

**United States Department of Labor
Employees' Compensation Appeals Board**

D.H., Appellant)	
)	
and)	Docket No. 21-0102
)	Issued: July 28, 2021
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Philadelphia, PA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Russell T. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 29, 2020 appellant, through counsel, filed a timely appeal from a May 27, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 issuance of the May 27, 2020 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 intermittent disability for the period September 30, 2019 through April 10, 2020, causally related to his accepted December 12, 2017 employment injury.

FACTUAL HISTORY

On December 12, 2017 appellant, then a 59-year-old mail handler equipment operator, filed a traumatic injury claim (Form CA-1) alleging that, on that day, he sustained a left upper back strain as a result of pulling and pushing bulk mail carriers and all-purpose containers while in the performance of duty. He stopped work on the date of the alleged injury and returned to full-duty work on December 14, 2017. In a statement of even date, appellant related that he sustained a left shoulder injury due to the claimed work incident.

OWCP, by decision dated January 31, 2018, initially denied appellant's traumatic injury claim, but on June 1, 2018 accepted the claim for left thoracic strain and left upper arm and shoulder strain.

OWCP subsequently received a May 16, 2019 medical report by Dr. Scott M. Fried, an attending osteopath Board-certified in orthopedic surgery. Dr. Fried noted a history of the December 12, 2017 employment injury and appellant's medical treatment. He also noted his cervical and left shoulder elbow, and hand complaints. Dr. Fried reported findings on examination diagnosed right and left median neuropathy; radial neuropathy of the left radial tunnel; left ulnar neuropathy; left brachial plexopathy/cervical radiculopathy with long thoracic neuritis; grade 2 and vascular scapular winging; and cervical strain and sprain with left radiculopathy, and noted a date of injury as December 12, 2017. He related that appellant was able to continue working with activity modifications, but there was no question that the nature of his work activities was such that he continued to reaggravate and exacerbate these issues with the more aggressive portions of his work activities.

On September 17, 2019 OWCP authorized physical therapy from September 9 to November 30, 2019.

Appellant thereafter filed several claims for compensation (Form CA-7) for intermittent disability from work during the period July 6, 2019 through January 1, 2020. In attached time analysis forms (Form CA-7a), he noted eight hours of leave without pay (LWOP) used on September 30 and October 7, 12, 13, 19, 21, 27, 28, and 30, November 2 through 6, 2019, and December 1, 7, 9, 11, and 14 through 18, 2019, two hours of LWOP used on October 2, 9, 16, and 23, 2019, 2.99 hours of LWOP used on December 2, 2019, and three hours of LWOP used on December 4, 2019 to attend physical therapy. OWCP paid appellant wage-loss compensation on the supplemental rolls for the period July 8 through September 25, 2019.

In disability certificates dated September 30 through October 31, 2019, Dr. Fried indicated that appellant had been under his care for his work-related injuries and that he remained disabled from work. He placed him off work on intermittent dates from September 30 to November 25, 2019 due to symptoms from his work activities.

On December 4, 2019 OWCP referred appellant, together with a statement of accepted facts, the medical record, and a set of questions, to Dr. Steven J. Valentino, an osteopath Board-certified in orthopedic surgery, for a second opinion to determine the nature and extent of his work-related disability.

In a January 8, 2020 medical report, Dr. Valentino noted appellant's history of the December 12, 2017 employment injury, medical treatment, and complaints related to his neck and right shoulder. He noted that appellant was released to full-duty work on February 7, 2018. Appellant worked until October 12, 2019 when his symptoms worsened, attributed to the repetitive activities involved with his work, and he had not returned to work. On physical examination, Dr. Valentino reported normal findings with the exception of limited range of motion of the cervical and left shoulder, and mild spasm of the cervical spine. He also reported a normal neurological examination. Dr. Valentino provided impressions of the accepted conditions of left thoracic, left upper arm, and left shoulder strain. He related that, while the record documented periods of total disability from October 12, 2019 through the date of his January 8, 2020 examination, appellant's total disability ceased as of the date of his examination. Dr. Valentino advised that appellant was capable of returning to gainful employment with modifications. He noted, however, that based on his findings of residuals of the accepted conditions, appellant could not return to his full-duty, date-of-injury position. Dr. Valentino noted that his prognosis was good given his normal neurological examination. He recommended a treatment plan and related that appellant's condition would possibly improve in time. In an accompanying work capacity evaluation (Form OWCP-5c), Dr. Valentino reiterated his opinion regarding appellant's inability to perform his usual job, but noted that he could work eight hours per day with restrictions.

By decision dated January 21, 2020, OWCP denied appellant's claims for disability from work for the period commencing September 30, 2019. However, it authorized payment of compensation for two hours of physical therapy treatment on October 2, 9, 16, and 23, 2019, totaling eight hours.

On January 27, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant continued to file Form CA-7 claims, requesting compensation for LWOP for the period January 4 through April 24, 2020.

OWCP received additional reports by Dr. Fried. In a March 23, 2020 report, Dr. Fried advised that appellant's symptoms fluctuated and were definitely affected by use and activities. In reports dated May 5 and 18, 2020, he reiterated a history of appellant's December 12, 2017 employment injury and related a history of his own treatment of appellant beginning May 16, 2019. Dr. Fried discussed examination findings and reiterated his prior diagnoses of median neuropathy of the left and right carpal tunnel, radial neuropathy of the left radial tunnel, left ulnar neuropathy, left brachial plexopathy/cervical radiculopathy with long thoracic neuritis, grade 2 and vascular scapular winging, and cervical strain and sprain with left radiculopathy. He also diagnosed aggravation and progressive traumatic median neuropathy of the bilateral carpal tunnel and progression of a left brachial plexus injury. Dr. Fried advised that the diagnosed conditions were secondary to appellant's accepted work injuries. He noted that, although appellant attempted to continue work activity through 2019, he became progressively more symptomatic over the course of that time. Dr. Fried maintained that it was clear that his highly repetitive and aggressive regular work activities, which included gripping, grasping, pulling, pushing, reaching,

and vibration exposure resulted in traumatic carpal tunnel median neuropathy and the left progression of his double crush with his C5, C6, and C7 nerve root involvement at the left brachial plexus, long thoracic nerve, and down through the hand and wrist in the arm to the median nerve proper at the wrist at the carpal tunnel aggravated and worsened his underlying injuries. He restated that appellant remained limited, but related that being able to rest and off work certainly helped him. Dr. Fried related that continued physical therapy and treatment programs would stabilize appellant's conditions and allow him to return to part-time work with modifications.

In a May 27, 2020 decision, an OWCP hearing representative affirmed in part and reversed in part the January 21, 2020 decision. She found that the weight of the medical evidence rested with Dr. Valentino's January 8, 2020 second opinion, which established that appellant did not sustain a recurrence of disability commencing September 30, 2019 causally related to his accepted December 12, 2017 employment injury without an intervening cause. The hearing representative recommended that appellant consider filing an occupational disease claim (Form CA-2) as the reports of Dr. Valentino and Dr. Fried attributed the worsening of his symptoms to his repetitive work duties. Further, she authorized payment for two hours of physical therapy on September 30 and October 7 and 21, 2019, which were not previously paid.

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.⁴ 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.⁵

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. The change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. OWCP does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.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 employment

⁴ 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

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 his burden of proof to establish a recurrence of intermittent disability for the period September 30, 2019 through April 10, 2020, causally related to his accepted December 12, 2017 employment injury.

Second opinion physician Dr. Valentino, in his January 8, 2020 report, concluded that appellant's disability from work from October 12, 2019 until the date of appellant's examination was related to his repetitive work duties, and while he could not return to his usual job as he had residuals of his accepted conditions, he could work eight hours per day with restrictions. He related that his prognosis was good given his normal neurological examination and advised that with the recommended treatment plan his condition would possibly improve in time. As Dr. Valentino reviewed the medical record and supported his conclusion with medical rationale, the Board finds that his report represents the weight of the medical evidence and establishes that appellant did not sustain a recurrence of disability commencing September 30, 2019 causally related to the December 12, 2017 employment injury.

In support of his claim, appellant submitted reports dated March 23 and May 16, 2019, and May 5 and 18, 2020 from Dr. Fried. Dr. Fried diagnosed: median neuropathy of the left and right carpal tunnel; radial neuropathy of the left radial tunnel; left ulnar neuropathy; left brachial plexopathy/cervical radiculopathy with long thoracic neuritis; grade 2 and vascular scapular winging; cervical strain and sprain with left radiculopathy; aggravation and progressive traumatic median neuropathy of the bilateral carpal tunnel; and progression of a left brachial plexus injury secondary to the December 12, 2017 employment injury. He attributed the diagnosed conditions and a worsening of the employment-related conditions to appellant's aggressive and repetitive regular work duties. Additionally, Dr. Fried advised that appellant remained physically limited and totally disabled from work. The Board has held, however, 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.⁹ While Dr. Fried opined that appellant was totally disabled from work, he did not explain, with rationale, whether that disability was causally related to the accepted employment injury. For this reason, the Board finds that Dr. Fried's reports are insufficient to establish appellant's recurrence of disability claim.

Similarly, in disability certificates dated September 30 to October 31, 2019, Dr. Fried attributed appellant's total disability from work on intermittent dates from September 30 to November 25, 2019 to his work-related activities rather than the accepted employment injury.¹⁰

⁷ *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

⁸ *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

⁹ *See Y.D.*, Docket No. 16-1896 (issued February 10, 2017) (finding that a report is of limited probative value regarding causal relationship if it does not contain medical rationale describing the relation between work factors and a diagnosed condition/disability).

¹⁰ *Supra* note 4.

Thus, the Board finds that this evidence is insufficient to establish appellant's recurrence of disability claim.

As appellant has not submitted sufficient medical evidence to establish that he was disabled from work for the period September 30, 2019 through April 10, 2020, due to a spontaneous change or worsening of his December 12, 2017 employment injury, the Board finds that he has not met his burden of proof to establish his claim.¹¹

On appeal, counsel contends that appellant sustained an employment-related recurrence of disability. However, as explained above, the medical evidence of record is insufficient to establish a recurrence of intermittent disability causally related to his accepted December 12, 2017 employment injury.

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 intermittent disability for the period September 30, 2019 through April 10, 2020, causally related to his accepted December 12, 2017 employment injury.

¹¹ See *E.M.*, *supra* note 8; *R.A.*, Docket No. 19-1595 (issued August 13, 2020).

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 28, 2021
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