United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 19-1402**
	)	**Issued: November 4, 2020**
U.S. POSTAL SERVICE, BROADVIEW HEIGHTS POST OFFICE, Cleveland, OH, 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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 13, 2019 appellant, through counsel, filed a timely appeal from an April 17, 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 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 disability commencing December 24, 2016 causally related to her accepted employment conditions.

FACTUAL HISTORY

On May 14, 2015 appellant, then a 40-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained lower back and lower extremity conditions due to factors of her federal employment. OWCP assigned this claim File No. xxxxxx602. Appellant noted that she first became aware of her conditions and realized their relation to her federal employment on April 27, 2015. She stopped work on April 30, 2015. By decision dated August 12, 2015, OWCP accepted the claim for lumbosacral radiculitis or neuritis. It paid appellant wage-loss compensation on the supplemental rolls from September 29, 2015 through March 18, 2016.

Previously, OWCP had accepted a September 24, 2007 occupational disease claim for acquired spondylolisthesis and lumbosacral stenosis under OWCP File No. xxxxxx438. Appellant underwent a laminectomy and L4-5 fusion on April 17, 2009. On August 24, 2015 OWCP administratively combined the claims, with File No. xxxxxx438 serving as the master file.

On January 21, 2016 appellant accepted a modified assignment offer for a full-time letter carrier position, under OWCP File No. xxxxxx438. The duties of the position included casing mail up to two hours a day, apartment and business mail up to two hours a day, Express Mail up to one hour a day, and collection up to one hour a day. The physical requirements of the position required pushing/pulling, bending, stooping and twisting up to one hour a day, lifting and carrying up to 10 pounds four hours a day, and standing and walking up to two hours a day.

In a June 1, 2016 report, Dr. Todd S. Hochman, a Board-certified internist and treating physician, noted appellant's history of injury in 2007 and 2015 and related that appellant was seen for complaints of low back pain associated with paresthesia in the lower extremity. He indicated that appellant attributed her complaints to "the work injury." Dr. Hochman also noted that appellant was 30 weeks' pregnant. In a June 1, 2016 duty status report (Form CA-17), Dr. Hochman released appellant to eight hours of restricted duties and a 10-pound lifting restriction. Appellant's other restrictions limited her to six to eight hours of standing, one to two hours of walking- as needed, zero to one hour of bending/stooping -- as needed, and zero to one hour of pushing and pulling -- as needed.

In a December 22, 2016 report, Dr. Hochman examined appellant and recommended sedentary duty. Appellant's physical examination findings were related as bilateral pain and paresthesia on straight leg raising. Dr. Hochman noted that appellant had been out of work on maternity leave and was now back at work. He related that he had reviewed appellant's previous restrictions and that he would modify her restrictions further to allow only sedentary work. Dr. Hochman also noted that appellant was having difficulty and it "sounds like she is working outside her restrictions." He related that he would request a functional capacity evaluation, a magnetic resonance imaging (MRI) scan and lumbar flexion/extension x-rays. Dr. Hochman

completed a duty status report (Form CA-17) advising that appellant could return to work on December 23, 2016 with work restrictions of eight hours of restricted duties, including four to six hours of sitting, zero to two hours of standing, zero to two hours of walking, and a 10-pound lifting restriction.

In a February 21, 2017 follow-up visit, Dr. Hochman noted that appellant's lumbosacral neuritis was "getting worse without intervening injury." Regarding appellant's physical examination, he again noted that appellant had pain on straight leg raising, and that she had numbness over the dorsum of the right foot. Dr. Hochman related that appellant was told by the employing establishment that there was no light-duty work available after her restrictions were changed in December 2016. He completed a duty status report (Form CA-17) on February 21, 2017 reiterating appellant's work restrictions of sitting for four to six hours with breaks, zero to two hours of standing, zero to two hours of walking, no climbing, kneeling, bending/stooping, or twisting, and a 10-pound lifting restriction.

The employing establishment issued a February 28, 2017 informational letter to appellant advising that it was unable to identify any available tasks within her medical restrictions. Appellant was also advised regarding the filing of a notice of recurrence (Form CA-2a), as well as CA-7 claims for compensation, and the need to update and submit medical documentation for review.

OWCP received a March 31, 2017 MRI scan of appellant's lumbar spine. The MRI scan indicated remote surgical changes from an L4-5 posterior fusion and L4 laminectomy, with unchanged grade 1 anterolisthesis at L4-5, no significant spinal can or neural foraminal stenosis.

In an April 10, 2017 report, Dr. Hochman noted that appellant still had back pain which radiated into the lower extremity. He indicated that appellant had undergone an MRI examination on March 31, 2017, however he did not report any findings from the MRI scan.

Dr. Hochman related in a June 6, 2017 progress report that appellant was still having back pain and parasthesias into the lower extremity. He noted a diagnosis of spondylosis post lumbar fusion surgery, and opined that appellant had aggravated her preexisting spondylolisthesis by performing occupational duties as a letter carrier. Dr. Hochman concluded that appellant's work restrictions remained in place. He completed another Form CA-17 report on June 6, 2017 reiterating appellant's prior work restrictions.

In a July 21, 2017 report, Dr. Sami Moufawad, Board-certified in pain medicine and physical medicine and rehabilitation, noted that appellant had back pain in the back which radiated to the lower limbs bilaterally. He indicated that appellant had been unable to return to work since December 31, 2016. Dr. Moufawad diagnosed lumbosacral radiculopathy. He also interpreted electromyogram (EMG)/nerve conduction velocity (NCV) studies dated July 21, 2017 as revealing bilateral lumbar and lumbosacral radiculopathy at L4, L5, and S1 bilaterally, which may be compatible with arachnoiditis.

Appellant was again seen by Dr. Hochman on August 8, 2017. Dr. Hochman related that he had reviewed appellant's EMG study, which revealed radiculopathy at the L4, L5, and S1 levels.

He completed another CA-17 form on August 8, 2017 wherein he reiterated his prior diagnosis and restrictions.

Dr. Hochman continued to treat appellant through November 2, 2017. He indicated that appellant was out of work, not by choice, but because there was no light-duty available. In his November 2, 2017 report, Dr. Hochman related that appellant was still having back pain, which radiated into the lower extremity. In a November 2, 2017 duty status report (Form CA-17), he again noted that appellant's diagnosis was "status post lumbar fusion surgery" and that appellant could perform modified duties up to eight hours per day with a 10-pound lifting restriction, four to six hours of sitting, and up to two hours of intermittent standing and walking.

In a February 8, 2018 letter, D.J, a human resource specialist, indicated that appellant was offered a modified city carrier position on January 17, 2018; however, effective January 24, 2018, appellant refused to accept the job offer and indicated that she could not medically perform the duties of the position. On March 14, 2018 OWCP advised the employing establishment that the modified city carrier position was not within appellant's restrictions as it required walking and standing up to eight hours a day. On April 6, 2018 the employing establishment issued another modified job offer, which required up to six hours of sitting per day, two hours of standing, two hours of walking, and up to 10 pounds of lifting. Appellant refused the offer "because of medical issues."

In a progress report dated March 6, 2018, Dr. Hochman related that appellant was still experiencing back pain, which radiated into her lower extremity. He examined appellant again on July 31, 2018 and noted back pain with lower extremity parasthesias.

On August 13, 2018 appellant filed claims for wage-loss compensation (Form CA-7) for disability from work during the periods January 21 through February 3, 2017, and April 29 to May 12, 2017.

In a development letter dated August 16, 2018, OWCP informed appellant that the evidence submitted was insufficient to establish her claims for compensation. It explained that she returned to work on June 1, 2016, in a full-time restricted-duty capacity, and stopped work again on December 24, 2016. OWCP requested that appellant submit additional evidence to establish the claimed disability. It afforded her 30 days to submit the requested information.

In an August 16, 2018 report, Dr. Moufawad noted that appellant had pain across the lower back and had been unable to return to work since December 31, 2016. He explained that appellant had undergone lumbar spine surgery in 2009 unrelated to this claim and opined that the present injury "aggravated the pain." Dr. Moufawad diagnosed lumbosacral radiculopathy and chronic back pain. He also noted that appellant had numerous unrelated medical conditions.

By decision dated September 18, 2018, OWCP denied appellant's claim for recurrence of disability. It found that she had not established that she was disabled from work due to a material change or worsening of her accepted work-related conditions "beginning on December 24, 2016 and continuing."

On September 26, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. During the hearing, held on February 8, 2019, counsel argues

that Dr. Hochman had increased appellant's restrictions after she returned to work following pregnancy leave and that the employing establishment did not provide work in accordance with these restrictions. Appellant confirmed that she had not worked from December 31, 2016 until she returned to work in January 2019. She also affirmed that she had not received treatment for her back between June and December 2016. Appellant related that the work she returned to in December 2016 was the same work she had been performing in June 2016.

OWCP received a November 29, 2018 progress report and Form CA-17 from Dr. Hochman. Dr. Hochman reiterated his prior findings, noted appellant's back pain which radiated into her lower extremities, and concluded that appellant was restricted to sedentary work.

In a February 28, 2019 report, Dr. Hochman noted that appellant had returned to a modified light-duty position, however, she was then granted retirement disability, and therefore she was currently off work.

By decision dated April 17, 2019, OWCP's hearing representative affirmed the September 18, 2018 decision.

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.[3] 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.[4]

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.[5]

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence

[3] 20 C.F.R. § 10.5(x); *see T.J.*, Docket No. 18-0831 (issued March 23, 2020); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[4] *Id.*

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

of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[6]

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

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability commencing December 24, 2016 causally related to her accepted employment conditions.

In support of her recurrence claim, appellant submitted a December 22, 2016 report, in which Dr. Hochman noted that she had returned to work following maternity leave. Dr. Hochman explained that she was having difficulty performing her job and it "sounds like she is working outside her restrictions." However, he did not provide an opinion regarding causal relationship between the claimed recurrence of disability and appellant's accepted employment conditions. Dr. Hochman also did not provide an opinion on causal relationship in his reports of February 21 and April 10, 2017. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[9] These reports are, therefore, insufficient to establish the recurrence claim.

In his June 6 and November 2, 2017, March 6 and November 29, 2018, and February 28, 2019 reports, Dr. Hochman reviewed diagnostic testing and provided diagnoses. However, he did not provide an opinion on causal relationship. As noted above, the Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[10] These reports are, therefore, also insufficient to establish the recurrence claim.

[6] *K.P.*, Docket No. 19-1811 (issued May 12, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

[7] *J.D.*, *supra* note 3; *C.C.*, Docket No. 18-0719 (issued November 9, 2018).

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

[9] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[10] *Id.*

Appellant also submitted Form CA-17 reports dated December 22, 2016, February 21, June 6, August 8, November 2, 2017 and November 29, 2018 in which Dr. Hochman listed the date of injury and noted appellant's continuing work restrictions. However, these Form CA-17 reports also do not contain an opinion on whether the accepted employment injury caused disability from employment due to a worsening of the accepted employment-related conditions consequently, as such, they are of no probative value on the issue of causal relationship and are therefore insufficient to establish appellant's recurrence claim.[11]

With regard to the June 1, 2016 narrative report and Form CA-17, the Board finds that as they predate the claimed period of disability, they are of no probative value.[12] Therefore they are insufficient to establish the claim.

In a July 21, 2017 report, Dr. Moufawad noted that appellant experienced back pain radiating to the lower limbs bilaterally, and opined that appellant had been disabled from work since December 31, 2016. As he did not address causal relationship between the claimed recurrence of disability and appellant's accepted medical conditions, this report is also of no probative value and insufficient to establish the claim.[13]

In an August 16, 2018 report, Dr. Moufawad noted that appellant had pain across the lower back and was unable to return to work since December 31, 2016. He explained that appellant had undergone surgery to the lumbar spine in 2009 and opined that the present injury "aggravated the pain." A cursory opinion that appellant's accepted condition worsened due to increased pain, without further explanation is of limited probative value.[14] Dr. Moufawad's report were therefore insufficient to establish appellant's recurrence of disability.

The Board therefore finds that the record does not contain a medical opinion of sufficient rationale to establish a recurrence of disability commencing December 24, 2016 causally related to appellant's accepted employment conditions.

The Board also finds that appellant has also not established that her claimed recurrence of disability was the result of a change in the nature and extent of her light-duty assignment. There is no evidence that the employing establishment either withdrew her June 2016 light-duty assignment or otherwise altered her job requirements. Based on information provided by both appellant and the employing establishment, the employing establishment reportedly could not accommodate Dr. Hochman's more restrictive work limitations, which he reported as of appellant's return to work in December 2016. However, as previously explained, appellant did not establish that these new work restrictions were necessitated by her accepted employment

[11] *Id.*

[12] *J.S.*, Docket No. 19-0345 (issued August 11, 2020).

[13] *Id.*

[14] *K.A.*, Docket No. 19-0679 (issued April 16, 2020).

conditions. Thus, the record does not establish that the employing establishment altered her light-duty assignment on or about December 24, 2016.[15]

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 her burden of proof to establish a recurrence of disability commencing December 24, 2016 causally related to the accepted employment conditions.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

[15] *See R.N.*, Docket No. 19-1685 (issued February 26, 2020); *Terry R. Hedman*, *supra* note 6.