



## **ISSUE**

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability commencing October 13, 2017 causally related to his accepted October 20, 2010 employment injury.

## **FACTUAL HISTORY**

On October 26, 2010 appellant, then a 50-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that on October 20, 2010 he sprained his neck and left shoulder, and experienced swelling in his neck and spasms in his lower-to-mid back while performing chin-ups, push-up, and sit-ups during a fitness test at work in the performance of duty. He did not stop work. On November 2, 2010 appellant accepted the employing establishment's offer of a full-time limited-duty position, effective November 4, 2010.

On December 2, 2010 OWCP accepted appellant's claim for neck sprain. It subsequently expanded acceptance of the claim to include displacement of the cervical intervertebral disc without myelopathy, left, at C3-4, closed dislocation of the cervical vertebra, and aggravation of degenerative disc disease (DDD). OWCP paid appellant wage-loss compensation for intermittent periods of disability.

OWCP received emergency department records and discharge instruction sheets dated October 13, 2017, which related that appellant was treated for complaints of neck pain radiating to his left arm and leg and associated with a left-sided headache radiating to his left temple which developed during the previous night. Appellant was diagnosed with cervical radiculopathy.

In an October 19, 2017 medical report, Dr. John T. Kane, a family practitioner, noted that appellant had a history of disc problems in his neck and back. He reportedly awoke last week with acute pains in his neck and back with "pins and needles" in his arms and legs that had persisted. Appellant was treated in an emergency room. Dr. Kane discussed his examination findings and provided an assessment of cervical and lumbar radiculopathy.

An October 13, 2017 brain computerized tomography (CT) scan report by Dr. Jaime L. Checkoff, a Board-certified diagnostic radiologist, noted an impression of small vessel ischemic changes with no acute intracranial abnormality. In a cervical spine CT scan report of even date, he provided an impression of DDD with no fracture.

On October 18, 2017 appellant filed a notice of recurrence (Form CA-2a) claiming disability beginning October 13, 2017 causally related to his accepted employment injury. He noted that he was sleeping in his bed and sometime during the night he was awakened by severe neck and head pain. Appellant claimed that his neck pain was on the same left side of his neck and head as originally diagnosed in 2010 as cervical disc herniation.

In a November 13, 2017 letter, the employing establishment controverted appellant's claim, contending that on the date of the alleged recurrence of disability, he was not in the performance of duty as that was his regular day off work. In addition, it contended that he did not submit any medical evidence to establish a work-related injury.

OWCP received an October 23, 2017 report by Dr. James D. Brady, a chiropractor, who noted a history of appellant's accepted October 20, 2010 employment injury and findings on examination of his cervical and lumbar spines. Dr. Brady advised that he had decreased range of motion of the cervical and lumbar pelvic spines with increased pain at the end of each movement. He opined that all of appellant's injuries were a result of his work-related injury. In progress notes dated October 23 through November 29, 2017, Dr. Brady reexamined appellant and provided an assessment of chronic and persistent cervical and thoracic spine pain.

In a report dated November 22, 2017, Dr. Anca Bereanu, a neurologist, noted appellant's history of injury on October 20, 2010 and medical treatment. She reported findings on examination and diagnosed the accepted conditions of sprain and strain of the bilateral shoulders and cervical, thoracic, and lumbar spines. Dr. Bereanu opined that appellant's conditions pertained to his October 20, 2010 employment injury.

OWCP, in a development letter dated January 9, 2018, informed appellant that the evidence of record was insufficient to establish his recurrence of disability claim. It provided him with the definition of a recurrence of disability and requested that he submit a physician's opinion explaining how his disability was causally related to his accepted employment injury. OWCP also provided a questionnaire for his completion. It afforded appellant 30 days to provide the necessary information.

On February 6, 2018 appellant responded to OWCP's development questionnaire. He noted he was unsure as to how his claimed recurrence occurred other than from airplane turbulence and working out at a hotel on October 9, 2017. Appellant indicated that on October 12, 2017 he experienced neck, back, and head pain. He related that since returning to work following his original injury, he had been involved in full physical training. Appellant claimed that he reinjured his cervical spine while lifting weights and airplane turbulence. He attributed his current condition to his accepted employment injury as he experienced the same intense pain. Additionally, appellant contended that his accepted conditions never disappeared as he had constant pain and muscle discomfort that comes and goes for which he sought medical treatment. He described his hobbies and noted that he constantly performed physical training during work hours and while off duty.

By decision dated February 13, 2018, OWCP denied appellant's recurrence claim, finding that he had not responded to its January 9, 2018 development letter by submitting medical evidence in support of his claim.

OWCP continued to receive progress notes dated December 1, 2017 through January 29, 2018 by Dr. Brady who reiterated that appellant had chronic and persistent cervical and thoracic spine pain.

In an additional report dated October 4, 2017, Dr. Kane indicated that appellant presented for a routine physical examination. He described examination findings and assessments of encounter for preventive health examination, inappropriate use of leisure time, asthma, and left foot pain.

On February 22, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the February 13, 2018 decision.

OWCP received additional progress notes dated February 2 through 28, 2018 by Dr. Brady who reiterated that appellant had chronic and persistent cervical and thoracic spine pain.

Dr. Bereanu, in an April 5, 2018 report, provided a history of appellant's medical treatment, including his own treatment of him beginning on November 21, 2017. She also noted a review of medical records. Dr. Bereanu noted that after reviewing the consecutive sustained treatments throughout the years, appellant had continued to have flare-ups of the same cervical pathology without other underlying medical problems or new injuries. She advised that his presentation for treatment in 2017 and 2018 was causally related to his October 20, 2010 work-related injury. Dr. Bereanu noted that appellant's treatment and neurological evaluation on November 21, 2017 was in direct relationship to his preexisting pathology stemming from his employment on October 20, 2010. She addressed his treatment plan.

In a December 26, 2017 cervical spine magnetic resonance imaging (MRI) scan report, Dr. Joel Swartz, a Board-certified diagnostic radiologist, provided an impression of no evidence of fracture/dislocation, marrow replacing process, or intrinsic cervical cord abnormality. He also provided impressions of disc desiccation with broad disc protrusion to the left at C3-4, disc degeneration with broad disc protrusion and marginal-osteophytosis at C4-5, disc degeneration with broad disc protrusion reducing canal diameter as described at C5-6, and disc degeneration and disc protrusion as described at C6-7.

An OWCP hearing representative, by decision dated July 26, 2018, affirmed the February 13, 2018 decision, finding that the medical evidence submitted was insufficient to establish that appellant sustained a recurrence of disability on October 13, 2017 causally related to his October 20, 2010 employment injury.

On February 7, 2019 appellant, through counsel, requested reconsideration. He submitted a September 17, 2018 letter from Dr. Bereanu. In this letter, Dr. Bereanu noted a review of appellant's case and opined that the aggravation he sustained to the cervical pathology was spontaneous, in the absence of traumatic injuries, including strenuous exercises. She indicated that cervical discs that have pathology are known in the medical literature for causing spontaneous abnormalities in the course of activities of daily living (ADLs), without a mandatory trauma injury. Such activities could include coughing, sneezing or, a sudden motion of the pre-injured or involved area of the spine. Dr. Bereanu opined that appellant sustained an aggravation of preexisting work initiated cervical disc pathology which predated the manifestation of October 13, 2017.

OWCP, by decision dated May 8, 2019, denied modification of the July 26, 2018 decision.

## LEGAL PRECEDENT

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>5</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>6</sup> Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.<sup>7</sup>

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 that had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. The term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>8</sup>

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the limited-duty requirements.<sup>9</sup>

An employee who claims a recurrence of disability resulting from an accepted employment injury has the burden of proof to establish that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and

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<sup>3</sup> *Id.*

<sup>4</sup> See *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

<sup>6</sup> *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

<sup>7</sup> *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>8</sup> 20 C.F.R. § 10.5(x); see *D.T.*, Docket No. 19-1064 (issued February 20, 2020).

<sup>9</sup> *C.B.*, Docket No. 19-0464 (issued May 22, 2020); see *R.N.*, Docket No. 19-1685 (issued February 26, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>10</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of total disability commencing October 13, 2017 causally related to his accepted October 20, 2010 employment injury.

Appellant stopped work on October 13, 2017, and filed a Form CA-2a alleging a recurrence of disability commencing that date. He has not alleged a change in his light-duty job requirements. Instead, appellant attributed his inability to work to a change in the nature and extent of his accepted displacement of the cervical intervertebral disc without myelopathy, left, at C3-4, closed dislocation of the cervical vertebra, and aggravation of DDD. He therefore has the burden of proof to provide medical evidence to establish that he was disabled from work due to a worsening of his accepted work-related conditions.<sup>11</sup>

In support of his recurrence claim, appellant submitted several reports from his physician, Dr. Bereanu. In a September 17, 2018 report, Dr. Bereanu opined that, based on a review of appellant's case, he sustained a spontaneous aggravation of preexisting work-initiated cervical disc pathology, in the absence of traumatic injuries including strenuous exercises, which predated manifestation on October 13, 2017. She noted that it was known in medical literature that cervical discs that have pathology cause spontaneous abnormalities in the course of ADLs without a mandatory trauma injury. Dr. Bereanu related that such activities included coughing, sneezing or, a sudden motion of the pre-injured or involved area of the spine. In her remaining reports dated November 22, 2017 and April 5, 2018, Dr. Bereanu diagnosed the accepted conditions of sprain and strain of the bilateral shoulders and cervical, thoracic, and lumbar spines. She opined that appellant's conditions and prior additional treatment were casually related to the October 20, 2010 employment injury. Dr. Bereanu did not, however, explain how the worsening of his accepted conditions caused his disability from work commencing October 13, 2017.<sup>12</sup> The Board finds that his reports are therefore of diminished probative value in establishing a recurrence of the accepted employment injury.

Appellant also submitted an October 19, 2017 report from Dr. Kane, who diagnosed cervical and lumbar radiculopathy. However, OWCP has not accepted cervical and lumbar radiculopathy as causally related to the October 20, 2010 employment injury. Dr. Kane did not provide a rationalized explanation as to why the additional conditions should be found employment related.<sup>13</sup> Moreover, he did not otherwise explain how appellant's conditions worsened to the

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<sup>10</sup> *Id.*

<sup>11</sup> *D.H.*, Docket No. 18-0129 (issued July 23, 2018); *D.L.*, Docket No. 13-1653 (issued November 22, 2013); *Cecelia M. Corley*, 56 ECAB 662 (2005).

<sup>12</sup> *See T.G.*, Docket No. 20-0032 (issued November 10, 2020); *J.B.*, Docket Nos. 18-1751 and 19-0792 (issued May 6, 2019).

<sup>13</sup> *See T.G., id.; M.S.*, Docket No. 16-1907 (issued August 29, 2017).

point where he could no longer perform his full-time limited-duty position.<sup>14</sup> Dr. Kane's remaining report dated October 4, 2017 lacks probative value as it predates the time of the claimed October 13, 2017 recurrence and does not address the relevant time period.<sup>15</sup> For these reasons, the Board finds that his reports are insufficient to meet appellant's burden of proof.

The emergency department records and discharge instruction sheets dated October 13, 2017 provided a diagnosis of cervical radiculopathy. As noted, OWCP has not accepted cervical and lumbar radiculopathy as causally related to the October 20, 2010 work injury. This evidence does not provide a rationalized explanation as to why the additional condition should be found employment related.<sup>16</sup> Further, this evidence does not provide an opinion on whether appellant's disability commencing October 13, 2017 was causally related to the October 20, 2010 employment injury.<sup>17</sup> Thus, the emergency department records and discharge instruction sheets are insufficient to establish appellant's recurrence claim.

Appellant also submitted Dr. Checkoff's October 13, 2017 brain and cervical spine CT scan reports and Dr. Swartz's December 26, 2017 cervical spine MRI scan report. The Board has held that reports of diagnostic testing lack probative value, as they do not address whether a given medical condition/period of disability was caused by the employment.<sup>18</sup>

The report and progress notes dated October 23, 2017 through February 28, 2018 from Dr. Brady, a chiropractor, are of no probative medical value as he did not diagnose spinal subluxation as demonstrated by x-ray evidence to exist.<sup>19</sup>

As appellant has not submitted rationalized medical evidence establishing a recurrence of total disability for the period commencing October 13, 2017 causally related to the accepted October 20, 2010 employment injury, the Board finds that he has not met his burden of proof.

On appeal counsel contends that Dr. Bereanu's September 17, 2018 report is sufficient to establish appellant's recurrence of disability claim. As noted above, Dr. Bereanu did not provide sufficient medical rationale supporting that the accepted conditions totally disabled appellant from work commencing October 13, 2017 or caused the additional diagnosed conditions.

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<sup>14</sup> See *T.G., id.; J.P.*, Docket No. 18-1396 (issued January 23, 2020).

<sup>15</sup> See *T.G., id.; S.W.*, Docket No. 19-1579 (issued October 9, 2020).

<sup>16</sup> *Supra* note 13.

<sup>17</sup> *Supra* note 14.

<sup>18</sup> See *T.G. supra* note 12; *R.N.*, Docket No. 19-1685 (issued February 26, 2020); *T.H.*, Docket No. 18-1736 (issued March 13, 2019).

<sup>19</sup> Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulations by the secretary. See *R.N., id.; S.D.*, Docket No. 19-1245 (issued January 3, 2020); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

Alternatively, on appeal counsel contends that the case should be remanded for further development of the medical evidence as OWCP noted in its May 9, 2019 decision that an August 18, 2011 medical opinion of Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon and an OWCP second opinion physician, indicated that appellant's DDD was permanently aggravated by the accepted October 20, 2010 work injury. While Dr. Draper opined that appellant's aggravation of DDD was permanent in nature, he found that he could perform full-time work with restrictions. The Board finds that his opinion is insufficient to establish appellant's burden of proof as he did not opine that appellant was totally disabled from work commencing October 13, 2017 due to the accepted 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 total disability commencing October 13, 2017 causally related to his accepted October 20, 2010 employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 9, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 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