

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

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M.S., Appellant)	
)	
and)	
)	Docket No. 18-0130
)	Issued: September 17, 2018
DEPARTMENT OF HOMELAND SECURITY,)	
IMMIGRATION & CUSTOMS)	
ENFORCEMENT, Newark, NJ, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 23, 2017 appellant filed a timely appeal from an August 23, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 case.

ISSUE

The issue is whether appellant has established a recurrence of disability commencing August 3, 2014 causally related to her accepted April 17, 2003 and February 17, 2007 employment injuries.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. The facts as presented in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On April 24, 2003 appellant, then a 41-year-old immigration enforcement agent, filed a traumatic injury claim (Form CA-1) alleging that she injured her neck during required physical fitness training on April 17, 2003. OWCP adjudicated this claim under OWCP File No. xxxxxx260 and accepted disc herniation at C5-6 and cervical radiculopathy. Appellant stopped work on May 27, 2003 and received continuation of pay through July 11, 2003. OWCP then paid her wage-loss compensation on the daily rolls until January 27, 2004 when it placed her on the periodic compensation rolls. On April 6, 2004 appellant returned to limited duty for six hours daily and worked until June 15, 2004. OWCP accepted a recurrence of disability on that date, and paid compensation on the daily rolls until September 5, 2004, when OWCP returned her to the periodic rolls.

On February 28, 2005 appellant underwent an anterior cervical discectomy at L5-6 and C6-7 with fusion, performed by Dr. John J. Knightly, a Board-certified neurosurgeon. She returned to a light-duty position on September 18, 2006.

On April 10, 2007 appellant filed a second traumatic injury claim (Form CA-1) alleging that she sustained a neck injury on February 17, 2007 during a 14-hour employment-related airplane flight from Newark, New Jersey to New Delhi, India when she was transporting a prisoner. OWCP adjudicated that claim under OWCP File No. xxxxxx616 and accepted cervical muscle spasm. Appellant stopped work on February 19, 2007. She received continuation of pay through April 2, 2007, and received intermittent wage-loss compensation through April 27, 2007.

On April 20, 2007 appellant filed a schedule award claim (Form CA-7) under current File No. xxxxxx260.² OWCP accepted a claimed May 1, 2007 recurrence of disability on June 28, 2007. It paid appellant wage-loss compensation on the supplemental rolls through July 30, 2007. OWCP then placed her on the periodic compensation rolls.

Appellant returned to a modified position on January 22, 2009. OWCP thereafter reduced her compensation based upon a loss of wage-earning capacity (LWEC) resulting from loss of administratively uncontrolled overtime (AUO).

OWCP, on April 20, 2009, administratively combined File Nos. xxxxxx260 and xxxxxx616, with the former designated as the master file.

² By decision dated April 17, 2008, OWCP denied appellant's schedule award claim. By decision dated October 23, 2008, an OWCP hearing representative affirmed the April 17, 2008 decision.

Appellant returned to full-duty work on May 22, 2009. She relocated to Florida on July 6, 2009 where she worked at the employing establishment's Moore Haven facility.³ On July 27, 2011 appellant requested a transfer closer to her home in Fort Lauderdale, Florida.

In a November 18, 2011 report, Dr. Knightly noted seeing appellant for follow-up evaluation. He diagnosed ulnar neuropathy, anxiety, depression, cervical radiculopathy, cervicgia, history of migraines, fibromyalgia, cervical spondylosis, and neuropathy. Dr. Knightly noted that appellant's medications included Xanax twice daily, and Vicodin as needed for pain.

On August 8, 2012 Dr. Lowell Davis, Board-certified in anesthesiology and pain medicine, diagnosed cervicgia and myofascial pain. He advised that appellant should continue Vicodin as needed for pain.

In reports dated April 24, 2013, Dr. Mark Fishman, an attending Board-certified psychiatrist, described appellant's complaint of long-standing neck pain that radiated into her bilateral upper extremities. He advised that she could not use firearms and recommended electrodiagnostic studies.

By report dated November 8, 2012, Dr. Dale R. Tidaback, Board-certified in occupational medicine, assessed appellant's fitness for duty.⁴ He reviewed her medical and employment history and determined that, while she was physically capable of performing her employment duties, she was not fit for duty, including carrying an issued firearm, due to her continued use of narcotics and anti-anxiety medications, because these could cloud the sensorium and affect decision making. Dr. Tidaback noted that they were prescribed on an "as needed" basis, which meant that appellant was free to increase or decrease their usage based on her symptoms. He indicated that there were other pain and anxiety medications which were equally efficacious with significant side-effects.

In correspondence dated January 14, 2013, J.M., deputy field office director with the employing establishment, notified appellant that it proposed to remove her from her position as an immigration enforcement agent for medical inability to perform the duties of her position. He indicated that the agency was concerned about her ability to perform all essential functions of her

³ By decision dated November 18, 2010, an OWCP hearing representative reversed a May 25, 2010 OWCP decision, finding that appellant established recurrent disability on February 16, 2010 caused by a change in the nature of her modified-duty position. He noted that appellant had returned to modified duty on June 8, 2010. By decision dated February 16, 2012, an OWCP hearing representative affirmed July 25, August 1, and 5, 2011 OWCP decisions, finding that appellant was not entitled to compensation for claimed periods of intermittent disability. In a September 23, 2011 decision, an OWCP hearing representative found that appellant was entitled to four hours of claimed compensation for a medical evaluation. By decision dated April 13, 2012, an OWCP hearing representative affirmed a September 8, 2011 decision denying compensation for intermittent disability from June 19 to 30, 2011. In decisions dated April 20 to June 12, 2012, OWCP denied appellant's claims for compensation for intermittent periods of disability. On April 24, 2013 it modified appellant's wage-loss compensation to reflect that she was entitled to lost AUO pay as of January 30, 2013. OWCP applied the *Shadrick* formula and found that she was entitled to compensation of \$1,069.00 every four weeks. In decisions dated April 30, 2013 to March 17, 2014, it again denied appellant's claims for compensation for intermittent disability.

⁴ Dr. Tidaback also referenced a July 31, 2012 report from Dr. Stuart A. Rubin, Board-certified in psychiatry and pain medicine, which is not found in the record before the Board.

position and for her safety and well-being, and the safety and well-being of her coworkers and the public the employing establishment served. J.M. referenced Dr. Tidaback's November 8, 2012 fitness-for-duty assessment, and agreed with his analysis that the medications including Vicodin, a narcotic, and Xanax, an anti-anxiety agent, could affect her judgment.⁵ He indicated that, during the notice period, appellant would remain in current duty status of administrative duties.⁶

A January 29, 2013 memorandum from the employing establishment to appellant indicated that she was being placed on administrative duty with no law enforcement duties at the Moore Haven facility, effective that day.

In a report dated December 9, 2013, Dr. Davis noted that appellant had a known history of chronic neck pain, primarily myofascial in nature. He noted diminished range of motion and tenderness on cervical spine examination. Dr. Davis advised that appellant could return to full-duty work and should continue her current pharmacological regimen.

In a June 30, 2014 letter, M.M., field office director at the employing establishment, noted that by letter dated January 14, 2013, the employing establishment had informed appellant that it proposed to remove her due to medical inability to perform the duties of her position as immigration enforcement agent due to her continued use of narcotic and other medications which, he maintained, clouded the sensorium and affected decision making.⁷ He noted that on January 29, 2013 appellant had been placed on administrative duties pending the outcome of the agency's proposed removal. M.M. indicated that, after reviewing all evidence, appellant's Xanax and Vicodin medication rendered her unfit for duty as an immigration enforcement agent and notified her of a position that she was qualified for as an enforcement removal assistant. He stayed the removal for 30 days to allow her to apply for the position, notifying her that, if he did not receive an e-mail indicating her desire to be considered for the enforcement removal assistant position, she would be removed from federal service effective August 2, 2014.

⁵ Xanax was identified as a benzodiazepine-type anxiolytic.

⁶ A May 21, 2012 medical examination conducted by Dr. Seth Feldman, an osteopath, advised that appellant should work limited duty due to chronic neck pain.

⁷ The position description for an immigration enforcement agent indicates that the agent carries firearms in the performance of duty. The record also contains employing establishment firearms policy.

On October 23, 2014 appellant filed a notice of recurrence (Form CA-2a) alleging that a recurrence occurred on August 3, 2014. She indicated that from January 29, 2013 she was prevented from performing usual duties until her removal on August 2, 2014 even though her physician had returned her to full-duty status.⁸ The CA-2a form contains no comments from the employing establishment.

By development letter dated December 30, 2014, OWCP informed appellant that the evidence she had submitted in support of her recurrence claim was insufficient to establish entitlement to wage-loss compensation. It advised her of the medical evidence needed to establish her claim and asked that she complete a questionnaire provided.

In a January 28, 2015 report, Dr. Matthew H. Moretti, an osteopath who practices family medicine, noted a history of two employment injuries. He advised that appellant was required to commute 100 miles each way to her job, and the stress of this caused muscle spasm and neck pain which, in turn, led to severe anxiety and migraine headaches. Dr. Moretti opined that appellant's medical symptoms were all caused by and/or stemmed from her employment injuries and were then exacerbated by a daily, extremely long commute.

By decision dated April 22, 2015, OWCP denied appellant's recurrence claim. It found that the medical evidence submitted did not support a spontaneous change in her medical condition which necessitated a work stoppage nor had she established that a limited-duty assignment was withdrawn.

On October 13, 2015 appellant, through counsel, requested reconsideration of the April 22, 2015 decision. Medical evidence submitted included a May 12, 2015 report in which Dr. Samy F. Bishai, an orthopedic surgeon noted appellant's descriptions of the employment injury and her continued complaint of radiating neck pain. Cervical examination demonstrated paraspinal muscle spasm and decreased range of motion. Dr. Bishai diagnosed cervical disc syndrome with bilateral radiculopathy, and status post disc excision and fusion at C5-6 and C6-7. He advised that, after his review of appellant's medical records, he would prepare a treatment program.

In a May 15, 2015 report, Dr. Davis noted seeing appellant in follow-up for history of chronic neck pain. Cervical spine examination demonstrated tenderness and spasm. Dr. Davis diagnosed cervicgia, myofascial pain syndrome, cervical facet joint mediated pain, cervical postlaminectomy, and anxiety/depression. In a June 22, 2015 report, Dr. Knightly noted that he had not seen appellant since May 2013. He described her report of continued neck pain and increasing arm pain and numbness with tingling into the hands bilaterally. Following physical examination, Dr. Knightly diagnosed deteriorating anxiety and depression, deteriorating right

⁸ The record includes a January 31, 2013 treatment note in which Dr. Fishman noted a history of ongoing axial neck pain. Dr. Fishman indicated that appellant was able to perform full-duty work per her recent functional capacity evaluation (FCE). In a May 3, 2013 report, Dr. Knightly noted that he had not seen appellant in a while and that she was doing well. He listed medications including Xanax and Vicodin, described physical examination findings, and noted diagnoses of ulnar neuropathy, anxiety depression, right cervical radiculopathy, cervicgia, history of migraines, fibromyalgia, cervical spondylosis, and neuropathy. He advised that she could return to full duty, but noted that the use of pain medications could be problematic in law enforcement specialties. On an emergency department report dated June 13, 2014, Dr. Vincent Roddy, Board-certified in emergency medicine, noted a history of chronic neck pain. He diagnosed neck pain and cervical radiculopathy.

cervical radiculopathy, and worsening neck pain. Dr. Knightly opined that because she was on Vicodin and Xanax, she would not be qualified to carry a firearm. In a July 14, 2015 report, Patricia G. Adams, a licensed social worker, noted seeing appellant for counseling for anxiety and depression related to her termination. Dr. Jason Mansour, Board-certified in emergency medicine, noted that appellant was seen in an emergency department on August 6, 2015 for worsening right-sided neck pain. She was treated with medication. Discharge diagnoses were cervical pain and herniated disc.

On May 20, 2015 Dr. Moretti indicated that, despite a May 2006 FCE that found appellant incapable of performing her usual position, she was returned to full duty, “in fear of retribution or termination,” and that an FCE in July 2012 recommended six-hour workdays, but she was forced to work eight-hour days with a two-hour commute each way. He opined that appellant’s pain was caused by a work-related injury, exacerbated by lack of approval for physical therapy and nonadherence by her supervisors of medically recommended work restrictions. In an August 25, 2015 report, Dr. Moretti opined that appellant’s anxiety and depression were due to her employment injuries. He advised that she could not perform any work due to chronic pain and secondary severe anxiety.

In an emergency department report dated September 17, 2015, Dr. Larry Carter, who practices emergency medicine, noted a history that appellant tripped while carrying groceries two weeks prior and was complaining of left buttock pain radiating down her leg. She was treated with medication. The discharge diagnosis was sciatica. In an emergency department report dated October 15, 2015,⁹ Dr. Julie A. Phillips, who practices emergency medicine, noted a complaint of chronic neck pain, exacerbated with movement. Appellant was treated with medication. The discharge diagnosis was cervical pain.

In October 2015 OWCP referred appellant to Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 19, 2015 report, Dr. Millheiser noted appellant’s description of the employment injuries, his review of the record, and appellant’s complaint of neck and back pain. Physical examination demonstrated moderate restriction of the cervical spine motion in all planes with no tenderness, spasm, or trigger points present. Dr. Millheiser found slight right thenar atrophy and hypesthesia of the left middle finger. Cervical spine x-rays demonstrated a fusion from C5 to C7, reversal of the curve at C3-4, and slight narrowing at C3-4 and C4-5 disc spaces. Dr. Millheiser diagnosed postcervical fusion from C5 to C7. He indicated that appellant had a chronic pain problem following the cervical fusion and still had neurological findings with hypoesthesia of the left middle finger and slight right thenar atrophy which were residuals of the employment injury. Dr. Millheiser also noted that appellant suffered from anxiety and should be weaned off narcotics. He concluded that appellant could not return to regular duty work without restrictions due to the cervical fusion, but could perform modified duty with lifting of 30 pounds and normal bending, sitting, standing, and walking. Appellant should avoid neck twisting.

⁹ The hospital is not identified in the report.

A revised letter of removal, submitted to OWCP on March 28, 2016, indicated that appellant was to be removed from federal service effective October 1, 2014 based on her continued use of both narcotics and benzodiazepine-type anxiolytics.¹⁰

On August 20, 2016 appellant elected to receive Office of Personnel Management (OPM) retirement benefits, effective October 2, 2014. On September 30, 2016 she elected OPM retirement benefits, effective January 1, 2015. Appellant's reduced compensation was terminated effective September 30, 2016.

By decision dated November 1, 2016, OWCP denied modification of its April 22, 2015 decision denying her recurrence claim, finding that the medical evidence submitted was insufficient to establish a spontaneous worsening of her accepted conditions and that the removal of her light-duty position was due to her daily commute she endured after her return to full-duty work.

On June 12, 2017 appellant, through counsel, requested reconsideration of the November 1, 2016 decision. Counsel asserted that appellant sustained a recurrence of disability because her light-duty work was withdrawn.

In an April 25, 2017 report, Dr. Davis noted that appellant was last seen in May 2015. He described her complaint of right-sided neck, shoulder, and upper extremity pain, managed by medication. Following physical examination, Dr. Davis diagnosed cervical spondylosis without myelopathy, cervical postlaminectomy syndrome, and right cervical radiculopathy.

By decision dated August 23, 2017, OWCP denied modification of its November 1, 2016 decision regarding the claimed August 3, 2014 recurrence of disability.

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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹¹ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the 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.¹²

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 light duty can be performed, the employee has the burden to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this

¹⁰ Page three of this document is missing.

¹¹ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

¹² *Id.*

burden of proof, the employee must show either 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.¹³

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of proof to establish that the disability is causally related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.¹⁴

ANALYSIS

The Board finds this case is not in posture for decision as to whether the withdrawal of appellant's modified duty was compensable under FECA. OWCP procedures provide that if the employing establishment withdraws a limited-duty assignment made specifically to accommodate a claimant's condition due to the work-related injury, and the withdrawal did not occur for cause, reduction-in-force (RIF), or closure of the facility, OWCP need only establish continuing injury-related disability for regular duty to accept the recurrence and begin payment of compensation benefits. To be compensable as a recurrence under FECA and its implementing regulations defining recurrence, "this withdrawal must have occurred for reasons other than misconduct or nonperformance of job duties."¹⁵

The Board has long held that if an employing establishment's actions prevent an employee from working due to a work-related condition, that employee is disabled within the meaning of FECA.¹⁶

Appellant was removed from the employing establishment, effective October 1, 2014, because the medications she was taking were incompatible with her full-duty requirements, especially that she was required to carry a weapon and be qualified to use it as needed. The record indicates that both Xanax and Vicodin were prescribed medications. If the accepted conditions necessitated the use of these medications, appellant would be entitled to compensation for the period that the use of these medications was needed.¹⁷ It is, however, unclear whether these medications were prescribed for the accepted conditions. Therefore, further development is needed.

¹³ *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁴ *S.S.*, 59 ECAB 315 (2008).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6-7 (June 2013).

¹⁶ *Claude E. Pilgreen*, 33 ECAB 566 (1982); *see B.S.*, Docket No. 11-1973 (issued May 7, 2012).

¹⁷ *Claude E. Pilgreen, id.* Section 8103 of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree, or the period of disability, or aid in lessening the amount of monthly compensation. 5 U.S.C. § 8103.

The Board finds that, as further development of the evidence is necessary, the case must be remanded to OWCP. On remand OWCP shall prepare a new statement of accepted facts and provide it, along with the case record, to an appropriate medical specialist for an opinion as to whether appellant's use of the medications Xanax and Vicodin, which led to her termination by the employing establishment, were necessitated by the accepted conditions. After this and such further development as may be deemed necessary, OWCP shall issue a *de novo* opinion.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant established a recurrence of disability on August 3, 2014 causally related to her accepted April 17, 2003 and February 17, 2007 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: September 17, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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