

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

A.M., Appellant)	
)	
and)	Docket No. 22-0664
)	Issued: May 15, 2023
U.S. POSTAL SERVICE, KILMER CARRIER)	
ANNEX, Edison, NJ, Employer)	
)	

Appearances:
Aaron Aumiller, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 28, 2022 appellant, through counsel, filed a timely appeal from a September 30, 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 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 his burden of proof to expand the acceptance of his claim to include an additional lumbar condition, resulting in an October 28, 2017 recurrence of total disability, causally related to his accepted May 31, 2016 employment injury.

FACTUAL HISTORY

On June 9, 2016 appellant, then a 39-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on May 31, 2016 he injured his lower back and right leg when he lifted tubs of mail and parcels while in the performance of duty. On July 26, 2016 OWCP accepted the claim for sprain of ligaments of lumbar spine; radiculopathy, lumbosacral region; and sciatica, right side. It paid appellant wage-loss compensation on the supplemental rolls for medical appointments and on dates that the employing establishment did not have work available within his restrictions commencing July 30, 2016.

On November 8, 2016 appellant returned to part-time, modified-duty work with restrictions, six hours per day. OWCP continued to pay him wage-loss compensation on the supplemental rolls for the remaining two hours per day and when no work was available through October 27, 2017.

In an October 23, 2017 visit note, Dr. Qing Tai, an attending Board-certified osteopathic physiatrist, related a history that appellant experienced increased pain in his lower back, right buttock, and posterior thigh in the past few weeks after twisting his back. He diagnosed lumbar disc herniation and posterior annular tear at L4-5 and L5-S1, and the accepted condition of right lumbar radiculopathy.

In a November 6, 2017 note, Dr. Tai opined that appellant may return to work with restrictions from November 11 through 29, 2017.

Appellant submitted a November 29, 2017 work capacity evaluation (Form OWCP-5c) from Dr. Tai who advised that he could not perform his usual job, but he could work four hours per day with restrictions. Dr. Tai noted that the work restrictions applied for three months.

On December 10, 2017 appellant filed a notice of recurrence (Form CA-2a), claiming a recurrence of disability commencing October 28, 2017. He noted that following his accepted May 31, 2016 employment-related injury he performed modified work with restrictions.

OWCP received an additional Form OWCP-5c dated December 14, 2017 from Dr. Tai, who again advised that appellant could not perform his usual job, but that he could work four hours per day with restrictions that applied for three months.

In response to an OWCP development letter, appellant submitted a January 11, 2018 letter in which he contended that he did not sustain a recurrence or a new traumatic injury. He claimed that he had increased back and leg pain that intensified more when he twisted his back, which felt like an intensified flare-up. Appellant asserted that he suffered from his employment injury with increased pain and discomfort.

In a January 10, 2018 Form OWCP-5c, Dr. Tai continued to advise that appellant could not perform his usual job, but he could work four hours per day with restrictions that applied for three months.

By decision dated February 1, 2018, OWCP denied appellant's recurrence claim. It found that the medical evidence of record was insufficient to establish that he was disabled due to a material change or worsening of his accepted May 31, 2016 work-related conditions.³

Dr. Tai, in a January 10, 2018 visit note, reiterated his prior diagnoses of lumbar disc herniation and posterior annular tear at L4-5 and L5-S1, as well as the accepted condition of right lumbosacral radiculopathy. In an addendum to his January 10, 2018 visit note, he reported that appellant had increased low back pain after position changes, which was a natural course of the back condition. Dr. Tai noted that flare-ups were common for patients with disc herniation and annular tears. He concluded that appellant did not sustain a new back injury in October 2017.

On March 2, 2018 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received additional medical evidence from Dr. Tai. In an undated prescription note, Dr. Tai opined that, based on appellant's history and his physical examination findings, appellant experienced a spontaneous recurrence of his original work-related injury.

In visit notes dated March 12, April 23, and August 2, 2018, as well as in an August 31, 2018 report, Dr. Tai restated his prior lumbar diagnoses and opinion that appellant did not sustain a new back injury in October 2017. In OWCP-5c forms dated November 29, 2017 and January 10, 2018, he continued to advise that appellant could work four hours per day with restrictions that applied for three months. In OWCP-5c forms dated April 23, August 2, and October 1, 2018, Dr. Tai advised that appellant could work six hours per day with restrictions that applied for three months.

An oral hearing was held before an OWCP hearing representative on August 15, 2018. By decision dated October 22, 2018, OWCP's hearing representative set aside the February 1, 2018 decision and remanded the case for further development to determine whether appellant's claim should be expanded to include additional conditions as causally related to his accepted May 31, 2016 employment injury. He directed OWCP to refer appellant, the medical record, and a statement of accepted facts (SOAF) to a specialist in the appropriate field of medicine for a second opinion evaluation, to be followed by issuance of a *de novo* decision.

On November 2, 2018 OWCP prepared a SOAF and referred appellant, along with the medical record and a series of questions, to Dr. Paul G. Teja, a Board-certified orthopedic surgeon, for a second opinion evaluation.

³ OWCP noted that the evidence suggested that he may have sustained a new injury and recommended that he file a new claim for this injury if his physician believed that his current disability was caused or aggravated by his light-duty work.

In a January 15, 2019 report, Dr. Teja noted his review of the SOAF and medical record. He reported his essentially normal findings on physical examination except for decreased range of motion (ROM) of the lumbar spine. Dr. Teja diagnosed the accepted conditions of lumbosacral radiculopathy, right sciatica, and sprained ligaments of the lumbar spine. He opined that appellant had fully recovered from his accepted conditions with no residuals. Dr. Teja reviewed radiological studies which demonstrated a disc bulge with right herniated nucleus pulposus (HNP) at L4-L5 and a small central HNP at L5-S1. Dr. Teja advised that these findings did not correlate with his clinical examination. He found no clinical evidence of radiculopathy on his examination. Dr. Teja advised that these radiology findings, combined with the history provided by appellant and provided in the records, and his physical examination findings indicated that appellant had fully recovered from the May 31, 2016 employment injury with no clinical evidence of residuals. He determined that appellant had reached maximum medical improvement (MMI) on the date of his examination. Dr. Teja advised that there was no indication or medical necessity for any ongoing orthopedic treatment as it related to the accepted employment injury. In response to questions posed by OWCP, he related that, based on the findings and review of the medical records, appellant's diagnosis of L4-5 and L5-S1 disc herniation was not causally related to the accepted work injury. Dr. Teja noted that his lumbar degenerative disc disease obviously was a preexisting condition. He concluded that appellant could resume his normal full-time employment without restriction. In an accompanying Form OWCP-5c of even date, Dr. Teja reiterated appellant's work restrictions.

OWCP, by letter dated January 22, 2019, informed Dr. Teja that he did not provide sufficient medical rationale to support his conclusions. It requested that he provide a well-rationalized opinion addressing how the May 31, 2016 employment injury caused his diagnosis of lumbar disc herniation at L4-5 and L5-S1. OWCP also requested that Dr. Teja explain how his finding of decreased ROM of the lumbar spine did not limit appellant's ability to perform his job and why he believed that these findings did not support the need for further medical treatment.

In a January 25, 2019 addendum report, Dr. Teja advised that appellant's lumbar disc herniation at L4-5 and L5-S1 was degenerative in nature and not related to appellant's May 31, 2016 employment injury. Dr. Teja noted that appellant sustained a soft tissue injury only in the form of a lumbar strain, from which he had fully recovered. Additionally, he explained that his finding of decreased ROM of the lumbar spine was subjective as ROM testing was performed actively by appellant at his own volition and appellant's examination was otherwise normal. Appellant was neurologically intact with no objective signs of radiculopathy, which indicated that the accepted conditions had fully resolved. Dr. Teja reiterated that appellant could resume his normal full-time employment without restriction.

By decision dated January 29, 2019, OWCP denied expansion of the acceptance of appellant's claim to include the additional condition of L4-5 and L5-S1 disc herniation causally related to the May 31, 2016 employment injury.

By decision also dated January 29, 2019, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish that he was disabled from work commencing October 28, 2017, due to a material change or worsening of his accepted work-related conditions.

On February 8, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on May 29, 2019 regarding both January 29, 2019 OWCP decisions.

By decision dated July 3, 2019, another OWCP hearing representative affirmed the January 29, 2019 decisions, finding that the weight of the medical evidence was accorded to Dr. Teja who opined that appellant did not sustain L4-5 and L5-S1 disc herniation or a recurrence of disability causally related to his accepted employment injury. He further found that the evidence of record was insufficient to establish a recurrence of disability based on a change in appellant's modified-duty position, as the employing establishment explained that modified-duty work was not available within appellant's new restrictions set forth by Dr. Tai as of October 28, 2017, which were based on a condition not accepted as employment related by OWCP.

On April 3, 2020 appellant, through counsel, requested reconsideration and submitted additional medical evidence. In an April 1, 2020 report, Dr. David Lessing, a Board-certified orthopedic surgeon, noted appellant's history of injury and medical treatment, and reported his examination findings. He diagnosed disc herniation right L4-L5 with annular tear superimposed on a disc bulge directly causing right sciatica, lumbar sprain, and lumbar radiculopathy. Dr. Lessing also diagnosed L5-S1 small disc herniation with central annular tear progressing to right paracentral and foraminal herniation as found on a September 18, 2019 magnetic resonance imaging (MRI) study, which aggravated preexisting right sciatica, lumbar sprain, and lumbar radiculopathy. He opined that the diagnosed conditions were directly caused by the May 31, 2016 employment injury. Dr. Lessing explained that when lifting from a forward flexed position the contraction of the paraspinal musculature in the lumbar spine counteracted the load held by the arms. He further explained that the load held by the arms has a large lever arm of the entire spine to reach the center of rotation at the hips. The paraspinal muscles have a much shorter lever arm through which to act which required them to contract with great force which is productive of local pain and spasm. The combination of the force of the spinal muscles plus the weight held by the arm and its large lever arm produces compressive forces across the lumbar discs which damages them and results in the herniation. The herniation in turn affects the local nerve roots front direct mechanical compression, chemical irritation from the spread of the nucleus pulposus through the herniation, and a zone of inflammation that extends to the nearby nerves. Dr. Lessing noted that these effects on the nerves are responsible for the sciatica, radiculitis, and radiculopathy. He related that the damaged L5-S1 disc deteriorated over time to the right herniation with foraminal compromise and nerve root compression diagnosed by a second MRI scan and subsequently addressed at surgery. Dr. Lessing indicated that the first MRI scan performed on September 9, 2016 showed normal disc height and disc signal in the lumbar spine. This indicated that there was no significant degenerative disc disease at the time the MRI scan was taken approximately three months from the accepted employment injury. Accordingly, Dr. Lessing concluded that appellant's disc herniations were traumatic and not degenerative in nature.

On July 22, 2020 OWCP declared a conflict in medical opinion between appellant's physicians, including Dr. Tai and Dr. Lessing, and the second opinion physician, Dr. Teja, regarding whether appellant's lumbar herniations and posterior annular tear at L4-L5 and L5-S1 superimposed on a disc bulge and bilateral lumbosacral radiculopathy, partial disability

commencing October 2017, and November 22, 2019 lumbar surgery were caused by his May 31, 2016 employment injury.⁴

On May 6, 2021 OWCP referred appellant, along with a SOAF, the medical record, and a series of questions to, Dr. Robert A. DeFalco, a Board-certified osteopathic physician specializing in orthopedic surgery, for a second opinion.

In a June 3, 2021 report, Dr. DeFalco noted a history of the May 31, 2016 employment injury and appellant's medical treatment. He also noted his review of the medical record and appellant's current complaints of back pain and discomfort that traveled to his buttocks and both legs, more on the right side. On physical examination, Dr. DeFalco reported essentially normal findings except for decreased ROM of the lumbar spine. He diagnosed the accepted condition of lumbar sprain. Dr. DeFalco opined that the accepted condition had resolved, and appellant had no disabling employment-related residuals. Based on his review of the medical record and history contained in the medical report, and the history provided by appellant, there was no aggravation of an underlying/preexisting condition. Dr. DeFalco advised that there were no other conditions related to the accepted work injury. He further advised that appellant could return to his date-of-injury position with no restrictions in a full-time capacity. Dr. DeFalco determined that appellant had reached MMI and there was no need for further treatment. He maintained that appellant's November 22, 2019 lumbar surgery was not related to the accepted employment injury. Dr. DeFalco explained that appellant had only sustained a soft tissue injury which did not hasten the need for surgery. In an accompanying Form OWCP-5c of even date, Dr. DeFalco reiterated appellant's work capacity.

By letter dated July 7, 2021, OWCP requested that Dr. DeFalco review an attached June 9, 2016 right hip x-ray report by Dr. Matthew Mendlick, a Board-certified neurologist, and September 9, 2016 lumbar spine MRI scan report by Dr. Ketang Modi, a Board-certified diagnostic radiologist, and provide an addendum report addressing whether appellant sustained lumbar disc herniations and any disability commencing October 28, 2017 causally related to his accepted employment injury.

In an August 19, 2021 report, Dr. DeFalco noted that Dr. Modi's September 6, 2017 lumbar spine MRI scan revealed right foraminal annular tear and disc herniation which superimposed on disc bulging narrow both neural foramina, right greater than left, and appeared to impinge the exiting right L4 nerve root at L4-5, which was of indeterminate age; and a central posterior annular tear and small disc herniation which effaced the anterior thecal sac and was of indeterminate age at L5-S1 an mild central spinal stenosis at L2-3, L3-4, and L4 which was of chronic age. He also noted that Dr. Mendlick's June 9, 2016 right hip x-ray was unremarkable. Regarding appellant's lumbar disc herniations, Dr. DeFalco referenced an article which indicated that in 40-year-old patients, studies have shown that disc degeneration occurred 68 percent of the time, disc bulges occurred 50 percent of the time, annular fissures occurred 22 percent of the time, and facet degeneration occurred 18 percent of the time. Accordingly, he advised that disc

⁴ On August 26, 2020 OWCP referred appellant, along with a SOAF, the medical record, and a series of questions, to Dr. Thomas Bills, a Board-certified orthopedic surgeon, for an impartial medical examination. On December 23, 2020 Dr. Bills' office informed OWCP that appellant's scheduled October 2, 2020 appointment was cancelled because the medical record was not sent to Dr. Bills.

degeneration occurred with age. Dr. DeFalco reiterated his prior opinion that appellant's accepted lumbar sprain had resolved. He related that this soft-tissue injury was superimposed upon degenerative disc disease, and appellant's ongoing complaints and symptoms were due to the natural progression of the degenerative condition, and not a result of his resolved May 31, 2016 employment injury. Dr. DeFalco noted that he was unable to comment on disability prior to his June 3, 2021 examination. He determined that appellant had reached MMI as of the date of his second opinion examination. Dr. DeFalco concluded that there was no medical necessity for continuing treatment, including surgery.

OWCP, by decision dated September 30, 2021, denied modification of the July 3, 2019 decision.

LEGAL PRECEDENT

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁵

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁶ A physician's opinion on whether there is causal relationship between the diagnosed condition and the accepted employment injury must be based on a complete factual and medical background.⁷ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's employment injury.⁸

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.⁹ 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.¹⁰ An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of

⁵ See *S.L.*, Docket No. 19-0603 (issued January 28, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁶ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁷ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁸ *Id.*

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

¹⁰ *Id.*

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.¹¹

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.¹²

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician, known as a referee physician or impartial medical examiner (IME), who shall make an examination.¹³ OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁴

ANALYSIS

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

In a series of reports dated October 23, 2017 through October 1, 2018, Dr. Tai diagnosed lumbar disc herniation and posterior annular tear at L4-5 and L5-S1. He opined that the diagnosed conditions were caused by the accepted May 31, 2016 employment injury. Additionally, Dr. Tai initially opined that although appellant could not perform his usual job, he could work four hours per day with restrictions. Subsequently, he opined that appellant could work six hours per day with restrictions. Dr. Tai explained why the diagnosed conditions were causally related to appellant's employment-related injury.

On April 1, 2020 Dr. Lessing diagnosed disc herniation right L4-5 with annular tear superimposed on a disc bulge which directly caused right sciatica, lumbar sprain, and lumbar radiculopathy; and L5-S1 small disc herniation with central annular tear progressing to right paracentral and foraminal herniation, which aggravated preexisting right sciatica, lumbar sprain, and lumbar radiculopathy. He opined that the diagnosed conditions were directly caused by the May 31, 2016 employment injury. Dr. Lessing also provided a detailed explanation of the causal relationship between appellant's conditions and the accepted employment injury.

In a January 15, 2019 report and addendum report dated January 25, 2019, OWCP's second opinion physician, Dr. Teja advised that appellant's diagnosis of lumbar disc herniation at L4-5 and L5-S1 was degenerative in nature and not related to his May 31, 2016 employment injury. Additionally, he explained that appellant was neurologically intact with no objective signs of

¹¹ *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

¹² *R.N.*, Docket No. 21-0948 (issued August 18, 2022).

¹³ 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

¹⁴ 20 C.F.R. § 10.321; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

radiculopathy, which indicated that the accepted conditions had fully resolved. Dr. Teja reiterated his opinion that appellant could resume his normal full-time employment without restriction.

On July 22, 2020 OWCP declared a conflict in medical opinion between appellant's physicians, Dr. Tai and Dr. Lessing, and the second opinion physician, Dr. Teja, regarding whether appellant's additional diagnosed conditions and disability commencing October 28, 2017 were caused by his May 31, 2016 employment injury.

OWCP, however, did not refer appellant for an impartial medical evaluation. Rather, it referred appellant to Dr. DeFalco for another second opinion examination. In a June 3, 2021 report, Dr. DeFalco diagnosed the accepted condition of lumbar sprain. He opined that the accepted condition had resolved, and appellant had no disabling employment-related residuals. Dr. DeFalco found that appellant did not sustain an aggravation of an underlying/preexisting condition and he had no additional employment-related conditions. He advised that appellant's November 22, 2019 lumbar surgery was not related to the accepted employment injury. Dr. DeFalco concluded that appellant could return to his date-of-injury position with no restrictions. In an August 19, 2021 report, he reviewed the diagnostic test reports of Dr. Modi and Dr. Mendlick as requested by OWCP and advised that appellant's annular tear and disc herniations of the lumbar spine were due to the natural progression of the degenerative condition, and were not related to his resolved May 31, 2016 employment injury. Dr. DeFalco further advised that he was unable to provide an opinion addressing appellant's disability prior to his June 3, 2021 examination.

As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint an IME who shall make an examination.¹⁵ The Board, therefore, finds that a conflict exists between OWCP's second opinion physicians, Drs. Teja and DeFalco, and appellant's treating physicians, Drs. Tai and Lessing, as to whether acceptance of appellant's claim should be expanded to include additional conditions causally related to the accepted employment injury; and if so whether appellant has established a recurrence of disability commencing October 28, 2017. On remand OWCP shall refer appellant to an IME, pursuant to 5 U.S.C. § 8123(a), to resolve the aforementioned conflict.¹⁶ It shall also request that the employing establishment provide information regarding whether work was available within appellant's restrictions as of October 28, 2017. 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.

¹⁵ See S.S., Docket No. 19-1658 (issued November 12, 2020); C.S., Docket No. 19-0731 (issued August 22, 2019).

¹⁶ See M.R., Docket No. 21-0219 (issued May 25, 2022); L.C., Docket No. 20-0866 (issued February 26, 2021); S.N., Docket No. 19-1050 (issued July 31, 2020); P.S., Docket No. 17-0802 (issued August 18, 2017).

ORDER

IT IS HEREBY ORDERED THAT the September 30, 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: May 15, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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