United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 12-1342**
	)	**Issued: June 11, 2013**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 6, 2012 appellant, through counsel, timely appealed the March 21, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her recurrence claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[2]

ISSUE

The issue is whether appellant sustained a recurrence of disability on July 26, 2008 causally related to her accepted employment injuries.

[1] 5 U.S.C. §§ 8101-8193.

[2] The record includes evidence received after the March 21, 2012 decision. As this evidence was not part of the record when OWCP issued its March 21, 2012 final decision, the Board is precluded from considering it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

Appellant, a 58-year-old mail processing clerk, has an accepted occupational disease claim for bilateral carpal tunnel syndrome (CTS) which arose on or about December 18, 2006. She previously sustained a left wrist sprain on January 9, 2006 (xxxxxx698).[3] Appellant also sustained an employment-related aggravation of her bilateral CTS on or about August 6, 2008 (xxxxxx177). The three upper extremity injuries have been combined under claim number xxxxxx519.

Appellant had been working full-time, regular duty; however, based on the advice of her treating physician, Dr. Scott M. Fried, a Board-certified orthopedic surgeon, she reduced her work schedule to six hours per day beginning in February 2008.[4] Her part-time work schedule was further reduced to four hours per day beginning June 11, 2008.[5] Appellant worked intermittently in July 2008, and she stopped work entirely on July 26, 2008.[6] In a July 30, 2008 treatment note, Dr. Fried excused her from all work. Approximately a year later, appellant filed a claim for recurrence (Form CA-2a) of disability. In a June 25, 2009 report, Dr. Fried advised that she could not return to regular work activities and that she should remain off work and focus on resting and healing. He also noted that appellant had been unable to work since August 6, 2008. Dr. Fried regularly treated her over the next several months and continued to find her disabled. Surgical intervention was also a consideration.

By decision dated August 4, 2010, OWCP found that appellant was not totally disabled at the time she ceased work in July 2008. Instead, appellant was able to work in a part-time (six hours), limited-duty capacity. OWCP based its finding on the April 29 and June 19, 2010 reports of Dr. Robert F. Draper, a Board-certified orthopedic surgeon and OWCP referral physician. Accordingly, it paid wage-loss compensation for two hours per day effective July 31, 2008.

In a decision dated January 25, 2011, the Branch of Hearings & Review set aside OWCP's August 4, 2010 decision. The hearing representative found that Dr. Draper's opinion was not sufficient to represent the weight of the evidence because OWCP had not advised him that appellant also had an accepted claim for an August 6, 2008 aggravation of bilateral CTS. Additionally, the hearing representative noted that Dr. Draper had not reviewed all available evidence because the records of appellant's three upper extremity injuries had yet to be combined when he examined her in April 2009. Consequently, the hearing representative remanded the case to OWCP with instructions to obtain clarification from Dr. Draper. The hearing representative further instructed OWCP to update the statement of accepted facts (SOAF) to include all of appellant's accepted conditions, as well as a description of her limited-duty assignment. Lastly, the hearing representative found that, based on Dr. Draper's opinion

[3] Appellant lost her balance and bumped her left hand/wrist against a case.

[4] Dr. Fried first treated appellant on October 1, 2007.

[5] OWCP paid wage-loss compensation for four hours per day for the period June 11 to July 26, 2008.

[6] Appellant utilized eight hours per day of sick leave through August 8, 2008, and then eight hours of leave without pay beginning August 9, 2008.

that appellant could work six hours per day, she was entitled to at least two hours of wage-loss compensation per day.

On remand, OWCP prepared a June 24, 2011 amended SOAF which indicated that at the time of her July 2008 work stoppage appellant's duties involved casing letters weighing 12 ounces or less to a distribution case. Appellant was not required to case more than 12 inches high. Her duties were described as repetitive. The amended SOAF also referenced appellant's three upper extremity injury claims.

OWCP had also received various physical therapy treatment records. Dr. Fried submitted follow-up treatment reports dated February 24, April 13, 27, May 11, 26 and June 29, 2011. The February 24, 2011 treatment notes documented ongoing significant upper extremity symptoms. Dr. Fried also noted that a recent functional capacity evaluation revealed that appellant could not even perform sedentary duties. He reiterated that she should remain out of work and focus on healing. In his April 13, 2011 report, Dr. Fried explained that appellant was disabled as of July 30, 2008 and her disability was ongoing. He noted that her symptoms worsened through 2008 to the point where she had missed multiple days in July 2008 and ultimately progressed to where she could no longer work.

Dr. Draper provided two additional reports dated August 18 and September 11, 2011. He reexamined appellant on August 18, 2011 and diagnosed bilateral carpal tunnel syndrome, bilateral upper extremity overuse syndrome and tendinitis. Dr. Draper also diagnosed mild degenerative cervical disc disease at C4-5 and C5-6, which he indicated was not employment related. Additionally, he found no evidence of thoracic outlet syndrome, brachial plexus lesion or reflex sympathetic dystrophy based on clinical examination. Also, there was no evidence of triangular fibrocartilage complex tear. Dr. Draper noted that symptomatically appellant had a suggestion of mild carpal tunnel syndrome, but clinically her examination was negative. He also stated that there was no evidence of her condition having worsened since his last examination in April 2010. Dr. Draper further indicated that appellant was capable of working full-time, modified duty. He noted that she could frequently lift 10 pounds and occasionally lift up to 20 pounds. Dr. Draper also advised that appellant should avoid excessive use of the hands. Lastly, he stated that there was no indication for surgery involving the upper extremities.

OWCP subsequently asked that Dr. Draper address appellant's July 28, 2008 employment duties as described in the June 24, 2011 amended SOAF. It specifically asked whether appellant's work-related condition had worsened to the point where she was unable to work effective July 31, 2008. Dr. Draper responded no. He further stated that appellant could have performed the described duties on a full-time basis.

In a September 26, 2011 decision, OWCP denied appellant's recurrence claim based on Dr. Draper's latest reports.

Appellant's counsel requested a hearing which was held on January 4, 2012.

Dr. Fried submitted additional follow-up treatment reports dated September 22 and November 28, 2011. He noted ongoing upper extremity symptoms and the need for further

treatment. Dr. Fried also noted that appellant was still not working and had not recently received any limited-duty job offers.

By decision dated March 21, 2012, the Branch of Hearings & Review affirmed OWCP's September 26, 2011 decision.

LEGAL PRECEDENT

A recurrence of a medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage.[7] 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.[8] This latter term also means an inability to work when a light-duty assignment specifically made to accommodate an employee's physical limitations due to 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 such that they exceed the employee's established physical limitations.[9] Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.[10]

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.[11] This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury.[12] The medical evidence must demonstrate that the accepted injury caused, precipitated, accelerated or aggravated the claimed recurrence.[13]

[7] 20 C.F.R. § 10.5(y). Continuous treatment for the original condition or injury is not considered a "need for further medical treatment after release from treatment," nor is an examination without treatment. *Id.*

[8] 20 C.F.R. § 10.5(x).

[9] *Id.*

[10] *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

[11] 20 C.F.R. § 10.104(b); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Carmen Gould*, 50 ECAB 504 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[12] *See Helen K. Holt*, *supra* note 11.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (January 2013).

ANALYSIS

Before her July 26, 2008 work stoppage appellant worked part-time (four hours), limited duty and OWCP compensated her for four hours of lost wages per day. Based on Dr. Draper's April 29 and June 19, 2010 reports, OWCP has compensated appellant for two hours of lost wages per day effective July 31, 2008. However, appellant's physician, Dr. Fried, found her totally disabled dating back to July 2008, and her disability has reportedly continued unabated. On appeal, counsel argued that Dr. Fried provided *prima facie* evidence of a recurrence of disability beginning July 26, 2008. He also argued that in light of Dr. Draper's conflicting opinion, the case should be remanded for referral to an impartial medical examiner.[14]

For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[15] In this instance, neither Dr. Fried nor Dr. Draper has provided a particularly well-reasoned opinion regarding appellant's ability to work on or after July 26, 2008. As noted, OWCP solicited Dr. Draper's opinion in an effort to assist in the development of appellant's recurrence claim. He first found that appellant was capable of working part-time (six hours), limited duty. Based on Dr. Draper's initial findings, OWCP has paid appellant wage-loss compensation for two hours per day. However, upon further reflection his opinion evolved to where he currently believes appellant capable of performing her July 26, 2008 modified duties on a full-time basis. The Board notes that Dr. Draper failed to reconcile his differing opinions.

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] Dr. Draper has twice examined appellant at OWCP's behest and has offered conflicting opinions without attempting to reconcile the differences. Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[17] Thus far, it has failed to meet its obligation and further development is necessary in view of Dr. Draper's conflicting opinions. On remand, OWCP shall refer appellant to another second opinion specialist for an opinion regarding the existence and extent of any employment-related disability on or after July 26, 2008. After it has developed the medical record consistent with the above-noted directive, it shall issue a *de novo* decision regarding appellant's claimed recurrence of disability beginning July 26, 2008.

CONCLUSION

The case is not in posture for decision regarding appellant's claimed recurrence of disability.

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[14] FECA provides that, if there is disagreement between an OWCP-designated physician and an employee's physician, OWCP shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[15] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

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

[17] *Richard F. Williams*, 55 ECAB 343, 346 (2004).

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2012 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: June 11, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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