

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

S.J., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, New York, NY, Employer**

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**Docket No. 12-1087
Issued: December 27, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 19, 2012 appellant filed a timely appeal from an October 26, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying his recurrence claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant established that he sustained a recurrence of disability on September 30, 2010 due to his accepted July 29, 2007 traumatic injury.

FACTUAL HISTORY

On July 30, 2007 appellant, then a 33-year-old federal corrections officer, filed a traumatic injury claim (Form CA-1) alleging that on July 29, 2007 he sustained a lower back and right shoulder injury during a cell extraction. By decision dated September 27, 2007, OWCP

¹ 5 U.S.C. § 8101 *et seq.*

accepted the claim for lumbar sprain and sprain of the right shoulder. By decision dated April 18, 2008, it expanded appellant's claim to include thoracic radiculopathy.

Appellant stopped work following his injury and returned to a limited-duty assignment on May 23, 2008. As of August 30, 2008, his physical limitations ceased and he was placed on regular duty-assignment with no work restrictions.

On October 7, 2010 appellant filed a recurrence claim (Form CA-2a) alleging that he was totally disabled for work as of September 30, 2010. He stated that his pain had never subsided, but returned with greater intensity in the same spot and location as his previous injury, leaving him unable to walk. Appellant stopped work on October 1, 2010.

In a December 2, 2010 magnetic resonance imaging (MRI) scan, Dr. Maurice Fitzpatrick, a Board-certified diagnostic radiologist, reported that appellant's lumbar spine showed L4-5 disc bulge with central disc herniation and facet arthrosis causing mild central stenosis. He also found L5-S1 disc bulge with broad-based central left paracentral disc herniation touching the left S1 root.

By letter dated October 21, 2010, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days.

In an October 27, 2010 medical report, Dr. Haodong Song, a Board-certified neurologist, noted that appellant was a corrections officer with a history of low back pain and lower extremity pain due to several injuries involving the back. Appellant complained of low back pain starting several years ago which became progressively worse. Nerve conduction studies were performed and Dr. Song diagnosed mild to moderate radiculopathy around the S1 level.

In a November 4, 2010 narrative statement, appellant reported that he returned to modified duty after his initial injury and continued to experience a dull pain in his back. He noted that the pain did not inhibit him from carrying out his normal duties so he returned to full duty. On June 10, 2010 appellant broke up two inmates who were in a physical altercation, which caused pain to his low back. This pain became increasingly worse and by September 30, 2010, his ability to walk was severely impeded and he sought medical treatment.

Appellant also submitted physical therapy notes dated November 17 to December 22, 2010 documenting his treatment for lumbar disc displacement and back pain.

In a November 23, 2010 medical report, Dr. Peter Zahos, a Board-certified neurological surgeon, reported that appellant was a prison corrections officer whose duties involved physical exertion. Appellant began to experience the onset of pain in September 2010. Upon review of diagnostic tests, Dr. Zahos noted low back pain and left radicular symptoms without weakness. He diagnosed lumbar disc displacement as a result of left L5-S1 and central L4-5 disc herniation.

By letter dated November 26, 2010, Dr. Peter Roblego, a treating physician, reported that appellant was being treated for lumbosacral radiculopathy and recommended that he be free of occupational duties until February 1, 2011.

Appellant filed a claim for compensation form (CA-7) for leave without pay for the period October 1 to December 23, 2010.

By decision dated January 13, 2011, OWCP denied appellant's recurrence claim finding that the medical evidence did not establish that his disability was causally related to the accepted July 29, 2007 employment injury. It noted that his statement appeared to suggest that he was in a new work-related incident in June 2010 and recommended that he file a Form CA-1.

On July 15, 2011 appellant requested reconsideration. He stated that his injury had caused him both physical and financial difficulties and that he was submitting additional medical evidence in support of his claim.

In medical reports dated April 11 to October 7, 2011, Dr. Jacqueline Del Valle, a Board-certified anesthesiologist, reported that appellant complained of lower back pain from a work-related injury on June 10, 2010. She stated that he was attempting to separate two men from fighting when he felt pain in the thoracolumbar area. Appellant tolerated the pain which severely increased, causing him to seek emergency treatment on October 1, 2010. Dr. Del Valle stated that he had a similar incident in July 2007 where he sustained a lumbar disc herniation and was treated with epidural steroid injections. Appellant reported that the steroid injections helped and that from July 2007 to June 2010 he was relatively pain free. Upon physical examination and review of diagnostic tests, Dr. Del Valle diagnosed left lumbar radiculopathy secondary to disc herniation, lumbar facet arthropathy and thoracic disc herniation. She opined that the incident on June 10, 2010 caused the reappearance of his disc herniation. Dr. Del Valle further noted that the lumbar radiculopathy and thoracic disc herniation were the result of the work-related injury that started in 2007 and were triggered by the work-related injury on June 10, 2010. She restricted appellant to light duty and provided epidural steroid injections and lumbar epidurography.

In a May 2, 2011 report, Dr. Sandip Basak, a Board-certified diagnostic radiologist, reported that an MRI scan of appellant's thoracic spine showed minimal stable degenerative changes.

By decision dated October 26, 2011, OWCP affirmed the January 13, 2011 decision and denied appellant's July 15, 2011 request for modification.² It further noted that the medical evidence submitted did not support a recurrence but a new injury that occurred on June 10, 2010 which was developed and decided under claim number xxxxxx585.³

² The Board notes that appellant submitted additional evidence after OWCP rendered its October 26, 2011 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

³ The record for claim number xxxxxx585.

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.⁴ 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.⁵

OWCP's procedures state 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.⁶

An employee, who is prevented by employment-related residuals from returning to a job the employee held when injured does return to a light-duty position or when the medical evidence shows that the employee could perform the light-duty position, the employee must present reliable, probative and substantial evidence that he or she cannot perform in the light-duty position because of a recurrence of total disability. As part of this burden, the employee must show 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.⁷

OWCP's procedures provide that a recurrence of disability can be created by the withdrawal of a light-duty assignment made to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.⁸

ANALYSIS

OWCP found that appellant sustained a traumatic injury on July 29, 2007 and accepted his claim for a sprain of the lumbar spine, sprain of the right shoulder and thoracic radiculopathy. The record reflects that he was released to full duty on August 30, 2008 and continued to work as a corrections officer. The issue is whether appellant has established that he sustained a recurrence of disability on or after September 30, 2010 causally related to his accepted injury.

⁴ 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).

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997). *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

⁷ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁸ *Supra* note 6, Chapter 2.1500.3b(1)(c) (January 1995).

The evidence of record fails to establish that appellant sustained a recurrence of disability.⁹ Appellant did not allege or establish that he experienced a spontaneous change in his medical condition due to the accepted injury. On his CA-1 form, he claimed a recurrence of total disability commencing September 30, 2010 because his chronic pain increased with greater intensity. Appellant's November 4, 2010 narrative statement, however, noted that on June 10, 2010 he separated two inmates who were in a physical altercation which caused pain in his lower back. This pain continued to increase, causing him to seek medical treatment on September 30, 2010. The Board finds that appellant's claim does not meet the definition of a recurrence of disability.¹⁰

In medical reports dated April 11 to October 7, 2011, Dr. Del Valle reported that appellant complained of lower back pain from a work-related injury on June 10, 2010 when he was attempting to separate two men from fighting and felt pain on the thoracolumbar area. This pain eventually became intolerable, causing appellant to seek emergency treatment on October 1, 2010. Dr. Del Valle stated that appellant had a history of disc herniation from a work-related injury in 2007 which was treated with epidural steroid injections. Appellant was relatively pain free from 2007 until June 10, 2010. Dr. Del Valle diagnosed left lumbar radiculopathy secondary to disc herniation, lumbar facet arthropathy and thoracic disc herniation. She opined that the lumbar radiculopathy and thoracic disc herniation were a result of the 2007 work-related injury and were triggered by the June 10, 2010 employment incident.

While Dr. Del Valle's reports provided findings on examination and a diagnosis of appellant's condition, she did not provide a probative, rationalized medical opinion sufficient to establish that his claimed disability as of September 30, 2010 was causally related to the accepted July 29, 2007 incident. She failed to provide a detailed history of his July 29, 2007 injury other than noting disc herniation, which was treated with steroid injections. Dr. Del Valle's opinion that appellant's lumbar radiculopathy and thoracic disc herniation were a result of the 2007 work-related injury and triggered by the June 10, 2010 employment incident does not provide support to establish a spontaneous recurrence or his of appellant's accepted condition. At best, her reports suggest a worsening of his condition due to new work factors. As OWCP indicated, Dr. Del Valle's reports describe a new injury, not a recurrence of disability. Therefore, her reports do not constitute sufficient medical evidence demonstrating a causal connection between appellant's conditions and his previously accepted claim.¹¹

The remaining medical evidence of record is also insufficient to establish appellant's recurrence claim. In an October 27, 2010 medical report, Dr. Song reported that appellant was a corrections officer with a history of low back injuries and diagnosed mild to moderate radiculopathy around the S1 level. Physical therapy notes dated November 17 to December 22, 2010 document appellant's treatment for lumbar disc displacement and back pain. A December 2, 2010 diagnostic report from Dr. Fitzpatrick diagnosed disc herniation, facet arthrosis and foraminal stenosis of the lumbar spine. In a November 23, 2010 medical report,

⁹ See *supra* note 4 and accompanying text.

¹⁰ See *Bryant F. Blackmon*, 56 ECAB 752 (2005).

¹¹ *D.M.*, Docket No. 11-2086 (issued August 15, 2012).

Dr. Zahos diagnosed lumbar disc displacement as a result of left L5-S1 and central L4-5 disc herniation, noting that appellant was a prison corrections officer whose duties involved physical exertion. In a November 26, 2010 report, Dr. Roblego reported that appellant was being treated for lumbosacral radiculopathy and recommended that he be free of occupational duties until February 1, 2011. Dr. Basak's May 2, 2011 diagnostic report noted degenerative changes of the thoracic spine.

While appellant's physicians provide detailed diagnoses, the medical reports fail to state an opinion regarding the cause of appellant's injury.¹² The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value.¹³ Further, the physician's assistant and physical therapy notes submitted by appellant do not constitute competent medical evidence in support of a claim as physical therapists and physician's assistants are not physicians as defined under FECA.¹⁴ Thus, the medical reports of record fail to establish that he sustained a recurrence of disability causally related to the July 29, 2007 employment incident and are of no probative value.¹⁵

Accordingly, appellant has failed to submit sufficient evidence to meet his burden of proof in establishing that he sustained a recurrence of his employment-related disability as of September 30, 2010. Rather, he is asserting a new injury under claim number xxxxxx585. The exposure to an intervening factor broke the chain of causation stemming from the accepted lumbar conditions. The circumstances did not involve a spontaneous change in the accepted condition.¹⁶ For the reasons stated above, OWCP's denial of the claimed recurrence of disability was proper under the law and facts of the case.¹⁷

The Board notes that OWCP conducted a merit review in its October 26, 2011 decision as appellant's July 15, 2011 request for reconsideration was accompanied by relevant evidence not previously considered by OWCP.¹⁸ Upon review of the additional evidence, OWCP properly found that appellant failed to meet his burden of proof to establish that he sustained a recurrence of disability as of September 30, 2010.

¹² S.S., Docket No. 07-579 (issued January 14, 2008).

¹³ *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁴ 5 U.S.C. § 8102(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; *see also Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996); *Barbara J. Williams*, 40 ECAB 649 (1988).

¹⁵ *Supra* note 12.

¹⁶ *Supra* note 10.

¹⁷ *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁸ 20 C.F.R. § 10.606(b)(2).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability on or after September 30, 2010.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 27, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board