United States Department of Labor
Employees' Compensation Appeals Board

B.O., Appellant	)	
and	)	**Docket No. 25-0049**
	)	**Issued: January 10, 2025**
U.S. POSTAL SERVICE, INDIANAPOLIS PROCESSING & DISTRIBUTION CENTER, Indianapolis, IN, Employer	)	

Appearances:
Stephanie N. Leet, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 21, 2024 appellant, through counsel, filed a timely appeal from a September 17, 2024 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.[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 September 17, 2024 decision, OWCP received additional evidence. 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 September 7, 2012 through December 1, 2016, causally related to his accepted May 13, 2004 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances as set forth in the Board's prior decision and orders are incorporated herein by reference. The relevant facts are as follows.

On June 10, 2004 appellant, then a 43-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that he injured his back on May 13, 2004 due to repetitive heavy lifting while in the performance of duty. He stopped work that day.[5] On June 5, 2009 OWCP accepted the claim for aggravation of cervical radiculopathy and aggravation of cervical degenerative disc disease.[6] It paid appellant wage-loss compensation on the supplemental rolls as of May 14, 2004, and on the periodic rolls as of August 30, 2009.

By decision dated September 6, 2012, OWCP terminated appellant's wage-loss compensation, effective that day, as his treating physician, Dr. Brian Foley, a physiatrist, had determined that he was no longer disabled from work due to the accepted conditions and was able to return to work as a mail processing clerk.[7] Appellant's claim remained open for medical benefits.

Appellant continued his medical care with Dr. Foley, which included left C6-C7 epidural steroid injections, physical therapy and diagnostic testing.

The record reflects that on March 27, 2013 Dr. Foley diagnosed appellant with neck pain and referred appellant for a cervical magnetic resonance imaging (MRI) scan, which appellant

[4] Docket No. 07-2427 (issued April 16, 2008); *Order Remanding Case*, Docket No. 18-0387 (issued April 4, 2019); *Order Remanding Case*, Docket No. 22-0870 (issued March 2, 2023).

[5] On the reverse side of the claim form, the employing establishment noted that appellant's last day in pay status was May 14, 2004, and he was separated from employment on November 15, 2005, due to unsatisfactory attendance.

[6] OWCP assigned the present claim OWCP File No. xxxxxx499. Appellant has a prior claim under OWCP File No. xxxxxx200, accepted for lumbar and cervical strains due to a December 12, 2003 work-related injury. OWCP administratively combined the present claim, OWCP File No. xxxxxx499, with OWCP File xxxxxx200, as well as with a denied claim for a January 29, 2004 traumatic injury under OWCP File No. xxxxxx704, with OWCP File No. xxxxxx499 serving as the master file.

[7] In a May 25, 2012 signed treatment note and a completed June 1, 2012 work capacity evaluation (Form OWCP-5c), Dr. Foley opined that appellant's left cervical radiculopathy had improved and he was capable of performing his date-of-injury job. Following OWCP's June 21, 2012 request to clarify that appellant could return to work without restrictions, Dr. Foley, in a July 2, 2012 letter, stated that his medical opinion on May 25, 2012 was "correct" and appellant could do his date-of-injury job as a mail processing clerk. A July 3, 2012 memorandum of telephone call (Form CA-110) also indicated that Dr. Foley's assistant confirmed appellant had been released to return to work full-time full duty.

underwent on April 3, 2013.[8] In a May 15, 2013 note, Dr. Foley diagnosed cervical radiculopathy at C6 based on MRI and examination findings of the initial visit of November 16, 2009. He indicated that appellant's pain, numbness and functional impairment "likely interferes" with his work ability. Dr. Foley provided an epidural steroid injection on May 21, 2013 and opined appellant could continue normal activities.

In a September 4, 2013 note, Dr. Foley stated appellant had made significant improvement and could continue normal activities. In a September 25, 2013 note, he reported that appellant was at maximum medical improvement on August 20, 2011 and that his symptoms had flared up in July 2012. Dr. Foley continued to opine that appellant's pain, numbness and functional impairment "likely interferes" with his work ability from his C6 cervical radiculopathy diagnosed on November 16, 2009.

In March and April 2014, Dr. Foley examined appellant and opined that he could continue normal activities. In an April 16, 2014 note, he stated that he had been treating appellant for several years and that appellant was at or nearing case closure on May 25, 2012. Dr. Foley stated that appellant had worsened significantly between July 2012 and March/April 2013 due to cervical nerve irritation. In a June 16, 2014 report, he indicated that appellant's physical therapy records note significant improvement in pain level and functional level. Dr. Foley reported that appellant's symptoms were more intermittent and advised appellant to continue normal activities.

The record does not reflect further medical care until August 11, 2015, when Dr. Neil Allen, a Board-certified neurologist, performed an impairment assessment. Dr. Allen addressed causation in a November 3, 2016 supplemental report. Appellant's work capability was not addressed.

In an August 26, 2015 report, Dr. Foley examined appellant and noted significant improvement. He was advised to continue normal activities. In a September 3, 2015 report, Dr. Foley summarized appellant's medical care. In a March 17, 2016 report, he noted examination findings and appellant to resume normal activities.

Appellant underwent a March 2, 2016 lumbar spine MRI scan, which demonstrated degenerative disc disease at L2-3, L3-4, and L4-5, regions of foraminal narrowing and no disc herniations or central canal stenosis, and a June 2, 2016 cervical spine MRI scan, which demonstrated left paracentral disc bulge/protrusion at C6-7 extending into the left neural foramen and scattered foraminal narrowing.

In May 20 and November 16, 2016 reports, Dr. Jill Donaldson, a Board-certified neurosurgeon, noted the history of injury, appellant's medical treatment and stated that he had returned to work for a short period in 2012 but had a relapse in symptoms. She provided an impression of chronic cervical radiculopathy and requested authorization for a two-level anterior cervical discectomy and fusion at C5-6 and C6-7.

Following an August 31, 2016 report from an OWCP district medical adviser (DMA), who opined that the proposed cervical fusion surgery was medically necessary and causally related to the accepted medical conditions, appellant underwent C5-6 and C6-7 anterior cervical discectomy

[8] An April 3, 2013 cervical MRI revealed little change from prior study of left-sided disc protrusion at C6-7, degenerative changes at C5-6 and C6-7, and foraminal narrowing at left side at C3-4.

and fusion on December 1, 2016. OWCP retained appellant on its supplemental rolls commencing December 1, 2016.

On May 15, 2019 OWCP accepted appellant's claim for recurrence of disability effective May 20, 2016. It noted that the accepted conditions also included the new condition of chronic cervical radiculopathy. OWCP requested appellant to file a completed claim for compensation (Form CA-7) through the employing establishment if he lost time from work due to his recurrence.

On July 5, 2019 appellant filed a Form CA-7 for the period September 7, 2012 through July 5, 2019.

In a July 22, 2019 development letter, OWCP advised appellant of the deficiencies in his claim, noting that he must submit medical evidence from a physician which included a history of his injury and a thorough explanation with objective findings, as to how his condition has worsened such that he was no longer able to perform the duties of his position when he stopped work. By separate letter of even date, it requested additional evidence from the employing establishment. OWCP afforded each party 30 days to respond.

OWCP subsequently received a February 3, 2009 narrative report from Dr. Ronald L. Young, a Board-certified neurosurgeon, wherein he explained that appellant's continued lifting activities at work permanently aggravated his degenerative disc disease and cervical radiculopathy and disabled appellant from his mail processing clerk position. Dr. Young also related that appellant required surgery. In an undated work capacity evaluation (Form OWCP-5c) he recited appellant's accepted conditions, that he required surgery and provided work restrictions until after he underwent the recommended surgery.

On July 8, 2020 appellant filed a revised Form CA-7 for wage-loss compensation from September 7, 2012 to December 1, 2016.

By decision dated March 18, 2021, OWCP denied appellant's claim for disability from work during the period September 7, 2012 through December 1, 2016, finding that no evidence was received in support of the claim.

In a June 24, 2021 report, Dr. Robert R. Reppy, an osteopath, provided additional diagnoses of lumbar spondylosis and radiculopathy. He opined that appellant was unable to work since 2004 and was totally disabled. Dr. Reppy noted that appellant had only received physical therapy and injections from 2009 to 2012 with surgery in 2016. He also provided progress reports dated July 28, September 8, and November 15, 2021 regarding the status of appellant's cervical radiculopathy, lumbar spondylosis and status post cervical fusion, two levels.

In a June 25, 2021 report, Dr. Omar D. Hussamy, a Board-certified orthopedic surgeon and second opinion physician, reviewed a statement of accepted facts (SOAF), the medical record and examined appellant. He opined that appellant continued to have residuals from his cervical injuries and surgery and was totally disabled. Dr. Hussamy also provided a June 25, 2021 Form OWCP-5c.

On January 26, 2022 appellant, through counsel, requested reconsideration. A duplicative copy of Dr. Young's February 3, 2009 report was provided along with progress reports from Dr. Reppy dated January 12 through April 25, 2022 regarding the status of appellant's cervical radiculopathy, lumbar spondylosis and status post two-level cervical fusion.

On January 26, 2022 appellant, through counsel, requested reconsideration. Duplicative evidence, previously of record, was received.[9]

By decision dated April 26, 2022, OWCP denied modification of its March 18, 2021 decision. It found that the evidence submitted on reconsideration was duplicative of previous evidence of record or did not address appellant's work capacity to "indicate a continuation of disability or a recurrence" during the period September 7, 2012 through November 30, 2016 due to the accepted work injury. OWCP indicated that all medical evidence of record was reviewed.[10]

On May 18, 2022 appellant, through counsel, appealed to the Board. The Board issued an order remanding the case on March 2, 2023.[11] The Board found that the record established that Dr. Young's February 3, 2009 medical report was not considered or addressed by OWCP in its April 26, 2022 decision. Accordingly, the Board remanded the case to OWCP to consider and address all evidence of record and, following this and any other development deemed necessary, to issue a *de novo* decision.

OWCP received additional medical evidence, including evidence previously of record or not relevant to disability due to the accepted conditions for the period of disability claimed.

In a January 12, 2024 report, Dr. William Dinenberg, a Board-certified orthopedic surgeon and OWCP referral physician, opined in relevant part that appellant remained totally disabled due to the accepted conditions. In a January 14, 2024 Form OWCP-5c, he opined that appellant was permanently disabled.

By decision dated February 23, 2024, OWCP denied appellant's request to expand the acceptance of the claim to include lumbar radiculopathy and degenerative disc disease of the lumbar spine at L2-3, L3-4, and L4-5, based the January 12, 2024 report of Dr. Dinenberg, who opined that the claimed lumbar conditions were not causally related to the May 13, 2004 employment injury.

By *de novo* decision dated May 10, 2024, OWCP found that the evidence of record was insufficient to establish that appellant sustained a recurrence of disability for the period September 7, 2012 through December 1, 2016 causally related to the accepted May 13, 2004 employment injury as no medical opinion regarding disability for the period claimed was received.

On June 6, 2024 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

Dr. Reppy continued to submit progress reports regarding appellant's cervical radiculopathy, lumbar spondylosis, status post cervical fusion and lumbar radiculopathy conditions.

[9] This included May 15, 2013 and April 16, 2014 reports by Dr. Foley; an August 31, 2016 report by a DMA, which authorized surgery; the August 11, 2015 permanent medical impairment report; Dr. Donaldson's May 20, 2016 report; a surgery request and diagnostic tests.

[10] Copies of evidence previously of record, which were discussed in the decision including a May 4, 2011 physical therapy report, were included with the decision.

[11] *Order Remanding Case*, Docket No. 22-0870 (issued March 2, 2023).

By decision dated September 17, 2024, an OWCP hearing representative affirmed OWCP's May 10, 2024 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.[12] 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.[13]

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.[14]

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.[15] Where no such rationale is present, the medical evidence is of diminished probative value.[16]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability for the period September 7, 2012 through December 1, 2016, causally related to his accepted May 13, 2004 employment injury.

In support of his claim, appellant submitted medical evidence from Dr. Foley dated March 27, 2013 through March 17, 2016. While Dr. Foley opined in several reports from 2013 that appellant's pain, numbness and functional impairment "likely interferes" with his work ability,

[12] 20 C.F.R. § 10.5(x); *see M.A.*, Docket No. 23-0713 (issued April 26, 2024); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[13] *Id*.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

[15] *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

[16] *R.D.*, Docket No. 21-0857 (issued August 20, 2024); *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

this opinion is couched in speculative terms. The Board has long held that medical opinions that are speculative or equivocal are of diminished probative value.[17] Thus, this evidence is insufficient to establish appellant's recurrence claim. In his April 16, 2014 note, Dr. Foley indicated that appellant had worsened significantly between July 2012 and March/April 2013 due to cervical nerve irritation. However, he failed to offer either an opinion on disability or provide an explanation as to the cause of such a material change/worsening in appellant's accepted cervical conditions. 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.[18] Therefore, this evidence is also insufficient to establish appellant's recurrence claim.

Dr. Young, in his February 3, 2009 report opined that the date-of-injury events caused a permanent aggravation and appellant remained disabled from his mail processing clerk job. However, as this report predates the claimed recurrence period from September 7, 2012 through December 1, 2016, it is not relevant to the issue at hand.[19] Furthermore, in Dr. Young's undated Form OWCP-5c, he noted work restrictions but did not provide a well-rationalized opinion on how appellant's physical limitations were caused by the accepted employment injury, nor did he specifically address his disability status during the dates for which compensation was claimed relative to the accepted March 13, 2004 employment injury.[20] Thus, Dr. Young's reports are of diminished probative value and insufficient to establish appellant's recurrence claim.

Dr. Reppy, in his reports commencing June 24, 2021, opined that appellant remained totally disabled during his treatment for lumbar conditions. In his June 24, 2021 report, he opined that appellant was unable to work since 2004 and was totally disabled from his job. However, Dr. Reppy did not offer a well-rationalized medical opinion to establish that appellant had recurrent disability from work for the period September 7, 2012 through December 1, 2016 causally related to the accepted cervical conditions. Thus, his reports are of diminished probative value.

The remaining medical evidence of record does not contain an opinion that appellant sustained a recurrence of disability for the period September 7, 2012 through December 1, 2016, causally related to the accepted May 13, 2004 employment injury. As noted above, 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.[21] Therefore, this evidence is insufficient to establish appellant's claim.

[17] *See R.B.*, Docket No. 23-0395 (issued October 2, 2023); *M.D.*, Docket No. 21-0080 (issued August 16, 2022); *R.B.*, Docket No. 19-0204 (issued September 6, 2019).

[18] *See T.L.*, Docket No. 22-0881 (issued July 17, 2024); *F.S.*, Docket No. 23-0112 (issued April 26, 2023); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[19] *See P.R.*, Docket No. 20-0596 (issued October 6, 2020); *M.L.*, Docket No. 18-1058 (issued November 21, 2019); *A.P.*, Docket No. 19-0446 (issued July 10, 2019); *D.J.*, Docket No. 18-0200 (issued August 12, 2019).

[20] *See D.F.*, Docket No. 24-0623 (issued July 26, 2024); *C.S.*, Docket No. 17-1686 (issued February 5, 2019); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

[21] *See supra* note 19.

Appellant also submitted several diagnostic studies during the claimed recurrence period. However, diagnostic studies, standing alone, lack probative value on causal relationship as they do not address whether employment factors caused the diagnosed condition.[22]

As the medical evidence of record is insufficient to establish causal relationship between the claimed recurrence of disability and the accepted May 13, 2004 employment injury, the Board finds that appellant 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 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 September 7, 2012 through December 1, 2016, causally related to his accepted May 13, 2004 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2025
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[22] *A.D.,* Docket No. 24-0770 (issued October 22, 2024); *T.L., supra* note 18; *C.S.,* Docket No. 19-1279 (issued December 30, 2019).