

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

B.E., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Philadelphia, PA, Employer**

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**Docket No. 16-1480
Issued: March 22, 2017**

Appearances:

*Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 11, 2016 appellant, through counsel, filed a timely appeal from a March 23, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

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.*

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of disability on August 24, 2015 causally related to the accepted January 26, 2009 employment injury.

On appeal, counsel contends that appellant has provided sufficient evidence to establish a recurrence of disability within 90 days of her return to work. He asserts that OWCP's decision should be reversed and the matter remanded for approval of the recurrence of injury. In the alternative, counsel suggests that the factual and medical evidence are sufficient to require further development and therefore OWCP's decision must be vacated and the matter remanded for such additional development.

FACTUAL HISTORY

On January 26, 2009 appellant, then a 57-year-old lead contact representative, filed a traumatic injury claim (Form CA-1) alleging that on that date she tripped ascending stairs and injured her right leg, knee, and wrist. She stopped work on the date of the injury. On March 29, 2009 OWCP accepted appellant's claim for closed dislocation subluxation at L5. Appellant received compensation benefits on the periodic rolls as of July 5, 2009. On June 1, 2011 OWCP also accepted her claim for sprain of the lumbar region of the back, closed dislocation lumbar vertebra, and aggravation of lumbar degenerative disc at L4-L5. OWCP later accepted appellant's claim for chronic pain syndrome.

In a medical report dated July 17, 2015, Dr. Laura E. Ross, a Board-certified orthopedic surgeon, indicated that appellant had spinal restriction/subluxation at T5, T6, T7, T8, L3, L4, L5, and the sacrum; thoracolumbar, lumbosacral and sacral pain; moderate muscle spasms mid thoracic, lower thoracic, left lumbar, lumbar, right lumbar, sacral, left buttock and right buttock; and that the entire spine had moderately reduced range of motion. She noted that appellant was improving because she was reporting less discomfort. Dr. Ross indicated that appellant could return to work four hours a day, that she had permanent restrictions including sitting, walking, standing, and reaching limited to four hours a day, and pushing, pulling and lifting limited to five pounds. Dr. Ross indicated that appellant would have these restrictions for eight weeks, after which time she would be able to work an eight-hour workday.

Appellant returned to work on July 17, 2015 at the employing establishment for four hours a day working under the restrictions assigned by Dr. Ross.

Appellant saw her chiropractor, Dr. Saute K. Dean, on July 21, 2015. Dr. Dean continued to diagnose subluxations of T1-3, L3-5, as well as shoulder subluxation. At that time, appellant complained of aching, numbness, tightness, throbbing, and tingling discomfort in the low back, at a level of 8 on a 1 to 10 scale, with 10 being the most severe. She noted that the discomfort increased with movement and prolonged sitting, and decreased with rest, ice, and heat. On July 28, 2015 Dr. Dean indicated that appellant rated her discomfort as level 8 at rest which may increase to a level 10, and that she was able with much difficulty to perform her normal job duties. He assessed her as better and with modest improvement.

On September 1, 2015 appellant filed a recurrence of disability (Form Ca-2A) alleging a recurrence of her January 28, 2009 injury as of August 24, 2015. She noted that she had been released to limited duty for four hours a day for eight weeks, having returned to work on July 27, 2015. Appellant alleged that her back pain, numbness, and tingling from her original injury never stopped, that she missed work on August 12, 2015 due to work injury pain, and that as she was getting dressed on August 24, 2015 for work when she noticed that her pain was worse than usual, but that she went to work and was given heat treatment by the employing establishment nurse.

In a September 4, 2015 report, Dr. Ross found limited range of motion of the left hip with tenderness to palpitation on the left lateral aspect, spasms in her lumbar spine with tenderness to palpitation, and with no new neurovascular findings bilateral lower extremities. She recommended a magnetic resonance imaging (MRI) scan of the left hip, and further consultations with specialists.

In a letter dated September 17, 2015, OWCP indicated that appellant's claim had previously been accepted for sprain of the lumbar region of the back, closed dislocation of the lumbar vertebra, degeneration of lumbar or lumbosacral intervertebral disc, and chronic pain syndrome. It described for appellant the additional evidence that was necessary to support her claim for a recurrence of disability.

A September 17, 2015 MRI scan report was interpreted by Dr. Scott G. Mattox, a Board-certified radiologist, as evincing no specific findings to suggest femoral acetabular impingement.

Appellant submitted notes from her August 24, 2015 hospital visit including notes of Dr. Ramrakshah Tiwari, an emergency room physician. The notes indicate that appellant's pain level was 10, but that she ambulated slowly with assistance. The diagnoses were sciatica and acute exacerbation of chronic back pain. Appellant was instructed to follow up with her physician.

In a statement dated October 6, 2015, appellant alleged that on August 12, 2015 she awoke with increased pain in her lower back that was intolerable, and she called her supervisor to report her back pain. She indicated that she visited her chiropractor, who treated her with heat and stimulation treatment that temporarily lessened her pain and allowed her to return to work until August 24, 2015. Appellant alleged that after August 12, 2015 her condition worsened daily even though she was working a light-duty schedule. She alleged that, on August 24, 2015, she could no longer tolerate the pain, she went to the nurses' office at the employing establishment where she received treatment, and later that day she went to the emergency room for pain treatment. Appellant stated that she called her supervisor the next day and told her that she was no longer physically able to continue working. She contended that this was not a new occupational disease, but rather a recurrence of the pain she had reported on August 12 and 24, 2015 related to her accepted work injury. Appellant noted that her accepted injury left her with constant low back pain that radiated down to her buttocks and both legs with numbness and tingling in both legs. She alleged that she never recovered from her original work injury and had received treatment from several doctors. Appellant noted that, although Dr. Ross released her to work light-duty employment four hours a day for eight weeks, before the eight weeks were

completed the pain from her original injury elevated to the point where she could no longer work.

In an August 26, 2015 note, Dr. Dean indicated that appellant had been under his care since January 26, 2009 for work-related injuries. He noted that appellant had been receiving care one to two times per week on a consistent basis to manage her chronic low back pain. Dr. Dean opined that appellant suffered an exacerbation of her existing lower back condition which led to her going to the emergency room to manage the pain on August 24, 2015. He indicated that appellant came to his office on August 26, 2015 for further evaluation and treatment. Dr. Dean noted an exacerbation of the injuries for which he had been treating her.

In an August 31, 2015 report, Dr. Susan E. Rowling, a Board-certified radiologist, interpreted x-rays of appellant's left hip as showing no fracture or misalignment. She noted that the left hip joint spaces were preserved without significant degenerative changes, but there was a persistent accessory ossification center lateral to the acetabulum. Dr. Rowling also noted a transition vertebra partially visualized at the lumbosacral junction, similar to previously.

In an October 7, 2015 report, Dr. Dean noted that appellant ranked her pain at a level 8 that may increase to a level 10. He opined that she was unable to perform her normal job duties, and was currently unable to work. Dr. Dean noted that appellant was approaching maximum medical improvement because she was reporting more discomfort. He did note that she had modest improvement as indicated in her subjective findings.

In an October 8, 2015 note, Dr. Ross indicated that appellant was seen in the emergency room on August 24, 2015 for an exacerbation of her previous disc problem of her lower back, which was a work-related injury that occurred on January 26, 2009. She opined that appellant was unable to work in any capacity due to an acute exacerbation of chronic pain syndrome. Dr. Ross also noted that appellant had a sprain of the lumbar region, closed dislocation of lumbar vertebra, and with degeneration of her lumbosacral intervertebral disc.

In an October 14, 2015 note, Dr. Stephen Boyajian, an osteopath specializing in pain management, noted that appellant had been under his care dating back to April 2009 for a work injury that occurred in January 2009. He noted that he had last evaluated appellant in May 2015 and that she had undergone treatment that only provided her with temporary relief. Dr. Boyajian concluded that appellant had since returned to the care of Dr. Ross for further evaluation and treatment.

By decision dated October 28, 2015, OWCP denied appellant's claim for a recurrence of disability. It determined that the evidence of record did not establish that appellant had a return of or increase in her disability due to a change or a material worsening of the accepted employment-related condition.

On November 4, 2015 appellant, through counsel, requested a hearing before an OWCP hearing representative.

Appellant continued to submit multiple reports with regard to her chiropractic appointments with Dr. Dean, dated from September 9, 2015 through February 11, 2016. In these reports Dr. Dean continued to opine that appellant was unable to work.

In a December 11, 2015 report, Dr. Ross noted that appellant was currently out of work and that treatment with Dr. Dean was medically necessary and causally related to the accepted employment injury of January 26, 2009. In a January 21, 2016 report, she noted that she had been treating appellant for several years for an injury to her low back that occurred on January 26, 2009. Dr. Ross noted that appellant's diagnoses were low back injury in the L4-L5 lumbar region, closed dislocation of lumbar vertebra, degeneration of lumbar/ lumbosacral intervertebral discs, and chronic pain syndrome. She opined that all of these conditions related to the original injury of January 26, 2009. Dr. Ross discussed her treatment of appellant. She noted that appellant went to the emergency room on August 24, 2015 due to an exacerbation of her previous, accepted low back work injury and there had been no new injury diagnosed. Dr. Ross opined that appellant was unable to work in any capacity at that time due to the exacerbation of her chronic pain syndrome and because she also had a sprain in her lumbar region, closed dislocation of the lumbar vertebrae, and degeneration of the lumbosacral intervertebral discs. She opined that this was not a new occupational disease, but rather the pain from her original work injury never stopped and began to increase from August 12 through 24, 2015 while she continued to try to work in the light-duty employment position at the employing establishment.

Dr. Ross noted that on August 24, 2015 appellant's pain became intolerable and she required further medical treatment at an emergency room. She opined, as appellant's treating medical provider, that her work-related medical condition worsened to a point where she was unable to do the modified work and that the worsening of the condition, without a doubt, was related to the initial injury. Dr. Ross noted that appellant had the same physical examination after August 24, 2015 as she did prior to August 24, 2015, noting that the examination was unchanged and was clearly consistent with her previous work-related injury that had occurred on January 26, 2009. She reported that no new findings were noted upon examination. Dr. Ross explained that the recurrence of appellant's injury occurred while she was doing her light work on August 12, 2015, and that she had been treated by her chiropractor whose treatment helped her to return back to work on August 24, 2015, until the pain reached an intolerant level and she went to the hospital. In a January 22, 2016 report, she indicated that appellant continued to have low back pain with unchanged neurologic findings in her lower extremities.

At the hearing held on February 17, 2016, appellant testified that she started work for the employing establishment on October 11, 1988. She described her employment and noted a prior employment injury that occurred in July 1997. Appellant noted that it had been raining and on the way back to her office she slipped on the stairs and fell about 15 stairs. She described her treatment, and noted that she was able to go back to full-duty work after this accident. Appellant noted that on January 26, 2009 she fell on some stairs entering work and hurt her knee, wrist and back. She stated that she returned to work in January 2010, but was unable to return to work full time, and ceased working on May 25, 2010. Appellant noted that she was under medical care at that time which included injections, therapy, chiropractic treatment, acupuncture, and aqua therapy. She returned to work in July 2015, when Dr. Ross agreed to allow her to work part time. Appellant noted that her doctor had initially placed restrictions on her commute so she did not go back, but that she received a letter from the employing establishment indicating that they were going to terminate her if she did not return to work immediately. She noted that for the first week of work she was getting trained while sitting and that the sitting exceeded her restrictions.

Appellant noted that she missed work on August 12, 2015 because of back numbness. She also alleged that the commute to her job exceeded her restrictions.

By decision dated March 23, 2016, the hearing representative affirmed the October 28, 2015 decision. He determined that appellant had not met her burden of proof to establish recurrent disability as of August 24, 2015.

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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³ The term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction in force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁴

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited duty position or the medical evidence of record establishes that he or she can perform the limited-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 to show that he or she cannot perform such limited-duty work.⁵ To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how or why the accepted injury or condition disabled the claimant from work on and after the date of the alleged recurrence of disability.⁶

OWCP procedures recognize that if an alleged recurrence occurs less than 90 days after a return to light or full duty, the claimant is not required to produce the same evidence as for a recurrence claimed long after apparent recovery and return to work. Therefore, in cases where recurring disability for work is claimed within 90 days or less from the first return to duty, the focus is on disability rather than causal relationship.⁷ The attending physician should describe

³ 20 C.F.R. § 10.5(x).

⁴ *Id.*

⁵ *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁶ *James H. Botts*, 50 ECAB 265 (1999).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5(a) (June 2013). *See also J.S.*, Docket No. 16-0922 (issued September 22, 2016).

the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability for work.⁸

ANALYSIS

OWCP accepted appellant's claim for a sprain of the lumbar region of the back, closed dislocation of lumbar vertebra, aggravation of lumbar degenerative disc at L4-L5, and chronic pain syndrome causally related to appellant's January 26, 2009 employment-related injury. Appellant returned to work at the employing establishment for four hours a day on July 17, 2015. She alleged that she suffered a recurrence of her accepted employment injury on August 24, 2015. Appellant denies that she suffered a new injury.

The Board finds that appellant has failed to establish a recurrence of disability. OWCP procedures provide if a claim for recurrence of disability is made within 90 days or less following the first return to duty, the focus is on disability rather than causal relationship.⁹ The Board finds that there is no objective rationalized medical evidence establishing recurrence of disability on August 24, 2015.¹⁰

In support of her recurrence claim, appellant submitted medical reports by Dr. Ross, her treating orthopedic surgeon. On July 17, 2015 Dr. Ross released appellant to return to work for four hours a day with limitations including pushing, pulling, and lifting limited to five pounds. She continued to treat appellant after she released her to return to work. In a January 21, 2016 report, Dr. Ross indicated that appellant was out of work due to the injuries she sustained as a result of the employment incident of January 26, 2009. She noted that these diagnoses included low back injury in the L4-L5 lumbar region, closed dislocation of the lumbar vertebrae, and degeneration of the lumbosacral intervertebral discs. Dr. Ross opined that this was not a new injury, but rather that appellant worked until her pain became intolerable on August 24, 2015 and she was treated at the emergency room. She opined that the medical reason for this conclusion was that appellant's examination was unchanged, that she had the same physical examination after August 24, 2015 as she did before August 24, 2015, and no new findings were noted. This report does not, however, demonstrate a recurrence of disability as Dr. Ross did not provide a rationalized medical opinion supporting an increase in disability after August 24, 2015. Dr. Ross indicated that appellant could return to work on July 17, 2015. Despite the fact that she opined that appellant was totally disabled as of August 24, 2015, she provided no objective evidence of worsening symptoms. Furthermore, Dr. Ross noted that appellant had the same physical examination findings before August 24, 2015 as she did after. Therefore, her report does not show that appellant had an onset of disability that prevented her from performing her limited-duty position.¹¹ Rather, Dr. Ross' report appears to indicate that there was no change in appellant's level of disability before and after the alleged date of recurrence other than subjective complaints of pain.

⁸ *D.K.*, Docket No. 15-665 (issued August 10, 2015).

⁹ *Supra* note 7; *see also A.P.*, Docket No. 14-1409 (issued June 17, 2015).

¹⁰ *Supra* note 8.

¹¹ *Supra* note 9.

Appellant received chiropractic treatment from Dr. Dean.¹² In a report dated August 26, 2015, Dr. Dean indicated that appellant had been under his care since January 26, 2009 for work-related injuries. He opined that she suffered an exacerbation of her existing lower back condition which led to her going to the emergency room to manage the pain on August 24, 2015. Dr. Dean indicated that appellant came to his office on August 26, 2015 for further evaluation and treatment at which time he determined that she suffered an exacerbation of the injuries for which he had been treating her. However, his reports also show similar physical findings prior to the August 24, 2015 alleged recurrence. For example, in an August 17, 2015 report, Dr. Dean indicated that appellant rated her discomfort at a level 8 with rest and that it increased to a level 10 pain with 10 being the most severe. He noted that appellant was able, with much difficulty, to perform her normal job duties. Dr. Dean noted that appellant was physically limited while lifting, bending, stooping, walking, prolonged sitting, pulling, pushing, and twisting. In his August 26, 2015 report, he noted that appellant had a discomfort level of 10 at rest and was unable to perform her normal job duties. By the time of his September 2, 2015 report, Dr. Dean noted that appellant's discomfort level was level 8 at rest which may increase to level 10, and that she was currently unable to work. He never explained how appellant's condition had been exacerbated on August 24, 2015 such that she sustained recurrent disability. As Dr. Dean's findings before and after August 24, 2015 are similar, and he referenced no objective findings showing an increased level of disability it is found that he failed to provide a rationalized explanation as to why appellant could perform her job duties, albeit with difficulty, before August 24, 2016, but at the time of his August 26, 2015 examination she was no longer able to do so. Dr. Dean appears to base appellant's inability to work solely on her subjective complaints of pain. A complaint of too much pain to work, without more, support does not establish disability for work.¹³

The remaining medical evidence does not provide a rationalized medical opinion establishing a recurrence of disability. Dr. Mattox merely interpreted a September 17, 2015 MRI scan report as evincing no specific MRI scan findings to suggest femoral acetabular impingement, his report does not address disability. Dr. Rowling interpreted x-rays of August 31, 2015 as evincing no fracture or misalignment of appellant's hip, and persistent accessory ossification center lateral to the acetabulum, and a transition vertebra partially visualized at the lumbosacral junction, similar to previously. Her report also does not address disability. The hospital report from August 24, 2015 that was signed by Dr. Tiwari indicates that appellant suffered from sciatica and an acute exacerbation of chronic back pain. This report does not address disability or explain why there was a recurrence of the initial disability. Dr. Boyajian noted that he provided treatment for pain relief, but also did not discuss any recurrence on August 24, 2015. These medical reports failed to contain rationalized medical opinion, with objective findings, explaining why appellant was unable to work her part-time light-duty job

¹² 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. *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹³ *See K.A.*, Docket No. 15-0665 (issued August 10, 2015).

beginning August 24, 2015. As such these reports lack probative value and are therefore insufficient to establish appellant's claim.¹⁴

Accordingly, appellant has submitted no probative medical opinion evidence to support her recurrence claim. The medical evidence of record is unsupported by rationalized medical evidence to demonstrate a claimed recurrence of total disability on August 24, 2015.

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 failed to meet her burden of proof to establish a recurrence of disability on August 24, 2015 due to the accepted January 26, 2009 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 23, 2016 is affirmed.

Issued: March 22, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹⁴ See *supra* note 8.