

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

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| V.J., Appellant |) | |
| |) | |
| and |) | Docket No. 24-0171 |
| |) | Issued: April 24, 2024 |
| SOCIAL SECURITY ADMINISTRATION, |) | |
| REGION IV, Atlanta, GA, Employer |) | |
| |) | |

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 13, 2023 appellant, through counsel, filed a timely appeal from a November 27, 2023 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.

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 has met her burden of proof to establish a recurrence of disability for the period January 24 through April 25, 2022, causally related to her accepted February 3, 2016 employment injury.

FACTUAL HISTORY

This case has previously been before the Board regarding different issues.³ 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 February 8, 2016 appellant, then a 56-year-old social insurance specialist, filed a traumatic injury claim (Form CA-1) alleging that on February 3, 2016 she injured her right hand, right shoulder, hips, and lower back when she fell out of a chair and onto the floor while in the performance of duty. She stopped work on February 4, 2016 and returned to part-time, modified duty for four hours per day on February 10, 2016. OWCP accepted appellant's claim for lower back contusion, lower back and pelvis contusion, and sprain of the sacroiliac (SI) joint. On January 30, 2018 appellant underwent OWCP-authorized SI joint stabilization surgery. She returned to full-time modified duty on April 3, 2018. OWCP paid appellant wage-loss compensation on the supplemental rolls.⁴

In a report dated January 25, 2022, Dr. Mark Dumonski, a Board-certified orthopedic surgeon, noted appellant's complaints of left leg pain. He indicated that his office had been treating appellant for left radiculopathy secondary to facet cyst at L4-5 in the presence of spinal stenosis and spondylolisthesis. Dr. Dumonski reported that, about one week ago, appellant's left leg pain returned "with a vengeance" and her pain was 90 percent back to pre-injection levels. He diagnosed recurrent left radiculopathy symptomatology with known L4-5 spinal stenosis, instability, and left-sided facet cyst. Dr. Dumonski reported that there was no change to appellant's permanent work note and restrictions.

In a report and work status note dated February 25, 2022, Dr. Dumonski noted that appellant informed him that she was in so much pain that she found it very difficult to work. On physical examination, he observed positive straight leg raise testing on the left and tenderness to palpation throughout the lumbar region. Dr. Dumonski diagnosed recurrent left radiculopathy symptomatology with recent progression into right leg pain. In a separate work status note of the same date, he reported that appellant was out of work until March 18, 2022. Dr. Dumonski also requested that she be excused from work from February 7 through 25, 2022.

In a report dated March 1, 2022, Dr. David A. Thompson, a Board-certified orthopedic hand surgeon, indicated that appellant was evaluated for problems with her right hand. He discussed her medical history and noted physical examination findings of no generalized upper

³ Docket No. 19-1225 (issued December 17, 2019); Docket No. 19-1789 (issued April 8, 2020).

⁴ By decision dated June 3, 2021, OWCP granted appellant a schedule award for 21 percent permanent impairment of the left lower extremity. The period of the award ran for 60.48 weeks from January 30, 2021 to March 29, 2022.

extremity edema or lymphadenopathy. Dr. Thompson diagnosed healed right wrist sprain, status-post right long finger trigger release with abnormal digital activation sequencing, right dorsal wrist tenosynovitis enlargement, left trapeziometacarpal osteoarthritis, and Dupuytren's versus pseudo-Dupuytren's, right greater than left. He indicated that all interested parties should consider placing appellant out of work entirely if no work was available within her restrictions.

Appellant submitted intra-articular injection procedure reports dated March 3 and 17, 2022.

In a work status note dated March 21, 2022, Dr. Dumonski indicated that appellant should remain out of work until her follow-up visit on March 25, 2022.

In a report and work status note dated March 28, 2022, Dr. Dumonski indicated that appellant returned with complaints of pain in her back and bilateral legs. He noted that she was currently not working. On physical examination, Dr. Dumonski observed tenderness diffusely throughout the low back. He diagnosed multilevel facet arthropathy with a lumbar degenerative scoliosis and lumbar spinal stenosis with claudication. Dr. Dumonski recommended that appellant remain out of work until a functional capacity evaluation (FCE) was completed.

On April 12, 2022 appellant underwent an FCE, which indicated that she could work in a sedentary capacity with restrictions of occasional lifting, carrying, pushing and pulling up to 10 pounds; occasional sitting and overhead reaching; infrequent standing, walking, and stepping; and no overhead lifting, leg lifting, bending, squatting, kneeling, climbing, or crawling.

Appellant submitted an April 14, 2022 pelvis computerized tomography report, which noted moderate osteoarthritis of the left SI joint, mild osteoarthritis of the right SI joint, and severe left and moderate right facet arthropathy at L5-S1.

In a report and work status note dated April 19, 2022, Dr. Dumonski indicated that appellant was seen to review the results of her April 12, 2022 FCE. He reported that she tested overall in the sedentary physical demand level for an eight-hour day with occasional sitting and infrequent standing and walking. Dr. Dumonski provided examination findings and diagnosed multilevel facet arthropathy with lumbar degenerative scoliosis and lumbar stenosis at L4-5 with instability. He indicated that appellant could return to work on April 25, 2022 according to the restrictions of the April 12, 2022 FCE.

In a work status note dated April 25, 2022, Dr. Troy C. Dawley, an osteopath and Board-certified neurosurgeon, indicated that appellant was currently under his care and was unable to return to work that day.

On April 26, 2022 appellant returned to modified duty.

In a report dated June 6, 2022, Dr. David Spivey, Board-certified in family medicine, noted appellant's complaints of chronic low back and leg pain and reviewed the medical treatment that she had received. He diagnosed chronic pain syndrome, long-term use of opiate analgesic, history of lumbar laminectomy, lumbar postlaminectomy syndrome, chronic left SI joint pain, status-post fusion of SI joint, chronic low back pain, chronic pain of the left lower extremity, numbness and tingling of the left lower extremity, and left leg weakness.

On May 31, 2022 appellant filed a notice of recurrence (Form CA-2a) alleging that on January 24, 2022 she stopped work due to her accepted February 3, 2016 employment injury. She noted that she returned to work on April 26, 2022. Appellant indicated that her condition worsened in late December 2021 through early January 2022. She reported that her radiculopathy and bilateral back pain increased to the point that she was unable to work a full shift, alternating from sitting to standing. Appellant explained that the radiculopathy was determined to result from the SI joint dysfunction. She noted that an FCE showed evidence of a deterioration in her ability to work under normal conditions.

In a report dated June 29, 2022, Dr. Spivey reviewed appellant's history and diagnosed chronic pain syndrome, history of lumbar laminectomy, lumbar postlaminectomy syndrome, chronic left SI joint pain, status-post fusion of SI joint, chronic low back pain, chronic pain of the left lower extremity, numbness and tingling of the left lower extremity, and left leg weakness.

In a development letter dated July 18, 2022, OWCP informed appellant of the deficiencies of her recurrence claim. It advised her of the type of additional factual and medical evidence needed and afforded her 30 days to submit the necessary evidence.

In a progress note dated July 27, 2022, Dr. Spivey recounted appellant's complaints of chronic low back and leg pain. He reviewed her history and provided examination findings. Dr. Spivey diagnosed chronic pain syndrome, long-term use of opiate analgesic, history of lumbar laminectomy, lumbar postlaminectomy syndrome, chronic left SI joint pain, status-post fusion of SI joint, chronic low back pain, chronic pain of the left lower extremity, numbness and tingling of the left lower extremity, and left leg weakness.

In a work capacity evaluation (Form OWCP-5c) dated August 16, 2022, Dr. Dumonski indicated that appellant could work full-time, sedentary duty. He noted diagnosed conditions of SI joint dysfunction and lumbar contusion.

By decision dated August 24, 2022, OWCP denied appellant's recurrence claim, finding that she failed to establish a material change/worsening in her accepted work-related conditions.

On September 1, 2022 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on January 4, 2023.⁵

Appellant continued to receive treatment for her low back pain symptoms. She submitted progress notes dated August 25 and October 5, 2022 by Dr. Spivey, an after-visit summary, and procedure reports dated September 16, 2022 through March 6, 2023, which noted that she was treated for spinal stenosis of the lumbar region with radiculopathy and received lumbar injections.

OWCP also received progress notes dated June 14, 2022 through March 7, 2023 by Dr. Oren N. Gotfried, a Board-certified neurosurgeon, who treated appellant for severe back pain radiating down her left leg. Dr. Gotfried reviewed her history and provided examination findings.

⁵ Appellant testified that she retired from federal service on August 31, 2022.

By decision dated March 16, 2023, OWCP's hearing representative affirmed the August 24, 2022 decision.⁶

On July 19, 2023 OWCP referred appellant, the medical record, a statement of accepted facts and a series of questions, to Dr. Seth L. Jaffe, an osteopath and Board-certified orthopedic surgeon, for a second opinion examination regarding the nature of her conditions resulting from the February 3, 2016 employment injury and her current work capacity. In a report dated August 29, 2023, Dr. Jaffe reviewed her history of injury and noted her accepted conditions of lower back contusion and SI joint dysfunction. He indicated that appellant continued to complain of pain in the lower back into the left thigh and leg. On examination of her lumbar spine, Dr. Jaffe observed tenderness to palpation and with range of motion. Sensation examination was intact to light touch. Dr. Jaffe diagnosed lumbar spondylosis, SI joint dysfunction of the left side, and bulging lumbar disc. He reported that appellant had reached maximum medical improvement (MMI) with treatment and care and recommended that she work light duty. Dr. Jaffe completed a Form OWCP-5c, which indicated that she could work full time with restrictions of no bending/stopping, lifting more than 30 pounds, and climbing.

Appellant submitted procedure and follow-up reports dated May 9 through August 17, 2023, which demonstrated that she received intra-articular injections in her lumbar spine and thoracic spinal cord stimulator for treatment of chronic low back pain.

OWCP also received emergency department records dated April 23, 2023, which indicated that appellant was evaluated for complaints of lower back pain radiating down her left leg and discharged with diagnoses of lumbar back pain and lumbar degenerative disc disease.

In a progress note dated September 1, 2023, Dr. Gottfried reviewed appellant's history and noted her complaints of intermittent worsening lower back pain. On examination of the lumbar spine, he observed no new motor deficit and decreased sensation in the left L5 pattern.

On September 27, 2023 appellant, through counsel, requested reconsideration.

By decision dated November 27, 2023, OWCP denied modification of the prior decision.⁷

LEGAL PRECEDENT

An employee seeking benefits under FECA⁸ has the burden of proof to establish the essential elements of his or her claim, including the fact that any disability or specific condition

⁶ In a letter dated April 11, 2023, appellant, through counsel, requested expansion of the acceptance of her claim to include lumbar spondylosis without myelopathy.

⁷ OWCP noted that this decision superseded a November 9, 2023 OWCP decision, which also denied modification of its prior decision.

⁸ *Supra* note 2.

for which compensation is claimed is causally related to the employment injury.⁹ The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.¹⁰ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.¹¹ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.¹²

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 that had resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment. 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.¹³

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.¹⁴ Where no such rationale is present, the medical evidence is of diminished probative value.¹⁵

ANALYSIS

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

In his August 29, 2023 second opinion report, Dr. Jaffe diagnosed lumbar spondylosis, SI joint dysfunction of the left side, and bulging lumbar disc. He reported that appellant had reached MMI with treatment and care and opined that she could work full-time, modified duty. Dr. Jaffe,

⁹ *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

¹⁰ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

¹¹ *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

¹² *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

¹³ 20 C.F.R. § 10.5(x); *see D.T.*, Docket No. 19-1064 (issued February 20, 2020).

¹⁴ *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

¹⁵ *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

however, was not asked to address and he did not specifically discuss the dates she claimed to be disabled due to a recurrence of her accepted February 3, 2016 employment injury.

It is well established that, proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁶ Once it undertakes development of the record, OWCP must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁷ As it undertook development of the evidence by referring appellant to an OWCP second-opinion examiner, it had an obligation to do a complete job and obtain a proper opinion and report that would resolve the issue in this case.¹⁸

On remand, OWCP shall obtain a supplemental opinion from Dr. Jaffee regarding whether appellant's claimed recurrence of disability from work for the period January 24 through April 25, 2022 was causally related to her accepted February 3, 2016 employment injury. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹⁶ See *C.L.*, Docket No. 20-1631 (issued December 8, 2021); *J.C.*, Docket No. 20-0064 (issued September 4, 2020); *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769-71.

¹⁷ *Id.*; see also *J.C.*, Docket No. 21-1216 (issued April 19, 2022); *S.A.*, Docket No. 18-1024 (issued March 12, 2020).

¹⁸ See *P.C.*, Docket No. 23-0845 (issued November 15, 2023) (the Board remanded the case because OWCP failed to request that OWCP second opinion examiner discuss the dates of the claimant's claimed recurrence of intermittent disability); see also *G.M.*, Docket No. 19-1931 (issued May 28, 2020); *W.W.*, Docket No. 18-0093 (issued October 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2023 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: April 24, 2024
Washington, DC

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

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

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