

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

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R.H., Appellant)	
)	
and)	Docket No. 21-0717
)	Issued: June 12, 2023
DEPARTMENT OF HOMELAND SECURITY,)	
FEDERAL PROTECTIVE SERVICE, New York,)	
NY, Employer)	
_____)	

Appearances:
*Erik Blowers, 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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 12, 2021 appellant, through counsel, filed a timely appeal from a January 21, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 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 an 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, following the January 21, 2021 decision, appellant submitted additional evidence to OWCP. 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 his burden of proof to establish a recurrence of disability, commencing July 25, 2019, causally related to the accepted March 20, 2015 employment injury.

FACTUAL HISTORY

On April 21, 2015 appellant, then a 52-year-old law enforcement security officer, filed a traumatic injury claim (Form CA-1) alleging that on March 20, 2015 he experienced lower back and right arm pain when he participated in defensive tactic simulation drills while in the performance of duty. He stopped work on April 8, 2015. OWCP accepted appellant's claim for right shoulder and lumbar sprains. It paid appellant wage-loss compensation on the supplemental rolls, effective May 7, 2015. On March 21, 2016 appellant returned to full-time, limited-duty work.

Appellant underwent a lumbar spine magnetic resonance imaging (MRI) scan on January 14, 2019, which revealed L5-S1, L4-5, L3-4, and L2-3-disc herniations deforming the thecal sac abutting the proximal nerve roots bilaterally at each level, with L3-4 and L4-5 bilateral neural foraminal extension abutting the existing nerve roots bilaterally at both levels with L2-3 and L4-5 central spinal stenosis in conjunction with facet and ligamentous hypertrophic changes.

In a July 26, 2019 hospital emergency department report, Linda J. Dalland, a nurse practitioner, recounted appellant's complaints of worsening chronic back pain for the past two days. She noted tenderness and pain to palpation of his back and diagnosed back pain.

In a report dated August 2, 2019, Martha Castro, a certified physician assistant, recounted appellant's complaints of increased back pain radiating into the lower back. She reported examination findings of slow and steady gait and straight leg raise testing was to 90 degrees. Ms. Castro indicated that appellant was unfit for work until he was reevaluated.

In a consultation note and a report both dated August 13, 2019, Dr. David M.S. Shein, a Board-certified orthopedic surgeon, recounted appellant's complaints of increased low back pain and weakness in the lower extremities. He indicated that appellant's recent lumbar MRI scan revealed the presence of more proximal element disc prolapse, which matched up with appellant's severe antalgic and neuralgic symptoms that had flared up over the past few weeks. Dr. Shein reported that appellant was too uncomfortable to undergo an examination. He noted that appellant was "unfit for work" due to his work-related injury.

On August 15, 2019 appellant filed a notice of recurrence (Form CA-2a) claiming disability from work commencing July 25, 2019. He indicated that, after his original March 20, 2015 employment injury, he was placed on light-duty work for two to three months and that he frequently visited his physician every month. Appellant reported that his back pain was now causing pain in both legs. On the reverse side of the claim form, the employing establishment indicated that he had stopped work on July 25, 2019 and had not returned.

In report dated August 27, 2019, Dr. Shein indicated that appellant suffered from "multilevel degenerative dis[c] problems which are all related to workers' comp recurrent injuries." He noted appellant's complaint of the weight and tension of his gun belt including his

weapon on the right hand and magazines on the left-hand side had “take[n] their toll on [appellant] and cause[d] him ongoing severe intractable discomfort.” Dr. Shein reported that he had held appellant off work for this reason and further opined that appellant could not work because of his ongoing clinical problem.

In an August 27, 2019 work status note, Dr. Shein reported a diagnosis of lumbar intervertebral disc disorder. He indicated that appellant was evaluated that day and was found “unfit for work.”

In an October 3, 2019 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish a recurrence of disability commencing July 25, 2019. It advised him of the type of evidence needed to establish his recurrence claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP subsequently received a report and work status note dated October 1, 2019, wherein Ms. Castro noted that she had conducted an examination, reviewed diagnostic testing, and assessed L3-4 and L4-5 disc prolapses, facet arthropathy due to overcrowding of the facet joints, and enthesopathic pain due to over pulling of the gluteus maximum and quadratus lumborum muscles. Ms. Castro indicated that appellant remained unfit for work since August 27, 2019.

In an October 22, 2019 report, Dr. Shein described the March 20, 2015 employment injury and noted that appellant had been on and off work since that time. He recounted that appellant’s current symptoms included lower back pain of an instability nature and L3-4 radiculopathic symptoms. Upon examination of appellant’s lower back, Dr. Shein observed central tenderness in the lumbosacral junction and enthesopathic tenderness in the erector spinae muscles. Sciatic stretch test was positive on the right. Dr. Shein reported that appellant’s present problem was a continual lumbar spondylitic process secondary to the injury that occurred in 2015. He explained that the injury resulted in “dis[c] changes in [appellant’s] lumbar spine, which have gone on to a progressive degenerative process resulting in disc space narrowing, facet joint malalignment, crowding of the foramen and impingement onto the nerve roots causing [appellant’s] current backache and nerve-related problems.” Dr. Shein indicated that appellant was currently off work.

In a report dated November 19, 2019, Dr. Shein indicated that he had placed appellant on disability over the past few months because of a flare-up of symptoms. He noted that appellant’s clinical examination remained unchanged.

By decision dated December 6, 2019, OWCP denied appellant’s recurrence claim, finding that the medical evidence of record was insufficient to establish that he was disabled from work, commencing July 25, 2019, due to a material change or worsening of his March 20, 2015 employment injury.

On January 27, 2020 appellant requested reconsideration.

In a report dated December 31, 2019, Dr. Shein noted appellant’s complaints of continued lower back pain and indicated that he could not work. He provided examination findings and assessed lumbar spondylosis. Dr. Shein described the March 20, 2015 employment injury and opined that appellant injured his lumbar facet joints and discs at the L4, L5, and S1 level.

By decision dated February 4, 2020, OWCP denied modification of the December 6, 2019 decision.

On June 16, 2020 appellant, through counsel, requested reconsideration.

In a May 26, 2020 narrative report, Dr. Shein described that on March 20, 2015 appellant was performing a type of military exercise where appellant carried weight above his height during defensive tactic training for work. He recounted that appellant had ongoing symptoms of intractable lower back pain since that date. Dr. Shein discussed appellant's lumbar spine MRI scan and explained that appellant's spinal stenosis with deformity and segmental instability were secondary to the massive loads applied to him at work. He reported that his initial diagnosis of a sprained back was correct at the time, but as time had progressed, "the pathology and progression of pathology to the spine is a result of the excessive loads as outlined above." Dr. Shein noted that a sprain pertained to the soft tissue elements of the muscle around the back, but appellant's clinical condition was far more significant since appellant had developed structural abnormalities in his actual spine and vertebral column.

OWCP received additional reports dated February 4, March 3, April 9, May 8, June 10, and July 17, 2020, by Dr. Shein who recounted appellant's complaints of ongoing low backache and bilateral radiculopathic pain into the buttocks, posterior thighs, and calves. Dr. Shein noted no change in appellant's clinical examination. In an April 9, 2020 report, he reported that appellant was unfit for work and had not worked since July 2019. Dr. Shein concluded that appellant remained 100 percent disabled because of his ongoing instability pattern, lumbar spondylosis.

By decision dated September 14, 2020, OWCP denied modification of the February 4, 2020 decision.

On November 16, 2020 appellant, through counsel, requested reconsideration.

In a November 10, 2020 report, Dr. Shein recounted that appellant participated in training protocols that required appellant to carry heavy weights above his shoulders and head. He explained that:

"[t]his repetitive axial loading to the spine results in marked increase in intradiscal pressure and some patients who are predisposed to this will ultimately fail in that the tissues will not be able to withhold the forces of the strain on the back resulting in deterioration of the dis[c,] which has occurred in [appellant]. This has resulted in dis[c] space narrowing with resultant facet malalignment of the joints behind which are the primary source of [appellant's] ongoing problem."

Dr. Shein reported that this problem was ongoing and would become increasingly problematic. He indicated that it may require surgical intervention.

Appellant submitted additional reports by Dr. Shein dated August 25 and October 30, 2020. Dr. Shein indicated that appellant's backache had significantly curtailed his lifestyle and stopped him from working. He indicated that appellant denied any focal weakness or radiculopathic pattern of pain. Dr. Shein recommended a new lumbar MRI scan.

By decision dated January 21, 2021, OWCP denied modification of the September 14, 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, without an intervening injury or new exposure to the work environment that caused the illness.⁴ Recurrence of disability also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁵ Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.⁶

When an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establish that the recurrence for which he or she claims compensation is causally related to the original injury.⁷ This burden of proof requires that a claimant furnish medical evidence from a qualified physician who concludes that the recurrent disability is causally related to employment injury.⁸ The physician's opinion must be based on a complete and accurate factual and medical history and it must be supported by sound medical reasoning.⁹ Where no such rationale is present, the medical evidence is of diminished probative value.¹⁰

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.¹¹ 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

⁴ 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008).

⁵ *Id.*

⁶ *G.L.*, Docket No. 16-1542 (issued August 25, 2017); *Theresa L. Andrews*, 55 ECAB 719, 722 (2004). *See also Albert C. Brown*, 52 ECAB 152 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁷ *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *S.S.*, 59 ECAB 315, 218-19 (2008).

⁸ *Id.*

⁹ *Id.*

¹⁰ *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

¹¹ *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹²

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing July 25, 2019, causally related to the accepted March 20, 2015 employment injury.

In support of his recurrence claim, appellant submitted a series of reports and notes from Dr. Shein dated August 13, 2019 through October 30, 2020. In a consultation note and a report both dated August 13, 2019, Dr. Shein discussed appellant's recent lumbar MRI scan and explained that the findings corresponded with appellant's severe antalgic and neuralgic symptoms that had flared up over the past two weeks. He noted that appellant was unfit for work due to his employment injury. In an April 9, 2020 report, Dr. Shein reiterated that appellant was unfit for work and had not worked since July 2019. In a May 26, 2020 narrative report, he described the original March 20, 2015 employment injury and explained that appellant's spinal stenosis with deformity and segmental instability were secondary to the massive loads applied to him at work. Dr. Shein explained that his initial diagnosis of a sprained back was correct at the time, but as time had progressed "the pathology and progression of pathology to the spine is a result of the excessive loads." While he opined that appellant was unable to work, he did not specifically address the relevant issue of whether appellant's disability from work beginning July 25, 2019 was causally related to the accepted March 20, 2015 employment injury. As previously noted, 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.¹³ Therefore, this evidence is insufficient to establish appellant's recurrence claim.¹⁴

OWCP also received a July 26, 2019 emergency room report from a nurse practitioner and treatment notes dated August 2 and October 1, 2019 from a physician assistant. Nurse practitioners and physician assistants are not considered physicians as defined under FECA, and their medical findings and opinions are insufficient to establish entitlement to compensation benefits.¹⁵

¹² See *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹³ *Id.*

¹⁴ See *D.H.*, Docket No. 22-0533 (issued August 4, 2022); *D.B.*, Docket No. 21-0503 (issued August 24, 2021).

¹⁵ Section 8101(2) of FECA provides as follows: the term 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); *N.C.*, Docket No. 21-0934 (issued February 7, 2022); *P.H.*, Docket No. 19-0119 (issued July 5, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA).

Appellant also submitted diagnostic studies. The Board has held, however, that diagnostic studies, standing alone, lack probative value as they do not address whether the employment injury caused a period of disability.¹⁶

As the medical evidence of record is insufficient to establish causal relationship between appellant's claimed recurrence of disability and the accepted March 20, 2015 employment injury, the Board finds 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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability, commencing July 25, 2019, causally related to the accepted March 20, 2015 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ *T.B.*, Docket No. 20-0255 (issued March 11, 2022); *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *see J.S.*, Docket No. 17-1039 (issued October 6, 2017).