

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

L.G., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Sacramento, CA, Employer**

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**Docket No. 12-1823
Issued: March 14, 2013**

Appearances:
Steven E. Brown, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 4, 2012 appellant, through his attorney, filed a timely appeal from a May 8, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed the denial of his claim for a recurrence of disability. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of disability commencing November 30, 2004 causally related to his accepted work injury.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On September 7, 2001 appellant, then a 51-year-old real estate specialist, injured his right shoulder and neck when he was involved in an automobile accident while in the performance of duty. OWCP accepted right shoulder strain and cervical strain and paid wage-loss compensation. Appellant returned to regular duty and retired on November 30, 2004.

Appellant submitted a September 13, 2001 report from Dr. Dennis Walker, a family practitioner, who treated him for right shoulder and neck pain after the motor vehicle accident. Dr. Walker diagnosed neck and shoulder pain that was work related. He noted that appellant had a history of previous right shoulder pain as well as neck arthritis as shown by an x-ray. Dr. Walker opined that no permanent effects were expected and that appellant could return to regular duty.

Appellant's claim remained dormant until 2010. On October 29, 2010 he filed a CA-2a, notice of recurrence of disability, asserting that he experienced increasing back and right shoulder pain causally related to his work injury. Appellant also noted that he underwent right shoulder surgery. After he retired in November 2004, he worked in the private sector from April 2006 to July 2007 with the Albuquerque District Corps of Engineers as a realty specialist. Appellant worked from November 2007 to August 2008 with Otay Group, Inc., as a chief of supply logistics and from October 2009 to November 2010 as a realty specialist.

From January 21, 2004 to July 22, 2010, appellant came under the treatment of Dr. Keith W. Harvie, an osteopath, for back and neck injuries sustained on September 7, 2001. In reports dated January 21 to May 3, 2004, Dr. Harvie noted that appellant had several back and shoulder surgeries; however, he continued to experience persistent neck and back pain. On May 4, 2004 he performed a microdecompression laminectomy of L4-5 and diagnosed spinal stenosis at L4-5. Dr. Harvie noted that appellant was progressing well until a fall in August 2004 which exacerbated his pain. He noted that an MRI scan of the lumbar spine revealed a herniated disc at L1-2 and he performed selective nerve root blocks without improvement. On February 15, 2005 Dr. Harvie performed microlaminectomy with excision of disc at L1-2 and diagnosed nerve root compression secondary to herniated disc at L1-2.

Appellant continued to be treated by Dr. Harvie for persistent lumbar pain. Dr. Harvie performed an x-stop at L2-3 on February 24, 2009 and at L3-4 on August 11, 2009. He diagnosed spinal stenosis at L2-3 and L3-4 and residual and foraminal stenosis.

In a report dated July 14, 2010, Dr. Harvie noted a history of injury on September 7, 2001 and summarized appellant's treatment from 2001 to 2010 for neck, back and shoulder pain. He opined that appellant suffered a significant injury to his right shoulder after the 2001 accident with degenerative changes which predated the accident. Dr. Harvie noted that appellant also had pain in his back which began at the time of the accident. He diagnosed status post right shoulder injury with joint arthritis with impingement syndrome, herniated disc at L3-4, discitis at L3-4, spinal stenosis at L4-5, herniated disc at L1-2, spinal stenosis at L2-3, chronic pain syndrome, depression, tobacco addiction. Dr. Harvie opined that to a reasonable degree of medical probability appellants back and shoulder injuries were related to his accident. He noted that appellant had prior right shoulder problems but was asymptomatic prior to the injury. In a

July 22, 2010 report, Dr. Harvie diagnosed status post right shoulder injury with joint arthritis and impingement syndrome, the arthritis predated the injury but was aggravated by the injury, herniated disc at L3-4 and discitis in L3-4, spinal stenosis in L4-5, herniated disc in L1-2 and spinal stenosis at L2-3, related to the accident and chronic pain syndrome and depression related to the accident.

In a June 7, 2011 letter, OWCP advised appellant of the evidence needed to establish his claim for recurrence of disability. It requested that he submit a physician's reasoned opinion addressing the relationship of his present condition to his work injury, accepted for a right shoulder and cervical strain.

In a June 21, 2011 statement, appellant noted that he returned to regular duty after the September 7, 2001 injury but experienced worsening symptoms from his accident. He used sick and annual leave from September 2001 to November 2004 to undergo back and shoulder surgeries. Appellant asserted that the surgeries were due to his accident. After returning to work, he performed office duties with little field work and noted his work ability changed due to constant pain and difficulty walking.

In a decision dated September 30, 2011, OWCP denied appellant's claim for a recurrence of disability. It found that Dr. Harvie's reports did not reflect an accurate history of the accepted conditions and related appellant's disability to nonaccepted conditions.

On October 28, 2011 appellant requested a telephonic oral hearing which was held on February 8, 2012. He submitted reports from Dr. Walker dated September 8, 2001 to September 14, 2003, who treated his neck and back pain after the 2001 work injury. On March 10, 2005 Dr. Walker noted appellant's complaints of chronic low back pain status post surgery and diagnosed low back pain, musculoskeletal and neurologic, possibly impingement and scarring post surgery. Appellant submitted reports from Dr. Mark D. Erasmus, a Board-certified neurosurgeon, from February 6 to April 23, 2003. Dr. Erasmus treated appellant for severe back pain radiating into the legs beginning in July 2002. He noted that epidural steroid injections were not successful and on April 4, 2003 he performed an L3-4 discectomy and diagnosed ruptured lumbar disc, right L3-4. On April 18, 22 and 23, 2003 Dr. Erasmus performed a repair of the spinal fluid leak. Appellant submitted reports from Dr. Harvie dated January 21, 2004 to May 4, 2005, previously of record. Also submitted were MRI scans of the lumbar spine dated June 3, 2003 to December 10, 2004 which revealed prominent left paracentral disc extrusion at L1-2 impinging on the L1 nerve root, multilevel degenerative disc changes, multilevel facet arthropathy and changes consistent with prior L4-5 hemilaminectomy.

In a May 8, 2012 decision, an OWCP hearing representative affirmed the decision dated September 30, 2011.

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.²

When an employee claims a recurrence of disability causally related to an accepted employment injury, he or she has the burden to establish by the weight of the reliable, probative and substantial medical evidence that the claimed recurrence of disability is causally related to the accepted injury.³ 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.⁴ An award of compensation may not be made on the basis of surmise, conjecture, or speculation or on an appellant’s unsupported belief of causal relation.⁵

ANALYSIS

OWCP accepted that appellant sustained a right shoulder strain and cervical strain on September 7, 2001. He returned to regular duty and retired on November 30, 2004. Appellant noted that he worked in the private sector from April 2006 to November 2010. He filed a Ca-2a, notice of recurrence of disability on October 29, 2010.

On appeal, appellant asserts that he has submitted sufficient medical evidence to establish his claim. The Board finds that the medical evidence of record lacks a well-reasoned narrative opinion from an attending physician providing an accurate history of the accepted condition or explaining how appellant’s claimed disability is related to his accepted employment injury.

In a July 14, 2010 report, Dr. Harvie listed the date of injury on September 7, 2001 and summarized appellant’s treatment from 2001 to 2010 for neck, back and shoulder pain. He opined that appellant suffered significant injury to his right shoulder during the 2001 work accident. Dr. Harvie advised that, while appellant had degenerative changes which predated the accident, he was asymptomatic prior to the injury. He opined that to a reasonable degree of medical probability appellant’s back and shoulder injuries were related to his accident. In a July 22, 2010 report, Dr. Harvie diagnosed status post right shoulder injury with joint arthritis and impingement syndrome, the arthritis predated the injury but was aggravated by the injury, herniated disc at L3-4 and discitis in L3-4, spinal stenosis in L4-5, herniated disc in L1-2 and spinal stenosis at L2-3, related to the accident and chronic pain syndrome and depression related to the accident. He did not specifically address how the right shoulder or cervical strains in 2001 caused or contributed to appellant’s disability or condition in 2010. Dr. Harvie did not provide a full history of medical treatment or address appellant’s work in the private sector. This is

² 20 C.F.R. § 10.5(x).

³ *Alfredo Rodriguez*, 47 ECAB 437 (1996); see *Dominic M. DeScala*, 37 ECAB 369 (1986).

⁴ See *Nicolea Bruso*, 33 ECAB 1138 (1982).

⁵ *Ausberto Guzman*, 25 ECAB 362 (1974).

especially important where the claim was dormant for a number of years and where the record documents that appellant had a nonwork-related fall in August 2004 and reported right shoulder pain prior to the work injury. Dr. Harvie did not sufficiently address why appellant's condition was not the result of the more recent nonwork-related injury instead of the 2001 work injury. He also did not address Dr. Walker's contemporaneous September 13, 2001 report which stated that there were no permanent effects expected and that appellant could return to regular duty. The Board has found that unrationalized medical opinions on causal relationship have little probative value.⁶ Other reports from Dr. Harvie are insufficient as they either predate the time of the claimed recurrence of disability or do not specifically address how appellant's disability beginning November 30, 2004 was causally related to the September 7, 2001 work injury.

In a March 10, 2005 report, Dr. Walker diagnosed low back pain, musculoskeletal and neurologic, possibly impingement and scarring post surgery. However, he did not specifically support that appellant had a recurrence of disability beginning November 30, 2004 causally related to the September 7, 2001 work injury. Other reports from Dr. Walker either predated the date of the claimed recurrent disability or did not support that the September 7, 2001 work injury was the cause of disability. Likewise, medical reports of record, such as reports from Dr. Erasmus and reports of diagnostic testing, either predate the claimed recurrence of disability or do not address causal relationship between the claimed disability and that accepted right shoulder strain and cervical strain

Therefore, appellant did not meet his burden of proof in establishing that he sustained a recurrence of disability. He did not otherwise submit medical evidence supporting that he sustained a recurrence of disability beginning November 30, 2004 causally related to his September 7, 2001 work injury. Although appellant's counsel, on appeal, asserts that OWCP's decision is contrary to fact and law and that appellant's evidence was ignored, the Board notes that, for the reasons set forth, the medical evidence is insufficient to establish his claim.

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 in establishing that he sustained a recurrence of disability commencing November 30, 2004 causally related to his accepted employment-related injury in September 7, 2001.

⁶ *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

ORDER

IT IS HEREBY ORDERED THAT the May 8, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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