United States Department of Labor
Employees' Compensation Appeals Board

A.V., Appellant	)	
and	)	**Docket No. 20-1251**
	)	**Issued: January 28, 2021**
U.S. POSTAL SERVICE, JFK INTERNATIONAL SERVICE CENTER, Jamaica, NY, Employer	)	

Appearances:
James D. Muirhead, 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 June 1, 2020 appellant, through counsel, filed a timely appeal from a January 21, 2020 merit decision and an April 14, 2020 nonmerit 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a recurrence of disability commencing July 26, 2017 causally related to his accepted August 9, 2011 employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 10, 2011 appellant, then a 38-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2011 he sustained injuries when he was struck by a piece of equipment towing postal containers while in the performance of duty.[3] He stopped work on August 10, 2011. OWCP accepted the claim for lumbosacral strain and neck sprain.[4] On September 21, 2011 appellant accepted a limited-duty mail handler position at the employing establishment. OWCP paid wage-loss compensation for intermittent time lost from work from October 8, 2011 until February 25, 2012.

A magnetic resonance imaging (MRI) scan of the cervical spine, obtained on July 11, 2016, revealed a large central disc herniation at C5-6 impinging the thecal sac, central cord, and intervertebral foramina, a left-sided disc herniation at C7 to T1 with impingement, posterior and central disc herniations at C3-4, C4-5, and C6-7 with impingement, marked narrowing of the canal with stenosis at C5-6 and C4-5, and central cord compression at C5-6.

In a report dated August 4, 2016, Dr. Demetrios Mikelis, an internist and physiatrist, evaluated appellant for complaints of back and neck pain.[5] He noted that appellant had a history of an August 9, 2011 employment injury. Dr. Mikelis diagnosed herniated cervical and lumbar discs with radiculopathy. He discussed treatment options, including surgery, and opined that appellant could not perform heavy lifting, carrying, or bending.

In a November 3, 2016 report, Dr. Erich G. Anderer, a Board-certified neurosurgeon, recounted appellant's history of a 2011 employment injury and current symptoms of neck pain, bilateral arm numbness, and bilateral leg pain. He advised that a cervical MRI scan had demonstrated "a congenitally narrow canal with central disc herniation and spinal cord compression at C4-5 and a large left paracentral disc herniation causing severe spinal cord compression with intrinsic signal change within the cord at C5-6." Dr. Anderer advised that a

[3] On the CA-1 form, appellant indicated the date of injury as August 10, 2011. It appears, however, that he was injured at 11:30 p.m. on August 9, 2011.

[4] By decision dated September 30, 2011, OWCP denied appellant's traumatic injury claim as the medical evidence was insufficient to establish that he sustained a medical condition causally related to the accepted employment incident. By decision dated January 26, 2012, an OWCP hearing representative affirmed the September 30, 2011 decision as modified to find that appellant had not factually established the employment incident due to a discrepancy in dates. By decision dated August 6, 2012, OWCP vacated the January 26, 2012 decision and accepted the claim for lumbosacral strain and neck sprain.

[5] On July 31, 2016 appellant filed a notice of recurrence of a medical condition (Form CA-2a). By letter dated August 19, 2016, OWCP advised that his claim remained open for medical treatment and that it would thus take no action of his Form CA-2a.

lumbar MRI scan had shown mild degenerative changes without significant neural compression or instability. He noted that appellant had "a history of neck and back pain with slow development of cervical myelopathy, all of which started after a work injury in 2011." Dr. Anderer recommended surgery.

On December 2, 2016 Dr. Anderer requested surgical authorization from OWCP to perform a spinal fusion.

On January 6, 2017 Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), opined that the requested cervical spinal fusion was medically necessary, but not causally related to the accepted condition of a neck sprain. He advised that the medical evidence showed disc degeneration which was "largely a genetic condition and not activity related."

On September 5, 2017 OWCP referred appellant to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he evaluate whether appellant had residuals or disability from appellant's accepted employment injury and whether the requested cervical spinal fusion was causally related to his accepted condition.

In a report dated October 30, 2017, Dr. Sultan reviewed appellant's history of injury and resulting medical treatment. On physical examination, he found intact sensory testing of the upper extremities and dull reflexes of the biceps and triceps. Dr. Sultan advised that appellant had negative straight leg test bilaterally and intact sensation of the bilateral lower extremities. He diagnosed status post-traumatic derangement of the cervical and lumbar spine with aggravation of preexisting cervical disc disease at multiple levels. Dr. Sultan opined that his physical examination demonstrated "positive objective examination findings in regard to the accepted compensable injuries involving [appellant's] cervical spine and lumbar spine." He related, "[Appellant's] current residuals include low grade cervical spine motion restriction with him being status post cervical disc surgery without the upper extremity neurological impairment. In regard to his lower back he is noted to be status post lumbar derangement with low grade lumbar spine motion restriction without any lower extremity neurological impairment." Dr. Sultan found that appellant had not fully recovered from the September 18, 2017 surgery of his cervical spine. He asserted that the September 18, 2017 cervical discectomy and fusion was "appropriate for the claimant's accepted condition," noting that diagnostic studies and examination findings supported disc herniations necessitating surgery. Dr. Sultan determined that appellant could perform sedentary or light employment duties with restrictions of lifting and carrying up to 20 pounds at a time using both hands.

On October 21, 2019 appellant filed a notice of recurrence (Form CA-2a) claiming disability beginning July 2017 causally related to his June 9, 2011 employment injury. The employing establishment advised that he had performed modified employment subsequent to his injury and that his last day working was July 26, 2017.

In a November 12, 2019 development letter, OWCP advised appellant of the definition of a recurrence of disability and requested that he submit a report from his physician explaining how his disability was causally related to his accepted employment injury. It provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary information.

Counsel responded on November 27, 2019 submitting a September 18, 2017 operative report from appellant's cervical discectomy and fusion at C4-5 and C5-6 and the October 30, 2017 report from Dr. Sultan. He further submitted an August 28, 2018 report from Dr. Michael Rosenberg, Board-certified occupational medicine. Dr. Rosenberg discussed appellant's history of cervical surgery one year earlier. He diagnosed sensory neuropathy of the bilateral hands, legs, and feet, mild bilateral wrist and hand pain, and a balance disturbance. Dr. Rosenberg advised that appellant had moderate-to-severe restrictions in activities that required walking, standing, and using fine manipulation using the hands and feet.

By decision dated January 21, 2020, OWCP found that medical evidence was insufficient to establish an employment-related recurrence of disability beginning July 26, 2017 causally related to appellant's August 9, 2011 employment injury. It noted that he had alleged a recurrence of disability two months prior due to an unauthorized surgery on his cervical spine.

On April 6, 2020 appellant, through counsel, requested reconsideration. Appellant asserted that OWCP should have authorized the cervical spinal fusion based on the opinion of Dr. Sultan. Counsel further contended that OWCP should pay disability compensation beginning July 26, 2017, noting that appellant's condition had worsened such that he required surgery.

By decision dated April 14, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim as he had not submitted evidence or raised an argument sufficient to warrant reopening of his case for further review of the merits under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

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]

[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).

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether appellant has met his burden of proof to establish a recurrence of disability commencing July 26, 2017 causally related to his accepted August 9, 2011 employment injury.

On November 3, 2016 Dr. Anderer found that appellant had neck and back pain that had begun after a 2011 employment injury and had developed into cervical myelopathy. He requested authorization from OWCP for a spinal fusion.

Dr. Fellars, a DMA, opined that the requested spinal fusion was not causally related to the accepted condition of a neck sprain. OWCP referred appellant to Dr. Sultan for a second opinion examination to determine whether he had continued residuals of his accepted employment-related conditions and whether the proposed spinal fusion was causally related to appellant's August 9, 2011 employment injury.

On October 30, 2017 Dr. Sultan discussed appellant's history of an August 9, 2011 employment injury and September 18, 2017 cervical discectomy and fusion. He contended that appellant had continued residuals of his accepted employment-related conditions. Dr. Sultan diagnosed status post-traumatic derangement of the cervical and lumbar spine and aggravation of preexisting disc disease at multiple levels. He opined that the cervical discectomy and fusion performed on September 18, 2017 was causally related to the accepted condition. Dr. Sultan further found that appellant could perform light or sedentary work duties lifting and carrying up to 20 pounds.

Appellant filed a notice of recurrence of disability beginning July 26, 2017 causally related to his June 9, 2011 employment injury. OWCP found that he had not met his burden of proof to establish a recurrence of disability, noting that he had undergone unauthorized surgery in September 2017. As noted, however, it had referred appellant to Dr. Sultan for an opinion on whether the September 2017 surgery should be authorized. OWCP did not, however, consider his findings that appellant had sustained additional employment-related conditions due to appellant's accepted employment injury and that the September 18, 2017 cervical discectomy and fusion resulted from the accepted work injury in finding that he had not established a recurrence of disability.

It is well established that, proceedings under FECA are not adversarial in nature and that while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence in order to see that justice is done.[9] Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[10] Further, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received prior

[9] *See N.L.*, Docket No. 19-1456 (issued July 14, 2020); *T.L.*, Docket No. 19-1572 (issued March 12, 2020).

[10] *See K.S.*, Docket No. 18-0845 (issued October 26, 2018).

to the issuance of its final decision.[11] In this case, OWCP adjudicated appellant's recurrence of disability claim without determining whether Dr. Sultan's opinion supported that it should expand acceptance of appellant's claim to include additional employment-related conditions and authorize appellant's September 18, 2017 cervical surgery. The case, therefore, will be remanded for OWCP to consider Dr. Sultan's October 30, 2017 report.[12] After this and such further development as deemed necessary, it should issue a decision regarding the issues of claim expansion and surgical authorization and a *de novo* decision regarding whether appellant has met his burden of proof to establish a recurrence of disability beginning July 26, 2017.[13]

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 14 and January 21, 2020 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 28, 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

[11] *J.R.*, Docket No. 18-1177 (issued July 25, 2019); *William A. Couch*, 41 ECAB 548 (1990).

[12] *J.R., id*.

[13] In view of the Board's disposition of Issue 1, Issue 2 is rendered moot.