

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On September 20, 2005 appellant, then a 36-year-old customer service representative, filed a notice of traumatic injury (Form CA-1) alleging that, on September 14, 2005, she injured her right wrist, lower back, and left knee when she slipped and fell on a wet floor while in the performance of duty. She stopped work on the date of injury.

OWCP accepted the claim for brachial neuritis/radiculitis and unspecified thoracic/lumbar neuritis/radiculitis. It paid appellant wage-loss compensation and medical benefits on the supplemental rolls as of October 31, 2005 and on the periodic compensation rolls as of October 1, 2006.

On August 28, 2008 the employing establishment offered appellant a modified customer service representative position four hours a day, working half an hour at a time with half hour breaks. Appellant accepted the position on August 29, 2008.

By decision dated October 28, 2008, OWCP determined that appellant's actual earnings in the part-time modified customer service representative position fairly and reasonably represented her wage-earning capacity and reduced her compensation accordingly.

In reports dated November 4 and 7, 2014, Dr. Leonard A. Bruno, a Board-certified neurosurgeon, who had treated appellant since December 2005, noted appellant's complaint of neck pain radiating into her head with severe headaches, bilateral arm pain, and increasing vertigo. He diagnosed worsening C5-6 and C6-7 herniated discs, recommended surgery, and advised that appellant could not work from November 4, 2014 to March 1, 2015 due to the herniated discs from C5 to C7.

Appellant stopped work on November 4, 2014 and filed Form CA-7 claims for compensation beginning that day. She continued to receive compensation based on a loss of wage-earning capacity (LWEC) determination dated October 28, 2008. Dr. Bruno continued to advise that appellant could not work.

Dr. Stephen J. Dante, a Board-certified neurosurgeon, examined appellant on February 10, 2015. He reviewed imaging studies and diagnosed cervical spondylosis with radiculopathy. Dr. Dante concluded that a treatment option would be cervical decompression and fusion surgery.

In February 2015, OWCP referred appellant to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Smith was specifically asked to identify all current diagnosed conditions and explain whether they were causally related to the accepted

³ Docket No. 16-0075 (issued September 25, 2017); Docket No. 17-0608 (issued March 19, 2018).

September 14, 2005 employment injury. An addendum to a statement of accepted facts (SOAF) dated February 19, 2015 indicated that cervical sprain had also been accepted.

In a February 27, 2015 report, Dr. Smith opined that there were no objective examination findings to support appellant's complaints and nothing to suggest an ongoing soft tissue sprain of the neck or any active neuritis/radiculitis in the extremities, and that, based on multiple magnetic resonance imaging (MRI) scans, she had preexisting degenerative disease of both her neck and back. He advised that she could return to work with regard to the accepted conditions. In April 2015 OWCP specifically asked Dr. Smith to comment on whether a cervical herniated disc was a result of the September 14, 2015 employment injury and whether cervical spine surgery was appropriate. On April 8, 2015 Dr. Smith advised that, as the findings of an October 9, 2006 electrodiagnostic study were mild and more than eight years old, there was no indication for surgery without updated studies showing a progressive neurological deficit.

In reports dated March 26 to April 3, 2015, Dr. James S. Harrop, a Board-certified neurosurgeon, noted seeing appellant for a long history of chronic neck and arm pain. He described physical examination and discussed MRI scan findings. Dr. Harrop diagnosed cervical myelopathy and recommended anterior cervical fusion at C5-6 and C6-7. He requested surgical authorization.

In April 2015, OWCP determined that a conflict in medical evidence had been created between Dr. Bruno and Dr. Smith regarding whether appellant had continuing residuals of the 2005 employment injury. Accordingly, it referred appellant to Dr. William H. Simon, a Board-certified orthopedic surgeon, for an impartial evaluation. OWCP provided a SOAF that identified the accepted conditions. In a set of questions, Dr. Simon was asked, *inter alia*, to describe any diagnoses due to the employment injury and whether appellant continued to suffer residuals of the accepted conditions. OWCP also asked him whether the recommended cervical spine surgery was medically necessary.

In a June 7, 2015 report, Dr. Simon noted his review of the SOAF and medical record. He described appellant's complaints of radiating neck and low back pain, migraine headaches, dizziness, and upper extremity tingling and numbness. Examination findings included limited cervical and left shoulder range of motion, bilateral negative straight-leg raising, and tenderness to palpation of the trapezius muscles. Dr. Simon discussed the September 4, 2014 MRI scan which was initially read as showing increased herniation at C5-6 and C6-7. He reviewed this MRI scan and interpreted it as showing a large osteophyte in the foramen on the right side at C5-6. Dr. Simon noted that no other physician, except the physician who initially read this MRI scan, had diagnosed disc herniations at these levels. He diagnosed degenerative disc disease of the cervical spine, particularly at C5-6, with mild degenerative changes at C4-5 and C6-7, which had worsened with the passage of time and were not related to the September 14, 2005 work injury.⁴ Dr. Simon

⁴ Appellant had a number of cervical spine MRI scans. An October 13, 2005 scan demonstrated mild disc bulges and spurring at C4-5, C5-6, and C6-7 with possible foraminal encroachment. A September 26, 2006 scan showed disc bulging and spondylotic changes at C4-5, C5-6, and C6-7 with mild ventral impingement and mild multilevel encroachment. A May 16, 2007 scan revealed no major change from the September 26, 2006 study. An April 12, 2011 scan showed multilevel spondylosis resulting in multilevel neural foraminal stenosis and no evidence of frank disc herniation. An April 13, 2012 scan demonstrated no significant change compared to the April 2011 study. A September 4, 2014 scan showed left foraminal stenosis at C6-7 due to an eccentric disc bulge, a prominent right disc

indicated that the requested surgery, which was scheduled for June 8, 2015, was not for an employment-related condition. Rather, it was necessary for appellant's underlying degenerative disc disease. Dr. Simon concluded that the accepted conditions had resolved.

In a May 14, 2015 report, Dr. Bruno noted treating appellant since 2005 for neck and arm pain from a cervical disc herniation that also caused cervical vertigo and migraine headaches, and that, as of November 4, 2014, appellant's disc herniations were worsening. He opined that, within a reasonable degree of medical certainty, appellant had herniated cervical discs at C5-6 and C6-7, which required surgery to prevent further deterioration in her condition, further nerve damage, and increased symptoms of neck pain, arm pain, weakness, and numbness.

Dr. Harrop performed C5-6 and C6-7 anterior cervical discectomy and fusion on June 8, 2015.

By decision dated July 1, 2015, OWCP denied modification of the October 28, 2008 LWEC determination. It found that the weight of the medical evidence rested with the opinion of Dr. Simon, the impartial medical examiner, who determined that appellant's employment injury had resolved without residuals and that she could return to her modified part-time work, with regard to the accepted conditions.

In a July 31, 2015 supplemental report, Dr. Simon advised that appellant could return to modified-duty work and that any restrictions were due to the underlying cervical degenerative disc disease and were not related to the employment injury.

Appellant, through counsel, appealed the July 1, 2015 decision to the Board on October 19, 2015.

On October 27, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It found that Dr. Simon's opinion that appellant no longer had disability or residuals due to the accepted conditions constituted the weight of the medical evidence.

Appellant, through counsel, disagreed with the proposed termination and submitted additional medical evidence including a November 11, 2015 report in which Dr. Bruno recommended a slow increase in activity.

In a November 20, 2015 report, Dr. Harry A. Doyle, a Board-certified psychiatrist, concluded that, as a result of appellant's chronic pain and ongoing symptoms of anxiety and depression, appellant could not return to her former job as a customer service representative or any other full- or part-time work.

In reports dated December 22, 2015, Dr. Harrop noted seeing appellant in follow-up visit post-cervical spine surgery. He maintained that since appellant had no symptoms prior to the

herniation at C5-6, and right foraminal stenosis at C4-5. A cervical spine scan on April 14, 2015 demonstrated degenerative changes including tiny right disc protrusions at C4-5 and C5-6. A cervical spine computerized tomography (CT) scan that day revealed mild-to-moderate degenerative changes with no high-grade central or foraminal narrowing.

employment injury, and immediately after the fall had severe radicular pain, she may have had some degree of a traction injury and neuropathic pain and symptoms.

By decision dated March 3, 2016, OWCP finalized the termination of wage-loss compensation and medical benefits, effective March 6, 2016, finding that the weight of the medical evidence rested with the impartial medical opinion of Dr. Simon.

On March 28, 2016 appellant, through counsel, timely requested a hearing and submitted additional medical evidence including a March 14, 2016 report in which Dr. Bruno reported appellant's chief complaint of low back pain. He indicated that her condition was no better, noting continued right arm radiculitis, radiculopathy, and persistent radiating low back pain, migraines, and headaches. Appellant additionally submitted evidence previously of record and reports of hospitalization for the June 8, 2015 cervical spine surgery, psychiatric treatment notes, and an April 20, 2016 x-ray of the cervical spine that demonstrated surgical changes.

A hearing was held on October 27, 2016. By decision dated January 9, 2017, OWCP's hearing representative affirmed the March 3, 2016 decision. He found that the weight of the medical opinion evidence rested with Dr. Simon, the impartial medical examiner, who opined that appellant's cervical symptoms were due to her degenerative cervical condition which had worsened over time. The hearing representative further found that the evidence of record was insufficient to establish an emotional condition causally related to the September 14, 2005 employment injury.⁵

On September 25, 2017 the Board reversed the July 1, 2015 OWCP decision, finding that it was error for OWCP to determine on October 28, 2008 that a part-time modified position fairly and reasonably represented appellant's wage-earning capacity when she had been employed full time at the time of her employment-related injury on September 14, 2005.⁶

Following the Board's September 25, 2017 decision, OWCP determined that appellant's work stoppage on November 4, 2014 would be considered a recurrence of disability.

By decision dated February 22, 2018, OWCP denied appellant's claim for total disability beginning November 4, 2014. It found the weight of the medical evidence rested with the opinion of Dr. Simon, the impartial medical examiner, who advised that the work-related conditions had resolved.

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

⁵ Appellant, through counsel, appealed the January 9, 2017 decision to the Board on January 18, 2017. By decision dated March 19, 2018, the Board affirmed the January 9, 2017 decision. *Supra* note 3.

⁶ *Supra* note 3.

the illness.⁷ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the 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.⁸

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 establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, 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.⁹

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of proof to establish that the disability is related to the accepted injury. This burden requires 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.¹⁰

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing November 4, 2014, causally related to the accepted conditions of brachial neuritis/radiculitis and thoracic/lumbar neuritis/radiculitis, and cervical strain.¹¹

Appellant submitted a number of reports from Dr. Bruno, an attending Board-certified neurosurgeon, who began treating her in December 2005. In reports dated November 4 and 7, 2014, Dr. Bruno noted appellant's complaint of neck pain radiating into her head with severe headaches, bilateral arm pain, and increasing vertigo. He diagnosed worsening C5-6 and C6-7 herniated disc, recommended surgery, and advised that she could not work from November 4, 2014 to March 1, 2015 due to the herniated discs from C5 to C7. Herniated cervical discs, however, have not been accepted as caused by the September 14, 2005 employment injury. Dr. Bruno did not provide a rationalized explanation as to why the additional conditions should be

⁷ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

⁸ *Id.*

⁹ *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁰ *S.S.*, 59 ECAB 315 (2008).

¹¹ The Board notes that from the time appellant stopped work on November 4, 2014 until her wage-loss compensation and medical benefits were terminated on March 6, 2016, she continued to receive compensation based on the October 28, 2008 LWEC determination.

found to be employment related.¹² His opinion is therefore of diminished probative value in establishing a recurrence of the accepted employment injury.

On May 14, 2015 Dr. Bruno noted that appellant's disc herniations were worsening, and they required surgery to prevent further deterioration in her condition, further nerve damage, and increased symptoms of neck pain, arm pain, weakness, and numbness. On March 14, 2016 he reported appellant's chief complaint of low back pain and indicated that her condition was no better, noting continued right arm radiculitis, radiculopathy and persistent radiating low back pain, migraines, and headaches. This is the last medical report from a physician found in the record. Dr. Bruno did not explain in his reports dated November 4, 2014 to March 14, 2016 how the September 14, 2005 employment injury rendered appellant unable to perform the sedentary duties she was performing on November 4, 2014 when she stopped work. A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted exposure could result in a diagnosed condition is not sufficient to meet a claimant's burden of proof.¹³

Dr. Harrop first saw appellant in March 2015, over nine years after the employment injury. He diagnosed cervical myelopathy and performed anterior discectomy and fusion at C5-6 and C6-7 on June 8, 2015. On December 22, 2015 Dr. Harrop opined that since appellant had no symptoms prior to the employment injury and immediately after the fall had severe radicular pain, she may have had some degree of a traction injury and neuropathic pain and symptoms. While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.¹⁴ Dr. Harrop's reports lack sufficient specificity to meet appellant's burden of proof.¹⁵

Dr. Dante reviewed imaging studies and diagnosed cervical spondylosis with radiculopathy. He however offered no opinion regarding causal relationship or whether these conditions disabled appellant during the time period in question. Dr. Dante's report is therefore of no probative value.¹⁶

In a February 27, 2015 report, Dr. Smith, an OWCP referral physician, found no objective evidence to support appellant's complaints and nothing to suggest an ongoing soft tissue sprain of the neck or any active neuritis/radiculitis in the extremities. He opined that, based on multiple

¹² See *M.S.*, Docket No. 16-1907 (issued August 29, 2017).

¹³ *Id.*

¹⁴ *Patricia J. Glenn*, 53 ECAB 159 (2001).

¹⁵ See *Y.R.*, Docket No. 17-1521 (issued December 28, 2017).

¹⁶ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

MRI scans, she had preexisting degenerative disease of both her neck and back and advised that she could return to work with regard to the accepted conditions. As such, Dr. Smith's report supports a finding that appellant was not disabled as of February 27, 2015.

In April 2015, OWCP found a conflict in medical evidence between Dr. Bruno and Dr. Smith regarding whether appellant had continuing residuals of the 2005 employment injury and referred her to Dr. Simon for an impartial medical evaluation on that issue. As Dr. Simon was not asked for an opinion regarding total disability between November 4, 2014 and June 7, 2015, the date of his evaluation, his opinion would not be considered that of a referee opinion entitled to special weight,¹⁷ and he did not comment on whether the September 14, 2005 employment injury caused total disability after November 4, 2014. After his review of MRI scans, he diagnosed degenerative disc disease of the cervical spine which was not due to the September 2005 employment injury, and on July 31, 2015 advised that appellant could return to modified duty work, and that any restrictions were due to her underlying cervical degenerative disc disease which was not employment related.

When an employee returns to light-duty work, he or she has the burden of proof to establish a recurrence of disability due to the employment-related conditions, and that he or she cannot perform such light duty.¹⁸ The employee must show a change in the nature of the accepted condition or a change in the light-duty job requirements.¹⁹ The Board finds that appellant submitted no such evidence in this case. Thus, appellant has not met her burden of proof.

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 her burden of proof to establish a recurrence of total disability commencing November 4, 2014, causally related to the accepted September 14, 2005 employment injury.

¹⁷ Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a). The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321. When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *V.G.*, 59 ECAB 635 (2008).

¹⁸ *Supra* note 8.

¹⁹ *K.C.*, Docket No. 09-1666 (issued August 25, 2010).

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2018
Washington, DC

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

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

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