

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

R.E., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
JAMES HALEY VETERANS MEDICAL
CENTER, Tampa, FL, Employer

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**Docket No. 20-0421
Issued: May 17, 2021**

Appearances:

Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On December 13, 2019 appellant, through counsel, filed a timely appeal from a June 27, 2019 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 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 June 27, 2019 decision, appellant submitted additional evidence to OWCP and with his/her appeal to the Board. 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 disability for the period August 22 through September 3, 2016, causally related to his accepted January 23, 2015 employment injury.

FACTUAL HISTORY

On January 26, 2015 appellant, then a 40-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on January 23, 2015 he sustained a disc herniation at L4-5 when lifting a 500-pound patient from the emergency management services stretcher to a bed while in the performance of duty. He stopped work on January 26, 2015. OWCP accepted appellant's claim for lumbar herniated nucleus pulposus (HNP) at L4-5 and subsequently expanded acceptance of his claim to include displacement of lumbar intervertebral disc without myelopathy, osseous and spondylolisthesis of the intervertebral foramina of the lumbar region, and postlaminectomy syndrome. It paid him wage-loss compensation on the supplemental rolls, effective March 12, 2015 and on the periodic rolls, effective April 5, 2015. On December 7, 2015 appellant underwent OWCP-approved lumbar surgery and stopped work again.

On March 2, 2016 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of his accepted January 23, 2015 employment injury.

In a May 27, 2016 report, Dr. Dinenberg noted his review of the SOAF and discussed appellant's history of injury. He recounted appellant's complaints of constant low back and left leg pain, as well as lower back and left lower extremity weakness. Dr. Dinenberg provided examination findings and diagnosed HNP at L4-5, status post-laminectomy discectomy with residual left lower extremity radiculopathy and moderate to severe spinal stenosis at L4-5, facet joint hypertrophy, and ligamentum flavum. He reported that appellant continued to have objective symptoms of his accepted work-related conditions. Dr. Dinenberg opined that appellant was not physically capable of performing the full duties of a nurse, but could work full-time with restrictions of lifting, pushing, or pulling up to 20 pounds for three hours per day; squatting, kneeling, and climbing with up to 10 pounds for one hour per day; twisting and bending/stooping for one hour per day; and the ability to change position from sitting to standing to walking, as needed. He completed a work capacity evaluation (Form OWCP-5c), which noted appellant's restrictions.

On July 12, 2016 the employing establishment offered appellant an alternate light-duty assignment as a registered nurse.⁴ The job offer indicated that the duties were within the restrictions specified by the second opinion physician, including: no lifting, pushing, or pulling greater than 20 pounds no more than 3 hours per day, no squatting, kneeling, and climbing greater than 10 pounds no more than 1 hour per day, twisting, and bending/stooping no more than 1 hour

⁴ The duties of the position included reporting to the nursing supervisor of the day for interdisciplinary patient assessment (IPA) or discharge assignments, completing IPA assessment, complete discharge instructions with veteran and documents in CPRS, provide customer service to all veterans, provide the completed IPA to the nurse assigned to the patient.

per day. It also indicated that appellant would be provided a computer on wheels so that he could sit or stand as needed.

Appellant accepted the light-duty job offer and on July 20, 2016 returned to full-time, modified-duty work.

In an August 19, 2016 Form OWCP-5c, Dr. Bharatkumar Patel, a Board-certified neurologist, noted diagnoses of lumbar disc stenosis. He indicated that appellant was unable to work his date-of-injury job. Dr. Patel reported that appellant had very serious residuals from his January 23, 2015 work injuries and explained that the neurovascular residuals were a consequence of his lumbar injuries. He provided restrictions of sitting intermittently for 30 minutes, along with other limitations.

In an August 31, 2016 report, Dr. Patel indicated that he had treated appellant for complaints of chronic lumbar pain radiating to both lower extremities. He reported that neurological examination revealed positive left leg motor and sensory deficit in the form of decreased sensation to pinprick in the left L4-5 and L5-S1 distribution and decreased muscle strength in the left plantar flexion, left ankle dorsiflexion, left knee flexion, and left ankle reflex. Dr. Patel diagnosed osseous and subluxation stenosis of intervertebral foramina of the lumbar region, displacement of the lumbar intervertebral disc without myelopathy, lumbar intervertebral disc disorders with radiculopathy, and muscle wasting and atrophy.

On September 7, 2016 appellant filed a claim for wage-loss compensation (Form CA-7) for total disability from for the period August 22 through September 3, 2016.

In a September 12, 2016 Form OWCP-5c, Laura Pulido, a nurse practitioner, checked a box marked "No" indicating that appellant was unable to work.

In a September 12, 2016 development letter, OWCP advised appellant that the evidence submitted was insufficient to establish total disability from August 22 through September 3, 2016 and requested that he submit additional evidence to establish that he was unable to work during the period claimed due to his January 23, 2015 employment injury. It provided a questionnaire for his completion and afforded him 30 days to respond.

In a September 29, 2016 letter, Dr. Patel referred to his previous medical reports regarding appellant's objective medical findings and diagnoses. He indicated that appellant's lumbar spine injury was chronic and reported that appellant was unable to return to work.

On October 11, 2016 OWCP received appellant's response to the September 12, 2016 development letter. In a completed questionnaire, appellant recounted that he was immediately taken off work after the January 23, 2015 date of injury and returned to modified duty on July 19, 2016. Appellant indicated that he was supposed to be seated doing admissions and discharges, but in reality he was standing and walking for eight hours per day. He recounted that his back was sore at the end of the day and that he could not feel his feet. Appellant noted that he believed that his disability was related to his original injury because he was only able to return to work for one month. He reported that he did not have any other injuries since the January 23, 2015 work-related injury and that he went to the gym for physical therapy.

In an October 14, 2016 decision, OWCP denied appellant's claim for recurrence of disability for the period August 22 through September 3, 2016. It found that he had not submitted

sufficient medical evidence from a physician establishing causal relationship between his alleged recurrence of disability and the accepted employment injury.

Appellant additionally filed form CA-7 claims for compensation for the period September 14 through October 14, 2016.

Appellant subsequently submitted letters dated October 20 and December 2, 2016 by Dr. Patel. Dr. Patel indicated that appellant suffered from chronic tenderness, muscle spasm to his lumbar spine, and neuropathies in his bilateral lower extremities as a consequence of his work-related injuries that had worsened over time and caused his left calf muscle wasting. Dr. Patel further explained that due to the length of time since the onset of appellant's lumbar injuries, the tenderness, muscle spasm, and neuropathies had moved from an acute stage to a chronic stage. He reported that appellant's worsening conditions were "consequential of the lumbar spine injury [appellant] suffered on 1/23/15." Dr. Patel continued to treat appellant for his lumbar conditions and provided reports dated December 7, 2016 and January 11, 2017.

OWCP also received an October 25, 2016 report co-signed by Dr. Sara Vizcay, a family medicine specialist, who recounted appellant's complaints of chronic low back pain radiating to both lower extremities. Upon examination of appellant's lumbar spine, Dr. Vizcay observed moderate muscle spasms and moderate pain on palpation on the right gluteal muscles. She diagnosed lumbar disc displacement with protrusion and neuritis, bilateral lower extremities radiculopathy, general anxiety secondary to chronic pain and work injuries, and reactive depression secondary to chronic pain and work injuries. Dr. Vizcay reported that appellant had neuromuscular conditions that were consequential to his work injuries. She explained that the neuropathic pain and weakness to appellant's lower extremities, specifically his left calf muscle wasting, placed him at a risk to fall, which would be detrimental to appellant and to his workplace. Dr. Vizcay continued to provide reports regarding appellant's medical treatment for his lumbar condition and left muscle wasting calf.

In a November 9, 2016 memorandum of telephone call (Form CA-110), the employing establishment informed OWCP that appellant had returned to modified-duty work.

On December 22, 2016 appellant, through counsel, requested reconsideration.

By decision dated March 22, 2017, OWCP denied modification of its prior decision.

OWCP subsequently received an August 19, 2016 report, wherein Dr. Patel indicated that appellant sustained back injuries in 2009, 2013, and most recently on January 23, 2015 when he transferred a 500-pound patient while at work. He discussed the medical treatment that appellant had received and indicated that appellant still suffered from lumbar pain, residual left foot drop, and had developed muscle atrophy in his left calf area. Dr. Patel provided examination findings and diagnosed chronic lumbalgia with bilateral lumbosacral radicular symptoms, left worse than right with residual left L4-5 sensory deficit, decreased muscle strength with decreased sensation especially in the left ankle with left calf atrophy, status-post January 23, 2015 injury and history of L5-S1 fusion in 2014, L4-5 discectomy in February 2015, and spinal cord stimulator placed in December 2015 with no help. He reported that "the emergent symptoms of foot drop caused by the lumbar pathology condition caused by his work injury of January 23, 2015 rendered this patient temporarily totally disabled at this time."

Appellant subsequently submitted medical evidence, including progress reports and OWCP-5c forms regarding continued treatment for his lumbar conditions. He also underwent additional diagnostic testing, including a July 14, 2017 electromyography and nerve conduction velocity (EMG/NCV) study; an August 3, 2017 lumbar spine computed tomography (CT) scan; and an August 3, 2017 lumbar myelogram.

On March 22, 2018 appellant, through representative, requested reconsideration.

In a June 19, 2018 decision, OWCP denied modification of its prior decision.

OWCP thereafter received a June 19, 2018 handwritten prescription note by Dr. Patel recommending physical therapy for low back pain and left leg weakness.

Appellant submitted a March 20, 2017 report by Dr. Vizcay who indicated that appellant was treated for follow-up of his lumbar condition and left muscle wasting calf. Dr. Vizcay noted lumbar spine examination findings of moderate muscle spasms and moderate pain on palpation. She diagnosed lumbar disc displacement with protrusion and neuritis, bilateral lower extremities radiculopathy, general anxiety and secondary to chronic pain and work injuries, and reactive depression secondary to chronic pain and work injuries.

On June 19, 2019 appellant, through representative, requested reconsideration.

By decision dated June 27, 2019, OWCP denied modification of the June 19, 2018 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.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. The 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

⁵ 20 C.F.R. § 10.5(x); *T.J.*, Docket No. 18-0831 (issued March 23, 2020); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

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 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

OWCP's procedures require that in cases where recurrent disability for work is claimed within 90 days or less from the first return to duty, the claimant is not required to produce the same evidence as a recurrence claimed long after apparent recovery and return to work.¹⁰ Thus, in cases where a recurrence is claimed within 90 days of the first return to duty, the focus is on disability rather than causal relationship of the accepted condition(s) to the work injury.¹¹

ANALYSIS

The Board finds that this case is not in posture for decision.

The record reflects that appellant returned to a full-time, modified-duty position on July 20, 2016. He stopped work again on August 22, 2016 and subsequently filed a Form CA-7 claiming wage-loss compensation for total disability until September 3, 2016. In his October 11, 2016 response to OWCP's development letter, appellant indicated that when he returned to modified duty in July 2016 he was supposed to be seated doing admissions and discharges, but in reality he was standing and walking for eight hours per day. Appellant alleged that his back was sore at the end of the day and that he could not feel his feet.

The Board finds that, in this case, the factual evidence of record is insufficient to determine whether appellant sustained a recurrence of disability due to a change to his light-duty position.¹² Accordingly, the evidence of record must be fully developed so that it contains accurate information regarding appellant's light duty position in order to determine whether he sustained a recurrence of disability for the period August 22 through September 3, 2016 because of a change to his limited-duty assignment.¹³

⁸ *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *C.C.*, Docket No. 18-0719 (issued November 9, 2018); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

⁹ *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013); *see also R.W.*, Docket No. 17-0720 (issued May 21, 2018).

¹¹ *K.R.*, Docket No. 19-0413 (issued August 7, 2019).

¹² *See P.H.*, Docket No. 20-0039 (issued April 23, 2020); *L.F.*, Docket No. 19-0519 (issued October 24, 2019); *M.S.*, Docket No. 18-0130 (issued September 17, 2018).

¹³ *See D.M.*, Docket No. 18-0527 (issued July 29, 2019); *J.G.*, Docket No. 17-0910 (issued August 28, 2017); *M.A.*, Docket No. 16-1602 (issued May 22, 2017).

On September 12, 2016 OWCP requested, in a development letter, that appellant provide additional evidence regarding his wage-loss compensation claim for total disability. In an October 11, 2016 response, appellant indicated that he was supposed to be seated doing admissions and discharges, but in reality he was standing and walking for eight hours per day. He recounted that his back was sore at the end of the day and that he could not feel his feet. The Board notes, however, that OWCP did not request that the employing establishment provide information regarding whether appellant's limited-duty employment position was modified during the period in which he has claimed wage-loss compensation. Specifically, the record is unclear regarding whether appellant's July 2016 modified-duty nurse position allowed him to sit or stand as needed, as required by Dr. Dinenberg's May 27, 2016 second opinion report.

Is it well established that, proceedings under FECA are not adversarial in nature and, while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁴ Accurate information regarding whether appellant's limited-duty assignment was within his work restrictions is essential to determine whether he sustained a recurrence of total disability.¹⁵ This evidence is of the character normally obtained from the employing establishment and is more readily accessible to OWCP than to him.¹⁶

On remand, OWCP shall request that the employing establishment clarify whether appellant's-duty assignment was modified during the period in which he has claimed wage-loss compensation and whether it was within the medical restrictions provided in Dr. Dinenberg's May 27, 2016 report. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁴ *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

¹⁵ See *K.T.*, Docket No. 17-0009 (issued October 8, 2019); *M.S.*, *supra* note 13; *Y.R.*, Docket No. 10-1589 (issued May 19, 2011).

¹⁶ *J.T.*, Docket No. 15-1133 (issued December 21, 2015); *J.S.*, Docket No. 15-1006 (issued October 9, 2015).

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 17, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board