

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

C.C., Appellant)

and)

U.S. POSTAL SERVICE, GREENSBORO)
PERFORMANCE CLUSTER, Greensboro, NC,)
Employer)

Docket No. 12-305
Issued: November 14, 2012

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 28, 2011 appellant, through her attorney, filed a timely appeal from the June 24, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her recurrence of disability claim. 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 met her burden of proof to establish that she sustained a recurrence of total disability on or after September 23, 2010 due to her May 7, 2004 work injury.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on May 7, 2004 appellant, then a 32-year-old letter carrier, sustained tendinitis of her left foot and ankle due to stepping out of a postal vehicle. Appellant began working in a light-duty position with restrictions on various activities, including the amount of time spent walking and standing. OWCP paid her compensation for periods of disability.

In an August 3, 2004 report, Dr. Hyatt M. Todd, an attending podiatrist, noted that appellant reported that the resolution of her left plantar fasciitis was doing well. He stated, "There is no pain on palpation of the medial calcaneal tubercle, left, just minimal pain on palpation to the lateral aspect of the left foot. However, the right foot is experiencing some symptomatology associated with the abnormal use of the orthotics."

In a November 14, 2004 report, Dr. Todd noted that x-ray testing of appellant's left foot did not show any osseous abnormality. He diagnosed tendinitis of the left perineal tendon and recommended work restrictions, including limits on walking and standing.

From September through November 2004, appellant received treatment from Burlington Orthopedic and Hand Surgery, but no diagnosis or details of any treatment were provided. On February 27, 2006 Dr. Todd diagnosed plantar fasciitis of the right foot and recommended work restrictions.

In a September 23, 2010 letter, the employing establishment advised appellant that her position had been evaluated under the National Reassessment Process (NRP). The employing establishment informed her that, effective September 23, 2010, it could no longer provide work within her medical restrictions.

Appellant stopped work on September 23, 2010 and filed a claim alleging that she sustained a recurrence of total disability on September 23, 2010 due to her May 7, 2004 work injury. She requested that she be reimbursed for medical care necessitated by the tendinitis, plantar fasciitis and arthritis of her left foot. Appellant stated that "restrictions have been kept over the years as it comes back when I stand or work for long periods of time on hard surfaces. Also, back pain adds to discomfort."

In an October 27, 2010 letter, OWCP noted that it had received appellant's claim for a recurrence of disability on September 23, 2010 due to her May 7, 2004 work injury.² It advised that she had the burden of proof to establish her claimed recurrence of disability and indicated that the evidence of record was insufficient to establish that her current medical conditions and total disability were causally related to the May 7, 2004 work injury. OWCP requested that appellant submit additional factual and medical evidence within 30 days of the date of the letter, including medical evidence containing a firm diagnosis, description of clinical course followed, findings of diagnostic testing and opinion on causal relationship between the accepted work injury and the claimed disability. Appellant did not submit any evidence within the period allotted by OWCP.

² OWCP stated, "You are asking to have your claim reopened as a result of the NRP program."

In a December 2, 2010 decision, OWCP denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability on or after September 23, 2010 due to her May 7, 2004 work injury.

Appellant disagreed with this decision and requested a telephonic hearing with an OWCP hearing representative. During the April 12, 2011 hearing, appellant's counsel argued that OWCP erred by requesting that appellant submit additional medical evidence in support of her claim as she had already established that she sustained a recurrence of total disability.

In a June 24, 2011 decision, an OWCP hearing representative affirmed OWCP's December 2, 2010 decision noting that appellant had the burden of proof to submit medical evidence establishing her claimed recurrence of total disability. She indicated that OWCP properly followed its procedure by requesting that appellant submit supporting medical evidence but indicated that she failed to submit such evidence.

LEGAL PRECEDENT

A recurrence of disability includes 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 -- except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force (RIF).³ Absent a formal wage-earning capacity determination and assuming the position was not withdrawn for cause or because of a RIF, the employee would be entitled to compensation based upon a showing of continuing injury-related disability for regular duty.⁴

In addition to the generally applicable provisions in the preceding paragraph, OWCP has issued specific guidance for employees affected by NRP of the postal service. FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to NRP. Regarding claims for total disability when a wage-earning capacity decision has not been issued, FECA Bulletin No. 09-05 provides that if the claimant has been on light duty due to an injury-related condition without a loss of wage-earning capacity (LWEC) rating (or if the LWEC rating has been set aside), payment for total wage loss should be made based on the Form CA-7 as long as the following described criteria are met. First, the current medical evidence within the file establishes that injury-related residual conditions continue. There must be sufficient medical evidence in the record within the last six months to make this determination. In addition, the evidence in the file must support that light duty is no longer available. There must be no indication that a retroactive LWEC determination should be made. Where a retroactive LWEC is considered, an OWCP district Director must approve any such decision. In the event OWCP's claims examiner finds that the evidence in file is not sufficient to determine whether total wage-loss benefits should continue, current medical evidence should be requested from the claimant and the employer.⁵

³ 20 C.F.R. § 10.5(x).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(4) (October 2009).

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

ANALYSIS

OWCP accepted that appellant sustained tendinitis of her left foot and ankle on May 7, 2004 and she began working in a light-duty position with restrictions on various activities. The employing establishment advised appellant that her position had been evaluated under NRP. Effective September 23, 2010, it could no longer provide work within her medical restrictions. Appellant stopped work on September 23, 2010 and filed a claim alleging that she sustained a recurrence of total disability due to her May 7, 2004 work injury.

Generally, a withdrawal of limited-duty constitutes a recurrence of disability under OWCP regulations. In the instant case, there is no LWEC in place. According to the guidelines outlined in FECA Bulletin No. 09-05, OWCP must consider whether the current medical evidence establishes that the injury-related residuals continue (within the last six months); that evidence in the file supports a certain number of hours of light duty are no longer available; and that there is no indication that a retroactive LWEC should be made. If such medical evidence does not exist or is insufficient, it should request current medical evidence from both the postal service and claimant.⁶

OWCP's December 2, 2010 and June 24, 2011 decisions denying appellant's claim for a recurrence of total disability beginning September 23, 2010 did not address FECA Bulletin No. 09-05 or fully follow its guidance. As such, the Board will set aside OWCP's June 24, 2011 decision and the case will be remanded for a proper decision in accordance with the procedures and guidance offered in FECA Bulletin No. 09-05. After such development OWCP finds necessary, it shall issue an appropriate decision.

CONCLUSION

The Board finds that OWCP failed to follow the procedures it has adopted for adjudicating claims under NRP and that the decision dated June 24, 2011 must be set aside and the case remanded.

⁶ See *T.C.*, Docket No. 11-1880 (issued September 25, 2012).

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for adjudication in accordance with this decision of the Board.

Issued: November 14, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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