

FACTUAL HISTORY

OWCP accepted that on February 24, 2009 appellant, then a 62-year-old rural carrier, sustained a lumbar sprain as a result of a motor vehicle accident. She stopped work on March 18, 2009 and returned to limited-duty work on April 16, 2009.

On November 8, 2010 appellant filed a claim (Form CA-2a) alleging a recurrence of disability commencing October 26, 2010 and for wage-loss compensation from November 6 through 19, 2010. She noted the employing establishment withdrew her limited-duty position under the National Reassessment Process (NRP).

In a September 2, 2010 medical report, Dr. Youssef W. Wassef, an attending Board-certified physiatrist, obtained a history of appellant's preexisting upper and lower back and neck pain, her accepted employment injury and medical treatment. He noted her complaint of burning low back pain that traveled down her left leg to the top of her foot and became worse with walking, standing, bending, lifting and sitting. Dr. Wassef advised that appellant left S1 radiculopathy based on electrodiagnostic testing.² A magnetic resonance imaging (MRI) scan showed a post-traumatic L5-S1 disc bulge with left paracentral protrusion. Dr. Wassef stated that appellant had no history of significant back problems or pain radiating down her left lower extremity until the February 24, 2009 employment injury. He advised that she was unable to return to her usual work. Dr. Wassef recommended a diagnostic analgesic L5-S1 discogram to confirm the diagnosis. He advised that appellant could continue to perform light-duty work with restrictions.

By letters dated December 6, 2010, OWCP advised appellant that no action would be taken on her claim for wage-loss compensation until her recurrence claim had been adjudicated. It requested that she submit additional factual and medical evidence in support of her recurrence claim. Appellant subsequently filed Forms CA-7 requesting wage-loss compensation from November 27, 2010 through February 25, 2011.

In treatment reports dated September 30 and November 11, 2010, Dr. Wassef reiterated his findings and conclusions regarding appellant's lumbar condition and work capacity. He noted that she had tenderness of the left sacroiliac joint on palpation.

In a February 28, 2011 decision, OWCP denied appellant's recurrence claim. It found that medical evidence from Dr. Wassef did not sufficiently address how appellant's S1 radiculopathy was causally related to the February 24, 2009 employment injury, accepted for a lumbar sprain.

On March 7, 2011 appellant, through her attorney, requested a telephone hearing before an OWCP hearing representative. In an April 4, 2011 report, Dr. Wassef listed findings on examination and stated that appellant had left S1 radiculopathy and a post-traumatic L5-S1 disc bulge with left paracentral protrusion. He noted that she was dismissed from work because no light-duty work was available. Dr. Wassef reiterated that she was capable of work with physical restrictions.

² A nerve conduction velocity study and electromyogram (EMG) performed on May 26, 2009 were suggestive of left borderline to mild S1 radiculopathy.

During the June 7, 2011 hearing, appellant testified that her modified position was discontinued by her employer on October 26, 2010. She stated that it was not a bid position and that there were no other positions at the employing establishment that required only answering telephones. Appellant testified that her layoff was not based on seniority but based on her status as an injured employee. She had not been reemployed and no loss of wage-earning capacity determination had been made by OWCP.

By letter dated June 30, 2011, the employer stated that following appellant's February 24, 2009 injury she accepted a job offer for a modified-duty position and returned to work on April 16, 2009. It acknowledged that she was advised on October 26, 2010 that no meaningful productive work could be found within her limitations.

In an August 3, 2011 decision, an OWCP hearing representative affirmed the February 28, 2011 decision. He stated that the February 28, 2011 decision did not specifically deny the relationship of the additional lumbar conditions addressed by Dr. Wassef to the accepted lumbar strain. The hearing representative found that the physical restrictions recommended by the physician were not related to the lumbar strain and, as appellant's disability was related to more significant conditions, compensation would not be payable under FECA Bulletin No. 09-05. The hearing representative stated:

“[OWCP] is not a disinterested arbiter, however, but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on [OWCP] to see that its administrative processes are impartially and fairly conducted. While the claimant has the burden to establish entitlement to compensation, [OWCP] shares responsibility in the development of the evidence. It must obtain any evidence that is necessary for the adjudication of the case which is not received when the notice or claim is submitted. *[OWCP] is responsible for providing the claimant information about the procedures involved in establishing a claim, including detailed instructions for developing the required evidence and upon initial examination of the case should request all evidence necessary to adjudicate the claim.* [OWCP] fulfilled these obligations in its December 6, 2010 letter.”

* * *

“Based on my review of the evidence, I find that [appellant] did not meet her burden of proof in establishing that she sustained a recurrence of disability on October 26, 2010. Although the medical evidence supports that she was unable to perform her date-of-injury job at that time, it does not support that her disability was causally related to the injuries she sustained on that date, for the reasons which are explained above. The evidence of record is insufficient to establish that [appellant] sustained a recurrence of disability as alleged.” [Emphasis added, citations omitted.]

LEGAL PRECEDENT

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record

establishes that she can perform the limited-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 she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.³ To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.⁴

FECA Bulletin No. 09-05 provides in pertinent part:

“B. LWEC decision HAS NOT been issued--

1. If the claimant has been on light duty due to an injury[-]related condition without an LWEC [loss of wage-earning capacity] rating, ... payment for total wage loss should be made based on the CA-7 as long as the following criteria are met:

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

the evidence of file supports that light duty is no longer available;
and

there 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.)”⁵

FECA Bulletin No. 09-05 also states that, if the medical evidence is not sufficient, the claims examiner should request current medical evidence from the employing establishment and the claimant.⁶

ANALYSIS

Appellant filed a claim for a recurrence of total disability and wage loss commencing October 26, 2010. The record establishes that her limited-duty job was withdrawn by her employer through the NRP.

³ *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986). Under 20 C.F.R. § 10.5(x) a recurrence of disability includes 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.

⁴ *Maurissa Mack*, 50 ECAB 498 (1999).

⁵ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁶ *Id.*

The guidelines for evaluating a claim for total disability under these circumstances were set forth by the Director in FECA Bulletin No. 09-05. The Board finds that the hearing representative did not properly consider OWCP's responsibility in such cases. Specifically, the hearing representative found that the duty of OWCP under the FECA Bulletin No. 09-05 was discharged by the December 6, 2010 claim development letter sent to appellant and her employer. The Board does not agree.

The precedent cited by the hearing representative pertains to the general obligation of OWCP to assist an employee to develop the evidence in the *initial* adjudication of a claim for compensation. Such is not the case in a claim arising from the withdrawal of a limited-duty job under the NRP. In this case, appellant's claim was accepted by OWCP for a lumbar strain on February 24, 2009 in a motor vehicle accident. She received wage-loss and medical benefits and returned to limited duty on April 16, 2009 under medical restrictions recommended by her attending physician. FECA Bulletin No. 09-05 is applicable in situations where OWCP has accepted claims of injury by employees who return to work but not at their date-of-injury positions. In situations addressed by the FECA Bulletin No. 09-05, the injured employee is working under medical restrictions that preclude his or her return to the date-of-injury job until such point where the employer advises such light duty is no longer available.

The hearing representative found that Dr. Wassef had "ceased discussing the sole accepted condition in the case, which is a lumbar strain, but has provided the opinion that [appellant] sustained more significant injuries as a result of the February 24, 2009 incident." He noted that the medical record reflected that as early as March 20, 2009, a diagnosis of sciatica had been made. On March 26, 2009 Dr. Scott Wilson cited a lumbar strain with right radicular symptoms. An April 1, 2009 lumbar MRI scan study cited a disc bulge at L5-S1 touching the thecal sac, narrowing the neural foramina and a paracentral left disc protrusion which extended into the left neural foramina and contributed to stenosis. On April 20, 2009 Dr. Gary Newcomer diagnosed a lumbar strain, abnormal disc protrusion and degenerative disc disease. On May 26, 2009 Dr. Wassef described a recent EMG study as indicative of borderline to mild left radiculopathy. On June 5, 2009 Dr. Steven Bailey stated that an L1-2 herniated disc was related to the motor vehicle accident. On February 11, 2010 OWCP inquired from Dr. Eric Scott whether appellant's lumbar strain had resolved. Dr. Scott responded in March 2010 that she still had residuals of her lumbar strain and that part of her present condition was related to preexisting degenerative conditions. The hearing representative determined that the medical evidence of record was not sufficiently rationalized on causal relation.

Although the hearing representative was correct in noting OWCP accepted only a lumbar strain due to the February 24, 2009 motor vehicle accident, the medical evidence of record raises the question of whether a strain was the proper or sole diagnosis related to the injury. While appellant has the burden to establish a condition not accepted by OWCP as causally related to the February 24, 2009 injury, OWCP shares in this responsibility. Several attending physicians of record have supported that the February 24, 2009 motor vehicle accident resulted in spinal conditions beyond the accepted lumbar strain. The nature and extent of appellant's lumbar conditions due to the accepted injury and the extent of any disability or physical restrictions necessitated by the injury are issues to be resolved by probative medical evidence. In this case, there was no record review by any OWCP medical adviser or referral of appellant for a second opinion evaluation. The evidence submitted by appellant is generally supportive of her claim and necessitates further medical development by OWCP.

As noted, the withdrawal of a light-duty position may be considered a recurrence of disability under OWCP regulations. 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 light-duty position. If the current medical evidence of record in an accepted claim is not sufficient to resolve this issue, OWCP should further develop the medical evidence.⁷

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 28, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁷ It would be OWCP's burden of proof to show that employment-related residuals had ceased. *See Helen F. Small*, Docket No. 11-1593 (issued May 13, 2012); *J.A.*, Docket No. 11-1592 (issued February 13, 2012).