

FACTUAL HISTORY

Appellant, a 45-year-old letter carrier, has an accepted claim for left foot closed fracture, left foot/ankle tenosynovitis and joint effusion, which occurred on March 14, 2012.³ OWCP authorized a September 20, 2012 surgical procedure.⁴ Appellant received wage-loss compensation from October 13 to December 4, 2012. She resumed work on December 6, 2012.

Appellant stopped work on December 29, 2012. She subsequently filed a recurrence of disability (Form CA-2a) alleging that the employing establishment “arbitrarily” sent her home on December 29, 2012. Appellant returned to work on January 4, 2013. The employing establishment advised that it had no information regarding her having been sent home.

When appellant filed her recurrence claim, the case record did not include contemporaneous medical evidence addressing any physical restrictions at the time she resumed work in early December 2012.⁵ On her CA-2a form, she stated that she returned to work with restrictions that included “Sit-stand, carry up to 4 [to] 5 hours, intermittently, 15 pounds weight, sit and drive.” On the back of the CA-2a form, the employing establishment advised that there had been no accommodation or adjustments to appellant’s regular duties due to injury-related limitations.⁶ It also claimed that it had not received any medical evidence regarding her September 2012 surgery.

On January 31, 2013 OWCP wrote to both appellant and her employing establishment inquiring about her medical status and any work restrictions in place on or after December 6, 2012. It summarized the various requirements for establishing a recurrence of disability and informed her of the need to submit additional medical evidence and factual information in support of her claim. OWCP afforded appellant 30 days to submit the requested factual information and medical evidence.

OWCP asked the employing establishment to submit information regarding the work appellant performed when she returned on December 6, 2012. It specifically inquired whether she returned to unrestricted or restricted work following surgery. If appellant returned to restricted duty, OWCP inquired as to what medical restrictions were in place. It advised the employing establishment to include a copy of the medical documentation because the file did not reflect such. Additionally, OWCP solicited information regarding what, if any, changes occurred between December 6 and 29, 2012 with respect to appellant’s medical condition and/or her

³ Appellant stepped on a branch and rolled her left ankle.

⁴ Dr. Harvey Lefkowitz, a podiatrist, performed a left ankle arthrotomy and excision of left foot os trigonum.

⁵ The record included podiatric treatment notes from Dr. Lefkowitz and his associates. Dr. Lefkowitz saw appellant on December 21, 2012 and was aware that she had been working. He diagnosed peripheral neuritis, left sural nerve and status post fracture left os trigonum. Dr. Lefkowitz drained fluid from appellant’s left ankle (posterior triangle arthrocentesis), renewed her prescription for Naproxen and instructed that she continue using her transcutaneous electrical nerve stimulation (TENS) unit. He advised appellant to follow up in two weeks. Appellant returned on January 8, 2013 and received a therapeutic nerve block, left sural nerve.

⁶ On a January 24, 2013 Form CA-7, the employing establishment indicated that when appellant resumed work on December 6, 2012 she returned to her predate-of-injury job with the same number of hours and same duties.

assigned duties. It specifically asked if she continued to work the same status until December 29, 2012. OWCP also inquired whether appellant presented new work restrictions on December 29, 2012, and if so, was the employing establishment able to honor the new restrictions. Lastly, it asked the employing establishment if she had been working restricted duties prior to December 29, 2012 and her medical restrictions remained the same, whether it failed to continue to provide restricted duties.

On February 11, 2013 appellant filed a claim for compensation (Form CA-7) for intermittent wage loss through January 25, 2013. Beginning January 4, 2013, she worked approximately six to seven hours a day. Appellant claimed wage loss for the balance of her eight-hour shift.

On February 13, 2013 OWCP acknowledged receipt of the latest CA-7, and reminded both appellant and the employing establishment of the need for additional evidence as outlined in its January 31, 2013 letter.⁷

OWCP received additional medical evidence.⁸ Neither appellant nor the employing establishment timely submitted the requested factual information regarding her specific duties upon returning to work on December 6, 2012, and what, if any changes occurred on or after December 29, 2012.

In a decision dated March 6, 2013, OWCP denied appellant's recurrence of disability claim. It found that the medical evidence of record did not set forth any work restrictions related to the claim or address any inability to work.

In April 2013, OWCP received additional factual information and medical evidence from appellant in response to its January 31, 2013 development letter.⁹

Appellant requested an oral hearing before the Branch of Hearings and Review. Her request had an April 6, 2013 postmark, which was one day beyond the 30-day limit for filing a timely request under 20 C.F.R. § 10.616(a).

In a decision dated May 10, 2013, the Branch of Hearings and Review denied appellant's hearing request as untimely. The hearing representative also denied a discretionary hearing

⁷ Also, OWCP left a February 13, 2013 voicemail message for the employing establishment regarding verification of appellant's work restrictions and further inquired whether the claimed wage loss was a result of the employing establishment's inability to provide work within appellant's restrictions.

⁸ Dr. Tara L. Stock, a podiatrist and colleague of Dr. Lefkowitz, examined appellant on January 22, 2013. She noted that appellant stated that she "Feels okay." Appellant also reportedly told Dr. Stock that she was unable to use a cane at work, but was willing to use a brace. She had been having shooting pain in the left foot. The previous injection had helped for only a few days. Objective findings on examination included pain on palpation at lateral ankle scar and a positive Tinel's sign. Dr. Stock diagnosed nerve compression/mononeuritis, left sural nerve and foot/ankle tenosynovitis, posterior tibial tendon. She recommended a topical analgesic cream and wearing a brace while working. Appellant deferred additional injections.

⁹ As discussed *supra* note 2, the evidence received after OWCP's March 6, 2013 decision is not properly before the Board, and cannot be considered with respect to the current appeal.

noting that appellant could instead file a request for reconsideration with OWCP and submit additional evidence relevant to the claim.

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 injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹⁰ Recurrence of disability also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.¹¹ A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties or other downsizing or where a loss of wage-earning capacity determination is in place.¹²

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing that the recurrence of disability is causally related to the original injury.¹³ This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.¹⁴ The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.¹⁵

ANALYSIS

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

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to compensation; however, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁶

Appellant underwent surgery on September 20, 2012, and OWCP paid wage-loss compensation for temporary total disability through December 4, 2012. She returned to work effective December 6, 2012 and continued to work until December 29, 2012. The record on

¹⁰ 20 C.F.R. § 10.5(x).

¹¹ *Id.*

¹² *Id.*; 20 C.F.R. §§ 10.104(c) and 10.509; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013).

¹³ 20 C.F.R. § 10.104(b); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapters 2.1500.5a and 2.1500.6b.

¹⁴ *See S.S.*, 59 ECAB 315, 318-19 (2008).

¹⁵ *Id.* at 319.

¹⁶ *William J. Cantrell*, 34 ECAB 1223 (1983).

appeal does not clearly establish the nature of the work appellant performed on or after December 6, 2012. OWCP's March 6, 2012 decision noted that it was unclear whether she was "working restricted or unrestricted" duties when she returned to work on December 6, 2012. It assumed that appellant returned to unrestricted work. An OWCP decision should be based on findings of fact, not assumptions.¹⁷ Accurate information regarding appellant's employment duties is essential in determining whether she sustained a recurrence of disability beginning December 29, 2012.

The Board acknowledges OWCP's previous attempts to develop the record regarding appellant's specific employment duties as of December 6, 2012. Neither appellant nor the employing establishment timely responded to OWCP's January 31 and February 13, 2013 inquiries. However, OWCP's efforts to obtain information from the employing establishment should not have ceased at that point. The employing establishment is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means.¹⁸ An employing establishment cannot withhold information to its employee's detriment.¹⁹

Appellant claimed the employing establishment "arbitrarily" sent her home on December 29, 2012. The employing establishment challenged this assertion, noting it did not have any information regarding appellant having been sent home. An employing establishment who has reason to disagree with any aspect of the claimant's report shall submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position.²⁰ If the employing establishment does not submit to a written explanation to support the disagreement, OWCP may accept the claimant's report as established.²¹ OWCP twice requested that the employing establishment submit information regarding the circumstances surrounding appellant's December 29, 2012 work stoppage. Other than noting its disagreement on the Form CA-2a, the employing establishment did not provide any evidence or argument in response to appellant's allegation that she was sent home on December 29, 2012.

Because the record lacks sufficient evidence for the Board to render an informed decision, the case shall be remanded to OWCP for further development. On remand, OWCP shall apprise the employing establishment of its responsibility for submitting all relevant and probative factual and medical evidence in its possession. Also, it should inform the employing establishment of the consequences for failing to substantiate its disagreement with appellant's allegations. After OWCP has developed the record consistent with the above-noted directive, it

¹⁷ See 20 C.F.R. § 10.126.

¹⁸ *Id.* at § 10.118.

¹⁹ As evidence appearing in the employing establishment's files is not generally available to claimants, the employing establishment must assemble and submit such evidence. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4(b) (June 2011).

²⁰ 20 C.F.R. § 10.117(a).

²¹ *Id.* at § 10.117(b).

shall issue a *de novo* decision regarding appellant's claimed recurrence of disability beginning December 29, 2012.

CONCLUSION

The case is not in posture for decision.²²

ORDER

IT IS HEREBY ORDERED THAT the May 10 and March 6, 2013 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this decision.

Issued: June 19, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²² Given the Board's disposition on the merits of the recurrence claim, the issue of whether the Branch of Hearings and Review properly denied appellant's hearing request is moot.