OWCP denied appellant's claim for a recurrence of disability beginning December 8, 2017 causally related to her September 19, 2016 employment injury. It noted that she had performed modified employment until December 8, 2017, when a physician assistant provided additional work restrictions that the employing establishment could not accommodate.

On May 4, 2018 appellant appealed the April 13, 2018 decision to the Board. In an order dated November 27, 2018, the Board dismissed the appeal at the request of her counsel.⁶

In a report dated May 10, 2018, Dr. Steve Klafeta, a Board-certified neurosurgeon, discussed appellant's complaints of low back pain radiating into the thigh and right buttocks numbness. He noted that she had a history of a "September 19, 2017" injury at work. Dr. Klafeta provided examination findings and diagnosed lumbar spondylosis with radiculopathy. He requested authorization for a lumbar interbody fusion at L4-5.

A physician assistant provided progress reports dated June 13 and 19, September 13, and October 9, 2018. A physician assistant also evaluated appellant at the emergency department on September 5, 2018 for increased low back pain after she stood up from a seated position.⁷

On November 5, 2018 Dr. Danielle Olson Basora, who specializes in family medicine, discussed appellant's complaints of increased back pain and diagnosed a lumbar disc herniation.

In duty status reports (Form CA-17) dated November 9 and 27, 2018, Dr. McComb provided work restrictions.

On December 24, 2018 appellant, through counsel, requested reconsideration. Counsel submitted a September 27, 2018 report from Dr. McComb. Dr. McComb advised that he had treated appellant since 2014 and that she had "a herniated disc at L4-5 which has been problematic since September 2016." He discussed her treatment and noted that she had experienced an aggravation of her back pain after performing twisting while delivering mail on a route on August 24, 2017. Dr. McComb recommended surgery and advised that she had exhausted conservative measures.

By decision dated January 29, 2019, OWCP denied modification of its April 13, 2018 decision. It found that appellant had not established that her condition worsened on August 30, 2017 such that she became disabled from employment on December 8, 2017.

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

⁶ *Order Dismissing Appeal*, Docket No. 18-1087 (issued November 27, 2018).

⁷ The report indicated that Dr. Holland was a cosigner to the report if needed.

compensable injury or illness and without an intervening injury or new exposure in the work environment.⁸ 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.⁹

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.¹⁰

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish 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.¹¹ Where no such rationale is present, the medical evidence is of diminished probative value.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability commencing December 8, 2017 causally related to her September 19, 2016 employment injury.

Appellant alleged that she sustained a recurrence of the need for medical treatment beginning August 30, 2017. She stopped work on December 8, 2017 and filed a claim for wage-loss compensation. A recurrence of a medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage.¹³ Appellant had not been released from medical treatment for her accepted medical condition at the time of her alleged recurrence of the need for medical

⁸ 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁹ *Id.*

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

¹¹ *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

¹² *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

¹³ 20 C.F.R. § 10.5(y).

treatment on August 30, 2017. Consequently, the relevant issue is whether she sustained an employment-related recurrence of disability on December 8, 2017.

Appellant has not alleged that she sustained a recurrence of disability because the employing establishment withdrew her limited-duty position. Instead, she maintained that on August 30, 2017 she herniated a disc in her back getting up from a chair. In a statement received by OWCP on March 6, 2018, appellant related that she had reinjured her back twisting and turning on a route. She requested wage-loss compensation for intermittent time lost from work due to increased restrictions effective December 8, 2017.

The Board notes that appellant has described two separate intervening events such as reinjuring her back getting up from a chair or twisting and turning while delivering mail on her route.¹⁴ The Board has found that a recurrence of disability does not occur where the claimant's work stoppage is caused by a new or intervening injury, even if the new injury involves the same part of the body previously injured.¹⁵

In an emergency department report dated December 7, 2017, Dr. Holland evaluated appellant for severe low back pain and noted that she had either a degenerative or herniated disc from a 2015 employment injury. He advised that she had reinjured her back in September 2017. Dr. Holland diagnosed an acute flare of chronic back pain. He did not, however, address the relevant issue of whether appellant had sustained an employment-related recurrence of disability and thus his report is of little probative value.¹⁶

In a duty status report (Form CA-17) dated December 8, 2017, a physician assistant provided increased work restrictions. The record contains numerous additional reports signed by either a physician assistant or a nurse practitioner. However, these reports are insufficient to satisfy appellant's burden of proof as neither a physician assistant nor a nurse practitioner are considered physicians as defined under FECA.¹⁷

On January 10, 2018, Dr. Flannigan obtained a history of appellant experiencing low back pain subsequent to a September 2016 employment injury. He diagnosed acute low back pain and sciatica on the right side and provided her with a two-day work note. On February 6, 2018 Dr. Louis diagnosed lumbar disc disease with low back pain. Neither Dr. Flannigan nor Dr. Louis

¹⁴ See *supra* note 10 at Chapter 2.1500.3(c)(5) (June 2013); see also *V.H.*, Docket No. 18-0456 (issued August 9, 2019).

¹⁵ See *V.H.*, *id.*

¹⁶ *D.B.*, Docket No. 19-0481 (issued August 20, 2019).

¹⁷ 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. See *id.* at § 8102(2); 20 C.F.R. § 10.5(t); *T.W.*, Docket No. 19-0677 (issued August 16, 2019). Lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA. See *E.O.*, Docket No. 19-0472 n. 11 (issued August 15, 2019).

addressed the relevant issue of whether appellant had sustained a recurrence of disability resulting from her accepted employment injury and thus their opinions are of little probative value.¹⁸

In a report dated February 15, 2018, Dr. D'Angelo discussed appellant's history of back pain after bending down at work. He diagnosed right hip bursitis which could be due to her injury to her low back. In another report of even date, Dr. D'Angelo evaluated appellant for right knee pain, noting that she advised that it might be related to a 2016 fall. He diagnosed internal derangement of the right knee and tears of the right medial and lateral meniscus. Dr. D'Angelo, however, failed to address appellant's disability from work or provide medical rationale explaining how she sustained a right knee or right hip condition causally related to her employment injury. Appellant has the burden of proof to submit reasoned medical evidence sufficient to establish causal relationship for conditions not accepted by OWCP as employment related.¹⁹

In a progress report dated March 8, 2018, Dr. D'Angelo diagnosed right hip bursitis and lumbar intervertebral disc displacement and noted that appellant's pain had begun after a September 19, 2016 employment injury. He failed to address the relevant issue of disability from employment and thus his report is of diminished probative value.²⁰ Additionally, the fact that a claimant was asymptomatic before the injury is insufficient, without adequate rationale, to establish causal relationship.²¹

In duty status reports (Form CA-17) dated March 9 and November 9 and 27, 2018, Dr. McComb provided work restrictions. However, the duty status reports are merely form reports and do not contain an opinion on whether the accepted employment injury caused disability from employment; consequently, and, as such, they are of no probative value on the issue of causal relationship.²²

On May 10, 2018 Dr. Klafeta reviewed appellant's history of an injury at work on September 19, 2017 and her current complaints of low back pain with radiculopathy. He diagnosed lumbar spondylosis with radiculopathy. Dr. Klafeta failed to address appellant's work status or any periods of disability. Without a specific opinion regarding how work factors caused a recurrence of disability, his report is insufficient to meet her burden of proof.²³

On November 5, 2018 Dr. Basora diagnosed a lumbar disc herniation. As she did not discuss employment-related disability, her report is of no probative value.²⁴

¹⁸ *See supra* note 16.

¹⁹ *O.G.*, Docket No. 17-1501 (issued January 5, 2018).

²⁰ *See id.*

²¹ *C.W.*, Docket No. 18-0002 (issued September 6, 2018).

²² *T.S.*, Docket No. 18-0150 (issued April 12, 2019).

²³ *See M.B.*, Docket No. 18-1455 (issued March 26, 2019).

²⁴ *See supra* note 17.

In a report dated September 27, 2018, Dr. McComb related that appellant had a herniated disc which became symptomatic in September 2016. He indicated that she had experienced an aggravation of low back pain on August 24, 2017 after twisting delivering mail. Dr. McComb recommended surgery. He did not provide an opinion regarding whether the accepted employment injury caused a recurrence of disability; consequently, his report is of no probative value on the issue of causal relationship.²⁵ Additionally, Dr. McComb described what appears to be an intervening injury on August 24, 2017 and thus his report fails to demonstrate a worsening of appellant's disability due to her accepted September 19, 2016 employment injury without intervening factors.²⁶

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 disability commencing December 8, 2017 causally related to her accepted September 19, 2016 employment injury.

²⁵ *Id.*

²⁶ *See E.B.*, Docket No. 17-1467 (issued July 26, 2018).

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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