



found that the motor vehicle accident occurred as alleged but that she submitted insufficient medical evidence to establish that she sustained an injury due to the May 30, 2003 employment incident. On January 26, 2004 an OWCP hearing representative reversed the July 16, 2003 decision and found that appellant sustained a left knee contusion caused by the May 30, 2003 motor vehicle accident. The hearing representative also found that OWCP should further develop the medical record to determine if she had a back condition causally related to the May 30, 2003 injury. By decision dated April 20, 2004, OWCP found that appellant did not sustain a back condition causally related to the May 30, 2003 employment-related motor vehicle accident. In a separate decision, it accepted that she sustained chondromalacia of the left knee patella and a damaged tooth caused by the May 30, 2003 incident.

On August 25, 2004 appellant had left knee arthroscopic repair of a medial femoral condyle lesion. She returned to work in December 2004 and received intermittent wage-loss compensation for medical appointments. On August 4, 2005 appellant underwent an autologous chondrocyte implantation in the left knee and returned to a part-time modified carrier position on February 13, 2006 and to full-time modified duty on April 3, 2006.<sup>2</sup> She received intermittent wage-loss compensation.

In reports dated February 4, 2010, Dr. Robert M. Meneghini, Board-certified in orthopedic surgery, performed a physical examination and injected appellant's knee. He diagnosed left knee pain and degenerative joint disease and provided restrictions to her physical activity.

On June 15, 2010 she filed a claim for intermittent compensation for the period June 15 to July 15, 2010 and attached a time analysis form noting that she worked part time and was then told to leave as there was no work for her. The time analysis form was signed by K. Donohue, an employing establishment official. By letter dated July 28, 2010, OWCP informed appellant that the medical evidence was insufficient to establish her claim for disability compensation and advised her to submit a report from her physician that explained why she could not work. Appellant filed claims for compensation for intermittent periods through December 13, 2010. She attached time analysis forms to each claim, signed by an employing establishment official, indicating that she was sent home because no work was available.<sup>3</sup>

In September 1, 2010 report, Dr. Jay R. Lieberman, a Board-certified orthopedic surgeon, noted appellant's complaint of left knee pain with activity. He provided examination findings and advised that, upon review of an x-ray study, she had some joint space narrowing in the medial aspect of the left knee. Dr. Lieberman diagnosed mild osteoarthritis of the left knee and recommended physical therapy. In a September 8, 2010 report, Dr. Elizabeth Appel, a Board-certified internist, advised that appellant was given minimal hours at work due to administrative issues. Appellant had been on light duty and was asked to go home. In September 22 and

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<sup>2</sup> The modified duty offer indicated that appellant would case mail from one to eight hours daily, alternate seated or standing for comfort level, no pushing or pulling greater than 10 pounds, no motor vehicle operation with restrictions of standing for three hours, sitting for six hours and walking for one hour.

<sup>3</sup> The time analysis forms indicated that appellant worked partial days on September 11, 21, 22, 27 and 29, October 5 and 9 and December 11, 13, 14, 15, 20, 21, 22 and 23, 2010.

October 6, 2010 reports, Dr. Lieberman diagnosed osteoarthritis due to the May 30, 2003 employment injury. He found that she could work eight hours a day with lifting and climbing restricted to six hours, standing, walking, pushing and pulling to two hours and bending and stooping to one hour daily with a 10-pound weight restriction.

On October 22 2010 OWCP asked Dr. Lieberman to address whether appellant's osteoarthritis of the left knee was causally related to the May 30, 2003 employment injury and whether she still had residuals due to the employment injury. By letter dated January 28, 2011, it informed her that it could not process her compensation claims because the medical evidence was insufficient to establish disability due to the accepted conditions. Appellant was afforded an additional 30 days to provide the requested information. She retired in January 2011. In a form report dated February 10, 2011, Dr. Appel advised that appellant became totally disabled on January 27, 2011. She diagnosed severe osteoarthritis of the left knee and maxillofacial injury.

By decision dated March 7, 2011, OWCP denied appellant's claim for intermittent wage-loss compensation from June 15 to December 31, 2010 finding that the medical evidence did not establish that she was disabled due to the accepted conditions.

On March 17, 2011 appellant requested a review of the written record. She asserted that the hours claimed were when she was sent home because no work was available and indicated that she had now retired. Appellant submitted a job offer dated January 3, 2007 that indicated that she was to work modified duties for eight hours daily, a job offer dated September 9, 2010 noting that she was to work two hours daily casing mail and leave slips dated June 15 to December 16, 2010 advising that she was told to leave work because no work was available. In letters dated September 11, October 9 and December 6, 11, 13, 14 and 16, 2010, the employing establishment advised her that, in accordance with the guidelines established by the National Reassessment Process (NRP), a search for tasks meeting her medical restrictions had been completed but that there was not enough work available within her restrictions for her to complete a full day of work. Appellant was instructed to complete a leave slip and informed that she could file a claim for compensation.<sup>4</sup>

In reports dated April 6 and 20, 2011, Dr. Lieberman noted appellant's complaint of left knee pain. He provided physical examination findings and advised that she had some medical setbacks including atrial fibrillation and that she had a stroke in January 2011 without residual.<sup>5</sup> Dr. Lieberman diagnosed early osteoarthritis and noted that appellant had joint space narrowing on x-ray.

By decision dated June 16, 2011, an OWCP hearing representative affirmed the March 7, 2011 decision on the grounds that the medical evidence was insufficient to establish the claimed disability.

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<sup>4</sup> Appellant also submitted evidence not relevant to the period of claimed disability, including information regarding the May 30, 2003 employment injury, correspondence with OWCP and the employment establishment, medical reports dated June 24, 2003 to March 8, 2010 and information regarding the Merit Systems Protection Board and Equal Employment Opportunity Commission process.

<sup>5</sup> A 24-hour Holter monitor report demonstrated asymptomatic atrial tachycardia.

## LEGAL PRECEDENT

OWCP's implementing regulations define a recurrence of disability as "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."<sup>6</sup> This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employees' physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>7</sup> If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.<sup>8</sup>

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty.<sup>9</sup> OWCP's procedures provide that a recurrence of disability can be caused by a withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.<sup>10</sup>

FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to the NRP. Regarding claims for total disability when a wage-earning capacity decision has not been issued, the Bulletin provides:

"1. If the claimant has been on light duty due to an injury[-]related condition without an LWEC [loss of wage-earning capacity] rating (or the CE [claims examiner] has set aside the LWEC rating as discussed above), payment for total wage loss should be made based on the [Form] CA-7 as long as the following criteria are met--

[T]he current medical evidence in the file (within the last [six] months) establishes that the injury[-]related residuals continue;

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<sup>6</sup> 20 C.F.R. § 10.5(x).

<sup>7</sup> *Id.* at § 10.5(x); *see also* *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

<sup>8</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- *Claims, Recurrences*, Chapter 2.1500.3.b(a)(1) (March 2011). *See also* *Donald T. Pippin*, 54 ECAB 631 (2003).

<sup>9</sup> *J.F.*, 58 ECAB 124 (2006); *Carl C. Graci*, 50 ECAB 557 (1999); *Mary G. Allen*, 50 ECAB 103 (1998); *see also* *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>10</sup> *See* Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1500.3.b(1)(c).

[T]he evidence of file supports that light duty is no longer available; and

[T]here is no indication that a retroactive LWEC determination should be made. (Note -- Retroactive LWEC determinations should not be made in these NRP cases without approval from the District Director.)”<sup>11</sup>

The Bulletin also states that, “[i]f the medical evidence is not sufficient, the claims examiner should request current medical evidence from the employing establishment and the claimant.”<sup>12</sup>

The Board has held that a claimant established an employment-related recurrence of disability when a modified position made specifically to accommodate an accepted condition was withdrawn as part of the NRP and there was no indication that the modified work was withdrawn due to misconduct or nonperformance of job duties.<sup>13</sup>

### ANALYSIS

The accepted conditions are left knee contusion and chondromalacia patella. Appellant claimed wage-loss compensation for intermittent disability when her work hours were reduced beginning on June 15, 2010. The record contains time analysis forms and leave slips, signed by employing establishment officials that note beginning on June 15, 2010 she was intermittently told to leave early because no work was available for her. The record also contains a letters from the employing establishment that informed appellant of the NRP guidelines to be followed when there was not enough work available to meet her medical restrictions.

The Board finds that OWCP failed to properly follow the guidelines in FECA Bulletin No. 09-05. In light of the withdrawal of appellant’s light-duty position, it did not properly review the medical evidence from Dr. Meneghini and Dr. Lieberman, who treated her left knee condition. As noted, OWCP’s procedures provide that a recurrence of disability can be caused by a withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.<sup>14</sup> The guidance from FECA Bulletin No. 09-05 indicates that OWCP should consider whether the current medical evidence establishes that appellant had continuing employment-related residuals at the time of the withdrawal of the modified position.

The March 7 and June 16, 2011 decisions denying appellant’s claim for compensation did not refer to FECA Bulletin No. 09-05 or attempt to follow its provisions. If no LWEC is in place, as in this case, OWCP is to evaluate the medical evidence to determine if the current evidence establishes that the employment-related residuals continue and, if the medical evidence is not sufficient, the claims examiner should request current medical evidence from both the

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<sup>11</sup> FECA Bulletin 09-05 (issued August 18, 2009).

<sup>12</sup> *Id.*

<sup>13</sup> *A.N.*, Docket No. 11-394 (issued October 26, 2011); *K.S.*, Docket No. 08-2105 (issued February 11, 2009).

<sup>14</sup> *Supra* note 10.

claimant and the employing establishment. Entitlement to wage-loss compensation would be established if the current evidence established that employment-related residuals continued, the light duty was no longer available and there was no indication that a retroactive LWEC determination should be made.<sup>15</sup>

The case will be remanded to OWCP for a proper decision in accord with the proper standard for review in accordance with FECA Bulletin No. 09-05. After such development as OWCP deems necessary, it should issue an appropriate decision.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 16 and March 7, 2011 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: June 14, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>15</sup> R.K., Docket No. 11-1048 (issued January 25, 2012).