

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

---

C.D., Appellant )

and )

**DEPARTMENT OF THE NAVY, OFFICE OF  
NAVAL INTELLIGENCE, Washington, DC,  
Employer** )

---

**Docket No. 11-303  
Issued: May 7, 2012**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 17, 2010 appellant, through his attorney, filed a timely appeal of an August 4, 2010 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.

**ISSUE**

The issue is whether appellant has established a recurrence of disability beginning August 4, 2009 due to his accepted employment conditions.

On appeal appellant, through his attorney, contends that the medical evidence established a recurrence of disability. In the alternative, appellant's attorney argued that the evidence was sufficient to require OWCP to further develop the claim.

---

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

## **FACTUAL HISTORY**

On June 20, 2005 appellant, then a 49-year-old intelligence specialist, filed a traumatic injury claim alleging that on June 13, 2005 he tripped on a coat rack, stumbled and fell into a wall, got caught on a metal wall plate and wrenched to stop and in twisting around to disengage from metal object, twisted back again. He alleged that as a result of this incident he suffered from a lumbar strain with left radiculopathy. OWCP accepted appellant's claim for sprain of the back, lumbar region; thoracic lumbar neuritis; derangement lateral meniscus of left knee; unspecified left internal derangement; tear of the left medial meniscus; osteochondritis dissecans; displacement of lumbar intervertebral disc without myelopathy; herniated nucleus pulposus L4-5 and L5-S1 with a disc bulge at L3-4; other specified arthropathy, left ankle and foot; cervicgia; and C6 radiculitis (right arm). Appellant underwent nerve blocks for lumbar radiculopathy with physical therapy, two arthroscopic surgeries and, on February 13, 2007, a total left knee replacement.

On October 17, 2007 appellant was offered a limited-duty position as an intelligence specialist. He accepted the offer and returned to work on October 29, 2007. On August 5, 2008 appellant underwent an L3-4, L4-5 and L5-S1 discogram.

On August 3, 2009 OWCP accepted that appellant sustained a recurrence with a period of disability from August 5 through October 3, 2008. Appellant returned to limited-duty work on April 16, 2009.

On October 4, 2009 appellant filed a recurrence of disability claim as of August 4, 2009. He stated that at the time he returned to work on April 16, 2009 he was on limited duty with minimal time for sitting, standing, walking and allowance for breaks every 20 minutes, ergonomic seating when possible. Appellant stated that approximately four weeks after returning to work he experienced a flare-up of knee, lower back, foot and neck pain. He then noted that on August 4, 2009 he experienced level 10 pain in his neck after hearing a popping sound when he turned his head. Appellant noted that he has been seen by back, knee and foot specialists starting in May 2009 and continuing through the current date.

In support of his claim, appellant submitted reports by Dr. Peter B. Bandera, his treating Board-certified physiatrist. In an August 17, 2009 report, Dr. Bandera listed his impressions as cervical/lumbar syndrome with strain/sprain with radiculopathy features; internal derangement of left knee status post total knee replacement; lumbar disc displacement, cervicgia; cervical syndrome with strain/sprain/radiculopathy features and traumatic expression of cervical degenerative joint disease/osteophytes. He noted that, due to appellant's morbidities and severity of his diagnoses, he is having trouble completing essential tasks and may need a vocational downgrade. In a September 23, 2009 report, Dr. Bandera noted appellant had slight improvement in his range of motion of the cervical spine extension which is still significantly limited. He noted positive bilateral Spurlings' maneuver/SR. Dr. Bandera opined that appellant would optimally do better in a home-based environment in terms of productivity and task completion; however, this is still problematic for him.

By decision dated February 5, 2010, OWCP denied appellant's claim for a recurrence of disability commencing August 4, 2009 as the factual and medical evidence did not establish that the claimed recurrence resulted from the accepted work injury of June 13, 2005.

By letter dated February 9, 2010, appellant, through his attorney, requested an oral hearing before an OWCP hearing representative.

In a January 13, 2010 report, Dr. Bandera stated that appellant was noting pain/dysfunction relative to the neck, back, left knee and left foot. He noted that functionally appellant is having increased problems with left foot status post incomplete fusion procedure. Dr. Bandera noted that review of symptoms identified increased paresthesias/numbness and tingling antalgic gait with cane. He stated that functionally, he was unsafe for transferring from sitting to standing rapidly. Dr. Bandera concluded that appellant had multiple comorbidities and continues at a high level of dysfunction. He noted that working at home was getting more difficult and that he may have to return him to total disability status. In a January 27, 2010 report, Dr. Bandera noted that appellant continued with neck and back pain with a radiating component and paresthesias lower extremities consistent with neuropathy, status post left total knee. He noted that appellant ambulated with a cane and had disruption of basic activities of daily living and that appellant was not working. Dr. Bandera noted that appellant's electrodiagnostic studies are consistent with bilateral L4-5 radiculopathy. He stated that in addition, appellant has symmetric polyneuropathy. Dr. Bandera indicated that, when compared to a prior study, there is expression of radiculopathy pattern with chronic/active features. In a February 24, 2010 note, he indicated that appellant continues with pain/dysfunction related to low back/left knee and has pronator abnormality in bilateral feet. Dr. Bandera also stated that an electromyogram of January 27, 2010 is consistent with bilateral L4-5 radiculopathy. He noted that the deterioration/worsening of appellant's overall condition is directly related to his work injury as the ongoing stresses cause further radicular pattern relative to the low back and degeneration relative to the knee in terms of prolonged sitting/standing/desk activities. As such, Dr. Bandera indicated that he has continued appellant's out of work status beginning August 4, 2009. He stated that his overall prognosis is poor due to multiple sites of injury. In a March 3, 2010 report, Dr. Bandera listed his impression as bilateral C6 radiculopathy. He stated that appellant has pain/dysfunction relative to the neck, back and left leg/knee/foot. Dr. Bandera stated that there was a direct causal relationship between these diagnoses/current injuries and his original work injury of June 2005. He noted that this was inclusive of cervical/lumbar radiculopathy documented on EMG testing. In a May 3, 2010 report, Dr. Bandera stated that appellant has ongoing decompression relative to his condition. He noted that appellant was having difficulties performing specific activities or prolonged sitting for periods of greater than 10 to 15 minutes. Dr. Bandera stated that he assigned him no work status secondary to his scope of injuries which included cervical/lumbar radiculopathy, left knee internal injury/degenerative joint disease and left foot degenerative joint disease status post fracture. In a June 3, 2010 report, he noted that appellant continued with a high level of disability/impairment. Dr. Bandera has incurred work stoppage resulting from a work injury of the above-accepted diagnoses without intervening cause with the original date of injury of June 13, 2005. He noted that appellant's worsening conditions culminated in August 4, 2009 with his inability to work and ongoing disability status.

At the hearing held on May 18, 2010, appellant testified that he had a 30 percent Veterans Administration disability rating based on both of his feet, but that he had no prior neck, back or knee injuries. He stated that he returned to work in October 2007, but was out of work again in August 2008. Appellant noted that he was permitted to return to work on April 16, 2009 with restrictions that he was limited to four hours a day of sitting, standing, walking and driving with 15-minute breaks as needed. He stated that he stopped work on the current recurrence on August 2, 2009. Appellant noted that he did not get a written job offer, but rather he called the employing establishment and they told him he was released to work. He stated that even though his doctor gave him a limited-duty restriction, he returned to his same job duties, except that it required more driving. Appellant noted that he commutes two and one-half hours each way to work. He stated that, about three weeks after he returned to work, he began to experience problems, first with his left knee, but that these symptoms spread to his lower back and neck in May 2009. Appellant testified that he infrequently took pain medication because he could not drive with the medication. He testified that on August 4, 2009 he turned to talk to his supervisor and he had an explosion of pain in his neck.

By decision dated August 5, 2010, the hearing representative affirmed OWCP's February 5, 2010 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 injury or illness without an intervening injury or a new exposure to the work environment.<sup>2</sup>

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.<sup>3</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>4</sup>

### **ANALYSIS**

OWCP accepted appellant's claim for sprain of the back, lumbar region; thoracic lumbar neuritis; derangement, lateral meniscus of left knee; unspecified left internal derangement; tear of the left medial meniscus; osteochondritis dissecans; displacement of lumbar intervertebral disc

---

<sup>2</sup> 20 C.F.R. § 10.5(x).

<sup>3</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>4</sup> *See Nicolas Brusio*, 33 ECAB 1138 (1982).

without myelopathy; herniated nucleus pulposus L4-5 and L5-S1 with a disc bulge at L3-4; other specified arthropathy, left ankle and foot; cervicalgia and C6 radiculitis (right arm). Appellant sustained a recurrence of disability on August 5, 2008 and returned to limited-duty work on April 16, 2009. He alleges that he sustained a recurrence of disability on August 4, 2009 when he turned towards his supervisor and experienced level 10 pain in his neck. However, the medical evidence is insufficient to meet appellant's burden of proof to establish that he suffered from a recurrence on August 4, 2009. There is no indication that he sought immediate medical attention on August 4, 2009. On August 17, 2009 appellant saw Dr. Bandera, but he made no mention of the event occurring on August 4, 2009 in this report. Dr. Bandera noted that appellant had ongoing symptoms and may need a vocational downgrade. However, he never stated in his report that appellant was unable to perform the duties of his job. In his September 23, 2009 report, Dr. Bandera also made no mention of events occurring on August 4, 2009. He noted that appellant would do better in a home-based environment, but did not indicate that he was disabled. In his January 13, 2010 report, Dr. Bandera noted that appellant continued to have a high level of dysfunction and indicated that he may have him assume total disability status. He does not attribute this to the August 4, 2009 alleged recurrence. Dr. Bandera's first mention of the date August 4, 2009 is in his report of February 24, 2010, over six months later, and at that point, he just noted that appellant had a continued out of work status beginning August 4, 2009. In his March 3, 2010 report, he indicated that there was a direct causal relationship between appellant's condition at that time and his employment, but this opinion does not address appellant's condition in August 2009. In his June 3, 2010 report, Dr. Bandera noted that appellant's worsening conditions culminated in an August 4, 2009 inability to work an ongoing disability status. This conclusion, however, is unsupported by his reports more contemporaneous to the date of the alleged recurrence.

The Board accordingly finds that appellant did not meet his burden of proof in this case. Appellant did not establish a change in the nature and extent of the injury-related condition or the light-duty job and OWCP properly denied his claim.

### **CONCLUSION**

The Board finds that appellant has not established a recurrence of disability beginning August 4, 2009 due to his accepted employment conditions.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 4, 2010 is affirmed.

Issued: May 7, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board