United States Department of Labor
Employees' Compensation Appeals Board

T.J., Appellant	)	
and	)	**Docket No. 18-0831**
	)	**Issued: March 23, 2020**
ARCHITECT OF THE CAPITOL, LABOR SHOP, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 12, 2018 appellant filed a timely appeal from a February 6, 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 the case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the February 6, 2018 decision, OWCP received additional evidence. Appellant also submitted additional evidence on appeal. 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 May 31, 2017 causally related to his accepted November 21, 2014 employment injury.

FACTUAL HISTORY

On December 1, 2014 appellant, then a 47-year-old laborer, filed a traumatic injury claim (Form CA-1) alleging that on November 21, 2014 he sprained his lower back when he bent over when wearing a vacuum on his back while in the performance of duty. OWCP accepted his claim for displacement of lumbar intervertebral disc without myelopathy. Appellant stopped work on November 21, 2014. OWCP paid him wage-loss compensation on the supplemental rolls commencing June 16, 2015.[3]

On December 17, 2015 Dr. Steven Scherping, Board-certified in orthopedic surgery, performed OWCP-authorized back surgery, including left L4 laminectomy with L4-5 lumbar discectomy.

Between 2015 and 2017, appellant periodically stopped work and then returned to work in modified positions. He primarily complained of low back pain and left leg numbness during this period.

In a duty status report (Form CA-17) dated January 24, 2017, Dr. Scherping noted that appellant could return to full-time work with restrictions, including intermittently lifting up to 50 pounds, continuously lifting up to 25 pounds, standing for up to six hours, and walking for up to six hours. On February 6, 2017 appellant returned to work in a modified laborer position for the employing establishment per the restrictions of Dr. Scherping.

An April 17, 2017 report, Dr. Scherping noted no change in appellant's condition from a clinical standpoint and indicated that appellant reported some back pain with referred pain in his left lower extremity. Appellant also reported that his modified work at times exacerbated his pain, but, in general, he was tolerating his work requirements. Dr. Scherping noted examination findings of mildly antalgic gait, diagnosed lumbar disc herniation and lumbar radiculopathy, and recommended continuation of modified activities both inside and outside of the workplace. In a Form CA-17 report dated April 25, 2017, he diagnosed lumbar radiculopathy and recommended continuation of the work restrictions he provided in January 2017.[4]

Appellant again stopped work in his modified laborer position on May 31, 2017. In a June 14, 2017 note, Valerie Villegas, a physician assistant, noted that appellant reported an acute

[3] OWCP paid appellant wage-loss compensation on the periodic rolls from August 23, 2015 and through December 10, 2016.

[4] A work assignment form signed by management on May 19, 2017 shows that appellant was to continue working in his modified laborer position.

exacerbation of chronic back and leg pain. She indicated that he was disabled from work from May 31 to June 2, 2017 and June 5 to 12, 2017.

On July 4, 2017 appellant filed a notice of recurrence (Form CA-2a) claiming total disability from work commencing May 31, 2017. He explained that the recurrence of disability occurred after being instructed to clean bathrooms on May 19, 2017 a task which required extended bending and standing, and that he experienced worsening lower extremity symptoms on May 21 and 24, 2017. Appellant's supervisor asserted that cleaning the bathrooms did not require extended bending and standing.

On July 10, 2017 Dr. Scherping treated appellant in follow up, noting no interval change in his condition. He advised that appellant complained of referred pain through his left lower extremity and he reported a physical examination finding of mild antalgic gait. Dr. Scherping diagnosed lumbar radiculopathy and advised that appellant's work restrictions would continue indefinitely.

In a Form CA-17 report dated July 25, 2017, Dr. Scherping diagnosed lumbar radiculopathy due to the November 21, 2014 employment injury and noted no change in appellant's prior condition and permanent restrictions. In an undated attending physician's report (Form CA-20) received on August 3, 2017, he diagnosed lumbar radiculopathy, listed the date of injury as November 21, 2014 and checked a box marked "Yes" indicating that appellant's condition was caused or aggravated by an employment activity. In a Form CA-17 report dated October 20, 2017, Dr. Scherping diagnosed lumbar disc degeneration and lumbar radiculopathy due to the November 21, 2014 employment injury, and he indicated no change in appellant's permanent restrictions. On that same date he diagnosed lumbar disc degeneration and lumbar radiculopathy in a Form CA-20. Dr. Scherping listed the date of injury as November 21, 2014 and checked a box marked "Yes" indicating that appellant's condition was caused or aggravated by an employment activity.

In a development letter dated December 28, 2017, OWCP informed appellant that the evidence of record was insufficient to establish his recurrence of disability claim. It provided him with the definition of a recurrence of disability and requested that he submit a physician's opinion explaining how the claimed disability was due to the November 21, 2014 employment injury. OWCP afforded appellant 30 days to provide the requested evidence.

Appellant submitted a January 19, 2018 report from Dr. Scherping, who noted that appellant clinically continued to have pain in his back, hip girdle, and left lower extremity, which was reported as intensifying with work duties that required more bending. On physical examination, he indicated that appellant had a mildly antalgic gait and no focal weakness in his hip/lower extremity muscles. Dr. Scherping saw no need or benefit from modifying appellant's treatment plan and he noted that appellant's work restrictions were permanent. He diagnosed diabetes mellitus, lumbar radiculopathy, and history of lumbar discectomy, and he emphasized the importance of blood sugar control on neuropathy.

By decision dated February 6, 2018, OWCP denied appellant's claim for a recurrence of disability commencing May 31, 2017 finding that the evidence of record contained no medical evidence explaining how his alleged total disability for the period in question was due to the

accepted November 21, 2014 employment injury. It advised that he might wish to file a claim for a new injury due to his reported work activities beginning in mid-May 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 compensable injury or illness and without an intervening injury or new exposure in the work environment.[5] 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.[6]

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.[7]

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.[8] Where no such rationale is present, the medical evidence is of diminished probative value.[9]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing May 31, 2017 causally related to his accepted November 21, 2014 employment injury.

[5] 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[6] *Id.*

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

[8] *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *C.C.*, Docket No. 18-0719 (issued November 9, 2018).

[9] *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

Appellant submitted a July 10, 2017 report from Dr. Scherping, who noted no interval change in appellant's condition. Dr. Scherping diagnosed lumbar radiculopathy and advised that appellant's work restrictions would continue on an indefinite basis.[10] His report is insufficient to meet appellant's burden of proof as he did not provide an opinion that appellant sustained a recurrence of disability commencing May 31, 2017 causally related to the accepted November 21, 2014 employment injury. The work restrictions that Dr. Scherping recommended were in accordance with the duties of the modified position appellant performed when he stopped work on May 31, 2017. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.[11] Thus, this evidence is insufficient to meet appellant's burden of proof.

In an undated Form CA-20 received on August 3, 2017 and another dated October 20, 2017, Dr. Scherping collectively diagnosed lumbar radiculopathy/lumbar disc degeneration and checked a box marked "Yes" indicating that appellant's condition was caused or aggravated by an employment activity. He did not address disability in these reports. In Form CA-17 reports dated July 25 and October 20, 2017, Dr. Scherping collectively diagnosed lumbar radiculopathy/lumbar disc degeneration and noted no change from prior permanent restrictions. These reports are of no probative value on the underlying issue of this case as Dr. Scherping did not provide an opinion that appellant sustained a recurrence of disability causally related to the accepted November 21, 2014 employment injury or otherwise provide medical reasoning explaining why disability commencing May 31, 2017 was employment related.[12]

In a January 19, 2018 report, Dr. Scherping noted appellant's continued complaints of pain in his back, hip girdle, and left lower extremity which appellant reported had intensified with his work duties. He diagnosed diabetes mellitus, lumbar radiculopathy, and history of lumbar discectomy. Dr. Scherping advised that there was no need to modify appellant's treatment plan and noted that his work restrictions were permanent. However, as noted above, he did not specifically address whether appellant sustained a recurrence of disability commencing May 31, 2017 causally related to the accepted employment injury.[13] The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation was claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[14] Thus, Dr. Scherping's January 19, 2018 report also is of no probative value on causal relationship and is insufficient to meet appellant's burden of proof.

In a June 14, 2017 note, Ms. Villegas, a physician assistant, advised that appellant was disabled from work from May 31 to June 2, 2017 and June 5 to 12, 2017. However, this report is

[10] Dr. Scherping had previously recommended work restrictions, including intermittently lifting up to 50 pounds, continuously lifting up to 25 pounds, standing for up to six hours, and walking for up to six hours.

[11] *See L.B., supra* note 7; *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[12] *See id*.

[13] *Id*.

[14] *B.L.*, Docket No. 19-0852 (issued October 18, 2019); *William A. Archer*, 55 ECAB 674 (2004).

of no probative value to establish employment-related disability given that the Board has held treatment notes signed by a physician assistant are not considered medical evidence as these providers are not a physicians under FECA and are not competent to render a medical opinion under FECA.[15]

As noted, appellant must submit rationalized medical evidence supporting causal relationship between the disabling condition and the accepted employment injury. Furthermore, the medical evidence must directly address the dates of disability for work for which compensation is claimed.[16] None of the medical evidence of record provided a discussion of how appellant's accepted November 21, 2014 employment injury caused total disability from work during the period in question. As appellant did not submit medical evidence establishing a recurrence of disability commencing May 31, 2017 causally related to his accepted employment injury, the Board finds that he 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 May 31, 2017 causally related to his accepted November 21, 2014 employment injury.

[15] Section 8101(2) of FECA provides that medical opinions can only be given by a qualified physician. This section 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. *H.K.*, Docket No. 19-0429 (issued September 18, 2019); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

[16] *See supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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