

FACTUAL HISTORY

On July 29, 2008 appellant, then a 44-year-old city carrier, filed a traumatic injury claim alleging that on that day he sprained his lower back when he slipped on a curb and heard a pop in his back. OWCP accepted the claim for lumbar back sprain. Appellant stopped work on July 29, 2008 and regularly submitted Form CA-7 claims for compensation until he was placed on the periodic rolls in January 2010. After a lengthy but unsuccessful nurse management program, he accepted a part-time modified job on July 30, 2010 and was removed from the periodic rolls. Appellant continued to receive wage-loss compensation for partial disability pursuant to Form CA-7 claims.

On October 19, 2010 appellant was referred for a second opinion evaluation with Dr. Lawrence I. Barr, an osteopath, for a functional capacity examination. In a November 8, 2010 report, Dr. Barr, based upon a review of the statement of accepted facts, employment injury history, magnetic resonance imaging (MRI) scans and physical examination, diagnosed chronic low back pain, morbid obesity and lumbar sprain with degenerative disc disease. He noted that appellant suffered from chronic low back pain but that the accepted injury of low back sprain had resolved. Dr. Barr opined that appellant was limited from full-duty work not from his resolved low back sprain but due to his degenerative disc disease and morbid obesity. He stated that he found no clinical signs supporting a diagnosis of radiculopathy or neuropathy. In an attached work capacity form, Dr. Barr indicated that appellant was capable of working four hours a day with restrictions.

On November 19, 2010 appellant filed a claim for recurrence of disability beginning October 14, 2010.

By letter dated January 5, 2011, appellant was advised as to the evidence required to support his recurrence claim. He was given 30 days to provide the requested information.

In response to OWCP's development letter, appellant submitted a January 3, 2011 progress note which noted physical findings and indicated that he continued to have lower back pain with spasms.²

In a January 6, 2011 supplemental report, Dr. Barr opined that appellant was capable of returning to his date-of-injury job with respect to his accepted injury as his back sprain had stabilized. He noted appellant's primary complaint was lumbar degenerative disc disease, a condition not accepted by OWCP.

On January 31, 2011 OWCP received an October 15, 2010 disability slip from Dr. Arthur G. Nahas, a treating osteopath, and an unsigned October 15, 2010 duty status report Form CA-17. Dr. Nahas diagnosed acute chronic lumbar sprain and morbid obesity and released appellant to return to work on January 15, 2011.

² The report contains initials, but not a signature.

By decision dated February 16, 2011, OWCP denied appellant's recurrence claim for failing to submit rationalized medical evidence establishing a change in his employment-related condition or a change in the nature or extent of his light-duty position.

On February 17, 2011 OWCP issued a decision terminating appellant's wage-loss compensation effective that day on the basis of Dr. Barr's report. Although it noted reviewing the medical reports from appellant's treating physicians reflecting his inability to work, OWCP found none of the reports attributed the disability to the accepted condition of low back sprain.

On February 22, 2011 OWCP issued a notice proposing to terminate appellant's medical benefits. It found the reports of Dr. Barr established that appellant had no residuals or disability due to the accepted lower back strain.

On March 14, 2011 appellant requested both an oral hearing and review of the written record by an OWCP hearing representative of the February 16, 2011 decision denying his recurrence claim.

By decision dated March 25, 2011, OWCP finalized the termination of appellant's medical benefits effective that day.

In an April 5, 2011 unsigned but initialed progress note, appellant was diagnosed with acute/chronic lumbosacral pain, morbid obesity and radicular bilateral leg pain. The note stated that he had found Dr. Barr's report was "replete with inaccuracies about [appellant's] condition and obviously prejudiced in favor of the insurance company."

On April 20, 2011 appellant requested review of the written record by an OWCP hearing representative of the March 25, 2011 decision terminating his medical benefits.

On May 23, 2011 counsel again requested reconsideration of the March 25, 2011 decision terminating his medical benefits. He also clarified that appellant's March 14, 2011 request should be treated as a request for an oral hearing by an OWCP hearing representative on the denial of his recurrence claim. A telephonic hearing was held on July 15, 2011 on the denial of appellant's recurrence claim.

On May 31, 2011 OWCP received a May 13, 2011 report from Dr. Nahas and a May 23, 2011 request to expand his claim to include lumbar radiculopathy.

Dr. Nahas' report found appellant was totally disabled and had sustained a permanent low back injury. He related that appellant was last seen on April 5, 2011 for low back pain and muscle spasms and bilateral radicular leg pain. Dr. Nahas opined that based on a nerve conduction study appellant has moderate left L5-S1 radiculopathy and mild right L5 radiculopathy. In concluding, he opined that appellant was disabled from performing his duties as a mail carrier due to work aggravating his conditions.

On June 15, 2011 appellant, through counsel, submitted an addendum to his May 23, 2011 letter clarifying that he was requesting reconsideration of the February 17, 2011 decision terminating his wage-loss benefits.

On July 18 and 21, 2011 OWCP received reports from Dr. Nahas. In a May 31, 2011 report, Dr. Nahas attributed appellant's disability commencing October 15, 2011 to his modified job duties, which exacerbated his symptoms and aggravated his back condition. He further opined that appellant's repetitive job duties exacerbated his lower back and leg pain.

Dr. Nahas, in a July 8, 2011 report, opined that appellant continued to have residuals due to the accepted July 29, 2008 employment injury. With respect to the cause of appellant's disability on and after October 14, 2010, he concluded that the disability was due to a new claim based on the progression of appellant's symptomatology and aggravating work factors. Dr. Nahas opined that appellant's total disability beginning October 14, 2010 and continuing was due to new employment factors.

By decision dated August 25, 2011, OWCP's hearing representative set aside the March 25, 2011 decision terminating appellant's medical benefits and remanded the case for further medical development on the issue of whether appellant's L5-S1 radiculopathy was causally related to the accepted July 29, 2008 employment injury.

OWCP requested a supplemental report from Dr. Barr, by letter dated September 8, 2011. It asked him to address Dr. Nahas' discussion regarding causal relationship of the diagnosed L5-S1 radiculopathy and the accepted 2008 work incident and to explain whether the work event caused, aggravated or worsened the diagnosed condition.

By decision dated September 15, 2011, OWCP denied appellant's reconsideration request of the February 17, 2011 decision terminating his wage-loss compensation benefits. Appellant argued that it was deficient as there had been no pretermination notice. OWCP denied the argument citing to OWCP Procedure Manual Part 2.1400.6c whereby a pretermination notice is not necessary if he had returned to work and was no longer on the period rolls.

By decision dated September 22, 2011, OWCP's hearing representative affirmed the February 16, 2011 decision denying appellant's recurrence claim. She found that the weight of the evidence rested with Dr. Nahas' reports, which attributed his October 14, 2010 recurrence to new aggravating work factors.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

³ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁴ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁵ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

If a claimant returns to work while in receipt of compensation a pretermination notice is not required.⁶

ANALYSIS -- ISSUE 1

OWCP accepted appellant's traumatic injury claim for lumbar strain. On October 19, 2010 OWCP referred appellant to Dr. Barr for a second opinion evaluation. In a November 8, 2010 report, Dr. Barr opined that appellant was capable of working part time with restrictions due to his morbid obesity and degenerative disc disease. In a July 6, 2011 supplemental report, he opined that appellant's accepted back injury had stabilized and he was capable of returning to his date-of-injury job. Dr. Nahas, a treating osteopath, determined in an October 15, 2010 disability slip and duty status report released appellant to return to work on January 15, 2011. By decision dated February 17, 2011, OWCP terminated appellant's wage-loss compensation effective that day based upon Dr. Barr's report and that none of the reports from appellant's treating physicians attributed his disability due to his accepted low back sprain. On September 15, 2011 it denied modification of the February 17, 2011 termination decision.

Counsel for appellant had agreed that the termination was procedurally defective as there had been no preliminary notice of termination. The Board finds that OWCP properly terminated without a preliminary notice as appellant had returned to work on July 5, 2010 and was no longer on the periodic rolls.⁷

The Board further finds that Dr. Barr's October 19, 2010 and July 6, 2011 reports constitute the weight of the medical evidence. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁸ Dr. Barr conducted an extensive physical examination, during which he observed that the low back sprain had resolved and that any disability was due to his morbid obesity and degenerative disc disease. He also noted the lack of any clinical signs on examination supporting a diagnosis of neuropathy or radiculopathy. Based on this thorough assessment, Dr. Barr concluded that appellant's disability from working was due solely to his nonemployment conditions of morbid obesity and degenerative disc disease. He also explained that appellant's accepted condition of low back sprain had stabilized with the primary complaint being lumbar degenerative disc disease.

The medical evidence submitted by appellant does not contain a report of similar probative value to the issue presented of whether his disability is due to his accepted lumbar sprain. Dr. Nahas' October 15, 2010 disability note and duty status report released appellant to work on January 15, 2011 and noted diagnoses of morbid obesity and acute lumbar. In his May 31 and July 8, 2011 reports, he attributed appellant's disability to aggravation by his repetitive job duties. Dr. Nahas did not provide a rationalized medical opinion with respect to a

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400(4)(a)(2) (February 2013).

⁷ *See id.*

⁸ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *K.W.*, 59 ECAB 271 (2007); *Michael S. Mina*, 57 ECAB 379 (2006); *James Mack*, 43 ECAB 321, 329 (1991).

disability causally related to the July 29, 2008 employment injury. Instead he attributes appellant's disability aggravation of his lower back and leg pain, to his repetitive work duties, which would constitute a new work factor. Dr. Nahas also failed to provide sufficient medical rationale explaining how residuals of the accepted lumbar strain were disabling.⁹ Consequently, the Board finds that OWCP properly relied on Dr. Barr's opinion in terminating appellant's wage-loss medical benefits.

On appeal, counsel argues that OWCP erred in relying upon Dr. Barr's opinion in terminating wage-loss compensation on February 17, 2011. He also argues that the reliance on Dr. Barr's opinion was contrary to the instructions given by an OWCP hearing representative on August 25, 2011. As discussed above, OWCP properly relied upon Dr. Barr's opinion in terminating appellant's wage-loss compensation as he found any disability was due to nonemployment conditions. In addition, the reports submitted by Dr. Nahas attribute any disability to a new work factor, *i.e.*, aggravation of back and leg pain by repetitive work duties. Contrary to counsel's contention OWCP did not ignore the instructions given by the hearing representative on August 25, 2011. The hearing representative remanded the case for OWCP to request Dr. Barr to provide an opinion as to whether there was any causal relationship between appellant's radiculopathy and the July 25, 2008 employment injury. Moreover, she specifically found that OWCP did not have to reinstate appellant's wage-loss compensation until after development of the evidence.

LEGAL PRECEDENT -- ISSUE 2

OWCP's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹⁰ If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.¹¹

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she 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 or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.¹² To establish a change in the

⁹ *Dean E. Pierce*, 40 ECAB 1249 (1989).

¹⁰ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). *See also Phillip L. Barnes*, 55 ECAB 426 (2004).

¹¹ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1500.3 (May 1997), *Donald T. Pippin*, 54 ECAB 631 (2003).

¹² *K.C.*, Docket No. 09-1666 (issued August 25, 2010); *S.F.*, 59 ECAB 525 (2008); *Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Albert C. Brown*, 52 ECAB 152 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.¹³

ANALYSIS -- ISSUE 2

As noted above, OWCP accepted that appellant sustained a lumbar strain as a result of the accepted July 29, 2008 employment injury. Appellant returned to a modified job working four hours a day on August 2, 2010. By decision dated February 17, 2010, OWCP denied his claim for a recurrence of total disability beginning October 14, 2010. Appellant has the burden to provide medical evidence establishing that he sustained a recurrence of disability on October 14, 2010 causally related to his accepted July 29, 2008 lumbar strain.

Appellant has neither shown a change in the nature and extent of his employment-related condition nor a change in the nature and extent of the limited-duty requirements. He returned to part-time modified work on August 2, 2010. The only medical evidence addressing appellant's recurrence claim is from Dr. Nahas, appellant's treating physician. On May 13 and July 8, 2011, Dr. Nahas attributed appellant's total disability on and after October 14, 2010 to new employment factors including prolonged bending, sitting and carrying parcels, which broke the chain of causation and caused his alleged disability for work. Thus, the circumstances of this case do not involve a spontaneous change in appellant's accepted medical condition arising from his July 29, 2008 employment injury. For this reason, the Board will affirm OWCP's September 22, 2011 decision, which found that appellant did not sustain a recurrence of disability due to the July 29, 2008 employment injury.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation effective February 17, 2011. The Board further finds that appellant failed to establish that he sustained a recurrence of disability on and after October 14, 2010 causally related to his accepted July 29, 2008 employment injury.

¹³ *Maurissa Mack*, 50 ECAB 498 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 22 and 15, 2011 are affirmed.

Issued: March 29, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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