

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

R.B., Appellant	)	
	)	
and	)	Docket No. 24-0110
	)	Issued: April 10, 2024
U.S. POSTAL SERVICE, INTERNATIONAL	)	
SERVICE CENTER NEW YORK, JOHN F.	)	
KENNEDY INTERNATIONAL AIRPORT,	)	
Jamaica, NY, Employer	)	
	)	

*Appearances:*  
Thomas S. Harkins, Esq., for the appellant<sup>1</sup>  
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 November 20, 2023 appellant, through counsel, filed a timely appeal from an October 2, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).

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<sup>1</sup> 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.

Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

### **ISSUE**

The issue is whether appellant has met his burden of proof to establish a recurrence of disability, commencing September 12, 2022, causally related to his accepted August 1, 2021 employment injury.

### **FACTUAL HISTORY**

On August 6, 2021 appellant, then a 57-year-old supervisor of distribution operations, filed a traumatic injury claim (Form CA-1) alleging that on August 1, 2021 he strained the lower right side of his back and experienced pain down his right leg when he lifted an automated parcel and bundle sorter door while in the performance of duty. He stopped work on August 2, 2021. OWCP accepted appellant's claim for lumbar spine herniation and lumbar spine stenosis. It paid him wage-loss compensation on the supplemental rolls, beginning September 16, 2021, and placed him on the periodic rolls, effective January 30, 2022.

On September 6, 2022 appellant returned to full-duty work.

In a report and duty status report (Form CA-17) dated September 13, 2022, Dr. David Weissberg, a Board-certified orthopedic surgeon, noted that appellant sustained an injury at work on August 1, 2021. On examination of appellant's lumbar spine, he observed limited range of motion (ROM) and tenderness on the sacroiliac (SI) joint on the right side. Dr. Weissberg diagnosed lumbar spine herniation and lumbar spine stenosis. In the September 13, 2022 Form CA-17, he indicated that appellant could work full-time, limited duty with restrictions of no lifting over 25 pounds.

On September 13, 2022 appellant filed a notice of recurrence (Form CA-2a) claiming disability beginning September 12, 2022 causally related to his August 1, 2021 employment injury. He alleged that the recurrence occurred on September 12, 2022, when the pain became unbearable, and he could not bend or walk. Appellant explained that, after he initially stopped work, he returned to work with restrictions of no lifting over 25 pounds.

In a development letter dated September 21, 2022, OWCP informed appellant of the deficiencies of his recurrence claim. It advised him of the type of evidence necessary to establish his claim specifically, the factual and medical evidence to substantiate that his disability occurred or increased due to "(1) a spontaneous change in the medical condition which resulted from the previous injury or occupational illness without an intervening injury or new exposure or new

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the issuance of the October 2, 2023 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.*

exposure to factors causing the original illness; or (2) a withdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury." OWCP provided a questionnaire for appellant's completion and afforded him 30 days to submit the necessary evidence.

In a response to the development letter dated September 23, 2022, appellant indicated that the recurrence occurred when he was working the floor supervising flat sorter and rack sectional. He reported that he was walking back and forth between sections and sitting down at a desk. Appellant explained that he believed that his current disability was due to his original injury because the pain was in the same area and only intensified when he returned to work.

In a progress report and Form CA-17 dated October 11, 2022, Dr. Weissberg noted appellant's August 1, 2021 employment injury and recounted his complaints of continued pain that worsened with standing or walking. He conducted a physical examination and diagnosed lumbar spine herniation and stenosis. In the October 11, 2022 Form CA-17, Dr. Weissberg reported that appellant was "100 percent out of work disabled."

On October 26, 2022 the employing establishment clarified that appellant returned to full time, limited duty on September 6, 2022 with restrictions of no lifting over 25 pounds. It explained that lifting was not part of his duties and provided a position description for a supervisor of distribution operations.

By decision dated October 27, 2022, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish a worsening of his accepted August 1, 2022 employment injury such that he was disabled from his work duties, commencing September 12, 2022.

Appellant submitted a lumbar spine magnetic resonance imaging (MRI) scan dated October 12, 2022, which demonstrated progressive left paracentral disc herniation at T12-L1 and disc bulge without significant central stenosis at L3-4.

On November 7, 2022 appellant requested reconsideration.

In a progress report dated November 3, 2022, Dr. Maria Herrera, a Board-certified physiatrist, described that on August 20, 2021 appellant suffered a lumbar lifting injury during the course of his work as a supervisor at the employing establishment. She reported that he returned to work on September 6, 2022, and had a "severe exacerbation of low back pain," bilateral lower extremity heaviness, and difficulty walking. Dr. Herrera noted diagnoses of intervertebral disc stenosis of the neural canal lumbar region, other intervertebral disc displacement of the lumbar region, cervicalgia, and lumbago with sciatica on both sides. She indicated that appellant was totally disabled. In a disability letter dated November 3, 2022, Dr. Herrera diagnosed cervicalgia and lumbago with sciatica on both sides, and noted that he was "unable to work at this time."

By decision dated November 15, 2022, OWCP denied modification of the October 27, 2022 decision.

On November 22, 2022 appellant requested reconsideration.

Appellant submitted an August 29, 2022 report by Dr. Elvis W. Rema, a Board-certified anesthesiologist, who indicated that appellant was seen for a history of ongoing lower back pain secondary to a work-related accident. On physical examination, Dr. Rema reported that straight leg raise testing was negative bilaterally. He diagnosed lumbar spondylosis and lumbar radiculitis.

In reports dated October 19 through November 18, 2022, Dr. George Kakoulides, a Board-certified neurosurgeon, noted appellant's history of back pain following an August 2021 employment injury. In his October 19, 2022 report, he recounted that, after appellant returned to work, "he had recurrence of his low back pain and the left paralumbar region" and noted that appellant complained of his bilateral lower extremities feeling heavy and developing throbbing pain in the bottom of his right foot. On physical examination of appellant's lumbar spine, Dr. Kakoulides observed tenderness to palpation over the left paralumbar and distal lumbar region. In form reports dated November 1 and 18, 2022, he responded "No" indicating that appellant could not return to work. Dr. Kakoulides responded "Yes" indicating that the described incident was the cause of the injury. He reported that appellant was 100 percent temporarily disabled.

In a report dated January 13, 2023, Dr. Herrera noted appellant's August 1, 2021 employment injury and recounted his complaints of low back pain radiating to the right lower extremity. She provided examination findings and diagnosed lumbago with right sciatica, multilevel disc bulge and spondylosis, left paracentral disc herniation T12-L1, and moderate left and severe right foraminal stenosis at L5-S1. Dr. Herrera reported that appellant was partially to severely disabled and noted work restrictions of no lifting more than 10 pounds, no frequent bending, and no prolonged continuous sitting, standing, or walking. In CA-17 forms dated December 27, 2022 and January 13 and February 10, 2023, she further noted work restrictions.

By decision dated February 14, 2023, OWCP denied modification of the November 15, 2022 decision.

On July 7, 2023 appellant, through counsel, requested reconsideration. Counsel cited to the definition of a recurrence of disability from work within 90 days of return to duty in the FECA Procedure Manual and alleged that OWCP did not follow the appropriate burden of proof applicable a claim for recurrence of total disability made within 90 days of return to duty. Counsel further alleged that the medical evidence submitted satisfied the burden of proof for a recurrence of total disability within 90 days of return to duty where the focus is on disability, rather than causal relationship.

In reports dated March 6 and June 15, 2023, Dr. Kakoulides indicated that appellant was evaluated for follow up of his ongoing low back pain secondary to a work-related accident. Appellant noted that his low back pain remained relatively unchanged since his last visit. Dr. Kakoulides provided examination findings and recommended that appellant follow up with pain management to discuss further medical treatment.

Appellant also submitted CA-17 forms dated March 18, April 18, and July 11, 2023 by Dr. Herrera, who diagnosed low back pain and sciatica, and indicated that he was unable to work.

In form reports dated April 6 through August 7, 2023, Dr. Kakoulides noted the August 1, 2021 employment injury and responded “No” indicating that appellant could not return to work. He also responded “Yes” indicating that the incident described was the cause of the injury.

In reports dated April 18 through September 19, 2023, Dr. Rema noted appellant’s history of ongoing lower back pain secondary to a work-related accident. He discussed the medical treatment that appellant received and diagnosed lumbar spondylosis and lumbar radiculitis.

In a May 30, 2023 report, Dr. Herrera referenced the August 1, 2021 employment injury and indicated that on September 6, 2022 appellant returned to limited-duty work, but had a “severe exacerbation of low back pain along with bilateral lower extremity heaviness and difficulty walking.” She noted that he was taken off work by another attending physician on September 12, 2022. Dr. Herrera detailed appellant’s examination findings and opined that his lumbar spine injury was causally related to the work accident of August 1, 2021. She explained that he had been disabled from work since September 12, 2022 when his back and sciatica pain significantly worsened after returning to work. Dr. Herrera reported that appellant continued to have difficulty sitting, standing, and walking, and needed alternate positions and rest in a recliner frequently, which made him unable to work limited duty. She indicated that the August 1, 2021 employment injury was the proximate cause of the described medical condition and disability. and noted that his disability was permanent at this time.

By decision dated October 2, 2023, OWCP denied modification of the February 14, 2023 decision.

### **LEGAL PRECEDENT**

OWCP’s procedures require that, in cases where recurrent disability for work is claimed within 90 days or less from the first return to duty, the claimant is not required to produce the same evidence as a recurrence claimed long after apparent recovery and return to work.<sup>4</sup> Thus, in cases where a recurrence is claimed within 90 days of the first return to duty, the focus is on disability rather than causal relationship of the accepted condition(s) to the work injury.<sup>5</sup>

The Board has held that, if recurrent disability from work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and demonstrate objective medical findings that form the basis for the renewed disability from work.<sup>6</sup>

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013); *see also R.E.*, Docket No. 20-0421 (issued May 17, 2021); *R.W.*, Docket No. 17-0720 (issued May 21, 2018).

<sup>5</sup> *Id.* at Chapter 2.1500.5a; *K.R.*, Docket No. 19-0413 (issued August 7, 2019).

<sup>6</sup> *M.H.*, Docket No. 19-1552 (issued February 2, 2021); *A.B.*, Docket No. 18-0978 (issued September 6, 2019); *J.F.*, 58 ECAB 124 (2006).

## ANALYSIS

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

OWCP accepted appellant's claim for lumbar spine herniation and lumbar spine stenosis causally related to the accepted August 1, 2021 employment injury. Appellant stopped work on August 2, 2021, and returned to his date-of-injury position on September 6, 2022 performing full-time light duty. He stopped work on September 12, 2022, and filed a Form CA-2a. On September 21, 2022 OWCP issued appellant a recurrence claim development letter.

The Board notes, however, that the September 21, 2022 development letter instructed appellant to provide medical evidence in accordance with the standard for a recurrence of disability after 90 days of his return to duty, which requires factual and medical evidence to substantiate that his disability occurred or increased due to (1) a spontaneous change in the medical condition, which resulted from the previous injury or occupational illness without an intervening injury or new exposure or new exposure to factors causing the original illness; or (2) a withdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury.<sup>7</sup> However, as appellant claimed a recurrence of disability within 90 days of his first return to duty, OWCP should have developed and decided the claim under the proper recurrence standard, emphasizing disability rather than causal relationship.<sup>8</sup>

OWCP's procedures provide that OWCP is responsible for requesting evidence.<sup>9</sup> Its procedures further provide that the claims examiner should contact the claimant in writing to obtain evidence and should specifically request the information needed, tailored to the specifics of the individual case.<sup>10</sup> In this case, OWCP improperly developed appellant's claim under the standard for a recurrence of disability claim after 90 days from return to duty.<sup>11</sup> The Board thus finds that this case must be remanded for further development applying the appropriate standard.<sup>12</sup> Following any such further development as deemed necessary, OWCP shall issue a *de novo* decision.<sup>13</sup>

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<sup>7</sup> *Supra* note 4 at Chapter 2.1500.6.

<sup>8</sup> *Id.*; see *S.B.*, Docket No. 22-0082 (issued April 14, 2023); see also *Order Remanding Case, D.K.*, Docket No. 18-0604 (issued October 21, 2019).

<sup>9</sup> *Id.* at Chapter 2.800.4c(2) (November 2023).

<sup>10</sup> *Id.* at Chapter 2.800.5. See also *V.R.*, Docket No. 16-1167 (issued December 22, 2016).

<sup>11</sup> *L.L.*, Docket No. 20-0956 (issued October 19, 2021); *Order Remanding Case, P.D.*, Docket No. 19-0763 (issued November 26, 2019).

<sup>12</sup> *Id.*

<sup>13</sup> See generally *B.N.*, Docket No. 17-0787 (issued July 6, 2018); *C.D.*, Docket No. 17-1074 (issued August 28, 2017).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 2, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 10, 2024  
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