

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

---

N.F., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
COATESVILLE VETERANS )  
ADMINISTRATION MEDICAL CENTER, )  
Coatesville, PA, Employer )

---

**Docket No. 12-1664  
Issued: June 24, 2013**

*Appearances:*  
Thomas R. Uliase, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 1, 2012 appellant, through her attorney, filed a timely appeal of a May 10, 2012 Office of Workers' Compensation Programs (OWCP) merit decision denying her claimed recurrence of disability in 2008. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUE**

The issue is whether appellant sustained a recurrence of disability on May 19, 2008 due to an accepted employment injury.

On appeal, counsel argued that OWCP had not met its burden of proof to reduce appellant's compensation based on her actual earnings as a clerk as Dr. Karl Rosenfeld, the

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

impartial medical specialist and a Board-certified orthopedic surgeon, did not provide the necessary reports establishing that appellant could use her left hand to perform the duties as required. He also argued that Dr. Rosenfeld did not address the issue of her recurrence of disability.

### **FACTUAL HISTORY**

This case has previously been before the Board on appeal. Appellant, a 29-year-old nursing assistant, filed a traumatic injury claim on March 4, 1996 alleging that she sustained an injury to her left wrist while moving a patient. OWCP accepted her claim for left wrist sprain and fracture of the navicular cystic of the second metacarpal. Appellant returned to full-time work as a receptionist on June 18, 2001 and filed a notice of recurrence of disability on August 10, 2001. The Board affirmed OWCP's May 23, 2003 denial of this claim on January 12, 2004.<sup>2</sup>

On December 7, 2004 OWCP accepted appellant's claim for the additional conditions of ulnar nerve lesion and neuropathy on the right and median neuropathy of the right forearm and wrist. It entered her on the periodic rolls on April 30, 1997. Appellant returned to work as a file clerk in the pharmacy department, which she alleged involved typing and repetitive motion. The duties included receiving telephone calls and mail, referring messages appropriately, placing work orders, mailing correspondence and processing refills as well as other unspecified duties. A pharmacy clerk is considered a sedentary position with some walking, lightweight carrying, bending and crouching. The employing establishment stated that appellant was instructed not to use the computer until voice activated software was purchased and that she took messages while another employee entered the messages into the computer system.

OWCP referred appellant for an impartial medical examination with Dr. Rosenfeld to determine the nature and extent of her injury-related condition and disability.<sup>3</sup> In a report dated April 1, 2008, Dr. Rosenfeld reviewed her factual and medical history and performed a physical examination. He found no spasm in appellant's neck and interscapular area and no atrophy in her upper extremities. Dr. Rosenfeld found observable deficit in her left arm and history of plexopathy and brachial plexus problems with her left upper extremity related to her initial injury. However, he found nothing wrong with appellant's right arm and opined, "[S]he could do everything required of her right arm that a person could do with her right arm. The left arm would be used only for minimal assistance." Dr. Rosenfeld stated that appellant could perform the clothing room position which did not entail pushing, pulling or lifting. He found that she should not lift over 20 pounds and should not perform repetitive movements of the left wrist and elbow. Dr. Rosenfeld also provided a work capacity evaluation and indicated that appellant work eight hours a day with restrictions. He found that she should not reach above the shoulder on the left and indicated that she should not push, pull or lift more than 10 pounds, 5 on the left.

---

<sup>2</sup> Docket No. 03-2023 (issued January 12, 2004).

<sup>3</sup> The Board determined that there was an existing conflict requiring an impartial medical examination. Docket No. 09-1356 (issued April 5, 2010). The statement of accepted facts that Dr. Rosenfeld reviewed was dated February 20, 2008 and included the accepted employment injuries. This document indicated that appellant stopped work in August 2001 and retired on August 10, 2003.

By decision dated June 9, 2008, OWCP determined that the position of pharmacy clerk fairly and reasonably represented her wage-earning capacity and found that she worked in this position since January 22, 2008. By decision dated February 17, 2009, the hearing representative affirmed Office's June 12, 2008 loss of wage-earning capacity determination.

The Board reviewed these decisions on April 5, 2010<sup>4</sup> and found that OWCP failed to meet its burden of proof to reduce appellant's compensation benefits. The Board found that Dr. Rosenfeld did not review the position of pharmacy clerk. The Board further found that the record did not establish that appellant actually performed the duties of this position at any time after her return to work. The Board noted that the employing establishment provided her with temporary assistance for data entry and never actually provided her with the voice activated software so that she could perform the position without assistance. Finally, appellant's attending physician, Dr. Scott Fried, an osteopath, opined that appellant could not perform the duties of this position beginning February 21, 2008 less than 60 days after she returned to work. He recommended that she began working four hours a day at that time. Dr. Fried noted increased pain in the right ulnar elbow with numbness and tingling as well as swelling. He reported appellant's allegation that she used the computer both keying and mousing. The Board reversed OWCP's February 17, 2009 decision. The facts and circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

Appellant continued to work full time as a pharmacy clerk. Dr. Fried recommended part-time work on March 20, 2008. In a report dated May 15, 2008, he stated that appellant had not received voice activated software and did not work due to increased swelling and pain in her hands. Dr. Fried noted that she was working in the pharmacy and receiving 75 calls a day with a headset, but still needed to repetitively pick up the receiver. He recommended voice activated software and a receiver controller.

In a note dated June 11, 2008, Dr. Leonard B. Kamen, an osteopath, noted that appellant was working four hours a day due to persistent swelling in her wrists. Appellant underwent an electroneuromygraphic evaluation on July 8, 2008 which demonstrated right upper brachial plexus nerve compromise, bilateral moderate ulnar nerve compromises, which had worsened since her February 20, 2007 testing, right median nerve motor compromise and unilaterally absent "left MABC sensory response."

In a note dated June 19, 2008, Dr. Fried stated that appellant reduced her work hours on May 19, 2008. He stated that she received a headset and receiver controller. Dr. Fried noted that appellant had right ulnar pain and left wrist pain. He found reactivity symptoms as well as swelling in the right hand, color and temperature changes. Dr. Fried diagnosed overuse syndrome of the right upper extremity progressive with de Quervain's syndrome of the right wrist. He again recommended voice activated software.

Dr. Fried examined appellant on July 17, 2008 and stated that she had right wrist symptoms, recommended voice activated software and functional capacity testing. He indicated that she could work four hours a day with restrictions. In a report dated September 24, 2008, Dr. Fried stated that appellant's work activities exacerbated her injuries. He stated that her

---

<sup>4</sup> Docket No. 09-1356 (issued April 5, 2010).

symptoms were worsened with lifting, pushing and pulling, regular gripping and grasping as well as repetitive activity. Dr. Fried diagnosed sympathetically mediated pain syndrome, on the right; ulnar, radial and median neuropathies, as well as de Quervain's tenosynovitis and on the left; median, ulnar and radial neuropathies. He stated that appellant was worsening every day she worked and needed voice activation software.

On May 20, 2009 appellant filed a recurrence of disability claim alleging that on February 21, 2008 she sustained a recurrence of disability due to her March 4, 1994 employment injury. Dr. Rosenfeld examined her on July 21, 2009. He stated that appellant's disabling conditions were her plexopathy and brachial plexus problem of her left upper extremity. Dr. Rosenfeld also noted symptoms consistent with de Quervain's syndrome of the right wrist. He completed a work capacity evaluation and indicated that appellant could work eight hours a day with restrictions including two hours reaching, two hours reaching above the shoulder, repetitive movements of the wrists and elbows for two hours a day with weight restrictions of two pounds as well as pushing and pulling for two hours each with weight restrictions of five pounds. Dr. Rosenfeld indicated that she could lift up to 10 pounds for two hours a day.

By decision dated July 30, 2009, OWCP denied the recurrence claim on the basis that the June 12, 2008 wage-earning capacity determination was in effect. The Branch of Hearings and Review vacated this decision on April 19, 2010 finding that OWCP should request a supplemental report from Dr. Rosenfeld regarding appellant's restrictions in February 2008.

Following the Board's April 5, 2010 decision reversing the loss of wage-earning determination,<sup>5</sup> OWCP referred appellant to Dr. Rosenfeld for a supplemental report. Dr. Rosenfeld responded on June 1, 2010 and noted that she stopped work on August 6, 2009. He performed a physical examination and opined that appellant could currently work eight hours a day with greater restrictions. Dr. Rosenfeld stated that she could not reach or reach above the shoulder. He indicated that appellant could perform repetitive movements for two hours a day with weight restrictions of two pounds. Dr. Rosenfeld stated that she could push and pull for one hour each with a weight restriction of five pounds. He indicated that appellant should not lift on the work capacity evaluation, but indicated that she could carry five pounds.

By decision dated June 21, 2010, OWCP reaffirmed the June 12, 2008 and February 17, 2009 decisions finding that Dr. Rosenfeld's report supported appellant's ability to perform the position of pharmacy clerk and did not establish a change in recurrence of disability. Counsel requested an oral hearing.

OWCP reissued the recurrence decision on July 20, 2010. Counsel requested an oral hearing on July 22, 2010.

The Branch of Hearings and Review issued a decision on September 15, 2010 finding that the recurrence decision required additional development including an updated statement of accepted facts and a request that Dr. Rosenfeld address whether there was a worsening of appellant's compensation which prevented her from performing full-time duties as a clerk in February 2008.

---

<sup>5</sup> *Id.*

The Branch of Hearings and Review also reviewed OWCP's June 21, 2010 decision and reversed this decision. The hearing representative noted that based on the Board's previous reversal of the loss of wage-earning capacity determination, if OWCP wished to reduce appellant's compensation based on her loss of wage-earning capacity, an entirely new loss of wage-earning capacity determination must be made and issued.

OWCP requested a supplemental report from Dr. Rosenfeld and provided an amended statement of accepted facts. Dr. Rosenfeld completed a report on February 4, 2011 and reviewed the new information. He stated that appellant had a 5-pound weight restriction rather than the 10 pounds required by a sedentary position. Dr. Rosenfeld stated, "If a subsequent report is received stating that her work would require her lifting not more than five pounds, which her duties would suggest, then I would okay this woman despite her admonition that she cannot handle her duties as being able to perform them."

OWCP requested a supplemental report on February 16, 2011 as Dr. Rosenfeld did not respond to requests for information regarding the worsening of appellant's condition in February 21, 2008. Dr. Rosenfeld responded on February 18, 2011 and stated that his restrictions were based on her subjective complaints.

By decision dated February 24, 2011, OWCP denied appellant's claim for a recurrence on May 19, 2008 relying on Dr. Rosenfeld's reports. Counsel requested an oral hearing on March 2, 2011. The Branch of Hearings and Review remanded the case on June 13, 2011 finding that Dr. Rosenfeld did not address the issues of whether appellant sustained a recurrence of disability. The hearing representative directed OWCP to prepare a statement of accepted facts including appellant's description of the duties performed and the physical requirements. She requested a supplemental report from Dr. Rosenfeld addressing Dr. Fried's reports in 2008 and providing rationale in support of his conclusions.

OWCP requested a supplemental report from Dr. Rosenfeld on August 1, 2011 and provided him with an addendum to the statement of accepted facts. Dr. Rosenfeld responded on September 20, 2011 and stated that when he examined appellant on April 1, 2008 she had observable deficit of her left upper extremity and should use her left arm for minimal assistance only. He found nothing wrong with her right upper extremity concluding that she could do anything required of her with her right arm. Dr. Rosenfeld stated, "In conclusion, accepting the job duties of full-time clerk in the pharmacy department as answering [tele]phones, scanning in refill request slips and packing mail, I believe that [appellant] could do most of this with her right arm and use her left arm only for minimal assistance."

In a decision dated October 6, 2011, OWCP denied appellant's claim for recurrence of disability on May 19, 2008. Counsel requested an oral hearing.

Counsel appeared at the oral hearing on February 28, 2012 and argued that as the Board found that OWCP had not established that the clerk position fairly and reasonably represented appellant's wage-earning capacity, then a recurrence "should be approved automatically."

By decision dated May 10, 2012, the hearing representative affirmed OWCP's October 6, 2011 decision finding that appellant had not submitted the necessary medical opinion evidence to

establish a causal relationship between her alleged recurrence of disability on May 19, 2008 and her accepted work injuries. He stated that Dr. Rosenfeld's most recent report was based on a proper history of injury and job description and opined that she was capable of performing the duties of a clerk full time and that her claimed recurrence was not due to her work injuries.

### **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. This term 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.<sup>6</sup> 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 of record establish that he or she can perform the light-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 show that he or she cannot perform such light duty. 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 light-duty requirements.<sup>7</sup>

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based on a proper factual background, must be given special weight.<sup>8</sup>

### **ANALYSIS**

Appellant filed a notice of recurrence of disability alleging that she sustained a recurrence on February 21, 2008 due to her March 4, 1994 employment injury. She continued to work eight hours a day in her position of pharmacy clerk until May 19, 2008. As appellant did not stop or reduce her work until May 18, 2008, she did not sustain a compensable recurrence of disability until that date.

Appellant's attending physician, Dr. Fried opined that appellant could not perform the duties of her pharmacy clerk position for eight hours a day, beginning on February 21, 2008. At that time he noted that she was using the computer and had not been provided with voice activated software and promised by the employing establishment. Dr. Fried attributed appellant's disability to her accepted right ulnar condition.

---

<sup>6</sup> 20 C.F.R. § 10.5(x).

<sup>7</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>8</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

Dr. Rosenfeld examined appellant on April 1, 2008 to resolve a conflict of medical evidence regarding the nature and extent of appellant's injury-related conditions and disability. He found that she had nothing wrong with her right arm and opined that she could do everything with her right arm with no limitations. Dr. Rosenfeld noted that appellant had left hand restrictions.

As Dr. Rosenfeld was selected to resolve a conflict of medical opinion regarding the nature and extent of appellant's injury-related condition, his report establishes that at the time of his April 1, 2008 examination she did not have a right upper extremity condition causally related to her accepted employment injuries and had not established a recurrence of disability. Dr. Rosenfeld based his report on a proper history of injury including the accepted conditions. He provided medical reasoning noting that appellant had no atrophy of the upper extremities and only subjective findings in the right upper extremity. As this report is based on a proper factual background, contains physical findings and medical reasoning, the report represents the special weight of the medical evidence. Appellant has not met her burden of proof in establishing a recurrence of disability due to her accepted employment injuries.

The Board finds that the contemporaneous medical evidence does not support a recurrence of disability on or after February 18, 2008.

On appeal, counsel argued that OWCP had not properly reduced appellant's compensation benefits based on her earned wages. As the hearing representative stated on September 15, 2010, the loss of wage-earning capacity determination was reversed by the Board on April 5, 2010 and OWCP has not issued a new loss of wage-earning capacity determination. Therefore, there is no loss of wage-earning capacity decision in effect in this case. The Board has addressed the remainder of counsel's arguments noting that appellant has not submitted the necessary medical evidence to establish a spontaneous change in the nature and extent of her injury-related condition and that her claim for injury and disability should be developed as a new occupational disease claim.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof in establishing a recurrence of disability on or after May 18, 2008. The Board further finds that appellant has submitted evidence of a new occupational disease claim which has not been properly developed by OWCP.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 10, 2012 decision of the Office of Workers' Compensation Programs is affirmed and the case remanded for further development consistent with this decision of the Board.

Issued: June 24, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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