United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 20-1543**
	)	**Issued: February 2, 2022**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Newark, NJ, Employer	)	

Appearances:
Lawrence Berger, 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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 24, 2020 appellant, through counsel, filed a timely appeal from a May 28, 2020 merit 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.[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 appellant submitted additional evidence on appeal. 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 from work commencing August 3, 2014 causally related to her accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 24, 2003 appellant, then a 41-year-old immigration enforcement agent, filed a traumatic injury claim (Form CA-1) alleging that on April 17, 2003 she injured her neck during required physical mat room training exercises while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx260 and accepted ventral disc herniation at C5-6 and cervical radiculopathy. Appellant stopped work on May 27, 2003. OWCP paid her wage-loss compensation for disability from work on the supplemental rolls commencing July 11, 2003 and on the periodic rolls commencing January 27, 2004. On February 28, 2005 Dr. John J. Knightly, a Board-certified neurosurgeon, performed an OWCP-authorized anterior cervical discectomy at C5-6 and C6-7 with fusion. Appellant returned to a limited-duty position on September 18, 2006, performing clerical duties and occasional lifting/carrying of articles such as docket files, ledgers, and small office tools.[5]

Appellant returned to full-duty work on May 22, 2009.

In a November 18, 2011 report, Dr. Knightly diagnosed ulnar neuropathy, anxiety, depression, cervical radiculopathy, cervicalgia, history of migraines, fibromyalgia, cervical spondylosis, and neuropathy. He noted that appellant's medications included Xanax twice daily, and Vicodin as needed for pain. In November 8, 2012 report, Dr. Dale R. Tidaback, a Board-certified occupational medicine specialist, assessed appellant's fitness for duty. He determined that, while appellant was physically capable of performing her employment duties, she was not fit for duty, including carrying an issued firearm, due to her continued use of narcotics and anti-anxiety medications on an "as needed" basis as these could cloud her sensorium and affect decision making. Dr. Tidaback indicated that there were other equally efficacious pain and anxiety medications that did not produce side effects, which could adversely affect her job.

In correspondence dated January 14, 2013, J.M., deputy field office director with the employing establishment, notified appellant that it proposed to remove her from her position as an immigration enforcement agent. He indicated that the employing establishment was concerned about her ability to perform all essential functions of her position and for her safety and well-being,

[4] Docket No. 08-1481 (issued January 27, 2009); Docket No. 18-0130 (issued September 17, 2018).

[5] On April 10, 2007 appellant filed a second traumatic injury claim (Form CA-1) alleging that she sustained a neck injury on February 17, 2007 during a 14-hour airplane flight from Newark, New Jersey to New Delhi, India when she was transporting a prisoner while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx616, accepted the conditions of cervical strain and cervical muscle spasm, and paid wage-loss compensation for periods of disability. On April 20, 2009 it administratively combined OWCP File Nos. xxxxxx260 and xxxxxx616, with the current file designated as the master file.

and the safety and well-being of her coworkers and the public. J.M. indicated that, during a notice period, appellant would remain in her current duty status of performing administrative duties. In a January 29, 2013 memorandum, the employing establishment informed appellant that she was being placed on administrative duty with no law enforcement duties at the Moore Haven facility in Florida, effective that date.

In a December 9, 2013 report, Dr. Lowell Davis, an osteopath and Board-certified anesthesiologist, diagnosed cervicalgia, cervical myofascial pain, and status post cervical surgery. He noted that appellant could return to full-duty work and should continue her current pharmacological regimen.

The employing establishment removed appellant effective August 3, 2014 due to her use of prescribed narcotic medication, which it asserted was not necessitated by her employment injury.

OWCP subsequently received a June 30, 2014 letter, wherein M.M., field office director at the employing establishment, advised that the employing establishment had informed appellant by letter dated January 14, 2013 that it had proposed to remove her due to medical inability to perform the duties of her position as an immigration enforcement agent due to her continued use of narcotic and other medications, which he maintained, clouded the sensorium and affected decision making.[6] He stayed the removal for 30 days to allow appellant time to apply for an enforcement removal assistant position.

On October 23, 2014 appellant filed a notice of recurrence (Form CA-2a) alleging that a recurrence of her accepted employment injuries occurred on August 3, 2014. She asserted that commencing January 29, 2013 she was prevented from performing usual duties until her removal from the employing establishment on August 3, 2014 even though her physician had returned her to full-duty status.

In a development letter dated December 30, 2014, OWCP informed appellant of the deficiencies of her recurrence claim. It advised her of the medical evidence needed to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In a January 28, 2015 report, Dr. Matthew H. Moretti, an osteopath and Board-certified family medicine specialist, noted the history of appellant's two employment injuries. He indicated that appellant reported that she was required to commute 100 miles each way to her job, and noted that the stress of this commute caused muscle spasm and neck pain which, in turn, led to severe anxiety and migraine headaches. Dr. Moretti opined that appellant's medical symptoms were all caused by and/or stemmed from her employment injuries and were then exacerbated by a daily, extremely long commute.

By decision dated April 22, 2015, OWCP denied appellant's recurrence claim, finding that appellant failed to establish that a spontaneous change in her employment-related medical condition necessitated a work stoppage on or after August 3, 2014.

[6] The position description for an immigration enforcement agent indicates that the agent carries firearms in the performance of duty. The record also contains documents concerning employing establishment firearms policy.

On October 13, 2015 appellant, through counsel, requested reconsideration of the April 22, 2015 decision. Medical evidence submitted included a May 12, 2015 report in which Dr. Samy F. Bishai, a Board-certified orthopedic surgeon, diagnosed cervical disc syndrome with bilateral radiculopathy, and status post disc excision and fusion at C5-6 and C6-7. On May 15, 2015 Dr. Davis diagnosed cervicalgia, myofascial pain syndrome, cervical facet joint mediated pain, post cervical laminectomy, and anxiety/depression. In a June 22, 2015 report, Dr. Knightly noted that he had not seen appellant since May 2013. He described her complaints of continued neck pain and increasing arm pain and numbness with tingling into the hands bilaterally. Following physical examination, Dr. Knightly diagnosed deteriorating anxiety and depression, deteriorating right cervical radiculopathy, and worsening neck pain. He opined that because appellant was on Vicodin and Xanax, she would not be qualified to carry a firearm.

In a May 20, 2015 report, Dr. Moretti indicated that, despite a May 2006 functional capacity evaluation (FCE), which found appellant incapable of performing her usual position, she was returned to full duty, working eight hours per day, "in fear of retribution or termination," and that an FCE in July 2012 recommended six-hour workdays, but she was forced to work eight-hour days with a two-hour commute each way. He opined that appellant's pain was caused by a work-related injury, exacerbated by lack of approval for physical therapy and nonadherence by her supervisors of medically recommended work restrictions. In an August 25, 2015 report, Dr. Moretti opined that appellant's anxiety and depression were due to her employment injuries. He advised that she could not perform any work due to chronic pain and secondary severe anxiety.

On September 23, 2015 OWCP referred appellant for a second opinion examination and evaluation, along with a statement of accepted facts (SOAF) and a list of questions, to Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon. It requested that Dr. Millheiser evaluate whether appellant's accepted employment injuries prevented her from performing her regular duties without restrictions.

In an October 19, 2015 report, Dr. Millheiser advised that the physical examination demonstrated moderate restriction of appellant's cervical spine motion in all planes with no tenderness, spasm, or trigger points present. He discussed appellant's diagnostic testing and diagnosed post cervical fusion from C5 to C7. Dr. Millheiser indicated that appellant had a chronic pain problem following the cervical fusion and still had neurological findings, including hypoesthesia of the left middle finger and slight right thenar atrophy, which were residuals of her employment injuries. He also noted that appellant suffered from anxiety and should be weaned off narcotics. Dr. Millheiser concluded that appellant could not return to regular-duty work without restrictions due to the cervical fusion surgery, but could perform modified duty with lifting of no more than 30 pounds, and avoidance of neck twisting, running, climbing, and subduing/ lifting uncooperative individuals.

By decision dated November 1, 2016, OWCP denied modification of its April 22, 2015 decision, finding that the medical evidence submitted was insufficient to establish a spontaneous worsening of her accepted conditions and that the removal of her limited-duty position was due to the daily commute she endured after her return to full-duty work.

On June 12, 2017 appellant, through counsel, requested reconsideration of the November 1, 2016 decision. Counsel asserted that appellant sustained a recurrence of disability because her limited-duty work was withdrawn. In an April 25, 2017 report, Dr. Davis noted that appellant was last seen in May 2015. He described her complaint of right-sided neck, shoulder, and upper

extremity pain, managed by medication. Following physical examination, Dr. Davis diagnosed cervical spondylosis without myelopathy, post cervical laminectomy syndrome, and right cervical radiculopathy.

By decision dated August 23, 2017, OWCP denied modification of its November 1, 2016 decision.

Appellant appealed to the Board and, by decision dated September 17, 2018,[7] the Board set aside the August 23, 2017 decision and remanded the case to OWCP for further development. The Board found that it was unclear from the case record whether appellant was prescribed the medications Xanax and Vicodin for her accepted employment injuries.

On remand, OWCP referred appellant for a second opinion examination and evaluation, along with a SOAF and series of questions, to Dr. Millheiser. It requested that Dr. Millheiser evaluate whether her use of Xanax and Vicodin was necessitated by the accepted employment injuries.

In a report dated November 5, 2018, Dr. Millheiser reported the findings of his physical examination, noting that appellant had a mild restriction of the cervical spine motion and no tenderness. He diagnosed post cervical fusion surgery and found that she was able to work. Dr. Millheiser advised that, with respect to the use of Xanax, appellant appeared to have had a stale cervical fusion and that she had no significant objective findings with respect to neurological loss over the years. He indicated that there was no reason for her to be on narcotics for the 13 years that had elapsed since her surgery. Dr. Millheiser opined that appellant's use of narcotics could not be explained by her physical findings and that it was not necessitated by the conditions of cervical radiculopathy and cervical spasm.

By decision dated January 25, 2019, OWCP denied appellant's claim, finding that she had not established a recurrence of disability commencing August 3, 2014 causally related to her accepted employment injury.

On February 16, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Prior to the hearing, OWCP's hearing representative issued a May 2, 2019 decision setting aside the January 25, 2019 decision and remanding the case to OWCP for further development. The hearing representative found that Dr. Millheiser's November 5, 2018 report did not fully address whether appellant's use of Vicodin was necessitated by work-related residuals and directed OWCP to obtain a supplemental report from Dr. Millheiser, which fully addressed appellant's use of both Vicodin and Xanax.

On May 15, 2019 OWCP requested a supplemental report from Dr. Millheiser in accordance with the May 2, 2019 decision. In a July 5, 2019 report, Dr. Millheiser noted that he had reviewed the relevant medical records and indicated that there was no change in his prior opinion that there was no need for appellant's ongoing use of Vicodin. He opined that there was no physical problem that would have necessitated the use of Xanax or Vicodin and found that these medications were not medically necessary for the accepted employment injuries. With specific respect to Xanax usage, Dr. Millheiser indicated that appellant had no specific localizing findings

[7] *Supra* note 4.

and there was no specific orthopedic or neurological reason why she needed the medication for work-related residuals, including those related to the cervical surgery.

By decision dated July 25, 2019, OWCP denied appellant's claim, finding that she had not established a recurrence of disability commencing August 3, 2014 causally related to her accepted April 17, 2003 and February 17, 2007 employment injuries.

On April 7, 2020 appellant, through counsel, requested reconsideration of the July 25, 2019 decision. In an accompanying statement, counsel argued that Dr. Millheiser did not adequately address appellant's need for medication to treat residuals of the accepted employment injuries. Appellant submitted an August 22, 2019 report from Dr. Moretti who indicated that he diagnosed her with ventral disc herniation at C5-6, cervical radiculopathy, and cervical muscle spasm, and that he was prescribing the medications Hydrocodone, Carisoprodol, and Alprazolam (also known as Xanax) to treat the conditions.

By decision dated May 28, 2020, 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.[8] This term also means an inability to work because a limited-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.[9] 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

[8] 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[9] *Id.*

[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).

injury, and supports that conclusion with medical reasoning.[12] Where no such rationale is present, the medical evidence is of diminished probative value.[13]

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.[14] 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.[15]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability from work commencing August 3, 2014 causally related to her accepted employment injury.

In support of her disability claim, appellant submitted a January 28, 2015 report from Dr. Moretti who indicated that appellant reported that she was required to commute 100 miles each way to her job, and noted that the stress of this commute caused muscle spasm and neck pain which, in turn, led to severe anxiety and migraine headaches. Dr. Moretti opined that appellant's medical symptoms were all caused by and/or stemmed from her employment injuries and were then exacerbated by a daily, extremely long commute. In a May 20, 2015 report, he indicated that an FCE in 2012 recommended six-hour workdays for appellant, but she was forced to work eight-hour days with a two-hour commute each way. Dr. Moretti opined that appellant's pain was caused by a work-related injury, exacerbated by lack of approval for physical therapy and nonadherence by her supervisors of medically recommended work restrictions. In an August 25, 2015 report, he opined that appellant's anxiety and depression were due to her employment injuries. Dr. Moretti advised that she could not perform any work due to chronic pain and secondary severe anxiety.

Although Dr. Moretti found employment-related disability in these reports, they are of limited probative value regarding appellant's recurrence of disability claim because he did not provide medical rationale in support of his opinion that appellant was disabled due to her April 17, 2003 and February 17, 2007 employment injuries. He did not describe these cervical injuries in any detail or explain the medical mechanism through which they would have caused disability. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how an employment activity could have caused or

[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 D.W.*, Docket No. 19-1584 (issued July 9, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

[15] *C.B.*, Docket No. 19-0464 (issued May 22, 2020); *see R.N.*, Docket No. 19-1685 (issued February 26, 2020).

aggravated a medical condition.[16] Therefore, Dr. Moretti's reports are insufficient to establish appellant's recurrence of disability claim.

In a June 22, 2015 report, Dr. Knightly diagnosed deteriorating anxiety and depression, deteriorating right cervical radiculopathy, and worsening neck pain. He opined that because appellant was taking Vicodin and Xanax, she would not be qualified to carry a firearm. Although Dr. Knightly suggested that appellant was disabled due to her use of medications, he did not provide a rationalized medical opinion that appellant's use of medication was necessitated by an employment-related condition and, therefore, effectively caused disability by preventing her from performing her limited-duty position.[17] As noted above, a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how an employment activity could have caused or aggravated a medical condition.[18]

Appellant also submitted a May 12, 2015 report from Dr. Bishai who diagnosed cervical disc syndrome with bilateral radiculopathy, and status post disc excision and fusion at C5-6 and C6-7. In a May 15, 2015 report, Dr. Davis diagnosed cervicalgia, myofascial pain syndrome, cervical facet joint mediated pain, postcervical laminectomy, and anxiety/depression. On April 25, 2017 he diagnosed cervical spondylosis without myelopathy, postcervical laminectomy syndrome, and right cervical radiculopathy. In an August 22, 2019 report, Dr. Moretti indicated that he diagnosed appellant with ventral disc herniation at C5-6, cervical radiculopathy, and cervical muscle spasm, and that he was prescribing the medications Hydrocodone, Carisoprodol, and Alprazolam (also known as Xanax) to treat her conditions. However, these reports are of no probative value on the underlying issue of the case because these physicians did not provide an opinion that appellant sustained a recurrence of disability commencing on or after August 3, 2014 causally related to her accepted April 17, 2003 and February 17, 2007 employment injuries. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.[19] Therefore, these reports are insufficient to establish appellant's recurrence of disability claim.

In addition, other medical evidence of record indicates that appellant did not sustain a recurrence of disability on or after August 3, 2014 because an employment-related condition prevented her from performing her limited-duty job tasks. In an October 19, 2015 report, Dr. Millheiser, OWCP's referral physician, acknowledged that appellant had residuals of her 2007 cervical fusion surgery, which necessitated work restrictions including lifting of no more than 30 pounds, and avoidance of neck twisting, running, climbing, and subduing/lifting uncooperative individuals. However, this report does not support appellant's claim of a recurrence of total disability because these restrictions would not prevent appellant from performing the clerical duties of the limited-duty position she returned to after suffering her initial April 17, 2003 employment injury. In addition, in a supplemental report dated November 5, 2018, Dr. Millheiser found that appellant was able to perform limited-duty work and opined that her use of prescription medications, specifically Xanax, could not be explained by her physical findings and was not

[16] *Supra* notes 12 and 13.

[17] *Id*.

[18] *Id*.

[19] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

necessitated by the accepted work-related cervical conditions. In subsequent supplemental report dated July 5, 2019, he opined that appellant's use of Xanax or Vicodin was not medically necessary for the accepted employment injuries.

As appellant has not submitted rationalized medical evidence establishing causal relationship between her claimed recurrence of disability and the accepted April 17, 2003 and February 17, 2007 employment injuries, the Board finds that she has not met her burden of proof.

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 her burden of proof to establish a recurrence of total disability from work commencing August 3, 2014 causally related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 2, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board