United States Department of Labor
Employees' Compensation Appeals Board

A.H., Appellant	)	
and	)	**Docket No. 22-0978**
	)	**Issued: January 24, 2023**
U.S. POSTAL SERVICE, WEDGWOOD POST OFFICE, Seattle, WA, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 9, 2022 appellant, through counsel, filed a timely appeal from a May 10, 2022 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of disability commencing November 21, 2005 causally related to his accepted July 22, 1998 employment injury.

[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*.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.[3] The facts and circumstances as set forth in the Board's prior decision is incorporated herein by reference. The relevant facts are as follows.

On July 22, 1998 appellant, then a 30-year-old rehabilitation clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date he bruised his right arm when his vehicle was struck by another vehicle causing it to roll on its side, while in the performance of duty. He did not stop work. OWCP accepted the claim for a contusion of the right elbow and forearm; a closed dislocation of unspecified cervical, thoracic, and lumbar vertebra; right shoulder contusion; cervical subluxation at C3 and C7; thoracic subluxation at T3 and T10; and lumbar subluxation at L5.[4]

On August 5, 1998 appellant accepted a modified job with the employing establishment. On March 25, 2002 he accepted a position as a modified mail processor. On September 25, 2003 appellant began working in a modified position due to restrictions in OWCP File No. xxxxxx405.[5]

On August 6, 2009 Dr. John A. Moen, a Board-certified internist, referred appellant for physical therapy treatment which was performed on September 17, 2009.

On March 15, 2017 Dr. Douglas H. Peffer, a chiropractor, recounted appellant's history of a July 22, 1998 back injury at work. He opined that appellant had no objective findings or diagnoses and could resume work without restrictions.

On January 7, 2022 appellant filed a notice of recurrence (Form CA-2a) claiming that he sustained a recurrence of disability on an unspecified date causally related to his July 22, 1998 employment injury. He noted that he had stopped work on December 7, 2005. Appellant indicated that the employing establishment had taken away his bid position due to his back injury.

In a development letter dated January 14, 2022, OWCP advised appellant that he had not indicated a date of recurrence or whether he was claiming a recurrence of the need for medical treatment or disability or both. It informed him of the definition of a recurrence of disability and requested that he provide medical evidence supporting that his accepted condition had worsened such that he was disabled from employment or required additional medical treatment. OWCP afforded appellant 30 days to respond.

[3] Docket No. 14-1535 (issued November 18, 2014).

[4] OWCP previously accepted that appellant sustained a severe right wrist sprain, an exacerbation of right wrist ligament tears, and right wrist extensor and de Quervain's tenosynovitis on April 9, 1996, assigned OWCP File No. xxxxxx405. Appellant also filed an occupational disease claim (Form CA-2) on November 11, 2002 alleging that he sustained back pain due to sitting causally related to factors of his federal employment. OWCP denied the claim, assigned OWCP File No. xxxxxx428. It combined OWCP File No. xxxxxx428 with the current claim, assigned OWCP File No. xxxxxx445, with the latter serving as the master file.

[5] Effective May 31, 2009, the employing establishment separated appellant from employment due to his inability to perform the duties of his position.

In a February 16, 2022 response, appellant related that his employment-related condition had worsened such that he experienced problems with his low back and legs. He advised that the employing establishment had removed him from his position in November 2005 due to his injuries. Appellant indicated that in August 2009 his physician had referred him for physical therapy. He maintained that his employment injury caused his pelvis to shift.

By decision dated February 22, 2022, OWCP denied appellant's claim for a recurrence of disability causally related to his accepted July 22, 1998 employment injury.

Subsequently, OWCP received a June 3, 2013 letter from appellant to the employing establishment advising that his only permanent injury at the time of his separation was to his right wrist. Appellant indicated that his back injury had been rated permanent and that he had no issues performing his bid position.

Physical therapy treatment notes dated September and November 2015, and October 2016, indicated that appellant underwent physical therapy.

In a report dated March 11, 2022, Dr. Kevin Polzin, a chiropractor, discussed appellant's history of a July 1998 motor vehicle accident. On examination he found positive findings of pain in low back and from the sciatic nerve, in the right sacroiliac joint, and in the hip joints. Dr. Polzin advised that he had obtained x-rays and diagnosed a L5 disc with radiculopathy, left low back pain with sciatica, lumbar, cervical, and thoracic subluxation, lumbar degenerative disc disease, thoracic scoliosis, back spasms, and cervical degenerative disc disease at C7. He noted that his pain was aggravated by lifting, twisting, and bending with weight. Dr. Polzin indicated that appellant had a disability percentage of 26 percent based on the pain scales.

On April 15, 2022 appellant, through counsel, requested reconsideration.

By decision dated May 10, 2022, OWCP denied modification of its February 22, 2022 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.[6] 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.[7]

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

[6] 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[7] *Id*.

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.[8]

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, based on 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.[9] Where no such rationale is present, the medical evidence is of diminished probative value.[10]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing November 21, 2005 causally related to his accepted July 22, 1998 employment injury.

Appellant has not submitted any medical evidence supporting that he was working with limitations due to his accepted June 22, 1998 employment injury.

Appellant also has not submitted medical evidence sufficient to establish that he was disabled from work commencing November 21, 2005 due to his accepted July 22, 1998 work injury.

In an August 6, 2009 report, Dr. Moen referred appellant for physical therapy. However, he did not reference the claimed period of disability, or address causation. 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.[11] Consequently, this referral note is insufficient to meet appellant's burden of proof.

The medical evidence of record dated from 2012 through 2013 also does not address the relevant issue of whether he sustained an employment-related recurrence of disability such that he was unable to work beginning November 2005. Therefore, it is also of no probative value and insufficient to meet appellant's burden of proof.[12]

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

[9] *C.Y.*, Docket No. 22-0474 (issued November 14, 2022); *L.O.*, Docket No. 19-0953 (issued October 7, 2019); *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

[10] *L.C.*, Docket No. 20-1679 (issued October 20, 2022); *M.G.*, Docket No. 19-0610 (issued September 23, 2019); *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

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

[12] *Id*.

Appellant also submitted chiropractic reports dated March 15, 2017 from Dr. Peffer and March 11, 2022 from Dr. Polzin. Under FECA, 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-rays to exist.[13] OWCP's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation, or abnormal spacing of the vertebrae which must be demonstrable on an x-ray film to an individual trained in the reading of x-rays.[14] Dr. Peffer did not diagnose or treat a spinal subluxation as demonstrated by x-rays to exist and thus his report is not considered that of a physician as defined by FECA.[15] In his March 11, 2022 report, Dr. Polzin discussed his treatment of appellant beginning February 18, 2020 for chronic back pain. He recounted his history of a July 1998 motor vehicle accident. Dr. Polzin obtained x-rays and diagnosed spinal subluxations. As such, he is considered a physician under FECA.[16] Dr. Polzin did not, however, address whether the claimed recurrence of disability was causally related to the accepted employment injury or discuss the relevant issue of whether appellant was disabled from employment. As noted, 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.[17] Consequently, Dr. Polzin's report is insufficient to meet appellant's burden of proof.

Appellant also submitted reports from physical therapists. The Board has held that the reports of physical therapists do not constitute probative medical evidence as physical therapists are not considered physicians under FECA.[18] Consequently, these reports are of no probative value regarding his recurrence claim.

As appellant has not submitted any rationalized medical evidence establishing a recurrence of disability commencing November 21, 2005 causally related to his accepted July 22, 1998 employment injury, the Boards that he has not met his 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.

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[13] 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law).

[14] 20 C.F.R. § 10.5(bb).

[15] *See S.P.*, Docket No. 19-0573 (issued May 6, 2021); *A.C.*, Docket No. 19-1950 (issued May 27, 2020).

[16] *S.R.*, Docket No. 22-0421 (issued July 15, 2022); *S.P.*, Docket No. 18-0870 (issued October 10, 2018).

[17] *Supra* note 13.

[18] Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *R.L.*, Docket No. 20-0284 (issued June 30, 2020) (a physical therapist is not considered physician as defined under FECA); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *see also P.D.*, Docket No. 21-0920 (issued January 12, 2022) (physical therapists are not considered physicians under FECA).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing November 21, 2005 causally related to his accepted July 22, 1998 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2023
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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