United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 19-1131**
	)	**Issued: April 2, 2020**
U.S. POSTAL SERVICE, HOPE MILLS POST OFFICE, Hope Mills, NC, 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:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 24, 2019 appellant, through counsel, filed a timely appeal from an April 3, 2019 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 to consider the merits of this case.[3]

[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*.

[3] The Board notes that, following the April 3, 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*.

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of disability, commencing March 18, 2018, causally related to the accepted January 27, 2004 employment injury.

FACTUAL HISTORY

This case has been previously before the Board. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.[4] The relevant facts are as follows.

On August 23, 2006 appellant, then a 35-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he had aggravated a preexisting back condition[5] on or before September 28, 2005 due to prolonged walking and carrying a mail satchel while in the performance of duty. He stopped work on July 26, 2006. OWCP accepted appellant's claim for a lumbar sprain, displacement of thoracic intervertebral disc without myelopathy, displacement of cervical intervertebral disc without myelopathy, aggravation of lumbar degenerative disc disease, and aggravation of cervical degenerative disc disease. He was placed on the periodic rolls by OWCP beginning September 2, 2006.

By decision dated April 16, 2008, OWCP terminated appellant's wage-loss compensation benefits effective that day, based on the opinion of Dr. Inad Atassi, a Board-certified neurosurgeon and impartial medical specialist, who opined that the accepted injuries had ceased without residuals. It denied modification by decision dated July 14, 2008. Appellant then appealed to the Board.

By decision and order dated June 19, 2009, the Board reversed OWCP's April 16 and July 14, 2008 decisions, finding that OWCP improperly terminated appellant's wage-loss compensation benefits. It explained that Dr. Atassi's opinion was insufficient to represent the weight of the medical evidence.[6]

In May 2010, appellant returned to full-time modified-duty work with permanent restrictions. He continued on modified duty with intermittent absences through early January 2018.

On January 11, 2018 the employing establishment reduced appellant's duty schedule from eight hours to five-and-a-half hours per day as he contended that his assigned work duties exceeded his medical restrictions. OWCP paid him wage-loss compensation for the remaining two-and-a-half hours per day.

[4] Docket No. 08-2477 (issued June 19, 2009).

[5] OWCP accepted that on January 27, 2004 appellant slipped and fell on icy pavement while in the performance of duty and sustained a lumbar sprain, T11-12 disc bulge, disc protrusions at C4-5 and C6-7, and aggravation of cervical and lumbar disc disease.

[6] *Supra* note 4.

In a February 13, 2018 duty status report (Form CA-17), Dr. Tracy Bullard, a Board-certified family practitioner, restricted appellant to sitting, driving, grasping, fine manipulation, or driving a vehicle for no more than five hours a day, lifting or carrying no more than 20 pounds for up to five-and-a-half hours, intermittent walking for up to five hours, twisting or pushing/pulling intermittently for four hours, standing or reaching above shoulder level for three hours, and climbing, kneeling, or bending/stooping intermittently for two hours.

On February 20, 2018 appellant accepted a new modified-duty assignment for five hours per day. The position limited lifting and carrying to 20 pounds, reaching above the shoulder three hours a day, twisting and bending to four hours a day, driving and all other physical activities to five hours a day. OWCP paid appellant wage-loss compensation for the remaining three hours per day.

OWCP received an employing establishment personnel (SF-50) form indicating that appellant voluntarily resigned from the employing establishment, effective March 18, 2018. Appellant began to receive disability retirement benefits through the Office of Personnel Management on March 18, 2018.

In a March 19, 2018 report, Dr. Bullard found appellant totally disabled from his part-time modified-duty position due to chronic neck and back pain, radiculopathy, occupational stress, and an exacerbation of post-traumatic stress disorder (PTSD).

On April 4, 2018 appellant filed a claim for compensation (Form CA-7) for the period March 17 to 30, 2018. On April 17, 2018 he filed a claim for compensation (Form CA-7) for the period March 31 to April 13, 2018.

In a development letter dated April 23, 2018, OWCP informed appellant that the factual and medical evidence of record was insufficient to establish his claim. It advised him regarding the evidence necessary to establish his claim and afforded him 30 days to submit the necessary evidence.

In response, appellant submitted a July 10, 2018 report by Dr. Christopher Imber, a Board-certified family practitioner, who related appellant's complaints of radicular symptoms in all extremities, and increased anxiety. Dr. Imber diagnosed cervical radiculopathy, lumbar radiculopathy, a history of degenerative disc disease, paraspinal muscle spasm, PTSD, and morbid obesity.

OWCP also received a September 6, 2018 note signed by Janet Jaime, a nurse practitioner.

By decision dated October 1, 2018, OWCP denied appellant's claim for wage-loss compensation, commencing March 18, 2018, as the medical evidence did not support that he had sustained a recurrence of disability.

On October 9, 2018 appellant, through counsel, requested a telephonic oral hearing before an OWCP hearing representative, which was held on January 25, 2019. At the hearing, he asserted that he had stopped work on March 18, 2018 as his physician informed him that diagnostic studies demonstrated a worsening of his spinal conditions. Appellant alleged that managers had pressured him to exceed his medical restrictions.

Following the hearing, appellant submitted February 13 and 15, 2019 statements regarding his request for an implanted spinal cord stimulator. He provided additional evidence.

In an August 21, 2017 electromyography report, Dr. Rangasamy Ramachandran, a Board-certified neurologist, opined that bilateral peroneal motor latencies and left tibial distal latencies were mildly prolonged when compared to a previous study.

In reports dated November 9, 2017, February 19, 2018, and February 19, 2019, Dr. Bullard noted appellant's belief that his condition had worsened. She opined that he could "no longer stand or work for any period of time due to pain."

On October 11, 2018 Dr. Viren D. Desai, a Board-certified anesthesiologist, administered a lumbar epidural injection.

A February 2, 2019 lumbar magnetic resonance imaging scan demonstrated degenerative disc disease and degenerative joint disease, a small disc protrusion at L1-2, posterior disc bulging at T11-12, and probable nondisplaced pars defects bilaterally at L5 with minimal anterior subluxation of L5 on S1 and moderate-right-sided foraminal stenosis.

In a report dated March 6, 2019, Dr. Christopher Ketchman, a licensed clinical psychologist, noted that additional psychological evaluation would be needed to determine if appellant was a suitable candidate for an implanted spinal cord stimulator. Dr. Franklin M. Epstein, a Board-certified neurosurgeon, recommended a spinal cord stimulator in a March 7, 2019 report. He noted that he had not reviewed "medical reports for the first 12 to 13 years of [appellant's] evaluation and treatment following the accepted work injury."

Appellant also submitted counseling notes dated from November 4, 2015 to December 30, 2016 signed by social workers, chart notes dated from September 6, 2018 to January 4, 2019 by Ms. Jaime, and February 5 and March 7, 2019 notes signed by Noli Punzalan, a nurse practitioner.

By decision dated April 3, 2019, OWCP's hearing representative affirmed OWCP's prior decision of October 1, 2018, denying appellant's claimed recurrence of disability beginning March 18, 2018.

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 injury or illness, without an intervening injury or new exposure to the work environment that caused the illness.[7] Recurrence of disability also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[8] Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to

[7] 20 C.F.R. § 10.5(x).

[8] *Id*.

light duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.[9]

When an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establish that the recurrence is causally related to the original injury.[10] This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.[11] The physician's opinion must be based on a complete and accurate factual and medical history and it must be supported by sound medical reasoning.[12] Where no such rationale is present, the medical evidence is of diminished probative value.[13]

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.[14] The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify their disability and entitlement to compensation.[15]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability, commencing March 18, 2018, causally related to the accepted January 27, 2004 employment injury.

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[16] It is therefore unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's July 14, 2008 decision because the Board considered that evidence in its June 19, 2009 decision.[17]

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[9] *G.L.*, Docket No. 16-1542 (issued August 25, 2017); *Theresa L. Andrews*, 55 ECAB 719, 722 (2004). *See also Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

[10] 20 C.F.R. § 10.104(b); *see* Federal FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 and 2.1500.6 (June 2013).

[11] *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *S.S.*, 59 ECAB 315, 218-19 (2008).

[12] *Id*.

[13] *G.L.*, Docket No. 19-0898 (issued December 5, 2019); *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

[14] *See B.D.*, Docket No. 18-0426 (issued July 17, 2019); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

[15] *Id*., *Fereideoon Kharabi*, 52 ECAB 291 (2001).

[16] *J T.*, Docket No. 18-1757 (issued April 19, 2019); *S.S.*, Docket No. 17-1106 (issued June 5, 2018); *H.G.*, Docket No. 16-1191 (issued November 25, 2016).

[17] *Id*., *supra* note 4.

In support of his claim for disability commencing March 18, 2018, appellant submitted a series of reports from Dr. Bullard, who held him off work for the claimed period due to cervical lumbar spine pain. In her February 13, 2018 report, Dr. Bullard found him medically able to perform the part-time modified-duty position he held as of March 18, 2018 when he stopped work and did not return. However, she opined in her March 19, 2018 and subsequent reports that appellant was disabled from his part-time modified-duty position due to neck and back pain, occupational stress, and an exacerbation of PTSD. The Board notes that pain is a symptom, not a compensable medical diagnosis.[18] Dr. Bullard did not provide medical rationale supporting an objective worsening of the accepted conditions between February 13 and March 19, 2018 such that appellant could no longer perform his modified-duty position. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/disability was related to employment factors.[19]

Dr. Imber discussed appellant's nonoccupational emotional condition, but did not address whether the accepted neck and back conditions totally disabled appellant from his modified-duty position as of March 18, 2018. Moreover, Drs. Desai, Epstein, Hartmann, and Ketchman did not find appellant disabled for work for the claimed period. As these physicians did not address appellant's claimed dates of disability, their opinions are insufficient to establish his claim.[20]

Appellant also submitted reports by Ms. Jaime and Mr. Punzalan, nurse practitioners, and counseling notes signed by social workers. As physician assistants and social workers are not considered physicians under FECA, their medical findings and opinions are insufficient to establish entitlement to compensation benefits.[21]

Finally, appellant submitted results from diagnostic testing. The Board has held, however, that diagnostic studies are of lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.[22] These reports are therefore insufficient to establish the claim.

[18] *I.M.*, Docket No. 19-1038 (issued January 23, 2020).

[19] *G.R.*, Docket No. 19-0940 (issued December 20, 2019); *D.L.*, Docket No. 19-0900 (issued October 28, 2019); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017); *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

[20] *M.L.*, Docket Nos. 18-1058, 18-1224 (issued November 21, 2019); *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[21] 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 § 8101(2); *T.G.*, Docket No. 19-1441 (issued January 28, 2020) (nurse practitioners are not considered physicians under FECA); *S.W.*, Docket No. 18-1217 (issued May 3, 2019) (social workers are not considered physicians under FECA); *T.K.*, Docket No. 19-0055 (issued May 2, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

[22] *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *see J.S.*, Docket No. 17-1039 (issued October 6, 2017).

As the medical evidence of record does not include a rationalized opinion on causal relationship between appellant's claimed disability and his accepted employment injury, the Board finds that he has not met his burden of proof.

On appeal counsel asserts that OWCP's April 3, 2019 decision is "[c]ontrary to law and fact." As explained above, the medical evidence of record is insufficient to establish that appellant sustained a recurrence of disability beginning March 18, 2018, as alleged. Consequently, appellant has not met his burden of proof.

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 has not met his burden of proof to establish a recurrence of disability commencing March 18, 2018 causally related to the accepted January 27, 2004 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 3, 2019 is affirmed.

Issued: April 2, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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