United States Department of Labor
Employees' Compensation Appeals Board

A.A., Appellant	)	
and	)	**Docket No. 20-1399**
	)	**Issued: March 10, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Manistee, MI, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 21, 2020 appellant, through counsel, filed a timely appeal from an April 29, 2020 merit decision and a May 28, 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.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a recurrence of disability commencing December 8, 2017 causally related to her accepted September 19, 2016

[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.*

employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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 September 23, 2016 appellant, then a 24-year-old sales, service, and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on September 19, 2016 she injured her lower back bending down to retrieve flats while in the performance of duty. OWCP accepted the claim for an aggravation of lumbar intervertebral disc displacement -- herniated disc at L4-5.[4]

Appellant stopped work on September 21, 2016 and received wage-loss compensation from OWCP for temporary total disability. She returned to modified employment on March 18, 2017.

In an emergency department report dated August 30, 2017, Dr. Rick L. Holland, Board-certified in emergency medicine, evaluated appellant for low back pain that had begun when she woke up that morning and increased after she got up from a chair after sitting for an extended period of time while at work. He noted that she had a history of low back pain treated with a rhizotomy in February 2017. Dr. Holland diagnosed acute low back pain and lumbar radiculopathy and provided restrictions.

A magnetic resonance imaging (MRI) scan obtained September 22, 2017 revealed a moderate disc herniation at L4-5 on the right causing mild central canal stenosis and seeming to abut the right L5 nerve root.

On October 24, 2017 appellant filed a notice of recurrence (Form CA-2a) for medical treatment beginning August 30, 2017 causally related to her accepted employment injury. She advised that she had felt a pull in her back when she got up from a seated position. Appellant asserted that objective testing had confirmed that she had again herniated her disc.

In an emergency department report dated December 7, 2017, Dr. Holland evaluated appellant for severe pain in her low back. He related, "She says she has degenerative disc or herniated disc, which occurred in 2015 at some type of a work injury. She reinjured her back in September of this year. [Appellant] now has a flare-up of low back pain, which radiates into the right buttock area." Dr. Holland diagnosed an acute flare of chronic back pain.

[3] Docket No. 19-0957 (issued October 22, 2019).

[4] By decision dated November 22, 2016, OWCP denied appellant's claim as the medical evidence was insufficient to show that she sustained a medical condition causally related to the accepted employment incident. By decision dated March 8, 2017, it vacated the November 22, 2016 decision and accepted the claim for an aggravation of an L4-5 herniated disc.

In a December 8, 2017 duty status report (Form CA-17), a physician assistant, Katie Dye, found that appellant's restrictions had increased such that she was limited to standing and walking for one hour per day and no bending, stooping, or twisting.

On December 22, 2017 appellant filed claims for compensation (Form CA-7) requesting intermittent wage-loss compensation for disability beginning December 9, 2017.

In a development letter dated January 19, 2018, OWCP advised appellant of the definition of a recurrence of disability and the type of evidence necessary to establish that she had sustained a recurrence of employment-related disability. It afforded her 30 days to submit additional evidence.

Subsequently, OWCP received an emergency department report dated January 10, 2018 from Dr. Matt Flannigan, an osteopath. Dr. Flannigan obtained a history of appellant experiencing chronic pain in her low back after a September 2016 injury at work. He diagnosed acute low back pain with right sciatica and provided her with a two-day out of work note.

A February 2, 2018 lumbar MRI scan revealed an L4-5 moderate disc protrusion on the right side.

In a February 8, 2018 response to OWCP's development letter, appellant specified that she had sustained a recurrence of disability on August 30, 2017 rather than December 8, 2017.[5] She related that she had reinjured her back twisting and turning on a route and had immediately sought treatment at the emergency department.

In a report dated February 15, 2018, Dr. Mark D'Angelo, an osteopath, evaluated appellant for right hip pain and a bulging disc. He obtained a history of her sustaining an injury at work when she experienced back pain after bending down. Dr. D'Angelo diagnosed right hip bursitis possibly related to appellant's low back injury and lumbar intervertebral disc displacement. In a separate report of even date, he evaluated appellant for right knee pain which could be related to a 2016 fall. Dr. D'Angelo diagnosed internal derangement of the right knee, a tear of the right medial meniscus, and a tear of the right lateral meniscus.

On March 8, 2018 Dr. D'Angelo again diagnosed right hip bursitis and lumbar intervertebral disc displacement. He noted that the pain in appellant's low back had begun after a September 19, 2016 employment injury.

In a March 9, 2018 Form CA-17, Dr. Brian McComb, an osteopath, provided work restrictions.

By decision dated April 13, 2018, OWCP found that appellant had not established a recurrence of disability beginning December 8, 2017 causally related to her September 19, 2016 employment injury.

[5] On February 6, 2018 Dr. Kenneth M. Louis, a Board-certified neurosurgeon, diagnosed low back pain, lumbar disc disease, and right hip pain. He discussed possible surgery.

In a report dated May 10, 2018, Dr. Steve Klafeta, a Board-certified neurosurgeon, discussed appellant's complaints of low back pain radiating into the thigh and right buttocks numbness. He noted that she had a history of a September 19, 2017 injury at work. Dr. Klafeta provided examination findings and diagnosed lumbar spondylosis with radiculopathy. He requested authorization for a lumbar interbody fusion at L4-5.

On October 21, 2018 counsel requested that OWCP authorize the proposed lumbar surgery.

OWCP referred appellant to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second opinion regarding the proposed lumbar surgery.

In a report dated December 3, 2018, Dr. Obianwu discussed appellant's history of injury and increased pain performing her work duties after March 2017.[6] He provided his review of the medical evidence and diagnosed degenerative disc disease at L4-5, a herniated L4-5 disc causing right L5 radiculopathy, morbid obesity, and the apparent failure of conservative treatment. Dr. Obianwu indicated that appellant's essential problem was her morbid obesity and that her symptoms should resolve if she lost weight. He opined that if her symptoms became "intractable then the surgical procedures of disc excision at the L4-5 levels followed by an interbody fusion would be quite a reasonable form of treatment at this time."

On December 24, 2018 appellant, through counsel, requested reconsideration. He submitted a September 27, 2018 report from Dr. McComb. Dr. McComb advised that he had treated appellant since 2014 and that she had "a herniated disc at L4-5 which has been problematic since September 2016." He noted that she had experienced an aggravation of her back pain after performing twisting while delivering mail on a route on August 24, 2017. Dr. McComb recommended surgery and advised that appellant had exhausted conservative measures.

By decision dated January 29, 2019, OWCP denied modification of its April 13, 2018 decision. It found that appellant had not established that her condition worsened on August 30, 2017 such that she became disabled from employment on December 8, 2017.

Appellant appealed to the Board on April 1, 2019.

Subsequently, OWCP received a December 21, 2018 operative report from Dr. Klafeta, who performed a right L4-5 decompression, facetectomy and interbody fusion.

By decision dated October 22, 2019, the Board affirmed the January 29, 2019 OWCP decision.[7] The Board found that appellant had described intervening incidents occurring on August 30, 2017 when she herniated a disc getting up from a chair and on March 6, 2018 when she advised that she had reinjured her back twisting and turning while performing her work duties.

In a report dated March 26, 2020, Dr. McComb related that he had treated appellant since November 5, 2014 for back pain that had begun after an injury she had sustained while in the military. On November 18, 2014 appellant experienced increased back pain after a motor vehicle

[6] In CA-17 form reports dated November 9 and 27, 2018, Dr. McComb provided work restrictions.

[7] *Supra* note 3.

accident. Dr. McComb related that appellant's back pain had resolved with medication. He subsequently treated her on September 21, 2016 for back pain after she sustained an injury at work when she bent over to pick up a magazine. Dr. McComb noted that a lumbar computerized tomography (CT) scan obtained at the emergency room on September 19, 2016 showed a central disc protrusion at L4-5 contracting and effacing the ventral thecal sac. He opined that the September 19, 2016 injury had aggravated appellant's preexisting back pain due to muscle spasm. Dr. McComb asserted that her spastic musculature pulled her vertebrae out of place when she bent to pick up a magazine, herniated her disc at L4-5. He opined that absent appellant's fusion on December 18, 2018, she would have been disabled from employment.

On April 27, 2020 counsel requested reconsideration based on Dr. McComb's November 16, 2016 and March 26, 2020 reports. He resubmitted the November 16, 2016 report from Dr. McComb, who described his history of treating appellant and noted that a November 2, 2016 MRI scan had shown a central disc herniation causing central canal stenosis effacing the right L5 nerve root. Dr. McComb diagnosed a herniated disc pressing on the L5 nerve root not present prior to the September 19, 2016 employment injury.

By decision dated April 29, 2020, OWCP denied modification of its January 29, 2019 decision.[8]

On May 13, 2020 counsel requested reconsideration. He resubmitted the November 16, 2016 and March 26, 2020 reports from Dr. McComb.

By decision dated May 28, 2020, OWCP denied appellant's request for reconsideration.

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.[9] 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.[10]

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

[8] OWCP indicated that it was denying modification of the Board's October 22, 2019 decision; however, the decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d).

[9] 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[10] *Id*.

condition that results from a new injury, even if it involves the same part of the body previously injured.[11]

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.[12] Where no such rationale is present, the medical evidence is of diminished probative value.[13]

ANALYSIS -- ISSUE 1

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

Initially, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's January 29, 2019 decision, which was considered by the Board in its October 22, 2019 decision. Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.[14]

Subsequent to OWCP's January 29, 2019 decision, appellant submitted an operative report dated December 21, 2018 from Dr. Klafeta, who performed a right decompression, facetectomy, and interbody fusion at L4-5 on the right side.

OWCP had previously developed the evidence regarding appellant's request for authorization for surgery by referring her to Dr. Obianwu for a second opinion examination. On December 3, 2018 Dr. Obianwu diagnosed degenerative disc disease at L4-5, a herniated L4-5 disc causing right L5 radiculopathy, morbid obesity, and the apparent failure of conservative treatment. He recommended that appellant lose weight, but further advised that if her symptoms were intractable then an interbody fusion would be reasonable. Dr. Obianwu was unclear regarding whether the surgery was causally related to the accepted employment injury.

It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[15] 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

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

[12] *L.O.*, Docket No. 19-0953 (issued October 7, 2019); *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

[13] *M.G.*, Docket No. 19-0610 (issued September 23, 2019); *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

[14] *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

[15] *See R.M.*, Docket No. 20-0342 (issued July 30, 2020); *S.C.*, Docket No. 19-0920 (issued September 25, 2019).

case.[16] As OWCP undertook development of the evidence by referring appellant to Dr. Obianwu for an opinion on whether the lumbar surgery should be authorized, it has the responsibility to obtain a rationalized medical opinion on this issue.[17] OWCP should adjudicate whether appellant's December 21, 2018 surgery should be authorized prior to determining whether she has established any periods of disability subsequent to December 2017.[18]

Accordingly, the Board will remand the case to OWCP. On remand OWCP shall obtain a supplemental report from Dr. Obianwu clarifying whether appellant's December 21, 2018 surgery was medically necessary and causally related to her accepted September 19, 2016 employment injury and, if so, addressing any periods of disability. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

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

[17] *See J.W.*, Docket No. 17-0715 (issued May 29, 2018).

[18] *See D.D.*, Docket No. 19-1606 (issued November 16, 2020).

ORDER

IT IS HEREBY ORDERED THAT the May 28 and April 29, 2020 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 10, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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