United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 16-1316**
	)	**Issued: March 10, 2017**
U.S. POSTAL SERVICE, DEARBORN STREET STATION, Chicago, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 9, 2016 appellant, through counsel, filed a timely appeal from an April 5, 2016 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 to consider 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 April 5, 2016 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

ISSUE

The issue is whether appellant met his burden of proof to establish a recurrence of disability on and after March 11, 2015 causally related to his accepted employment injuries.

FACTUAL HISTORY

On May 1, 2012 appellant, then a 44-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 19, 2012 he sustained a back injury due to lifting three tubs of mail. He stopped work on April 21, 2012. OWCP accepted the claim for a lumbar strain.[4] Appellant returned to work for four hours per day on December 5, 2012.

On December 17, 2012 appellant filed a claim for a recurrence of disability (Form CA-2a) beginning December 10, 2012. He related that while carrying mail and going up and down stairs that his lower back began to hurt in the same area as his original injury. OWCP determined that appellant had sustained a new injury on December 7, 2012 and accepted the claim for aggravation of lumbar spondylosis without myelopathy and lumbosacral radiculopathy.[5]

By letter dated October 30, 2013, OWCP placed appellant on the periodic rolls for payment of temporary total disability wage-loss benefits.

On March 10, 2014 OWCP authorized surgery for lumbar spine fusion and insertion of a spine fixation device. Appellant underwent the authorized surgery on May 13, 2014.

In a November 7, 2014 report, Dr. Harel Deutsch, a treating Board-certified neurosurgeon, diagnosed obesity, lumbar radiculopathy, and grade 1 spondylolisthesis. Examination findings included good extremity strength movement, unremarkable sensory examination, normal lumbar paraspinal muscles, and absent Waddell signs. Dr. Deutsch recommended a functional capacity evaluation (FCE) test be performed to determine appellant's permanent work restrictions. He completed a work capacity evaluation form (Form OWCP-5c) indicating lifting restrictions of no more than 10 pounds and that an FCE was required to determine specific restrictions.

On November 17, 2014 OWCP referred appellant to Dr. Safwan Barakat, a physician specializing in neurosurgery, for a second opinion evaluation to determine appellant's work capability and diagnoses.

A November 25, 2014 FCE found appellant was capable of performing a light-to-medium job and could safely lift 28 pounds with a 13-pound overhead restriction. The FCE noted no limitations with standing during the test. Appellant reported his job required occasional standing while the functional job description noted up to seven hours of standing.

[4] OWCP assigned File No. xxxxxx145.

[5] OWCP assigned File No. xxxxxx817. On August 27, 2013 OWCP combined File No. xxxxxx817 with File No. xxxxxx145, with the latter file number designated as the master file.

In a December 2, 2014 report, Dr. Barakat reviewed medical evidence and provided medical and employment injury histories and examination findings. He diagnosed L5-S1 degenerative disc disease with spondylolisthesis which he opined had been successfully treated with interbody fusion surgery. Dr. Barakat opined that appellant was capable of performing the job of mail processing clerk. He further noted that appellant recently underwent an FCE and if there was a conflict then he would need to reconsider appellant's limitations. Lastly, Dr. Barakat reported that appellant was capable of working an eight-hour day.

On January 29, 2015 the employing establishment offered appellant the modified job of mail processing clerk. The duties of the position were loading, culling, and feeding mail; clearing mail jams and sweeping bins; standing, walking, bending, and twisting; and labeling and dispatching trays with a lifting restriction of 10 pounds.

Appellant accepted the job offer under duress and returned to work on March 7, 2015.

In a March 16, 2015 report, Dr. Henry A. Posada, a treating chiropractor, reported that appellant had been under his care for back pain. He provided work restrictions in his report and a March 18, 2015 duty status report (Form CA-17). On the March 18, 2015 CA-17 form, Dr. Posada diagnosed a work-related herniated disc. The restrictions included no standing for more than 15 minutes every 3 hours, no bending at the waist, no twisting, and no walking more than 15 minutes every 3 hours. Lastly, Dr. Posada opined that appellant was unable to work for the next 30 days.

On March 20, 2015 appellant filed a claim for a recurrence of disability (Form CA-2a) beginning March 11, 2015. He stated that he was unable to stand for the period of eight hours.

In a May 15, 2015 report, Dr. Deutsch noted that appellant did not like the job offered based on the restrictions found in the FCE. Appellant informed Dr. Deutsch that after trying the job that he felt worse. Dr. Deutsch provided examination findings and diagnoses of obesity, lumbar radiculopathy, and grade one spondylolisthesis. He noted that appellant complained of pain on prolonged standing and recommended appellant be able to sit 15 minutes every hour. Dr. Deutsch noted that appellant could return to work on May 18, 2015.

In a letter dated May 15, 2015, Dr. Deutsch provided work restrictions of no lifting or carrying more than 28 pounds and the ability to change positions and sit 15 minutes every hour.

By decision dated June 18, 2015, OWCP denied appellant's claim for a recurrence of disability beginning March 11, 2015.

In a letter dated June 23, 2015, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on February 8, 2016.

On January 19, 2016 appellant retired on disability.

By decision dated April 5, 2016, an OWCP hearing representative affirmed the June 18, 2016 decision. He found that appellant's modified job duties were within his medical restrictions and that appellant had not established a recurrence of disability.

LEGAL PRECEDENT

A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing 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.[6] OWCP's procedures discuss the evidence necessary if recurrent disability for work is alleged within 90 days of return to duty. It is noted that the focus is on disability rather than causal relationship of the accepted condition to the work injury.[7]

The Board has held that if recurrent disability for work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and demonstrate objective medical findings that form the basis for the renewed disability for work.[8] When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[9]

ANALYSIS

OWCP accepted the conditions of lumbar strain, aggravation of lumbar spondylosis without myelopathy and lumbosacral radiculopathy and authorized lumbar spine fusion and insertion of a spine fixation device, which occurred on May 13, 2014. The record indicates that appellant accepted a January 29, 2015 job offer, which he indicated was under duress, returned to work on March 7, 2015, and stopped on March 11, 2015. By decision dated June 18, 2015, OWCP denied appellant's claim for a recurrence of disability on and after March 11, 2015, which an OWCP hearing representative affirmed in an April 5, 2016 decision.

Appellant does not allege and the record does not reflect that his light-duty job requirements had changed. Rather, he attributes his disability on March 11, 2015 to his accepted employment injuries such that he was unable to perform the standing required of the job. As noted above, when the claim for recurrence is within 90 days of a return to work, the focus is on disability, rather than causal relationship. Regarding disability, the medical evidence must provide a description of the job duties appellant cannot perform and objective evidence supporting a finding of disability.[10] The Board finds that appellant has failed to provide sufficient medical evidence showing how or why his accepted back conditions objectively worsened such that he was unable to work his modified-job assignment as of March 11, 2015.

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[6] *W.D.*, Docket No. 09-658 (issued October 22, 2009); *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013).

[8] *See G.P.*, Docket No. 14-1150 (issued September 15, 2014); *R.C.*, Docket No. 14-201 (issued May 8, 2014); *J.F.*, 58 ECAB 124 (2006).

[9] *See S.E.*, Docket No. 14-1125 (issued October 1, 2014).

[10] *See supra* note 7.

In support of his claim appellant submitted a report and letter dated May 15, 2015 from Dr. Deutsch. In his report, Dr. Deutsch noted appellant did not like the job offered based on the restrictions found in the FCE and that he felt worse after attempting to perform the job. He provided examination findings, noted appellant complained of pain on prolonged standing, and recommended appellant be able to sit 15 minutes every hour. In his letter, Dr. Deutsch provided work restrictions of no lifting or carrying more than 28 pounds and the ability to change positions and sitting 15 minutes every hour. While Dr. Deutsch provided examination findings and recommended additional work restrictions of changing positions and sitting 15 minutes every hour, he failed to provide any medical rationale or detailed explanation supporting his recommendations. Dr. Deutsch failed to explain how his examination findings supported that the additional restrictions regarding standing, particularly as the November 25, 2014 FCE found no standing restrictions. The Board notes that Dr. Deutsch's opinion is not based on objective medical findings, but rather is based on appellant's pain complaints on prolonged standing, which is insufficient to establish a recurrence of disability.[11] Dr. Deutsch failed to provide any explanation, based on objective medical evidence, of why appellant was unable to perform the modified-job assignment with only a lifting restriction of 10 pounds. The medical evidence from Dr. Deutsch is insufficient to establish his recurrence claim.

Appellant also submitted a March 18, 2016 CA-17 form and March 16, 2016 report from Dr. Posada, a chiropractor, providing work restrictions of no standing for more than 15 minutes every 3 hours, no bending at the waist, no twisting, and no walking more than 15 minutes every 3 hours. Under FECA a chiropractor is considered a physician only to the extent that the reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[12] Dr. Posada did not indicate that he obtained x-rays or diagnosed a spinal subluxation.[13] Without a diagnosis of spinal subluxation from an x-ray, a chiropractor is not considered a physician under FECA and his opinion does not constitute medical evidence.[14] Thus, Dr. Posada's reports are insufficient to support appellant's claim for recurrent disability.

On appeal, counsel contends that OWCP's decision was contrary to fact and law. Based on the findings and reasons set forth above, the Board finds counsel's arguments are not substantiated.

[11] *See V.T.*, Docket No. 14-1251 (issued April 28, 2015); *William A. Archer*, 55 ECAB 674 (2004).

[12] Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. *See R.M.*, 59 ECAB 690 (2008); *Merton J. Sills*, 39 ECAB 572 (1988).

[13] OWCP's implementing federal regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See* 20 C.F.R. § 10.5(bb).

[14] *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

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 on and after March 11, 2015 causally related to his accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 5, 2016 is affirmed.

Issued: March 10, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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