United States Department of Labor
Employees' Compensation Appeals Board

E.P., Appellant	)	
and	)	**Docket No. 18-1147**
	)	**Issued: August 6, 2019**
DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICES, Tunkhannock, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 15, 2018 appellant, through counsel, filed a timely appeal from a March 27, 2018 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 over 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 March 27, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability commencing January 3, 2016, causally related to his accepted May 15, 1989 employment injuries.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 7, 2003 appellant, then a 47-year-old district conservationist, filed an occupational disease claim (Form CA-2) alleging that while in the performance of duty on May 15, 1989 he injured his neck and head when a chair in which he was sitting flipped backwards onto the floor. He stopped work on the date of injury and returned to full-duty work on May 16, 1989. OWCP accepted the claim, assigned OWCP File No. xxxxxx558, for herniated cervical disc and authorized anterior cervical discectomy and fusion at C4-5 performed on February 22, 1990. It also accepted appellant's subsequent traumatic injury claim under OWCP File No. xxxxxx164 for aggravation of cervical disc disease, including residuals of a failed fusion sustained on January 26, 1990. OWCP has administratively combined his two claims, with the current file, OWCP File No. xxxxxx558, serving as the master file.

On December 6, 2016 appellant filed a notice of recurrence (Form CA-2a) alleging that he sustained a recurrence of total disability on January 3, 2016 due to his accepted May 15, 1989 employment injury. He alleged that his current symptoms were identical to those he experienced at the time of his original injury. Appellant indicated that a current magnetic resonance imaging (MRI) scan showed that his cervical fusion resulted in a spinal cord indentation at C3/C4. On the reverse side of the claim form, the employing establishment indicated that he retired on January 3, 2016.

OWCP subsequently received procedure notes dated November 16 and 30 and December 21, 2016 by Dr. Avner R. Griver, an attending Board-certified physiatrist. Dr. Griver diagnosed cervical radiculitis, cervical stenosis, cervical postlaminectomy syndrome, and cervicalgia. He administered cervical epidural steroid injections. In a physiatric impairment rating evaluation dated September 30, 2016, Dr. Griver diagnosed cervical fusion C4-5 and fibromyalgia related to appellant's 1989 employment injury, and nonwork-related psoriatic arthritis. He determined that appellant had 13 percent permanent impairment of the whole person.

OWCP also received a medical report dated November 22, 2016 from Physician Care, P.C. with an illegible signature. The report provided laboratory test results and diagnoses of cervical intervertebral disc disorder and myalgia without myelopathy.

In progress notes dated September 16 through December 19, 2016, Dr. Paul J. Herbener, a chiropractor, advised that appellant's neck condition was extremely chronic and permanent and no

[4] Docket No. 15-0458 (issued April 7, 2015); Docket No. 10-0414 (issued December 22, 2010); *Order Dismissing Appeal*, Docket No. 09-0701 (issued September 29, 2009).

substantial improvement was likely. He noted that appellant's condition showed poor response to treatment.

A report dated October 25, 2016 by Dr. Marianne J. Santioni, a rheumatologist, diagnosed psoriatic arthritis, fibromyalgia, and cervical disc disease.

By development letter dated January 18, 2017, OWCP informed appellant that the evidence submitted was insufficient to establish his recurrence claim. It included a questionnaire for his completion and requested that he provide a comprehensive medical evaluation. OWCP afforded appellant 30 days to respond.

OWCP received additional progress notes dated December 28, 2016 and January 2, 11, 18, and 25, 2017 by Dr. Herbener which continued to note that appellant had a chronic and permanent neck condition and slow improvement in his condition.

On January 29, 2017 appellant responded to OWCP's development questionnaire. He claimed that a recurrence of disability occurred during the summer of 2015. Appellant noted that he developed symptoms identical to those he experienced at the time of his May 15, 1989 employment injury. He maintained that his current condition/disability was related to his original injury. Appellant reiterated that his symptoms were identical. He also noted that he had spinal cord indentation at C3/C4. Appellant related that his condition had worsened and resulted in his total disability as indicated by Dr. John F. Mclntyre, an attending family practitioner, in a letter dated August 15, 2016. He further related that his need for medical care and his symptoms were continuous and became severe during the summer of 2015. Appellant indicated that he had developed fibromyalgia after the May 15, 1989 employment injury, which was accepted by OWCP. He further indicated that he had not participated in any hobbies or activities that would have negatively affected his accepted work-related injury condition.

Dr. McIntyre, in a letter dated February 3, 2017, noted appellant's history of injury and medical treatment. He indicated that during the summer of 2015 appellant's condition worsened requiring additional medical care by his physicians. Dr. McIntyre related that appellant's current symptoms included pain in his head, neck, arms, hands, fingers, upper back, legs, feet, and toes. Appellant also suffered from numbness and weakness in many of the same areas, including his face. His grip was negatively compromised. Appellant developed a tingling sensation in many of the referenced areas during the summer of 2015. His mobility was also compromised by his condition. Dr. McIntyre reported the findings of his January 23, 2017 examination of appellant, which confirmed that he suffered the above-noted symptoms. Additionally, he found that appellant suffered much mental stress that he attributed to his handicapped condition. Dr. McIntyre believed that cervical spinal stenosis was causing his pain. He related that appellant exhibited permanent physical limitations related to his condition. Appellant's symptoms were impacting his upper and lower extremities. Dr. McIntyre referenced MRI scan results, which showed continued deterioration in areas associated with the cervical fusion and indentation of the cord at level C3/C4. He opined that, as of the end of December 2015, appellant was no longer able to safely perform the requirements of his district conservationist position. Dr. McIntyre noted that, while under his care, he had developed physical symptoms similar to those exhibited immediately after his May 15, 1989 employment injury. Appellant's condition worsened at that time and he was currently undergoing additional medical care. He concluded that his present condition was totally related to his original injury and illness. Dr. McIntyre further concluded that, as stated in his

August 15, 2016 letter, appellant was totally and permanently disabled from work as a district conservationist.

OWCP thereafter received a prescription dated January 1, 2017 by Dr. McIntyre who diagnosed other cervical disc displacement, unspecified cervical region. Dr. McIntyre ordered continued physical therapy with spinal manipulation and massage therapy.

OWCP received an additional report February 3, 2017 by Dr. Griver who continued to diagnose cervicalgia and cervical radiculopathy and spinal stenosis. Dr. Griver also diagnosed other specified dorsopathies, and cervical region.

OWCP, by decision dated March 9, 2017, denied appellant's claim for a recurrence of disability commencing January 3, 2016. It found that the medical evidence of record was insufficient to establish a material change or worsening of his accepted work-related conditions.

OWCP subsequently received additional progress notes dated February 1 through March 1, 2017 by Dr. Herbener who restated his prior assessment of appellant's cervical condition.

On March 21, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. He submitted an additional report dated March 3, 2017 report from Dr. Griver who restated his prior cervical diagnoses.

OWCP thereafter received additional progress notes dated December 7, 2016 to July 26, 2017 from Dr. Herbener who continued to note appellant's chronic and permanent neck condition that had a slow recovery response.

In procedure notes dated May 3 and July 5, 2017, Dr. Griver administered another epidural steroid injection to treat appellant's diagnosis of cervicalgia and cervical facet syndrome. In a report dated May 12, 2017, he reiterated his prior cervical diagnoses.

In a progress note dated February 27, 2017, Jaime L. Doyle, a certified physician assistant, provided assessments of history of cervical fusion at C4-5, cervical radiculopathy, and chronic bilateral upper extremity paresthesias.

By decision dated November 27, 2017, an OWCP hearing representative affirmed the March 9, 2017 recurrence decision, finding that the medical evidence submitted was insufficient to establish that appellant was disabled from work due to a material worsening of his accepted employment-related conditions.

OWCP subsequently received reports dated August 2 through December 26, 2017 by Dr. Herbener which addressed the treatment plan for appellant's cervical and thoracic conditions.

On December 27, 2017 appellant, through counsel, requested reconsideration of the hearing representative's November 27, 2017 decision.

OWCP thereafter continued to receive reports dated December 27, 2016 through February 14, 2018 by Dr. Herbener who again addressed appellant's treatment plan for his cervical and thoracic conditions.

In an additional report dated February 1, 2018, Dr. Santioni reiterated her prior diagnoses of psoriatic arthritis, fibromyalgia, and cervical disc disease.

A report dated March 9, 2018 with an illegible signature provided a diagnosis of cervical disc disease.

OWCP, by decision dated March 27, 2018, denied modification of the November 27, 2017 decision.

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 compensable injury or illness and without an intervening injury or new exposure in the work environment.[5] This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations and which is necessary because of a work-related injury or illness is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.[6]

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.[7]

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish 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. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.[8] Where no such rationale is present, the medical evidence is of diminished probative value.[9]

[5] 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

[6] *Id.*

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

[8] *See C.C.*, Docket No. 18-0719 (issued November 9, 2018); *see also Ronald A. Eldridge*, 53 ECAB 218 (2001).

[9] *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of total disability commencing January 3, 2016, causally related to his accepted May 15, 1989 employment injuries.

Appellant submitted a report dated February 3, 2017 from Dr. McIntyre. Dr. McIntyre diagnosed cervical spinal stenosis. He indicated that he believed that the diagnosed condition was causing appellant's current pain. Dr. McIntyre advised that appellant's condition was causally related to the May 15, 1989 employment injury. He opined that appellant was permanently and totally disabled from work due to a worsening of his accepted employment injury. The Board finds that, while Dr. McIntyre's opinion is generally supportive of causal relationship, he did not provide adequate medical rationale explaining the basis of his opinion. Dr. McIntyre failed to offer a rationalized medical explanation as to how the accepted May 15, 1989 employment injury caused appellant's recurrence of disability. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how the claimed medical condition/disability was causally related to an employment injury.[10]

In a prescription note dated January 1, 2017, Dr. McIntyre diagnosed other cervical disc displacement, unspecified cervical region. However, he did not offer an opinion as to whether appellant's condition was due to the May 15, 1989 employment-related injury. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's disability/condition is of no probative value on the issue of causal relationship.[11] Thus, the Board finds that Dr. McIntyre's report and prescription are insufficient to establish appellant's recurrence claim.

Appellant also submitted a series of reports from Dr. Griver. In procedure notes dated November 16, 2016 through July 5, 2017, Dr. Griver diagnosed cervical radiculitis and stenosis, cervical postlaminectomy, and cervicalgia. He administered cervical epidural steroid injections to treat appellant's diagnosed conditions. Dr. Griver did not offer an opinion as to whether appellant's conditions were due to the May 15, 1989 employment-related injury. As noted above, the Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's disability/condition is of no probative value on the issue of causal relationship.[12] Likewise, Dr. Griver's remaining reports, which reiterated his diagnoses of cervical radiculitis and stenosis and cervicalgia and found that appellant had 13 percent permanent impairment of the whole person, do not provide an opinion on the causal relationship between appellant's condition and impairment and accepted employment-related injury.[13] For these reasons, the Board finds that his reports are insufficient to establish appellant's recurrence claim.

Further, Dr. Santioni's reports dated October 25, 2016, July 20, 2017, and February 1, 2018 also fail to provide an opinion on the cause of appellant's diagnosed cervical and pain

[10] *See G.G.*, Docket No. 18-1788 (issued March 26, 2019); *E.W.*, Docket No. 17-1988 (issued January 29, 2019).

[11] *See M.J.*, Docket No. 18-1043 (issued November 28, 2018); *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

[12] *Id.*

[13] *Id.*

conditions. The Board finds, therefore, that these reports are also insufficient to establish his recurrence claim.[14]

The progress notes and reports dated September 16, 2016 through July 26, 2017 from Dr. Herbener, a chiropractor, are of no probative medical value as he failed to diagnose spinal subluxation as demonstrated by x-ray to exist or document whether x-rays were taken.[15]

The progress note dated February 27, 2017 from Jaime L. Doyle, a certified physician assistant, likewise has no probative value. A physician assistant is not considered a physician as defined under FECA and, therefore, is not competent to provide a medical opinion.[16]

Appellant submitted reports dated November 22, 2016 and March 9, 2018 that do not bear a legible signature. Reports bearing no signature or an illegible signature cannot be identified as having been prepared by a physician and, therefore, they do not constitute competent medical opinion evidence.[17]

As appellant has not submitted medical evidence sufficient to establish a recurrence of disability commencing January 3, 2016 causally related to his May 15, 1989 work injury, the Board finds that he has not met his burden of proof.[18]

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 total disability commencing January 3, 2016, causally related to his accepted May 15, 1989 employment injury.

[14] *Id.*

[15] 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 regulations by the secretary. *See P.Q.*, Docket No. 14-1905 (issued May 26, 2015); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[16] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2); *F.D.*, Docket No. 18-0199 (issued March 20, 2019) (physician assistants are not considered physicians under FECA).

[17] *See L.F.*, Docket No. 18-0327 (issued August 17, 2018); *Merton J. Sills*, *supra* note 15.

[18] *G.G.*, *supra* note 10; *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *Alfredo Rodriguez*, 47 ECAB 437 (1996).

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 6, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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