

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

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S.D., Appellant))	
))	
and))	Docket No. 20-0827
))	Issued: September 3, 2021
U.S. POSTAL SERVICE, POST OFFICE,))	
Oceanside, CA, Employer))	
_____))	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 4, 2020 appellant filed a timely appeal from a November 29, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ The Board notes that, during the pendency of this appeal, OWCP issued a February 26, 2021, decision which denied modification of its November 29, 2019 decision. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). Consequently, OWCP's February 26, 2021 decision is set aside as null and void. 20 C.F.R. §§ 501.2(c)(3), 10.626; *see J.W.*, Docket No. 19-1688, n.1 (issued March 18, 2020); *J.A.*, Docket No. 19-0981, n.2 (issued December 30, 2019); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the November 29, 2019 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 her burden of proof to establish a recurrence of total disability commencing March 11, 2019, causally related to her accepted employment injury.

FACTUAL HISTORY

On March 30, 2009 appellant, then a 45-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained an L5-S1 annular tear with L3-5 internal disc derangement due to factors of her federal employment. She noted that she first became aware of her condition on October 16, 2000 and realized its relationship to her federal employment on July 23, 2007. In an attached statement, appellant explained that she had sustained prior employment injuries over the course of her 17 to 19 years of employment, with the first occurring in 1991.⁴ She alleged that her current lumbar conditions were aggravations of her prior conditions and were also related to her continued job duties of casing and delivering mail, which required repetitive lifting, bending, pivoting, and getting in and out of her postal vehicle. By decision dated December 9, 2011, OWCP accepted the claim for aggravation of L4-5 herniated disc, aggravation of S1 sacral radiculopathy, and aggravation of lumbosacral degenerative disc disease. Acceptance of the claim was subsequently expanded to include reaction to lumbar or spinal puncture. OWCP authorized removal of spinal lamina and L3-4 laminectomy surgery, which was performed on October 18, 2012. Appellant returned to part-time work on September 23, 2013 and she returned to full-time modified duty on October 12, 2014.

In a duty status report (Form CA-17) dated March 7, 2019, Dr. Hosea Brown, III, a Board-certified internist, noted an October 16, 2000 injury date, diagnosed lumbar radiculitis, and found appellant totally disabled from work until June 1, 2019 due to lumbar instability.

On March 8, 2019 appellant filed a claim for compensation (Form CA-7) for disability for the period March 11 to June 1, 2019.

In a development letter dated March 18, 2019, OWCP provided appellant with the definition of a recurrence of disability and requested that she submit additional factual and medical evidence supporting that she was disabled from work during the claimed period. It provided a questionnaire for her completion and specifically requested that she submit a physician's opinion explaining how the claimed disability was due to her accepted employment conditions. OWCP afforded appellant 30 days to provide the requested evidence.

OWCP subsequently received a narrative report dated March 7, 2019 from Dr. Brown. Dr. Brown noted that appellant related that her back pain had become so severe she found it difficult to focus and concentrate. He detailed physical findings which included altered painful ambulatory antalgic gait, positive Lasegue and bilateral straight leg raising tests, severe

⁴ OWCP accepted a lumbar sprain and lumbar intervertebral disc disorder with myelopathy under OWCP File No. xxxxx583 with a date of injury of July 18, 1991. Under OWCP File No. xxxxx127 it accepted left sciatica and lumbar sprain with an injury date of October 16, 2000. Both of these claims are administratively closed. Under OWCP File No. xxxxx314 with an injury date of February 19, 2015, OWCP accepted the claim for cervical spondylosis with radiculopathy, thoracic region intervertebral disc degeneration, and thoracic radiculopathy. Appellant's claims have not been administratively combined.

lumbosacral paraspinal musculature spasm, and decreased lumbar range of motion. Dr. Brown diagnosed lumbosacral disc displacement, lumbosacral neuritis, and lumbar/lumbosacral degenerative disc disease, low back pain syndrome/failed back surgery syndrome, and status post lumbar surgery. Due to her severe lumbar spine instability, he found appellant temporarily totally disabled until June 1, 2019.

A March 26, 2019 computerized tomography (CT) scan of appellant's lumbar spine revealed status post L4-5 laminectomies, moderate lumbar degenerative changes associated with L4-5 moderate stenosis of the right neural foramen, no significant central canal stenosis noted at any level, and moderate sacroiliac joint degenerative changes.

Dr. Brown, in progress notes dated April 4, 2019, diagnosed lumbar disc displacement, lumbosacral neuritis, lumbar/lumbosacral degenerative disc disease, status post lumbar surgery, and low back pain syndrome/failed back surgery syndrome. He explained that appellant had been placed on temporary total disability based on objective clear evidence of lumbar instability. The objective findings included persistent low back pain, altered painful antalgic waddling ambulatory gait, tremendously decreased lumbar range of motion, positive bilateral straight leg raising test, and positive Lasegue test. Dr. Brown completed a Form CA-17, in which he indicated that she was disabled from work until June 1, 2019 due to lumbar instability.

In a report of even date, Dr. Brown addressed OWCP's letter requesting additional medical information regarding appellant's recurrence of disability and noting the accepted conditions of lumbar disc displacement, lumbosacral neuritis, lumbar/lumbosacral degenerative disc disease, and status post lumbar spine surgery. He related that she had been performing her usual employment duties when she experienced an acute spontaneous increase in flare-up of pain and discomfort in her back. Dr. Brown noted appellant's severe low back pain was consistent with objective findings of positive Lasegue test, positive bilateral straight leg raising, and severe paraspinal lumbosacral muscle spasm. Additionally, appellant exhibited decrease lumbosacral range of motion. Dr. Brown opined that she was temporarily totally disabled due to her severe lumbar instability, which was supported by objective findings and March 7, 2019 CT scan. Findings from the March 7, 2019 magnetic resonance imaging scan showed evidence of prior L4-5 laminectomies and persistent L3-4 and L4-5 disc herniation pathology, which he explained was consistent with appellant's increased symptomology and clear evidence of lumbar spine instability and temporary total disability.

In progress notes dated May 9, 2019 and in a Form CA-17 dated May 9, 2019, Dr. Brown noted diagnosis of lumbar radiculitis and found appellant totally disabled from work until August 1, 2019 due to lumbar instability.

Appellant filed a Form CA-7 claim for disability for the period June 1 to August 1, 2019.

By decision dated May 24, 2019, OWCP denied appellant's claim for a recurrence of disability beginning March 11, 2019. It found that the evidence was insufficient to establish a material worsening of the accepted condition.

In a report dated June 27, 2019, Dr. Brown, related his disagreement with the denial of appellant's recurrence claim. Due to her lumbar instability, he opined that she was temporarily totally disabled from work as discussed in his April 4, 2019 report. In support of his opinion,

Dr. Brown noted that appellant's lumbar disc displacement, lumbosacral neuritis, and lumbar radiculitis had been caused by her repetitive work activity and these conditions had a propensity to reoccur without any intervening cause. Moreover, appellant's disability was supported by objective evidence, which included decreased lumbosacral range of motion, severe lumbosacral paraspinal musculature spasm, altered painful antalgic ambulatory gait, bilateral positive straight leg raising, and positive Lasegue test. A review of a March 26, 2019 CT scan showed persistent multiple level disc herniations supportive of appellant's complaints of low back pain and lumbar instability. Dr. Brown concluded that she had increased disability due to a spontaneous change and worsening of her accepted conditions as supported by physical examination and objective findings.

Progress notes from Dr. Brown dated May 30 and June 27, 2019 were repetitive of prior reports.

On July 5, 2019 appellant requested reconsideration.

On July 8, 2019 OWCP referred the case record, along with a statement of accepted facts (SOAF) and a list of questions to Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as a district medical adviser (DMA).⁵

A progress note dated July 9, 2019 by Dr. Yogesh V. Patel, a Board-certified pain medicine physician, diagnosed lumbar radiculopathy, chronic pain syndrome, postlaminectomy syndrome, and other lumbar intervertebral disc degeneration. Appellant's physical examination findings included limited lumbar range of motion with stiffness and pain with twisting motion, mild tenderness on palpation of the lumbar paraspinal muscles, positive sacroiliac joint tenderness, no tenderness on palpation of the facet joints, normal motor strength, and normal bilateral lower extremity sensation. In an August 1, 2019 report, Dr. Ugokwe opined that there was no objective evidence supporting Dr. Brown's finding that appellant was totally disabled. In support of this conclusion, he explained that she was neurologically intact and her complaints of pain were subjective. Dr. Ugokwe opined that subjective complaints of pain with no supporting objective evidence were insufficient to find appellant totally disabled. He further found no objective findings of spinal instability on diagnostic imaging or on examination. In addition, he found no measurable or material change in appellant's spinal pathology.

By decision dated August 7, 2019, OWCP denied modification.

Progress notes dated August 7 and September 6, 2019 by Dr. Patel were unchanged from prior reports.

In progress notes dated August 8, 2019, Dr. George Ricks, a family medicine specialist, diagnosed lumbar intervertebral disc displacement without myelopathy, thoracic and lumbosacral neuritis or radiculitis, reaction to lumbar spinal puncture, and status post lumbar surgery. He related that appellant's physical examination findings included difficulty standing up from seated position, negative bilateral straight leg raising, bending at waist was reduced by 30 percent, and

⁵ The questions included "Please advise [of any] objective findings there [are] of 'spinal instability' in the record. What objective findings are present [that] show the worker has this condition? Are the accepted conditions on the [SOAF] indicative of 'spinal instability'?"

backwards extension at the waist was reduced by 70 percent. Dr. Ricks placed her off work until October 1, 2019 due to lumbar instability.

In progress notes dated September 5, 2019, Dr. Brown diagnosed lumbar intervertebral disc displacement without myelopathy, thoracic and lumbosacral radiculitis or neuritis, reaction to spinal or lumbar puncture, lumbar or lumbosacral intervertebral disc degeneration, and status post lumbar spine surgery. Range of motion findings included 20 degrees flexion, 10 degrees extension, 10 degrees lateral flexion, and 20 degrees lateral rotation. Other physical findings included severe lumbosacral paraspinal musculature spasm, persistently positive Lasegue test, positive bilateral straight leg testing, and bilateral lower extremity weakness 3+/5+.

In a report of even date, Dr. Brown reviewed the DMA's August 1, 2019 report and noted his disagreement. He noted that, contrary to the DMA's opinion, his reports did contain objective findings included range of motion, positive Lasegue and bilateral straight leg tests, severe lumbosacral paraspinal musculature spasms, and active altered antalgic ambulatory gait. Furthermore, Dr. Brown stated that his reports documented a significant diminished lumbar range of motion in his March 7, 2019 when compared with his April 5, 2018 report.

On September 12, 2019 appellant requested reconsideration.

By decision dated November 29, 2019, OWCP denied modification.

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.⁶

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work.⁷ As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.⁸ Section 8123(a) of FECA provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁹ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and

⁶ 20 C.F.R. § 10.5(x); *R.M.*, Docket No. 20-0486 (issued June 9, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁷ See *R.M., id.*; *D.W.*, Docket No. 19-1584 (issued July 9, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁸ *Id.*

⁹ 5 U.S.C. § 8123(a).

who has no prior connection with the case.¹⁰ Where a case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹¹

ANALYSIS

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

In multiple reports covering the period March 7 through September 5, 2019, Dr. Brown reviewed appellant's employment injury history. He found that she had sustained lumbar instability causally related to the accepted employment injury. Dr. Brown advised that appellant's accepted lumbar disc displacement, lumbosacral neuritis, lumbar radiculitis had a propensity to reoccur without any intervening cause, and that her condition had in fact spontaneously occurred following her failed lumbar spine surgery. He indicated that his diagnosis of lumbar instability and corresponding disability was supported by objective evidence and examination findings.

In a report dated August 1, 2019 report, Dr. Ugokwe, a DMA, opined that there was no objective findings supporting Dr. Brown's diagnosis of lumbar instability or disability. In support of this conclusion, he explained that appellant was neurologically intact and her complaints of pain were subjective.

Both Dr. Brown and Dr. Ugokwe noted appellant's employment injury history and both provided rationale for their respective findings based on their review of the medical evidence and examination findings. The Board, therefore, finds a conflict in medical opinion regarding whether she sustained lumbar instability causally related to or as a consequence of her accepted employment injury and whether she therefore sustained a recurrence of disability commencing March 11, 2019 causally related to the accepted employment conditions.¹² Under section 8123(a) of FECA (5 U.S.C. § 8123(a)), OWCP must resolve this conflict by referring appellant, together with the case record and a SOAF, to an impartial medical specialist.¹³ After this and other such further development as deemed necessary, it shall issue a *de novo* decision.¹⁴

CONCLUSION

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

¹⁰ *D.H.*, Docket No. 19-0687 (issued March 31, 2021); *T.J.*, Docket No. 20-0721 (issued November 17, 2020); *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

¹¹ *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

¹² *See D.H.*, *supra* note 10; *A.T.*, Docket No. 19-0294 (issued May 29, 2019).

¹³ *Supra* note 9.

¹⁴ On remand OWCP should consider administratively combining all of appellant's relevant claim files.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2019 of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 3, 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