

ISSUE

The issue is whether appellant has met his burden of proof to establish recurrences of disability commencing April 8, 2002 and September 20, 2006 causally related to his accepted January 3, 1996 employment injury.

FACTUAL HISTORY

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

On January 16, 1996 appellant, then a 46-year-old aircraft mechanic foreman, filed a notice of traumatic injury (Form CA-1) alleging that on January 3, 1996 he sustained a back injury when moving lockers while in the performance of duty.⁴ He stopped work on January 8, 1996. OWCP initially accepted the claim for lumbosacral strain and subsequently expanded acceptance of the claim to include displacement of a lumbar intervertebral disc without myelopathy and other acquired deformities of the ankle and foot, bilateral. On August 14, 1996 appellant underwent a hemilaminotomy and microdiscectomy at L4-5. He worked intermittently before returning to full-duty work on October 5, 1998. Appellant was suspended without pay effective April 21, 2002 and terminated for cause effective September 12, 2002. After his suspension, he worked in private sector employment. Appellant was incarcerated from November 17, 2003 until September 5, 2006 for reasons unrelated to his compensation claim. He did not return to work.

On April 13, 2007 appellant filed a notice of recurrence (Form CA-2a) claim. He alleged that the recurrence occurred on September 20, 2006 when he was playing with his grandchildren and he felt a sharp low back pain and a loss of strength in his low back and left leg, which caused him to fall. Appellant explained that he had numbness and pain in his toes, low back pain radiating down his left leg, and sharp left buttock pain. He advised that he had never fully recovered from his work injury, which had worsened over time, disabled him, and limited his activity.

On February 18, 2010 appellant filed another Form CA-2a. He alleged that his recurrence occurred on April 8, 2002. Appellant alleged that two or three times a month he experienced sharp pain in his left buttock which radiated down his left leg to his left heel and caused him to fall. He indicated that the pain worsened each time and the falls were occurring more often.

Following further development, by decision dated August 11, 2016, the Board reversed OWCP's February 9, 2016 decision, which affirmed the rescission of acceptance of appellant's recurrence of disability claim beginning September 20, 2006 causally related to his accepted January 3, 1996 employment conditions.⁵ The Board found that OWCP had not met its burden of

³ *Order Remanding Case*, Docket No. 19-0346 (issued November 26, 2019); Docket No. 17-1390 (issued April 23, 2018); Docket No. 16-0715 (issued August 11, 2016).

⁴ Appellant sustained prior injuries to his back. OWCP File No. xxxxxx757 pertains to a January 12, 1983 back injury and OWCP File No. xxxxxx431 pertains to a July 6, 1994 back injury.

⁵ Docket No. 16-0715, *supra* note 3.

proof to rescind acceptance of the recurrence claim as it should have analyzed the medical evidence to determine whether he had sustained a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.

By decision dated April 23, 2018, the Board affirmed OWCP decisions dated May 1, 2017 and two decisions dated April 28, 2017.⁶ The Board found that OWCP had met its burden of proof to rescind its acceptance of the September 20, 2006 recurrence claim. The Board also found that appellant had not met his burden of proof to establish a recurrence of total disability commencing either April 8, 2002 or September 20, 2006 causally related to his January 3, 1996 employment injury.

During the pendency of appellant's prior appeal to the Board, OWCP, in a letter dated July 13, 2017, requested that Dr. Kevin Scott, a Board-certified orthopedic surgeon, review an updated statement of accepted facts (SOAF) dated July 13, 2017 and provide a supplemental report regarding appellant's lumbar condition.⁷ It inquired as to the cause of appellant's disability and whether or not his accepted conditions or the aggravations had resolved. In a July 18, 2017 addendum to his January 18, 2017 report, Dr. Scott indicated that his opinion on causality remained unchanged. He opined that appellant's current disability was related to appellant's January 3, 1996 employment injury as it was his most significant injury and caused him to have a discectomy at that level. Dr. Scott explained that appellant did well for a while but, according to the most recent magnetic resonance imaging (MRI) scan, appellant has a paracentral disc extrusion at the previous level of L3-4 and a left sided lateral recess impingement of the L4 nerve root, where the extruded disc was back in 1996. He noted that, while he would like to see documentation that appellant actually performed the exercises noted on the SOAF during his incarceration, he did not think it would change his opinion. Dr. Scott reiterated that, for now, his opinion remained unchanged.

On August 17, 2018 appellant, through his then-representative, requested reconsideration and submitted additional evidence. OWCP received treatment notes from Dr. Paul Salerno, a Board-certified physiatrist, dated May 1, 2017 through October 18, 2018. Dr. Salerno provided assessments of lumbosacral region intervertebral disc degeneration, postlaminectomy syndrome, muscle spasm back, and lumbar region spinal enthesopathy. He opined that appellant's current disability was related to appellant's original work injury and subsequent surgery. Duplicative copies of health records dated January 21, 2004 through July 31, 2006 from the State of New York Department of Correctional Services, signed by registered nurses and a nurse practitioner, were also received.

⁶ Docket No. 17-1390, *supra* note 3.

⁷ The SOAF noted that on or about March or April 2006, while incarcerated, appellant's right hand slipped while going onto the bunk and he reached for a bar and he felt a tear. It also noted that appellant's physical activities while incarcerated included: 400 sit ups/day, running 4 miles/day, and pushups.

By decision dated October 30, 2018, OWCP denied modification of its April 28 and May 1, 2017 decisions. It noted that medical evidence was submitted, but did not reference the July 18, 2017 addendum from Dr. Scott.

On December 3, 2018 appellant appealed to the Board. In an order dated November 26, 2019, the Board set aside OWCP's October 30, 2018 decision and remanded the case for further development.⁸ The Board found that Dr. Scott's July 18, 2017 addendum report was received, but not reviewed by OWCP prior to the issuance of its October 30, 2018 decision. It remanded the case for a proper review of all the evidence of record followed by the issuance of a *de novo* decision.

OWCP received additional reports from Dr. Salerno dated November 15, 2018 through January 9, 2020, in which he continued to opine that appellant's current disability was related to appellant's original work injury and subsequent surgery. It also received letters dated August 20 and November 25, 2018 from appellant's then-representative which presented arguments pertaining to the violation of appellant's privacy rights regarding the use of his medical records from the State of New York Department of Corrections.

By decision dated February 25, 2020, OWCP denied modification of its prior decision. It found that the medical evidence did not contain a rationalized medical opinion based on a complete and accurate history with supporting objective findings which explained how appellant's disability was caused by a change/worsening of his accepted conditions during the periods claimed.

On July 14, 2020 appellant requested reconsideration. He submitted additional reports from Dr. Salerno dated February 20, March 19 and May 6, 2020. In a July 15, 2020 12 page letter, appellant's then representative, went over the procedural history of the claim and set forth several arguments where he alleged OWCP erred in each of its decisions. With regard to appellant's recurrence claims, the representative alleged, in relevant part, that OWCP should have requested a supplemental opinion from Dr. Scott as it knew that his second opinion reports were of limited probative value as they did not address appellant's claims of recurrence on the dates in question.

By decision dated September 24, 2020, OWCP denied modification of its February 25, 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.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

⁸ *Order Remanding Case*, Docket No. 19-0346, *supra* note 3.

⁹ 20 C.F.R. § 10.5(x); *see A.E.*, Docket No. 20-0259 (issued April 28, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

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 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

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.¹⁴ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify their disability and entitlement to compensation.¹⁵

ANALYSIS

The Board finds that this 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 May 1, 2017 and the two April 28, 2017 decisions, which was considered by the Board in its April 23, 2018 decision. Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.¹⁶

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

¹² *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

¹³ *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

¹⁴ *See B.D.*, Docket No. 18-0426 (issued July 17, 2019); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹⁵ *Id.*, *Fereideoon Kharabi*, 52 ECAB 291 (2001).

¹⁶ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

OWCP has accepted that appellant, as a result of his January 3, 1996 employment injury, sustained displacement of lumbar intervertebral disc without myelopathy; other acquired deformities of ankle and foot, bilateral; and sprain of lumbosacral joint/ligament. Following the Board's November 26, 2019 order remanding the case for consideration of Dr. Scott's July 18, 2017 addendum report, OWCP issued a *de novo* decision dated February 25, 2020 denying appellant's recurrence claims and a September 24, 2020 decision denying modification of its February 25, 2020 decision. It found that the medical evidence submitted in support of appellant's alleged recurrence failed to provide a well-rationalized opinion supported by objective findings that his work-related condition had materially changed or worsened without an intervening injury or exposure to work factors and which prevented him from performing work during the claimed period of disability.

OWCP undertook development of the claim by referring appellant for a second opinion examination with Dr. Scott. On July 13, 2017 it requested a supplemental report from Dr. Scott based on an updated SOAF. In its July 13, 2017 letter, OWCP inquired as to the cause of appellant's disability and whether or not his accepted conditions or the aggravations had resolved. It did not inquire as to whether he sustained a recurrence of disability commencing April 8, 2002 and September 20, 2006 causally related to his accepted January 3, 1996 employment injury. OWCP then found Dr. Scott's July 18, 2017 addendum report of limited probative value as it failed to address the relevant issue of whether or not appellant sustained a recurrence of disability on the dates in question.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.¹⁷ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁸ Because Dr. Scott, serving as OWCP's second opinion examiner, has not specifically addressed whether or not appellant sustained a recurrence of disability on the dates in question, the case must be remanded to OWCP.¹⁹

On remand OWCP shall request a supplemental report from Dr. Scott to obtain a rationalized medical opinion on whether or not appellant sustained a recurrence of disability on April 8, 2002 and September 20, 2006 causally related to his accepted January 3, 1996 employment injury. If Dr. Scott is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, together with a SOAF and a list of specific questions, to another second opinion physician in the appropriate field of medicine to resolve the issue. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

¹⁷ *C.R.*, Docket No. 20-1102 (issued January 8, 2021); *K.P.*, Docket No. 18-0041 (issued May 24, 2019).

¹⁸ *M.T.*, Docket No. 20-0321 (issued April 26, 2021); *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

¹⁹ *M.T.*, *id.*

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 26, 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