

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

T.H., Appellant)	
)	
and)	Docket No. 21-0969
)	Issued: August 24, 2023
U.S. POSTAL SERVICE, ELIZABETH POST OFFICE, Elizabeth, NJ, Employer)	
)	

Appearances:

Robert D. Campbell, 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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 7, 2021 appellant, through counsel, filed a timely appeal from a March 31, 2021 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 the 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 31, 2021 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 her burden of proof to establish a recurrence of disability commencing June 9, 2020 causally related to her accepted December 23, 2019 employment injuries.

FACTUAL HISTORY

On January 2, 2020 appellant, then a 36-year-old mail carrier, filed a traumatic injury claim (Form CA-1)⁴ alleging that on December 23, 2019 she injured her left knee, right leg, and lower back when she tripped and fell while ascending stairs in the performance of duty. She stopped work on December 23, 2019 and returned to full-time light-duty work on December 28, 2019. OWCP accepted the claim for internal derangement of the left knee, abrasion of the right lower leg, and strain of the muscle, tendon, and fascia of the lower back.

On May 6, 2020 Dr. Naomi Gold, an osteopath, Board-certified in physical medicine and rehabilitation, examined appellant for back pain resulting from her December 23, 2019 employment injury. She diagnosed low back pain, lumbago with sciatica, bilaterally, and strain of the muscle, fascia, and tendon of the lower back. Dr. Gold noted that appellant was “full duty” considering only her low back.

In a May 12, 2020 note, Dr. David E. Rojer, a Board-certified orthopedic surgeon, examined appellant due to bilateral knee pain and severe back and neck pain due to her December 2019 employment injury. He indicated that she was working with restrictions and advised that there was no “change in work status.”

Appellant received physical therapy from May 2020 through March 2021.

On June 3, 2020 Dr. Kumar Sinha, a Board-certified orthopedic surgeon, noted appellant’s history of injury in December 2019 with resultant knee and back pain. He also indicated that appellant fell at work on May 15, 2020 and that since that time she had experienced worsening back, left upper extremity, and neck pain. Dr. Sinha diagnosed a cervical sprain and opined that the initial fall had caused a lower back injury and that the second fall resulted in a “worsening of the lower back symptomatology.”

On June 9, 2020 Dr. Rojer examined appellant and noted that she sustained an additional injury on May 15, 2020 when she fell at work.

⁴ Appellant filed a second traumatic injury claim on May 19, 2020 alleging that on May 15, 2020 she injured her upper back and neck when she tripped over several buckets while in the performance of duty. OWCP assigned this claim OWCP File No. xxxxxx108. Appellant stopped work on May 16, 2020. By decision dated August 20, 2020, OWCP denied this claim finding that she had not established causal relationship between her diagnosed conditions and her accepted May 19, 2020 employment incident. Appellant requested a review of the written record by a representative of OWCP’s Branch of Hearings and Review on September 1, 2020. By decision dated January 19, 2021, OWCP’s hearing representative affirmed the August 20, 2020 OWCP decision. Counsel did not request review by the Board of the January 19, 2021 decision in the June 7, 2021 appeal, and this issue is not currently before the Board. 20 C.F.R. § 501.3(c). On January 20, 2021 OWCP File Nos. xxxxxx108 and xxxxxx586 were administratively combined with the latter claim serving as the master file.

In a June 23, 2020 note, Dr. Rojer observed diffuse sensitivity in the left knee, as well as the cervical and lumbar spine. He opined that appellant was totally disabled.

Beginning on July 1, 2020 appellant filed claims for compensation (Form CA-7) requesting wage-loss compensation starting June 9, 2020. The employing establishment noted that she returned to full-time, light-duty work on December 28, 2020 and had worked until she experienced another employment incident on May 15, 2020. On June 9, 2020 appellant reported that she was totally disabled.

On July 7, 2020 appellant filed a notice of recurrence (Form CA-2a) for medical treatment and disability beginning June 9, 2020 causally related to her December 23, 2019 employment injury. She stopped work on June 9, 2020. Appellant alleged that she experienced increased pain and disability in her left knee, lower back, and right leg. She also indicated that she had injured her neck and upper back on May 15, 2020 in the performance of duty.

In a July 10, 2020 development letter, OWCP advised appellant of the definition of a recurrence of disability and requested that she provide additional factual and medical evidence in support of her claim. It provided a questionnaire for her completion and afforded her 30 days to submit the necessary information.

Subsequently, OWCP received a June 9, 2020 note from Dr. Rojer, who diagnosed left knee pain, contusion, and effusion, as well as synovial cyst of the popliteal space. Dr. Rojer also diagnosed low back pain and intervertebral disc disorders with radiculopathy, lumbosacral region. He found that appellant was totally disabled.

On July 8, 2020 Dr. Rojer noted that he was treating appellant for her left knee condition and not for low back pain. In a separate report of even date, he diagnosed left knee pain, contusion, and effusion with synovial cyst of the popliteal space and low back pain with a new diagnosis of intervertebral disc disorders with radiculopathy in the lumbosacral region. In a duty status report (Form CA-17) of even date, Dr. Rojer opined that appellant was disabled from employment.

In a July 10, 2020 report, Dr. Sinha discussed appellant's complaints of neck and low back pain and noted that at the last evaluation he had attributed the injury to the cervical spine to a fall in May 2020. He noted that she had originally sustained an injury in 2019. Dr. Sinha indicated that appellant related that her neck and lumbar pain increased after her fall in May 2020 but advised that he was only treating her upper back. He opined that her neck and upper back condition were due to the fall and found that she could perform light-duty work.

On July 22, 2020 Dr. Rojer discussed appellant's history of injuries in December 2019 and May 2020. He provided findings on examination of the left knee. Dr. Rojer noted that clarification was required regarding whether her lumbar spine condition was covered under workers' compensation.

On August 5, 2020 appellant completed the development questionnaire and asserted that she sought treatment from Dr. Rojer on June 9, 2020 due to increased pain from her left knee and lower back, the same areas injured on December 23, 2019. She also reported her May 15, 2020 employment incident.

In an August 25, 2020 development letter, OWCP requested that appellant submit additional evidence in support of her claim for wage-loss compensation, including medical documentation supporting that she was disabled from work beginning June 9, 2020 due to the accepted December 23, 2019 employment injury. It afforded her 30 days to submit the requested evidence.

Thereafter, OWCP received an August 24, 2020 report from Dr. James E. Patti, a Board-certified orthopedic surgeon, who examined appellant due to her December 23, 2019 low back injury. Dr. Patti reported that appellant had fallen down three flights of stairs on that date. He diagnosed lumbar sprain and right-side sciatica. Dr. Patti attributed these conditions to appellant's December 23, 2019 employment injury and opined that she was totally disabled.

On September 8, 2020 appellant underwent a lumbar magnetic resonance imaging (MRI) scan which demonstrated no disc bulges or herniations. Her MRI scan demonstrated mild facet hypertrophy at L3-4 and L4-5 with mild neural foraminal narrowing.

In a note dated September 23, 2020, Dr. Rojer found that appellant had reached maximum medical improvement with regard to her left knee injury that had occurred in December 2019. He reported that she could return to try to resume full duty with no restrictions within two weeks.

On September 24, 2020 counsel discussed the medical evidence submitted and asserted that appellant had established that she sustained a recurrence of disability beginning June 9, 2020 due to a worsening of her lumbar spine condition.

On October 1, 2020 appellant submitted an undated narrative statement and attributed the recurrence of her low back pain and development of sciatica to the six-month delay in treatment. She noted that she returned to limited duty until May 15, 2020, when she fell at work injuring her upper extremities. Appellant reported that after May 15, 2020 her back pain increased and traveled to her right leg in the form of sciatica. She stopped work due to these conditions.

By decision dated October 8, 2020, OWCP denied appellant's claimed recurrence of disability finding that she had not submitted medical evidence establishing total disability from work due to a material change in her accepted December 23, 2019 employment injury.

In work notes dated October 7, and 21, 2020, Dr. Patti opined that appellant was totally disabled due to her diagnosed conditions of lumbar sprain and right sciatica related to her December 23, 2019 employment injury which he described as falling down three flights of stairs. He released appellant to return to light-duty work on October 28, 2020.

On October 22, 2020 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In a report dated December 14, 2020, Dr. Patti advised that he was treating appellant for a lumbar spine injury that occurred when she fell down three flights of stairs at work. He diagnosed right sciatica and persistent lumbar pain. Dr. Patti provided work restrictions. He opined that appellant's lumbar pain and sciatica was caused by the mechanism of the fall which created postural changes beyond the normal physiological limits leading to injury. Dr. Patti concluded that appellant's lumbar conditions were precipitated by her fall on December 23, 2019 and required further medical treatment.

In a supplemental report dated January 5, 2021, Dr. Patti clarified that appellant did not fall down the stairs, but instead tripped and fell forward. He amended his prior reports, but noted that his opinions remained unchanged.

The record also contains unrelated medical reports dated January 22, February 8, March 6 and 11, May 18, September 23, November 2, and December 14, 2020 from Dr. Patti regarding a different patient. These notes are erroneously associated with this OWCP file.

In a note dated February 24, 2021, Dr. Patti again provided a history of appellant sustaining an injury on December 23, 2019 when she fell down three flights of stairs. He reviewed appellant's September 8, 2020 MRI scan and found no herniated disc and no fractures. Dr. Patti diagnosed lumbar sprain, right sciatica, and other intervertebral disc disorders, lumbar region.

By decision dated March 31, 2021, OWCP's hearing representative affirmed the October 8, 2020 OWCP decision. He improperly reviewed the January 22, February 8, March 6 and 11, May 18, September 23, November 2, and December 14, 2020 notes from Dr. Patti regarding a different patient in evaluating the medical evidence in appellant's claim. The hearing representative noted that appellant sustained a new traumatic back and upper extremity injury on May 15, 2020 which constituted an intervening event that had been inadequately addressed by the medical evidence.⁵

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.⁶ 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.⁷

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

⁵ In a letter dated March 25, 2021, counsel requested that appellant's claim be expanded to include the additional conditions of right sciatica, other intervertebral disc disorders, lumbar regions, lumbar disc displacement without myelopathy, and lumbar radiculopathy. OWCP's hearing representative explicitly provided that he had not considered appellant's claim for expansion and directed her to pursue this claim through OWCP.

⁶ 20 C.F.R. § 10.5(x); *T.H.*, Docket No. 21-0751 (issued September 29, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁷ *Id.*

condition that results from a new injury, even if it involves the same part of the body previously injured.⁸

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.⁹ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹⁰

ANALYSIS

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

Appellant stopped work on December 23, 2019 and returned to full-time modified employment on December 28, 2019. She has not contended, and there is no evidence, that the employing establishment changed or withdrew her limited-duty position. Appellant, therefore, has the burden of proof to provide medical evidence that she was disabled from work due to her accepted December 23, 2019 employment injury.¹¹

OWCP's hearing representative, however, inappropriately relied upon Dr. Patti's unrelated medical reports dated January 22, February 8, March 6 and 11, May 18, September 23, November 2, and December 14, 2020, which discuss the physical findings of a different patient, in reaching the March 31, 2021 decision.

The Board finds that the evidence upon which OWCP explicitly relied in denying appellant's claim was not in fact medical evidence related to appellant, but rather was evidence erroneously submitted by Dr. Patti regarding an altogether different patient and completely unrelated and irrelevant to appellant's medical history and condition.

Accordingly, the Board will remand the case for OWCP to review only the evidence submitted in support of appellant's alleged recurrence of disability commencing June 9, 2020 causally related to her accepted December 23, 2019 employment injuries and to make findings of fact based on the evidence properly before it and issue an appropriate decision. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *R.E.*, Docket No. 20-0421 (issued May 17, 2021); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

⁹ *R.C.*, Docket No. 20-1637 (issued September 24, 2021); *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

¹⁰ *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹¹ *See S.P.*, Docket No. 21-0380 (issued November 22, 2022); *N.B.*, Docket No. 21-0710 (issued August 19, 2022); *Cecelia M. Corley*, 56 ECAB 662 (2005).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2021 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: August 24, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board