United States Department of Labor
Employees' Compensation Appeals Board

K.E., Appellant	)	
and	)	**Docket No. 13-296**
	)	**Issued: June 6, 2013**
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Seattle, WA, Employer	)	

Appearances:
Steven E. Brown, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2012 appellant, through her attorney, filed a timely appeal from a September 13, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that she did not establish a recurrence of disability.[1] Pursuant to the Federal Employees' Compensation Act[2] (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 sustained a recurrence of disability on July 28, 2008 causally related to her October 27, 2005 employment injury.

[1] The record also contains a June 20, 2012 decision granting appellant a schedule award for a 16 percent permanent impairment of the left lower extremity. She has not appealed from this decision and it is not before the Board at this time. *See* 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated April 14, 2011, the Board reversed a September 25, 2009 decision retroactively reducing appellant's compensation to zero based on OWCP's finding that her actual earnings as a modified biologist effective August 28, 2007 fairly and reasonably represented her loss of wage-earning capacity.[3] The Board noted that she had filed a recurrence of disability and a claim for compensation due to disability beginning July 25, 2008. OWCP found that appellant had not established modification of the established loss of wage-earning capacity determination as of July 25, 2008. The Board found that, as there was no loss of wage-earning capacity in place at the time appellant stopped work, OWCP should have adjudicated her claim for compensation as a recurrence of disability rather than a request for modification of a loss of wage-earning capacity finding. The Board concluded that OWCP improperly issued a retroactive loss of wage-earning capacity determination after she stopped work and filed a claim for compensation. The facts and circumstances as set forth in the Board's prior decision are hereby incorporated by reference.

In a work restriction evaluation dated August 9, 2007, Dr. Robert W. Kunkle, a Board-certified orthopedic surgeon, listed work restrictions that included no sitting for more than two hours, walking for more than one hour at a time, lifting over 20 pounds and operating a motor vehicle more than one and a half to two hours both at work and driving to and from work. On August 28, 2007 appellant returned to work. She informed OWCP that she was working in her usual position except for not walking on uneven surfaces.

In a July 15, 2008 work restriction evaluation, Dr. Kunkle listed the same work restrictions but found that appellant could commute to work only four days a week.

On July 31, 2008 the employing establishment offered appellant a position as a modified biologist.[4] It eliminated the requirement for field work and noted that the "majority of the work is sedentary and performed in an office setting."

---

[3] Docket No. 10-1211 (issued April 14, 2011). OWCP accepted that on October 27, 2005 appellant, then a 40-year-old biologist, sustained a contusion and sprain of the left knee and lower leg and chondromalacia of the left patella in the performance of duty. On April 25, 2006 she underwent an abrasion chondroplasty of the left patellofemoral joint and on December 8, 2006 she underwent a left partial medial meniscectomy and scar revision. In a decision dated February 5, 2008, OWCP reduced appellant's compensation to zero after finding that her actual earnings as a modified biologist effective August 28, 2007 fairly and reasonably represented her wage-earning capacity. On June 26, 2008 an OWCP hearing representative reversed the February 5, 2008 decision. In a decision dated July 30, 2008, OWCP again reduced appellant's compensation to zero based on her actual earnings as a modified biologist beginning August 28, 2007; however, on December 10, 2008 a hearing representative set aside the July 30, 2008 decision. In decisions dated February 13 and September 25, 2009, OWCP reduced her compensation based on her actual earnings as a modified biologist.

[4] On August 6, 2008 the employing establishment advised appellant that it was changing her work hours to 8:00 a.m. to 4:30 p.m. due to her assertion that she was unable to take public transportation working 10.5-hour days. On August 14, 2008 appellant accepted the job offer provided it met the limitations set forth in the July 15 and August 14, 2008 medical reports. On August 15, 2008 the employing establishment advised her that her "attempted modification of the offer constitutes a rejection of the offer." On September 16, 2008 appellant's attorney argued that she was unable to accept a job offer due to her traveling restrictions. He maintained that she could not take public transportation and arrive at the office by 8:00 a.m.

On August 4, 2008 appellant filed a notice of recurrence of disability beginning July 28, 2008 causally related to her October 27, 2005 employment injury. She stated that on July 16, 2008 Dr. Kunkle limited the numbers of days she could commute to work. As a result, appellant worked 10.5 hours each day and was unable to take mass transit. She further asserted that she could not drive for more than one and a half to two hours avoiding stop and go traffic. Appellant stopped work on July 24, 2008 and did not return. The employing establishment asserted that it had accommodated her work restrictions of not walking on uneven surfaces or performing field work. It noted that it had returned her to a schedule of eight hours a day five days a week as she contended that she had to drive to work on the compressed schedule.

In a report dated August 14, 2008, Dr. Kunkle diagnosed post-traumatic severe chondromalacia patella following a fracture. He related that appellant could not drive more than 30 minutes due to knee pain with flexion.[5]

On October 9, 2008 Dr. Kunkle advised that appellant could perform her job duties with the restriction of not driving more than one hour. In an accompanying treatment note, he related that she wanted a work position with a commute under 45 minutes to lessen her knee pain. Dr. Kunkle diagnosed status post excision of a patellar fragment with severe chondromalacia patella.

In a statement dated October 23, 2008, appellant maintained that the employing establishment's finding that she should work from 8:00 a.m. to 4:30 p.m. conflicted with the July 15, 2008 restrictions set forth by Dr. Kunkle.

In a work restriction evaluation dated November 14, 2008, Dr. Kunkle related that appellant could commute to work only four days per week and should telework if possible. He listed restrictions of sitting, walking, and standing for 30 minutes at a time and operating a motor vehicle at work and to and from work 30 minutes at a time.

Appellant resigned from employment effective December 1, 2008.[6]

In a decision dated May 5, 2011, OWCP found that appellant did not establish a recurrence of disability beginning July 28, 2008 as the medical evidence was insufficient to

[5] On September 11, 2008 Dr. Kunkle noted that appellant had returned to work but stated that her "chondromalacia has made her knee intolerable for activities such as long periods of driving, long periods of sitting, long periods of walking, or going up and down stairs, to the point where she is disabled from doing many of the activities that are required of her job."

[6] In a report dated January 6, 2009, Dr. Kunkle diagnosed progressive, degenerative chondromalacia patella and related that appellant may need a total knee replacement. He discussed her physical limitations. On July 15, 2009 Dr. Kunkle related that appellant had permanent restrictions due to her knee injury and was unable to "keep her knee flexed for long periods of time without significant pain." On September 14, 2010 Dr. Spencer Coray, a Board-certified orthopedic surgeon, discussed appellant's history of a fall in 2005 and subsequent surgeries. He diagnosed chronic knee pain on the medial side status post partial patellectomoy and arthroscopoy. On September 28, 2010 Dr. Coray diagnosed chronic left knee pain and advised against surgery. On June 1, 2011 he related that appellant's history was complicated and noted that her original attending physician, Dr. Kunkle, was deceased. Dr. Coray indicated that on December 6, 2010 she did not have many objective findings and recommended an impairment rating.

establish that she was disabled from employment due to her October 27, 2005 employment injury.

On June 2, 2011 appellant, through her attorney, requested a telephone hearing before an OWCP hearing representative. On July 27, 2011 counsel argued that she was unable to work as a modified biologist as she was unable to travel due to residuals of her work injury.

In a work restriction evaluation dated July 27, 2011, Dr. John E. Nimlos, Board-certified in preventive medicine, found that appellant was not able to perform her usual position as she could not drive or perform field work. He opined that she could drive to and from work for a total of one hour in separated half-hour segments.

In a July 27, 2011 narrative report, Dr. Nimlos reviewed the job offer from the employing establishment and found that appellant could perform the physical duties "with [the] exception of the commuting requirement to and from her home." He found that she could drive no more than 30 minutes.

On August 11, 2011 OWCP referred appellant to Dr. Dana Covey, a Board-certified orthopedic surgeon, to determine the extent of any permanent impairment.[7] It also requested that Dr. Covey review the position of modified biologist which restricted appellant from walking on uneven surfaces and address whether she was capable to performing the job duties.

Following a preliminary review, on August 29, 2011 an OWCP hearing representative set aside the May 5, 2011 decision. He determined that OWCP did not address the suitability of the job that appellant held when she stopped work prior to adjudicating her notice of recurrence of disability.

In a report dated August 31, 2011, Dr. Covey diagnosed congenital bipartite patella of the left knee aggravated by a severe contusion of the patellofemoral joint on October 27, 2005 and Grade 3 to 4 chondromalacia patellofemoral joint of the left knee due to her work injury. In a work restriction evaluation, Dr. Covey advised that appellant could sit for six hours per day, walk and stand for one to two hours per day, operate a motor vehicle at work and to and from work one hour per day and push, pull and lift up to 20 pounds three hours per day.

By letter dated October 17, 2011, OWCP noted that, at the time of her July 25, 2008 recurrence of disability, appellant had been working in a position as a modified biologist beginning August 28, 2007. It requested that she submit a narrative report from her physician addressing whether her condition worsened such that she was unable to perform her limited-duty employment.

[7] In a disability certificate dated July 25, 2008, received by OWCP on August 25, 2011, Dr. Kunkle determined that appellant should remain off work until her restrictions were "clarified." On September 4, 2008 he found that she was off work until her restrictions were met. On October 9, 2008 Dr. Kunkle found that appellant could perform all job duties except that she could not drive more than one hour at a time.

On October 22, 2011 appellant related that she was not working in a modified biologist position at the time she stopped work and that the job offer came after she left her position.[8] She maintained that she accepted the offered position with her physician's restrictions but that it was construed as a refusal of the offer. Appellant described OWCP's actions in her claim and asserted that the employing establishment changed her work hours in conflict with her restrictions. She tried the new schedule which resulted in a recurrence of disability on July 25, 2008.

On November 2, 2011 appellant's attorney argued that the opinions of Dr. Kunkle and Dr. Covey established that she could not perform her limited duty due to her driving restrictions. He asserted that on July 21, 2008 the employing establishment changed her work hours such that she could not "carpool or telework back and forth to work. On July 24, 2008 in order to try to avoid the stop-and-go traffic it took appellant 2.75 hours to travel from work to her residence."

On November 16, 2011 OWCP requested that Dr. Covey address whether appellant could perform her modified biologist technician position if not for her driving restrictions. In a December 5, 2011 response, Dr. Covey related that she could "perform her modified duties of a biological technician if it were not for the driving restrictions" of 30 minutes.

By decision dated December 21, 2011, OWCP found that appellant had not established a recurrence of disability beginning July 28, 2008 due to her accepted employment injury. It found that when she stopped work on July 25, 2008 she was working with the restrictions effective August 9, 2007. OWCP further determined that appellant only had to drive 26 minutes from her home to reach a park and ride. It concluded that the medical evidence established that she could perform the position except for her driving limitations, which it found was not a physical requirement of the position.

On January 12, 2012 appellant requested a telephone hearing, which was held on April 19, 2012.[9] Her attorney argued that she had not received a written job offer prior to July 31, 2008. Instead, appellant worked within her own limitations. The employing establishment changed her schedule to 8:00 a.m. to 4:30 p.m. five days a week. Appellant related that she would still have to drive to attend meetings and do inspections. She maintained that her physician did not want her commuting over four days per week so the employing establishment changed her daily work schedule such that she was unable to use public transportation. Appellant's condition worsened because of the increased driving.

In a decision dated July 18, 2012, an OWCP hearing representative set aside the December 21, 2011 decision. She remanded the case for OWCP to determine whether appellant was able to perform her limited-duty employment given her field work requirements.

[8] In an October 18, 2011 response, appellant related that the August 28, 2007 modified biological position did not exist.

[9] By decision dated June 20, 2012, OWCP granted appellant a schedule award for a 16 percent permanent impairment of the left lower extremity.

In a July 30, 2012 memorandum of conference, the employing establishment related that appellant did not have to travel for meetings as these could be held in the office or by telephone.[10]

In a decision dated September 13, 2012, OWCP found that appellant had not established a recurrence of disability.

On appeal appellant's attorney contends that it took her over 30 minutes to drive to a location where she could use public transportation. Citing Board case law relevant to loss of wage-earning capacity determinations and the termination of compensation for refusing suitable work under 5 U.S.C. § 8106(c), he argued that OWCP had the burden to prove the position was suitable and within her commuting restrictions. Appellant's attorney also contended that she had to attend meetings as part of her work duties.

LEGAL PRECEDENT

Where 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 the employee 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 to 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 job requirements.[11]

OWCP regulations provide that 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.[12] 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, (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.[13]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[14] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that

[10] By letter dated August 13, 2012, appellant related that she was required to participate in meetings and disagreed that all meetings could occur in the office or telephonically.

[11] *Richard A. Neidert*, 57 ECAB 474 (2006); *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[12] 20 C.F.R. § 10.5(x).

[13] *Id*.

[14] *See Vanessa Young*, 55 ECAB 575 (2004); *Jimmy A. Hammons*, 51 ECAB 219 (1999).

justice is done.[15] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[16]

ANALYSIS

OWCP accepted that on October 27, 2005 appellant sustained a left knee sprain and contusion and chondromalacia of the left patella. In an August 9, 2007 work restriction evaluation, Dr. Kunkle found that she could resume work with limitations that included operating a motor vehicle no more than one and a half to two hours. Appellant returned to modified employment on August 28, 2007. On July 15, 2008 Dr. Kunkle found that she could continue to work with the same restrictions but could only commute to the employing establishment four days a week. Appellant stopped work on July 28, 2008 and filed a recurrence of disability. She related that after her physician limited her to four days of commuting a week, she began working 10-hour days and could not use mass transit. The employing establishment stated that it had returned appellant to a schedule of eight-hour days, five days a week due to her contention that she could not use public transportation working only four hours a day.

The issue is whether appellant has established either a change in her limited-duty employment or a change in her employment-related condition such that she could no longer perform her modified employment at the time she stopped work on July 28, 2008.[17] If either her limited-duty assignment changed or her condition worsened such that she could no longer commute to work, this would constitute a recurrence of disability.[18] On the other hand, if the commute itself caused in increase in disability, this would not be compensable as driving to and from work is not a work factor under FECA.[19]

The Board finds that the case is not in posture for decision as OWCP did not adequately develop the issue of whether appellant sustained a recurrence of disability such that she was no longer able to commute to work. On August 14, 2008 Dr. Kunkle diagnosed severe post-traumatic chondromalacia patella and found that she could not drive more than 30 minutes due to pain. In a work restriction evaluation dated November 14, 2008, he again found that appellant could only commute four days per week and operate a motor vehicle no more than a half hour at a time.

[15] *Richard E. Simpson*, 55 ECAB 490 (2004).

[16] *See K.H.*, Docket No. 12-1930 (issued March 28, 2013); *Melvin James*, 55 ECAB 406 (2004).

[17] The suitability of the July 31, 2008 job offer is not an issue in this case as at the time the employing establishment made the offer she had already stopped work and filed a claim for compensation for disability.

[18] *See generally Betty S. Thompson*, Docket No. 01-2039 (issued July 2, 2002) (where the Board found that the medical evidence was insufficient to establish that the claimant was unable to commute to work due to her employment injury). If, however, a claimant relocates following an injury, an inability to commute due to the decision to move away from work would result from an intervening cause and would not be compensable. *See T.C.*, Docket No. 09-268 (issued October 8, 2009).

[19] *See Robert J. Pribula, Jr.*, Docket No. 05-1239 (issued February 17, 2006).

On July 27, 2011 Dr. Nimlos reviewed a July 31, 2008 job offer from the employing establishment and found that appellant could perform the duties except for the commute from her home. He advised that she could not drive more than 30 minutes.

OWCP referred appellant to Dr. Covey for a second opinion examination. It requested that he address whether she was capable of working as a modified biologist position at the time she stopped work in July 2008 excluding her driving restrictions. On August 31, 2011 Dr. Covey diagnosed congenital bipartite patella of the left knee aggravated by an employment-related severe contusion of the patellofemoral joint and employment-related Grade 3 to 4 chondromalacia of the patellofemoral joint. He found that appellant could operate a motor vehicle at work and commuting to and from work for one hour per day. On December 5, 2011 Dr. Covey determined that she could perform the duties of a biological technician if not for her 30-minute driving restriction.

Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do in a manner that will resolve the relevant issues in the case.[20] It specifically informed Dr. Covey not to consider appellant's ability to commute in evaluating whether she was capable of performing her modified employment at the time she stopped work. Accordingly, the Board finds that the case must be remanded to OWCP. On remand, OWCP should clarify her hours of employment at the time she stopped work on July 28, 2008 and outline her various commuting options. It should then request that Dr. Covey review appellant's work duties at the time she stopped work on July 28, 2008 and her commuting options and provide an opinion regarding whether she has established that she sustained a recurrence of disability such that she was unable to perform the duties of her limited-duty position or commute to and from her employment. Dr. Covey should also address whether any increase in disability resulted from the commute itself, which would not be compensable, or constituted a spontaneous worsening of her condition due to her accepted work injury. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision on the recurrence issue.

CONCLUSION

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

[20] *See Melvin James*, *supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the September 13, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 6, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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