United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 21-0503**
	)	**Issued: August 24, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Elmhurst, IL, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 16, 2021 appellant, through counsel, filed a timely appeal from a February 3, 2021 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 February 16, 2018, causally related to her accepted November 26, 2011 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 28, 2011 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 26, 2011 she sustained a left arm and shoulder injury when lifting a mail tray from the back of her mail truck while in the performance of duty. OWCP accepted the claim for left upper arm joint pain, neck sprain, C5-6 disc herniation, and right brachial neuritis/radiculitis. It also authorized a May 2, 2012 anterior cervical discectomy and fusion at C5-6 performed by Dr. Dalip Pelinkovic, a Board-certified orthopedic surgeon. OWCP paid appellant wage-loss compensation for temporary total disability for the period April 12 through December 24, 2012.

In a January 10, 2013 work capacity evaluation (Form OWCP-5c), Dr. Pelinkovic advised that appellant was capable of performing her usual job. He recommended that she use a cart to avoid reinjuring her neck.[4]

On March 12, 2018 appellant filed a notice of recurrence (Form CA-2a) claiming disability beginning February 16, 2018. She stopped work completely as of March 7, 2018. Appellant noted that she no longer delivered mail as of January 2016, and had since been promoted to a supervisor. She explained that on February 16, 2018 she experienced sharp pain in her neck and across both shoulders, with numbness and tingling in her hands.

In an attached statement, appellant recounted that she returned to regular duties as a letter carrier on December 24, 2012 following her November 26, 2011 employment injury. She reported experiencing intermittent pain, weakness, and numbness in her hands months after returning to work, which worsened in January 2018, causing her to seek treatment at an urgent care facility on February 16, 2018.

In a treatment note dated March 30, 2018, Dr. Vivek Mohan, a Board-certified orthopedic surgeon, treated appellant for severe neck pain, numbness in both hands, and weakness in her upper extremities. He noted the findings of a 2018 magnetic resonance imaging (MRI) scan of the cervical spine. Dr. Mohan diagnosed cervical disc disorder with myelopathy and status post

[3] Docket No. 19-0481 (issued August 20, 2019).

[4] On January 13, 2015 appellant sustained another work-related traumatic injury, which OWCP accepted for left hip contusion under OWCP File No. xxxxxx290. She was released to resume her full-time, regular work duties effective February 14, 2015. Appellant's claims have not been administratively combined.

cervical spinal fusion. He recommended a C3-4 fusion, possible fusion of C4-5, possible removal of C5-6 anterior cervical hardware due to the severe stenosis with myelopathy at C3-4, and large disc herniation. On April 23, 2018 appellant underwent a C3-4 anterior cervical discectomy and fusion. Dr. Mohan advised that because she was a letter carrier she could not return to work for three months. He noted a likelihood that this was a recurrent disc herniation due to prior cervical fusions and related to a work injury.

By decision dated June 22, 2018, OWCP denied appellant's claim for a recurrence of disability. It found that the medical evidence of record was insufficient to establish that her accepted November 26, 2011 employment injury had worsened to the extent that she was disabled from her work duties.

On June 29, 2018 appellant through counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on October 22, 2018.

OWCP subsequently received additional evidence. In a report dated February 21, 2018, Dr. Pelinkovic noted that he treated appellant for neck pain and right shoulder pain radiating over her deltoid and shoulder blade. He diagnosed cervical radiculopathy and noted that x-rays revealed a fusion at C5-6 with C4-5 segment disease. Dr. Pelinkovic returned appellant to work with restrictions. On March 7, 2018 appellant presented with neck pain and clumsiness in the upper extremity. Dr. Pelinkovic reviewed the MRI scan findings and diagnosed cervical spinal stenosis with myelopathy, history of cervical spinal fusion, and extension of fusion by two levels. He advised that appellant remain off work until her follow-up appointment.

On April 23, 2018 Dr. Mohan performed an anterior cervical discectomy and fusion at C3-4, interbody cage placement and anterior spinal instrumentation. He diagnosed right cervical disc herniation and radiculomyelopathy.

On June 8, 2018 Dr. Mohan diagnosed status post C3-4 anterior cervical discectomy and fusion and advised that appellant could not work for three months due to surgery.

In a report dated August 17, 2018, Dr. Mohan noted that she reported improved neck pain after the C3-4 anterior cervical discectomy and fusion. He continued to hold appellant off work.

Dr. Mohan, in a September 7, 2018 report, noted that appellant presented with right hand pain and he diagnosed status post cervical fusion and positive de Quervain's tendinitis of the right hand. Dr. Mahon returned her to work and recommended a brace for her right hand and limited her lifting to 20 pounds.

By decision dated December 7, 2018, the hearing representative affirmed the June 22, 2018 decision.

On January 2, 2019 appellant appealed her claim to the Board. By decision dated August 20, 2019, the Board affirmed the December 7, 2018 decision, finding that medical

evidence of record was insufficient to establish a recurrence of disability commencing February 16, 2018, causally related to her accepted November 26, 2011 employment injury.[5]

Appellant continued to submit evidence. She was treated by Dr. Tibor Boco, a Board-certified neurosurgeon, on July 31, 2019, for neck and shoulder pain, pain into both arms, glove like paresthesias in the arms, and persistent weakness. He noted that appellant's history was significant for two anterior cervical discectomies with the initial surgery the result of a work-related incident in 2011. Findings on examination revealed positive Spurling Maneuver, positive Hoffman's sign, difficulty with heel and toe walking, cervical paraspinal muscle spasm, diffuse bilateral upper extremity weakness, diffuse glove like paresthesias in the arms bilaterally, and increased deep tendon reflexes in the upper extremities. Dr. Boco diagnosed cervical spondylosis with radiculopathy and cervical spondylosis with myelopathy and recommended additional diagnostic studies. On August 20, 2019 he treated appellant in follow-up and diagnosed cervical spondylosis with myelopathy and cervical spondylosis with radiculopathy. Dr. Boco reviewed the computerized tomography (CT) scan of the cervical spine performed on August 5, 2019 and the MRI scan of the cervical spine performed August 6, 2019. He related that appellant had significant degenerative disc disease at C4-5 and a large osteophyte formation. Dr. Boco recommended surgical correction of the pseudarthrosis, extension of the fusion from C3-7, and a laminectomy from C3-7 to stabilize her spine. He advised that the original fusion was associated with a work-related event and the second fusion was necessitated as a consequence of the initial surgery. Dr. Boco opined that appellant's current condition was causally related to the initial need for surgery following the work injury. On October 8, 2019 he indicated that she remained symptomatic. Dr. Boco diagnosed cervical spondylosis with radiculopathy and pseudarthrosis at C3-4 and recommended a C3-7 posterior decompression and fusion.

On August 5, 2019 appellant underwent a CT scan of the cervical spine, which revealed postsurgical changes at C3-4 and C5-6, anterior cervical discectomy and fusion, multilevel degenerative changes of the cervical spine, multilevel spinal canal stenosis exacerbated by congenital narrowing of the cervical spinal canal, C6-7 mild spinal canal neural foraminal stenosis, C2-3 mild-to-moderate spinal canal and mild right neural foraminal stenosis, and C4-5 mild spinal canal stenosis. Similarly, an August 6, 2019 MRI scan of the cervical spine revealed postoperative changes of anterior plate and screw fusion from C3-6, degenerative disc, facet, uncovertebral joint disease throughout most prominent at C6-7, and central disc protrusion at C2-3 with moderate narrowing of the canal.

Dr. Pelinkovic treated appellant on January 13, 2020 for neck pain and right shoulder pain radiating over her deltoid and shoulder blade. He diagnosed C6-7 moderate central stenosis, C3-4 and C5-6 fusion, and adjacent segment disease and recommended physical therapy. In a work duty status report of even date Dr. Pelinkovic affirmatively noted that appellant was medically unable to return to work.

By an appeal request form dated February 4, 2020, postmarked February 10, 2020, and received by OWCP on June 9, 2020, appellant through counsel, requested reconsideration.

[5] Docket No. 19-0481 (issued August 20, 2019).

By decision dated September 24, 2020, OWCP denied modification of the prior decision.

On December 9, 2020 appellant, through counsel, requested reconsideration.

On October 1, 2020 appellant underwent an electromyography and nerve conduction velocity (EMG/NCV) test. An October 7, 2020 MRI scan of the thoracic spine revealed small left paracentral disc protrusion at T5-6 and degenerative disc disease/spondylosis at C6-7. An MRI scan of the lumbar spine of even date revealed mild developmental central narrowing of lumbar canal and nonspecific edema in soft tissues of upper lumbar region.

On October 20, 2020 Dr. James M. Mok, a Board-certified orthopedist, advised that appellant underwent a C3-4 and C5-6 anterior cervical fusion for treatment of a work-related injury. He noted a pseudarthrosis of C3-4 and C5-6 and opined that this condition was directly related to the prior surgery at C3-4 and C5-6 and should be considered related to the original work injury.

By decision dated February 3, 2021, OWCP denied modification of its September 24, 2020 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.[6] 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.[7]

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.[8]

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

[6] 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[7] *Id.*

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

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.[9] Where no such rationale is present, the medical evidence is of diminished probative value.[10]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability, commencing February 16, 2018, causally related to her accepted November 26, 2011 employment injury.

By decision dated August 20, 2019, the Board affirmed OWCP's denial of appellant's claim for a recurrence of disability commencing February 16, 2018, causally related to her accepted November 26, 2011 employment injury. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[11] The Board will therefore not review the medical evidence addressed in the prior appeal.

Appellant subsequently submitted additional evidence including a July 31, 2019 report, wherein Dr. Boco noted treatment for neck and shoulder pain, glove-like paresthesias in the arms, and persistent weakness. He diagnosed cervical spondylosis with radiculopathy and cervical spondylosis with myelopathy. On August 20, 2019 Dr. Boco repeated his diagnoses and recommended surgery to stabilize her spine. He advised that the original fusion was associated with a work-related event and the second fusion was necessitated as a consequence of the initial surgery. Dr. Boco opined that appellant's current condition was causally related to the initial need for surgery following the work injury.

On October 8, 2019 Dr. Boco diagnosed cervical spondylosis with radiculopathy and pseudarthrosis at C3-4 and recommended a C3-7 posterior decompression and fusion. He did not, however, address the period of claimed recurrence or indicate that appellant was totally disabled for any specific period. The Board has held that medical evidence that does not provide an opinion as to whether a period of disability is due to an accepted employment-related condition is of no probative value on the issue of causal relationship.[12] Therefore, this evidence is insufficient to meet appellant's burden of proof.

Dr. Pelinkovic treated appellant on January 13, 2020 for neck pain and right shoulder pain radiating over her deltoid and shoulder blade. He diagnosed C6-7 moderated central stenosis, C3-4 and C5-6 fusion and adjacent segment disease. In a work duty status report of even date Dr. Pelinkovic affirmatively noted that appellant was medically unable to work. However, these

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

[10] *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

[11] *See M.M.*, 18-1366 (issued February 27, 2019); *E.L.*, 16-0635 (issue November 7, 2016); *R.L.*, Docket No. 15-1010 (issued July 21, 2015). *See also A.P.*, Docket No. 14-1228 (issued October 15, 2014).

[12] *M.A.*, Docket No. 19-1119 (issued November 25, 2019); *S.I.*, Docket No. 18-1582 (issued June 20, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018.

reports do not contain an opinion on whether the accepted employment injuries caused disability from employment for the claimed period. 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.[13] Accordingly, without a specific opinion regarding how work factors caused a recurrence of disability, Dr. Pelinkovic's report is insufficient to meet appellant's burden of proof.[14]

On October 20, 2020 Dr. Mok advised that appellant underwent a C3-4 and C5-6 anterior cervical fusion for treatment of a work-related injury. He noted a pseudarthrosis of C3-4 and C5-6 and opined that this condition was directly related to the prior surgery at C3-4 and C5-6 and should be considered related to the original work injury. However, Dr. Mok did not provide an opinion regarding how appellant's work factors caused a recurrence of disability. His report is therefore insufficient to meet her burden of proof.[15]

As appellant has not submitted rationalized medical evidence sufficient to establish a recurrence of disability commencing February 16, 2018 causally related to her accepted November 26, 2011 employment injury, she has not met her 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 her burden of proof to establish a recurrence of disability commencing February 16, 2018, causally related to her accepted November 26, 2011 employment injury.

[13] *Id.*

[14] *See M.B.*, Docket No. 18-1455 (issued March 11, 2019).

[15] *Supra* note 12

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 24, 2021
Washington, DC

Alec J. Koromilas, 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