

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

M.H., Appellant)	
)	
and)	Docket No. 19-1552
)	Issued: February 2, 2021
SOCIAL SECURITY ADMINISTRATION,)	
San Patricio, PR, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 15, 2019 appellant, through counsel, filed a timely appeal from a January 16, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 The Board notes that following the January 16, 2019 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.*

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability beginning April 2, 2012 causally related to her accepted December 14, 2011 employment injury.

FACTUAL HISTORY

On December 19, 2011 appellant, then a 52-year-old service representative, filed a traumatic injury claim (Form CA-1) alleging that on December 14, 2011 she injured her back, neck, right arm, and right leg when she slipped on water while in the performance of duty. She stopped work on December 15, 2011 and returned to work on January 17, 2012. OWCP accepted the claim for a back contusion. Appellant received continuation of pay from December 15, 2011 to January 17, 2012.

In a December 19, 2011 authorization for examination and/or treatment (Form CA-16), Dr. Enid M. Berrios Menendez, a physiatrist, checked a box marked "Yes" that the condition was caused or aggravated by the described employment activity of appellant slipping and falling backward on December 14, 2011.⁴

A computerized tomography (CT) scan obtained on December 20, 2011 revealed mild spondylosis causing some spinal canal stenosis and neural foramina narrowing.

On March 9, 2012 an OWCP referral nurse indicated that appellant was working full time in her usual employment at reduced hours. She noted that she had returned to work on January 17, 2012, but stopped work again from February 14 to 21, 2012.

A magnetic resonance imaging (MRI) scan dated April 4, 2012 showed a broad-based disc protrusion at L4-5 with a small annular tear, a posterocentral disc protrusion at L5-S1 causing mild compression of the dural sac, and early facet arthropathy at L4-5 and L5-S1.

In an April 26, 2012 attending physician's report (Form CA-20), Dr. Menendez diagnosed status post cervicodorsolumbosacral strain and degenerative disc disease. She responded in the affirmative that the condition was caused by the described employment activity of appellant slipping on the floor and falling backward. Dr. Menendez opined that she was totally disabled from work. In a progress report of even date, she diagnosed a traumatic strain of the cervicodorsolumbosacral region, and possible carpal tunnel syndrome.⁵

³ 5 U.S.C. § 8101 *et seq.*

⁴ The diagnosis provided on the form is illegible. The record also contains handwritten progress reports from Dr. Menendez that are illegible.

⁵ The remainder of the report is illegible.

On April 25, 2012 appellant filed a claim for wage-loss compensation (Form CA-7) from April 9 to 20, 2012.

In a development letter dated May 9, 2012, OWCP requested that appellant complete a notice of recurrence of disability (Form CA-2) and submit additional evidence showing a change in the nature and extent of her limited-duty employment or a change in the extent of her injury-related condition. It provided a checklist for her completion. OWCP afforded appellant 30 days to submit the necessary information.

Thereafter, OWCP received a progress report dated April 3, 2012 from Dr. Menendez. Dr. Menendez diagnosed degenerative disc disease and cervicodorsolumbosacral strain. In a May 4, 2012 progress report, she diagnosed status post cervicodorsolumbosacral strain, degenerative disc disease, two herniated nuclei pulposi, and depression.⁶

On May 17, 2012 appellant filed a Form CA-2a alleging that she sustained a recurrence of disability beginning April 2, 2012 causally related to her accepted December 14, 2011 employment injury. She related that when she returned to work she was limited in performing her work duties because she could not remain in a standing or seated position for extended periods. The employing establishment advised that appellant had performed her regular employment duties without accommodation after her injury.

By decision dated June 12, 2012, OWCP found that appellant had not established a recurrence of disability beginning April 2, 2012 causally related to her December 14, 2011 employment injury.

On June 20, 2012 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Thereafter, OWCP received an undated report from Dr. Menendez. Dr. Menendez advised that she had evaluated appellant on December 15, 2011 for cervicodorsolumbosacral pain, headaches, and right upper extremity pain after she slipped and fell at work. On examination she found muscle spasms of the spine. Dr. Menendez discussed the results of diagnostic studies and noted that she had released appellant to resume work on January 16, 2012. She advised that she had evaluated appellant on April 3, 2012 for severe back pain that she attributed to standing up quickly after sitting with a client for an extended period of time. On examination Dr. Menendez found muscles spasms, tenderness, and decreased sensation at C5-6 on the right and at L5-S1. She indicated that she had recommended "total disability for an indefinite period." Dr. Menendez advised that on April 10, 2012 appellant had an aggravation of her symptoms "when assuming the standing position suddenly after sitting for [a] prolonged time working with a client...." She reviewed the findings of the MRI scan showing disc protrusions at L4-5 and L5-S1. Dr. Menendez related that appellant was depressed and anxious and recommended "indefinite total disability."

⁶ Appellant also submitted the first page of an undated report from Dr. Menendez.

An August 8, 2012 electromyogram (EMG) revealed radiculopathy at C5-6 and L5. An August 13, 2012 MRI scan of the cervical spine showed cervical spondylosis causing spinal canal stenosis and neural foraminal narrowing worse at C3-4.

In a report dated September 11, 2012, Dr. Luis E. Faura Clavell, a physiatrist, diagnosed preexisting left lumbar radiculopathy aggravated by appellant's fall and polyradiculopathy at C5-6 as a new condition. He found that the diagnosed conditions were directly related to the fall as demonstrated by the August 2012 EMG study and MRI scan.

A telephonic hearing was held on September 19, 2012.

By decision dated November 2, 2012, OWCP's hearing representative affirmed the June 12, 2012 decision.

On November 8, 2013 appellant requested reconsideration. Her then-representative contended that she had submitted medical evidence showing several diagnosed conditions due to her work injury. He maintained that appellant had requested light-duty work, but that it had not been provided.

By decision dated February 21, 2014, OWCP denied modification of its November 2, 2012 decision.

In a report dated June 25, 2014, Dr. Margarita Correa-Perez, a Board-certified physiatrist, advised that appellant had a history of pain in her neck and low back that had begun several years earlier. She noted that she had a workers' compensation claim with a date of injury of December 14, 2011. Dr. Correa-Perez diagnosed lumbosacral and cervical spondylosis without myelopathy, displacement of a cervical and lumbar intervertebral disc without myelopathy, lumbago, cervicalgia, and unspecified thoracic or lumbosacral neuritis or radiculitis.

On February 20, 2015 appellant, through counsel, requested reconsideration. He noted that she had a 1994 employment-related injury to her low back which had resolved without disability for 16 years. Counsel asserted that diagnostic testing subsequent to appellant's December 14, 2011 injury showed a herniated disc, and that she was unable to perform her full-time usual employment.

By decision dated April 23, 2015, OWCP denied modification of its February 21, 2014 decision.

OWCP subsequently received additional evidence. In progress reports dated May 4 and June 1, 2015, Dr. Correa-Perez provided the same diagnoses as in her June 25, 2014 report and described her treatment recommendations. In an August 26, 2015 duty status report (Form CA-17), she diagnosed a low back contusion and indicated that appellant was disabled from employment.

An October 29, 2015 lumbar MRI scan showed a left paracentral disc extrusion at L5-S1, a central disc protrusion at L4-5, a right disc herniation at L3-4, and disc degeneration mild at L4-5 and moderate at L5-S1.

In an initial evaluation dated March 25, 2016, Dr. Robert R. Reppy, an osteopath, discussed appellant's history of slipping and falling on a wet floor at work. He noted that she had returned to work on January 16, 2012 at reduced hours, but that her pain had increased such that she stopped work on April 2, 2012. Dr. Reppy reviewed appellant's current complaints of low back pain radiating into the left lower extremity and the results of diagnosed studies. He opined that symptoms of a back contusion would not continue to the present. Dr. Reppy related, "The picture [appellant] presents is one of steady progression of a bulging disc stemming from a slip and fall of December 2011 to a gradually worsening disc problem...." He indicated that she had experienced an aggravation of her back pain with the onset of sensory involvement in April 2012, noting that subsequent MRI scans showed that the bulging disc was larger and there was an annular tear. Dr. Reppy attributed the disc changes to the "natural progression of an existing disc injury becoming more and more aggravated with time and developing from a bulge into a herniation." He asserted that the injury of December 14, 2011 was the only injury and that she had not sustained a new injury on April 2, 2012.

On April 22, 2016 appellant, through counsel, requested reconsideration and submitted additional medical evidence.⁷

A nerve conduction velocity (NCV) study performed on June 8, 2016 revealed radiculopathy bilaterally at L5 and on the left at S1. In a report dated June 17, 2016, Dr. Reppy reviewed the results of the NCV study and diagnosed cervical and lumbar disc disease with radiculopathy and a disc herniation at L3-4 and L4-5.⁸

By decision dated July 21, 2016, OWCP denied modification of its April 23, 2015 decision.

OWCP subsequently received a November 11, 2016 progress report, wherein Dr. Reppy diagnosed cervical disc disease with radiculopathy and a herniated disc at L3-4 with radiculopathy.

On February 3, 2017 Dr. Reppy indicated that OWCP's finding that appellant had only sustained a contusion was "ridiculous" given the continuation of her symptoms. He diagnosed cervical disc disease with radiculopathy and a herniated disc at L3-4 with radiculopathy and advised that she needed to have her diagnosis changed. In an April 28, 2017 progress report, Dr. Reppy opined that the proper diagnosis was not a back condition and referred to the listed diagnoses, in particular the herniated disc at L3-4 with lower extremity radiculopathy.⁹ In a progress report dated June 2, 2017, he again indicated that it was error for OWCP to accept the diagnosis of a contusion.¹⁰

⁷ In a progress report dated April 22, 2016, Dr. Correa-Perez provided diagnoses and treatment recommendations.

⁸ Appellant underwent functional capacity evaluations on June 20 and November 14, 2016.

⁹ Dr. Reppy continued to perform NCV studies and physical capacity evaluations.

¹⁰ In a progress report dated July 20, 2017, Dr. Reppy provided the same diagnoses.

On July 20, 2017 appellant, through counsel, requested reconsideration.¹¹ Counsel asserted that she had sustained her recurrence of disability within 90 days of her return to employment as she had resumed work following her injury on January 16, 2012 and had stopped work on April 2, 2012. Counsel argued that OWCP thus had the burden to show an intervening injury to deny causal relationship. He contended that the reports from Dr. Reppy were sufficient to establish that her claim should be expanded to include herniated discs.¹²

A July 27, 2017 MRI scan of the lumbar spine showed lumbar spondylitic changes primarily at L3-4.

By decision dated October 18, 2017, OWCP denied modification of its July 21, 2016 decision.

Appellant submitted progress reports from Dr. Reppy and Dr. Martinez-Sanchez dated October 20, 2017 through January 2018.

In a report dated February 13, 2018, Dr. Paul S. Webster, a Board-certified anesthesiologist, evaluated appellant for complaints relating to a December 14, 2011 slip and fall at work. He diagnosed lumbar radiculopathy and muscle contracture at multiple sites. Dr. Webster provided progress reports dated March 20, April 17, May 15, August 14, and October 9, 2018.¹³

On October 18, 2018 appellant requested reconsideration.

By decision dated January 16, 2019, OWCP denied modification of its October 18, 2017 decision.¹⁴

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.¹⁵ 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

¹¹ In a progress report dated June 30, 2017, Dr. Mireda Martinez-Sanchez, a Board-certified physiatrist, indicated that appellant had a December 14, 2011 workers' compensation injury. She diagnosed a back contusion, low back pain, and long-term use of opiates.

¹² In progress reports dated August 4 and September 8, 2017, Dr. Reppy provided diagnoses and treatment recommendations.

¹³ Appellant also received treatment from a nurse practitioner beginning in June 2018.

¹⁴ The Board notes that appellant has requested an expansion of her claim to include additional conditions. However, as OWCP has not formally adjudicated this issue, it is not before the Board on appeal. *See* 20 C.F.R. § 501.2(c).

¹⁵ 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

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.¹⁶

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.¹⁷

OWCP's procedures discuss the evidence necessary if recurrent disability for work is alleged within 90 days of return to duty.¹⁸ The focus is on disability rather than causal relationship of the accepted condition to the employment injury.¹⁹

The Board has held that, if recurrent disability from work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and demonstrate objective medical findings that form the basis for the renewed disability from work.²⁰

ANALYSIS

The Board finds that the case is not in posture for decision regarding whether appellant has met her burden of proof to establish a recurrence of disability beginning April 2, 2012 causally related to her accepted December 14, 2011 employment injury.

OWCP's procedures provide that, in cases where recurrent disability from 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 for a recurrence claimed long after apparent recovery and return to work.²¹ In cases where recurring disability from work is claimed within 90 days or less from the first return to duty, the focus is on disability rather than causal relationship.²² The attending physician should describe

¹⁶ *Id.*

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

¹⁸ *Id.* See also *K.D.*, Docket No. 19-0628 (issued November 5, 2019); *B.R.*, Docket No. 18-0339 (issued January 24, 2019).

¹⁹ *K.D.*, *id.*

²⁰ *A.B.*, Docket No. 18-0978 (issued September 6, 2019); *J.F.*, 58 ECAB 124 (2006).

²¹ *Supra* note 17 at Chapter 2.1500.5(a) (June 2013); *R.W.*, Docket No. 17-0720 (issued May 21, 2018)

²² *Id.*; *K.R.*, Docket No. 19-0413 (issued August 7, 2019).

the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability from work.²³

Appellant stopped work on December 15, 2011 and returned to work on January 17, 2012. She stopped work again on April 2, 2012 and alleged a recurrence of disability. As appellant claimed a recurrence of disability within 90 days of her first return to duty, OWCP should have developed and decided the claim under the proper recurrence standard, emphasizing disability rather than causal relationship.²⁴ However, the May 9, 2012 OWCP development letter improperly instructed her to provide medical evidence in accordance with the standard for a recurrence of disability claim after 90 days of her return to duty, which required that she establish a change in her medical condition.²⁵

OWCP's procedures provide that OWCP is responsible for requesting evidence.²⁶ Its procedures further provide that the claims examiner should contact the claimant in writing to obtain evidence and should specifically request the information needed, tailored to the specifics of the individual case.²⁷ In this instance, OWCP improperly developed appellant's claim under the standard for a recurrence of disability claim after 90 days from return to duty.²⁸ As she failed to receive the proper guidance from OWCP regarding the specific evidence required to establish a recurrence claim within 90 days of her return to duty, the Board finds that this case must be remanded for further development.²⁹ Following such further development as it deems necessary, OWCP shall issue a *de novo* decision.³⁰

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has met her burden of proof to establish a recurrence of disability beginning April 2, 2012 causally related to her accepted December 14, 2011 employment injury.³¹

²³ *Supra* note 17 at Chapter 2.1500.5(b). *See* A.C., Docket No. 17-0384 (issued September 11, 2017).

²⁴ *Id.*; *Order Remanding Case*, Docket No. 18-0604 (issued October 21, 2019).

²⁵ *Id.* at Chapter 2.1500.6.

²⁶ *Id.* at Chapter 2.800.4(c)(2) (June 2011).

²⁷ *Id.* at Chapter 2.800.5. *See also* V.R., Docket No. 16-1167 (issued December 22, 2016).

²⁸ *Order Remanding Case*, Docket No. 19-0763 (issued November 26, 2019).

²⁹ *Id.*

³⁰ *See generally* B.N., Docket No. 17-0787 (issued July 6, 2018); C.D., Docket No. 17-1074 (issued August 28, 2017).

³¹ The Board notes that the employing establishment issued a Form CA-16. A properly completed CA-16 form authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the January 16, 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: February 2, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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