

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

M.G., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
FACILITIES ENGINEERING COMMAND,
Philadelphia, PA, Employer**

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**Docket No. 23-1051
Issued: March 8, 2024**

Appearances:

*Michael D. Overman, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 7, 2023 appellant, through counsel, filed a timely appeal from a February 21, 2023 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 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 February 21, 2023 OWCP decision, appellant submitted additional evidence to the Board. 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 for the period April 23, 2019 through March 29, 2021, causally related to his accepted August 14, 2017 employment injury.

FACTUAL HISTORY

On August 18, 2017 appellant, then a 57-year-old performance assessment representative, filed a traumatic injury claim (Form CA-1) alleging that on August 14, 2017 he sprained his right shoulder and cervical spine when he slipped on gravel and fell while in the performance of duty. OWCP assigned OWCP File No. xxxxxx066 and accepted the claim for sprain of right shoulder, sprain of ligaments of the cervical spine, sprain of ligaments of the thoracic spine, and complete rotator cuff tear or rupture of the right shoulder.⁴ On October 23, 2017 appellant underwent right shoulder surgery. OWCP paid him wage-loss compensation on the supplemental rolls effective September 29, 2017, and on the periodic rolls effective November 12, 2017. Appellant stopped work on the date of injury and returned to light-duty, part-time work on July 23, 2018.

In an April 23, 2019 report, Dr. Jeffrey A. Rihn, a Board-certified orthopedic surgeon, noted examination findings of bilateral paraspinal cervical and trapezial tenderness, limited range of motion (ROM) of neck flexion, extension, and lateral rotations, posterior neck pain with attempted ROM, decreased sensation to light touch in the left first through third fingers, and positive Hoffman's sign bilaterally. He reviewed a September 5, 2017 magnetic resonance imaging (MRI) scan and noted that appellant had severe spondylosis and stenosis at C5-7. Dr. Rihn diagnosed cervical radiculitis, spinal stenosis of cervical region, and cervical spondylosis without myelopathy. He recommended anterior cervical discectomy fusion (ACDF) at C5-7 given the nature of appellant's symptoms and his unresponsiveness to past conservative treatment.

An MRI scan of the cervical spine, obtained on May 10, 2019 revealed cervical degenerative change more pronounced at C5-6 and C6-7 with moderate central canal narrowing and focal cord signal abnormality at C5-6.

In a June 11, 2019 second opinion report, Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, noted his review of the medical record and statement of accepted facts (SOAF). His examination revealed bilateral positive Phalen's test extending to the first through third digits, positive compression test, and global discomfort with Neer, drop-arm, Speed, superior labrum anterior to posterior, apprehension, and Hawkins tests. Dr. Didizian diagnosed sprain of the right shoulder joint, sprain of ligaments of the cervical spine, sprain of ligaments of the thoracic spine, and complete rotator cuff tear or rupture of the right shoulder status postsurgery on October 23, 2017. He related that appellant reported working full-time sedentary duty as of May 2019. Dr. Didizian opined that appellant had reached maximum medical improvement (MMI) and was status postsurgery with some residuals that necessitated work restrictions. In an

⁴ Appellant previously filed a claim under OWCP File No. xxxxxx864, which OWCP accepted for a neck sprain, right shoulder sprain, and cervical protrusion/herniation at C5-6 and C6-7 due to a May 12, 2008 employment injury. OWCP has administratively combined this claim with the present claim, OWCP File No. xxxxxx066, with the latter serving as the master file.

accompanying work capacity evaluation (Form OWCP-5c), he indicated that appellant could work full time with permanent restrictions of sedentary-duty work and no lifting over 10 pounds.⁵

In a June 18, 2019 report under OWCP File No. xxxxxx864, Dr. Robert E. Elliott, a Board-certified neurosurgeon, related appellant's history of injury and worsening symptoms. His examination demonstrated diminished left triceps and biceps reflexes, some numbness and paresthesias in C6 and C7 distributions with the thumb, pointer, and middle fingers most affected, and positive Spurling sign reproducing pain into the arms bilaterally. Dr. Elliott opined that appellant was a good candidate for ACDF at C5-7.

In an August 13, 2019 report, Dr. Rihn diagnosed cervical spinal stenosis, cervical radiculitis, and cervical spondylosis without myelopathy. He again recommended surgery and opined that appellant's "work injury represents exacerbation of [appellant's] underlying degenerative condition[s] C5 to C7." Dr. Rihn further opined that appellant should not return to work until he had surgical intervention.

In a December 17, 2019 second opinion report under OWCP File No. xxxxxx864, Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, noted his review of the medical record and reported his examination findings. He opined that, though appellant had no restrictions related to the resolved May 12, 2008 traumatic injury, it would be reasonable to restrict him to full-time, light-duty work due to his cervical stenosis.

In a January 21, 2020 report, Dr. Rihn diagnosed cervical spondylosis with myelopathy and cervical spinal stenosis, and again recommended surgery. On September 15, 2020 he added a diagnosis of cervical radiculitis and related that appellant was previously scheduled for a surgery, but that it was cancelled due to insurance issues. Dr. Rihn noted that appellant had severe stenosis and spondylosis at C5-7 and again recommended ACDF.

In February 23 and March 1, 2021 work excuse notes, Dr. Rihn noted that appellant was seen for an evaluation of his cervical spine on April 23, 2019 and had been completely disabled since that date. He indicated that surgery had been scheduled for May 24, 2019, but that it had to be rescheduled to March 29, 2021.

On March 9, 2021 appellant filed a claim for compensation (Form CA-7) for intermittent disability from work for the period September 28, 2020 through January 22, 2021.

On March 29, 2021 Dr. Rihn performed an ACDF at C5-6 and C6-7.

In a development letter dated April 22, 2021, OWCP informed appellant of the deficiencies of his recurrence claim. It advised him of the type of factual and medical evidence needed to establish a recurrence of disability. OWCP noted that appellant returned to his usual employment

⁵ On July 19, 2019 appellant filed a claim for compensation (Form CA-7) for intermittent disability from work for the period April 22 through May 10, 2019. In accompanying time analysis forms (Form-CA-7a), the employing establishment confirmed that, during the claimed period, he used sick or annual leave for four hours per day and leave without pay (LWOP) for the remaining hours each day on his physician's orders. OWCP paid appellant wage-loss compensation for the claimed LWOP for intermittent disability due to the accepted conditions.

on July 23, 2018 in a limited capacity and worked until September 28, 2020. It afforded him 30 days to submit the requested information.

On May 18, 2021 OWCP received a Form CA-7 in which appellant claimed disability through March 29, 2021.

By decision dated June 1, 2021, OWCP found that appellant had not established a recurrence of disability for the period September 28, 2020 through February 21, 2021, causally related to his accepted August 14, 2017 employment injury.

Appellant subsequently submitted an August 2, 2019 note from Dr. Rihn, indicating that he had failed conservative treatment for his severe spinal stenosis at the C5-7 levels and was an appropriate candidate for ACDF, which was medically necessary for him to resume activities of daily living. Dr. Rihn noted that appellant had been unable to perform the function of his job since April 2019, and was currently unable to return to work due to his condition, pain, and difficulty with ambulation.

In an email dated June 16, 2021, an employing establishment official indicated that appellant was released to work full-time, limited duty on May 14, 2019 per his medical report, but noted that the last time he was actually at work was on April 22, 2019 when he worked for four hours.

By *de novo* decision dated July 13, 2021, OWCP found that appellant had not established a recurrence of disability due to a worsening of his accepted August 14, 2017 employment injury.

On July 20, 2021 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on September 14, 2021.

In a September 24, 2021 note, Dr. Rihn noted that appellant was under his care for cervical radiculitis, spinal stenosis of the cervical region, cervical spondylosis, and spinal stenosis, and that he underwent ACDF on March 29, 2021. He indicated that appellant experienced chronic neck pain, numbness, and tingling in his bilateral hands, difficulty using his hands, and weakness in his arms. Dr. Rihn stated that appellant was advised not to drive, lift anything greater than 10 to 15 pounds, repetitively bend, twist, squat, climb, sit or stand for long periods, and ambulate for long distances. He opined that appellant had been unable to perform the functions of his job since April 23, 2019 "due to [appellant's] condition and postoperative condition."

By decision dated November 24, 2021, OWCP's hearing representative vacated the June 1 and July 13, 2021 decisions and remanded the case for further medical development. The hearing representative instructed OWCP to refer the case to an OWCP district medical adviser (DMA) for a rationalized opinion on the issue of whether the cervical surgery should be authorized because of appellant's employment injuries.

On February 11, 2022 OWCP referred appellant's case, along with a SOAF, to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as the DMA, for determination as to whether ACDF at C5-7 should be authorized, and whether appellant would have been expected to be disabled commencing April 29, 2019. In a February 15, 2022 report, Dr. Katz indicated that he had reviewed the SOAF and the medical record. He opined that the necessity for

the recommended cervical surgery was related to the August 14, 2017 employment injury, but noted that he could not provide an opinion regarding disability commencing April 29, 2019.

On March 18, 2022 OWCP referred appellant's case, along with a series of questions and a SOAF to Dr. Didizian for a second opinion regarding whether appellant continued to suffer residuals of the accepted employment injury, the extent of appellant's work capability, whether ACDF at C5-7 should be authorized, and whether he would have been expected to be disabled commencing April 29, 2019. In a March 31, 2022 report, Dr. Didizian noted his review of the medical record and provided examination findings. He opined that appellant had reached MMI and continued to have residuals of the accepted work injury one year after neck surgery. Dr. Didizian advised that appellant could return to light-duty work with restrictions. In an accompanying Form OWCP-5c, he indicated that appellant could work full-time light-duty work with restrictions.

On May 4, 2022 OWCP requested clarification from Dr. Didizian regarding whether appellant was disabled from work commencing April 29, 2019. In a May 18, 2022 supplemental report, Dr. Didizian indicated that when he saw appellant on June 11, 2019 he stated that appellant was working full-time sedentary work with lifting restrictions. He further indicated that when he saw appellant on February 18, 2020 he stated that appellant returned to full-duty work in May 2019. Dr. Didizian opined that, based on these statements, he disagreed with Dr. Rihn's assertion that appellant was disabled commencing April 29, 2019.

By decision dated June 30, 2022, OWCP found that appellant had not established a recurrence of disability for the period April 23, 2019 through March 29, 2021, causally related to his accepted August 14, 2017 employment injury. In a separate decision of even date, it retroactively authorized the March 29, 2021 cervical surgery.

On July 6, 2022 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. On November 9, 2022 he converted the hearing request to a request for a review of the written record.

By decision dated January 27, 2023, OWCP's hearing representative affirmed the June 30, 2022 decision.

On February 9, 2023 appellant, through counsel, requested reconsideration. In support of his request, he submitted a January 18, 2023 narrative report from Dr. Rihn describing his treatment of appellant from October 19, 2017 through January 17, 2023. Appellant summarized various reports previously of record.

By decision dated February 21, 2023, OWCP denied modification of the January 27, 2023 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 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

OWCP's procedures provide additional guidance as to when a notice of recurrence should be filed. Its procedures provide, in relevant part, that a recurrence of disability does not include a work stoppage caused by "[a] condition which results from a new injury, even if it involves the same area of the body previously injured, or by renewed exposure to the causative agent of a previously suffered occupational disease."⁹ If a new work-related injury or exposure occurs, a Form CA-1 or Form CA-2 should be completed accordingly.¹⁰

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability for the period April 23, 2019 through March 29, 2021, causally related to his accepted August 14, 2017 employment injury.

In an August 13, 2019 report, Dr. Rihn diagnosed cervical spinal stenosis, cervical radiculitis, and cervical spondylosis without myelopathy and opined that appellant should not return to work until he had surgical intervention. In a December 17, 2019 second opinion report, Dr. Valentino opined that it would be reasonable to restrict appellant to full-time, light-duty work due to his cervical stenosis. In February 23 and March 1, 2021 work excuse notes, Dr. Rihn noted that appellant was seen for an evaluation of his cervical spine on April 23, 2019 and had been completely disabled since that date. He indicated that surgery had been scheduled for May 24, 2019, but that it had to be rescheduled to March 29, 2021. In an August 2, 2019 note, Dr. Rihn indicated that appellant was an appropriate candidate for ACDF, which was medically necessary for him to resume activities of daily living. He noted that appellant had been unable to perform the function of his job since April 2019, and was currently unable to return to work due to his condition, pain, and difficulty with ambulation. In a September 24, 2021 note, Dr. Rihn noted that

⁶ 20 C.F.R. § 10.5(x); *C.Y.*, Docket No. 22-0474 (issued November 14, 2022); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *A.A.*, Docket No. 19-0957 (issued October 22, 2019); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

⁹ *Id.* at Chapter 2.1500.3c(5) (June 2013).

¹⁰ *Id.*

appellant was under his care for cervical radiculitis, spinal stenosis of the cervical region, cervical spondylosis, and spinal stenosis, and that he underwent ACDF on March 29, 2021. He opined that appellant had been unable to perform the functions of his job since April 23, 2019 “due to [appellant’s] condition and postoperative condition.” Neither Dr. Rihn nor Dr. Valentino provided any rationale for their disability determinations. They failed to explain how the August 14, 2017 employment injury resulted in disability from employment for the period April 23, 2019 through March 29, 2021. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/level of disability has an employment-related cause.¹¹ This evidence is therefore insufficient to establish a recurrence of disability.

Additional evidence failed to address the relevant issue of whether appellant was disabled for the period April 23, 2019 through March 29, 2021 due to his accepted August 14, 2017 employment injury. In an April 23, 2019 report, Dr. Rihn diagnosed cervical radiculitis, spinal stenosis of cervical region, and cervical spondylosis without myelopathy, and recommended ACDF at C5-7. In a June 18, 2019 report, Dr. Elliott opined that appellant was a good candidate for ACDF at C5-7. In a January 21, 2020 report, Dr. Rihn diagnosed cervical spondylosis with myelopathy and cervical spinal stenosis, and again recommended surgery. On September 15, 2020 Dr. Rihn added a diagnosis of cervical radiculitis and again recommended ACDF. In a February 15, 2022 report, Dr. Katz, the DMA, noted that he could not provide an opinion regarding disability commencing April 29, 2019. In a January 18, 2023 narrative report, Dr. Rihn described his treatment of appellant from October 19, 2017 through January 17, 2023 and summarized various reports previously of record. As these physicians failed to address the relevant issue of disability from work due to the accepted August 14, 2017 employment injury, this evidence is insufficient to establish appellant’s recurrence claim.¹²

OWCP also received a June 11, 2019 second opinion report, in which Dr. Didizian diagnosed sprain of the right shoulder joint, sprain of ligaments of cervical spine, sprain of ligaments of thoracic spine, and complete rotator cuff tear or rupture of the right shoulder status postsurgery on October 23, 2017. Dr. Didizian related that appellant reported working full-time, sedentary duty as of May 2019 and that he was status postsurgery with some residuals that necessitated work restrictions. In an accompanying Form OWCP-5c, he indicated that appellant could work full time with permanent restrictions. On March 31, 2022 Dr. Didizian advised that appellant could return to full-time, light-duty work with restrictions. In a May 18, 2022 supplemental report, he indicated that when he saw appellant on June 11, 2019 he stated that appellant was working full-time sedentary work with lifting restrictions, and that on February 18, 2020 appellant stated that he went back to full-duty work in May 2019. Dr. Didizian opined that, based on these statements, he disagreed with Dr. Rihn’s assertion that appellant was disabled commencing April 29, 2019. The Board finds that these reports are of no probative value regarding appellant’s disability claim because they do not contain an opinion that appellant was disabled from work during the claimed period causally related to his accepted August 14, 2017 employment injury. As noted above, 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

¹¹ See *H.C.*, Docket No. 22-0844 (issued December 5, 2022); *J.S.*, Docket No. 18-0944 (issued November 20, 2018).

¹² See *D.M.*, Docket No. 21-0930 (issued February 8, 2023); *A.G.*, Docket No. 21-0756 (issued October 18, 2021); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

the issue of causal relationship.¹³ Therefore, this evidence is insufficient to establish appellant's disability claim.

OWCP also received the results of diagnostic studies. However, diagnostic studies, standing alone, lack probative value on the issue of causal relationship as they do not address causation.¹⁴

As appellant has not submitted any rationalized medical evidence to establish a recurrence of disability for the period April 23, 2019 through March 29, 2021, causally related to his accepted August 14, 2017 employment injury, 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 for the period April 23, 2019 through March 29, 2021 causally related to his accepted August 14, 2017 employment injury.

¹³ See *L.B., id.; D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁴ *K.R.*, Docket No. 20-1103 (issued January 5, 2021); *F.S.*, Docket No. 19-0205 (issued June 19, 2019); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 8, 2024
Washington, DC

Alec J. Koromilas, 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