

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

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<b>J.I., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 23-0659</b>
	)	<b>Issued: April 17, 2024</b>
<b>DEPARTMENT OF THE ARMY, U.S. ARMY</b>	)	
<b>CORPS OF ENGINEERS, Detroit, MI, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On April 6, 2023 appellant filed a timely appeal from an October 14, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability commencing August 4, 2021, causally related to his accepted May 21, 2020 employment injury.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the October 14, 2022 decision, OWCP received additional evidence. However, the Board's *Rules of Procedures* 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.*

## **FACTUAL HISTORY**

On May 28, 2020 appellant, then a 43-year-old small craft operator, filed a traumatic injury claim (Form CA-1) alleging that on May 21, 2020 he injured his back and right leg when he was moving equipment on a boat and slid off the side of the vessel to the ground while in the performance of duty. He stopped work on May 26, 2020. On July 23, 2020 OWCP accepted the claim for strain of lower back and L3-4 intervertebral disc disorders. It paid appellant intermittent wage-loss compensation on the supplemental rolls from July 6, 2020 through August 3, 2021.

In an August 3, 2021 work status report, Dr. Richard Harrison, a family medicine specialist, noted that he evaluated appellant that day, and due to progressively worsening lower back and right lower extremity symptoms, appellant was totally incapacitated and unable to work. He advised that appellant would be reevaluated in approximately one month and that surgery was pending.

On August 18, 2021 appellant filed a claim for compensation (Form CA-7) for disability from work during the period August 1 through 14, 2021. In the time analysis form (Form CA-7a), he indicated that as of August 4, 2021 he was claiming eight hours of leave without pay. An August 6, 2021 x-ray of the lumbar spine read by Dr. Steven H. Falconer, a Board-certified diagnostic radiologist, revealed no acute abnormalities; lower lumbar fusion and laminectomies with no major complications; and degenerative changes, including mild-to-moderate multilevel disc space narrowing at T12-L4.

Appellant continued to submit Form CA-7 claims for wage-loss compensation.

In a development letter dated September 8, 2021, OWCP informed appellant of the deficiencies of his recurrence claim. It advised him of the type of additional medical evidence needed, provided a questionnaire for his completion, and afforded him 30 days to respond.

In a September 22, 2021 report, Dr. Harrison noted that appellant had been under his care since November 24, 2020, and continued to experience severe low back and right lower extremity pain and numbness of the right thigh. He also noted that appellant had difficulty walking and lifting his leg due to pain and weakness. Dr. Harrison examined appellant and found right hip flexor weakness and decreased sensation in the right L3-4 distribution. He explained that appellant's symptoms had persisted despite time and conservative treatment, and that a May 29, 2020 magnetic resonance imaging (MRI) scan of the lumbar spine revealed a large disc herniation at the L3-4 level and postoperative changes. Dr. Harrison noted that appellant had multiple lumbar surgeries performed by Dr. Kevin Lawson, an orthopedic surgery specialist, most recently a left L5-S1 discectomy and L4-5, L5-S1 posterior fusion. He opined that "the current disc pathology is related to injury sustained on May 2020. It is not due to prior surgeries or preexisting condition. The large disc herniation seen is also the clear cause of [appellant's] low back and right lower extremity pain, right leg numbness, and right hip flexor weakness." Dr. Harrison further opined that there was no need for an additional MRI scan and that appellant was totally incapacitated and unable to perform the duties required for his employment, based on his symptoms and examination findings as of August 3, 2021. He advised that the case should be reconsidered to approve surgery for lumbar disc herniation with radiculopathy.

In a September 22, 2021 response to OWCP's development questionnaire, appellant indicated that his symptoms remained since the original injury and became increasingly worse,

due to the delay in medical intervention/surgery, as recommended by his physician. He noted that, since returning to work, he primarily performed office work with some mentoring of other employees. Appellant denied any intervening injuries.

By decision dated October 27, 2021, OWCP expanded the acceptance of the claim to include intervertebral lumbar disc herniation disorders with radiculopathy.

By separate decision also dated October 27, 2021, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish a worsening of the accepted conditions without an intervening cause.

OWCP received a copy of an October 17, 2007 operative report from Dr. Lawson who noted a postoperative diagnosis of L5-S1 recurrent left herniated nucleus pulposus and L4-S1 spondylosis and degeneration.

OWCP received July 13, 2021 notes from Dr. Harrison who diagnosed intervertebral disc disorder with myelopathy, lumbar region.

Progress notes from a physical therapist dated August 6, 2021, related that appellant had two or more falls with injury in the last year and the cause of the falls was neurological weakness being addressed with surgery.

In a November 18, 2021 work status report, Dr. Harrison diagnosed a back condition and indicated that appellant could "work maximum of two hours daily from home doing office-type work only."

On April 25, 2022 appellant underwent OWCP-authorized surgery performed by Dr. Harrison for an L3-4 transforaminal fusion with instrumentation and interbody device, and an extension of prior fusion from L4-S1 with removal of prior hardware.

On July 18, 2022 appellant requested reconsideration and submitted additional evidence.

In a July 18, 2022 report, Dr. Harrison noted that he was addressing the denial of appellant's claim for a recurrence. He explained that appellant had been under his care for intervertebral disc disorder with radiculopathy and L3-4 lumbar intervertebral disc disorder since November 24, 2020, and that appellant had suffered a work-related injury on May 21, 2020.<sup>3</sup> Dr. Harrison related that appellant was placed on work restrictions prior to the initial office visit and continued to work with restrictions until appellant's untreated symptoms became more severe in August 2021, and left him unable to stand up straight or take a step on his right leg. He opined that appellant became incapacitated due to pain in August 2021, which was a spontaneous change in the severity of the symptoms caused by his May 2020 work injury and necessitated a withdrawal from light-duty work to prevent further worsening of his conditions prior to operative intervention.

By decision dated October 14, 2022, OWCP denied modification of its October 27, 2021 decision.

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<sup>3</sup> Dr. Harrison noted the date of injury as May 28, 2020. However, this appears to be a typographical error as the case record establishes that the date of injury was May 21, 2020.

## LEGAL PRECEDENT

OWCP's procedures and regulations provide that 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 demonstrated by objective findings which resulted from a previous compensable injury or illness, and without an intervening injury or new exposure in the work environment.<sup>4</sup>

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.<sup>5</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>6</sup>

## ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of total disability commencing August 4, 2021, causally related to his accepted May 21, 2020 employment injury.

In support of his claim for a recurrence of disability commencing August 4, 2021, appellant submitted several reports from his treating physician, Dr. Harrison. In an August 3, 2021 work status report, Dr. Harrison noted that he evaluated appellant and that appellant was incapacitated and unable to work due to progressively worsening lower back and right lower extremity symptoms. As he did not provide objective findings to support his opinion that appellant's condition had spontaneously worsened and caused total disability, his opinion is insufficient to establish the recurrence claim.<sup>7</sup>

In a September 22, 2021 report, Dr. Harrison noted that appellant had been under his care since November 24, 2020, and continued to have severe low back and right lower extremity pain, numbness of the right thigh, and difficulty walking and lifting his leg due to pain and weakness. He related that appellant had multiple lumbar surgeries performed by Dr. Lawson and opined that the current disc pathology was related to injury sustained on May 21, 2020, and not due to prior surgeries or a preexisting condition. Dr. Harrison opined that a large disc herniation was seen on an MRI scan at L3-4, was the clear cause of appellant's low back and right lower extremity pain, right leg numbness, and right hip flexor weakness. He indicated that appellant's condition was "not due to prior surgeries or preexisting condition." However, Dr. Harrison did not explain with rationale how or why appellant spontaneously developed a worsening of his accepted conditions

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); 20 C.F.R. § 10.5(x); *see T.B.*, Docket No. 22-1304 (issued April 21, 2023); *D.B.*, Docket No. 21-0503 (issued August 24, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

<sup>5</sup> *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

<sup>6</sup> *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

<sup>7</sup> *Supra* note 4.

as of August 4, 2021, causing a recurrence of total disability. As his opinion is conclusory in nature, it is insufficient to establish appellant's recurrence claim.<sup>8</sup>

OWCP received work status reports from Dr. Harrison dated July 13 and November 18, 2021, however, in these reports he did not provide an opinion regarding the cause of appellant's disability. The Board has held that medical evidence that does not provide an opinion on causal relationship is of no probative value.<sup>9</sup> Therefore, this evidence is insufficient to establish the recurrence claim.

In a July 18, 2022 report, Dr. Harrison explained that appellant had been under his care for intervertebral disc disorder with radiculopathy and L3-4 lumbar intervertebral disc disorder since November 24, 2020. He further indicated that appellant continued to work with restrictions until his untreated symptoms became more severe in August 2021 and left him unable to stand up straight or take a step on his right leg. Dr. Harrison concluded that appellant became incapacitated due to pain in August 2021, which was a spontaneous change in the severity of the symptoms caused by his May 2020 work injury. As he did not explain in this report how appellant's accepted condition worsened to cause total disability, this report is insufficient to establish appellant's recurrence claim.<sup>10</sup>

Appellant also submitted reports from physical therapists. However, the Board has held that physical therapists are not considered physicians under FECA, and consequently, their reports are of no probative value.<sup>11</sup>

The record also contains diagnostic studies. The Board has held, however, that diagnostic studies, standing alone, lack probative value on the issue of causal relationship as they do not address whether the accepted employment injury resulted in appellant's claimed disability.<sup>12</sup>

As the medical evidence of record is insufficient to establish a recurrence of total disability commencing August 4, 2021, causally related to his accepted May 21, 2020 employment injury, the Board finds that appellant has not met his burden of proof.

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<sup>8</sup> See *M.S.*, Docket No. 19-0189 (issued May 14, 2019); *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *B.H.*, Docket No. 18-1219 (issued January 25, 2019); *Birger Areskog*, 30 ECAB 571 (1979).

<sup>9</sup> See *W.S.*, Docket No. 21-0257 (issued February 22, 2022); *B.M.*, Docket No. 20-0826 (issued May 10, 2021); *Y.D.*, Docket No. 20-0097 (issued August 25, 2020); *M.A.*, Docket No. 19-1119 (issued November 25, 2019); *S.I.*, Docket No. 18-1582 (issued June 20, 2019).

<sup>10</sup> *Id.*

<sup>11</sup> 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 note 4 at *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).

<sup>12</sup> *J.B.*, Docket No. 23-0660 (issued October 12, 2023); *L.A.*, Docket No. 22-0463 (issued September 29, 2022); *D.K.*, Docket No. 21-0082 (issued October 26, 2021); *O.C.*, Docket No. 20-0514 (issued October 8, 2020); *R.J.*, Docket No. 19-0179 (issued May 26, 2020).

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 total disability commencing August 4, 2021, causally related to his accepted May 21, 2020 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 14, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2024  
Washington, DC

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

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

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