United States Department of Labor
Employees' Compensation Appeals Board

S.W., Appellant	)	
and	)	**Docket No. 14-343**
	)	**Issued: December 16, 2014**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Toledo, OH, Employer	)	

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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 2, 2013 appellant, through her attorney, timely appealed the October 9, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 31, 2012 causally related to her May 21, 2012 employment injury.

[1] 5 U.S.C. §§ 8101-8193.

[2] The record on appeal contains evidence received after OWCP issued its October 9, 2013 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

Appellant, a 47-year-old bulk mail technician, injured her low back and right knee on May 21, 2012 when she slipped on a wet floor.[3] After first treating the claim as a minor injury, OWCP later developed the claim and, on September 28, 2012, accepted lumbar and right knee sprains.[4] On May 25, 2012 appellant accepted a full-time position as a modified business mail technician. The limited-duty assignment was based on the May 24, 2012 work restrictions from her treating physician, Dr. Robert L. Kalb, a Board-certified orthopedic surgeon. The position required no more than one-hour of intermittent lifting and carrying (20 pounds), three hours of sitting intermittently (rotate as needed), one-hour of standing and walking (rotate as needed) and one-hour of intermittent pushing and pulling (20 pounds).

On June 26, 2012 appellant accepted another limited-duty assignment as a modified bulk mail technician. This offer was based on Dr. Kalb's June 19, 2012 work restrictions. Dr. Kalb advised that appellant could perform a sit down job only. Appellant was not to drive at work and was precluded from bending, stooping and climbing. Additionally, she could not carry anything in excess of 20 pounds. As a modified bulk mail technician, appellant's duties included data input on the employer's computer system. She also weighed items on a scale and performed required webinars. There was also a catch-all responsibility of "any other requirements necessary to perform [appellant's] duties on the computer." The position required appellant to sit for seven hours. She was not expected to drive, bend, stoop, climb or carry anything over 20 pounds.

On July 9, 2012 appellant underwent a functional capacity evaluation (FCE) administered by Jon Nickey, a physical therapist.[5] The FCE results found her totally disabled. The therapist explained that appellant was generally deconditioned but appeared to have provided good effort during testing and attempted all tasks. The therapist recommended that she be placed on lifting restrictions. Prior physical therapy reportedly provided little measureable increase in her function or decrease in pain. Appellant would not be able to complete her current job with the lifting requirements as given.[6] He also stated that she would be unable to complete a job in the sedentary category due to difficulty sitting for greater than 30 minutes.

Dr. Kalb reexamined appellant on July 31, 2012. He reviewed the results of a July 2, 2012 lumbar magnetic resonance imaging (MRI) scan and the July 9, 2012 FCE.[7] On

[3] Appellant slipped, but avoided falling. A coworker, James Boatman, witnessed the May 21, 2012 employment incident.

[4] Appellant previously injured her right shoulder and lower back on January 19, 2010 when she slipped and fell on ice (File No. xxxxxx304). OWCP accepted the claim for right shoulder sprain, right lumbar sprain and right buttock contusion. Appellant also had a prior history of bilateral total knee arthroplasty in June 2008.

[5] Mr. Nickey administered the July 9, 2012 FCE.

[6] Mr. Nickey relied on appellant's description of her duties rather than an official position description. Appellant reported that her then-current duties required her to take mail from customers and put it on a scale to weigh and then remove the item from the scale.

[7] The July 2, 2012 MRI scan revealed a posterior disc bulge at L2-3, an annular tear at L3-4, disc bulge at L4-5, and spondylolisthesis at L4-5 secondary to facet hypertrophy.

examination, appellant complained of back and right buttock pain, as well as right knee pain. Dr. Kalb diagnosed right knee sprain, lumbar sprain and right buttock pain, which he attributed to her May 21, 2012 employment injury. He also diagnosed comorbid obesity.[8] Dr. Kalb advised generally that appellant had permanent work restrictions per FCE.[9]

On August 16, 2012 appellant filed a claim for compensation (Form CA-7) beginning July 31, 2012 noting that she was out of work due to the FCE.[10]

Dr. Kalb saw appellant again on October 2, 2012. Appellant complained of right knee and low back pain. Dr. Kalb diagnosed lumbar sprain, contusion of buttock and knee sprain. He did not specifically address appellant's ability to work.

OWCP requested additional evidence from appellant to substantiate her claims for wage loss. It noted that her acceptance on May 25, 2012 of a limited-duty assignment, but questioned whether she had ever returned to work. Appellant submitted an October 25, 2012 statement noting that she did return to work until July 31, 2012 when she realized that the results of the FCE had rendered her totally disabled. She showed the results to her supervisor who told her to end her tour and to take care.

By decision dated December 4, 2012, OWCP denied appellant's claim for wage-loss compensation commencing July 31, 2012 finding the evidence insufficient to establish a recurrence due to her accepted conditions.[11]

Counsel timely requested an oral hearing, which was held on March 4, 2013.

In a November 27, 2012 consultation report, Dr. Amar N. Goyal, a Board-certified anesthesiologist with a subspecialty in pain medicine, noted appellant's complaint of right shoulder pain, neck pain, right buttock and lower back pain. He noted an employment-related injury in 2010 when she reportedly had slipped and fallen on a wet floor. Dr. Goyal diagnosed lumbar sprain and knee/leg sprain. He did not address appellant's work capacity.

In a January 10, 2013 examination, Dr. Kalb diagnosed lumbar sprain, contusion of buttock, knee sprain, obesity, knee replacement, and degenerative lumbar intervertebral disc. He noted that appellant's symptoms were out of proportion to objective findings. Appellant reportedly refused injections for pain management and also refused surgery for her lumbar spine.

[8] Appellant was 5'1" and weighed 210 pounds.

[9] The Ohio "Work Ability" form Dr. Kalb indicated that appellant could return to work with permanent restrictions. Apart from a general reference to the FCE findings, Dr. Kalb did not otherwise describe appellant's "permanent" work restrictions.

[10] Appellant filed additional CA-7 forms claiming wage-loss compensation for total disability through September 20, 2013.

[11] Appellant received 5½ hours of wage-loss compensation for various medical appointments during the period July 31 to October 28, 2012.

Dr. Kalb also noted that the July 9, 2012 FCE indicated that she was totally disabled. He advised that appellant had reached maximum medical improvement.[12]

On January 25, 2013 appellant was seen by Gregory Otto, a physician's assistant. Her chief complaints were right shoulder and low back pain. Mr. Otto noted a history of injury on January 19, 2010 when appellant had slipped and fallen on ice at work. He diagnosed right shoulder sprain and right lumbar sprain.

Dr. Tallat M. Rizk, a Board-certified physiatrist, examined appellant on January 31, 2013. Appellant's chief complaint was right shoulder pain. Dr. Rizk noted a January 19, 2010 work-related injury involving the right shoulder, lower back and right buttock where she had slipped and fallen on ice. He also noted the recent May 21, 2012 employment injury where appellant sustained a lumbar sprain and right knee sprain, but he did not otherwise describe how she was injured on May 21, 2012. Dr. Rizk also noted that a recent lumbar MRI scan revealed an L3-4 left paracentral annular tear which was not seen on a prior MRI scan from 2009. He diagnosed chronic lumbar sprain and chronic right shoulder/arm sprain. Dr. Rizk recommended including L3-4 annular tear as an accepted condition under appellant's May 21, 2012 injury claim.

A February 13, 2013 lumbar MRI scan revealed a moderate-to-large protrusion-type disc herniation at L2-3. There was also a grade 1 anteriolisthesis of L4 on L5 with posterior disc bulge and facet and ligamentous hypertrophy. Additionally, the February 13, 2013 lumbar MRI scan revealed mild-to-moderate intervertebral disc space narrowing at L4-5.

Dr. Kafai Lai, a Board-certified orthopedic surgeon, examined appellant on February 19, 2013 for a chief complaint of right knee pain. He noted a prior bilateral total knee arthroplasty in 2009. Dr. Lai also noted appellant had slipped and fallen in 2010. He requested a right knee x-ray.[13] Based on his physical examination and review of the recent x-ray, Dr. Lai stated that appellant's right knee was stable. He deferred any disability assessment to Dr. Rizk.

In a February 28, 2013 report, Dr. Willis M. Morse, a Board-certified family practitioner, advised that he had been appellant's primary care physician since 2008. He noted having initially treated her for lumbar disc disease with sciatic-type symptoms. A lumbar MRI scan reportedly showed mild degenerative changes without significant disc herniation or canal or neuroforaminal stenosis. Dr. Morse indicated that appellant's pain was severe and she had seen Dr. Kalb, who further noted that appellant initially did well, but she had progressive symptoms which required increasing doses of pain medication. He noted the respective findings from her July 2, 2012 and February 13, 2013 lumbar MRI scans. Dr. Morse also noted that appellant had been having progressive right shoulder pain. Additionally, he described the findings of an unidentified right shoulder MRI scan, which reportedly revealed, *inter alia*, a 50 percent tear of

[12] Dr. Kalb advised appellant to return in one month. Appellant subsequently requested a change in treating physician, which OWCP authorized.

[13] The February 19, 2013 right knee x-ray revealed a total knee arthroplasty in place, in good alignment with no acute abnormality and no loosening. There was very little joint effusion and some minor swelling. The reviewing radiologist's final impression was "Total knee in satisfactory alignment."

the infraspinatus rotator cuff tendon. Dr. Morse indicated that appellant had progressive worsening of her degenerative disease as a result of work she completed through the employing establishment. He did not address her capacity for employment.

In an April 12, 2013 decision, the Branch of Hearings and Review affirmed the December 4, 2012 decision denying wage-loss compensation for disability on or after July 31, 2012.

On May 30, 2013 counsel requested reconsideration. He submitted a May 3, 2013 form report from Dr. Rizk who diagnosed employment-related left L3-4 annular tear. The report identified May 21, 2012 as the date of injury, but Dr. Rizk did not otherwise describe the mechanism of injury.[14]

By decision dated June 3, 2013, OWCP denied appellant's request for reconsideration.

On July 31, 2013 counsel again requested reconsideration. Dr. James H. Rutherford, a Board-certified orthopedic surgeon, examined appellant on July 16, 2013 with respect to her January 19, 2010 and May 21, 2012 employment injuries.[15] He identified various positions she held during her 28-year tenure with the employing establishment, including work as a letter sorting machine operator, a flat sorting machine operator, window clerk, mail processor and bulk mail entry unit clerk. Dr. Rutherford noted that appellant had not worked since July 31, 2012. He noted a medical history that included bilateral total knee arthroplasty surgeries in June 2008. Dr. Rutherford reviewed Dr. Kalb's medical records from January 2012 to January 2013, which initially involved treatment for right shoulder and lower back complaints and subsequent aggravation of appellant's lower back in May 2012. Additionally, he discussed the July 9, 2012 FCE results, which he attributed to Dr. Kalb. Dr. Rutherford also described various diagnostic studies, including appellant's lumbar MRI scans of July 2, 2012 and February 13, 2013. He further noted that a prior lumbar MRI scan dated October 29, 2009 showed only "mild degenerative changes." Dr. Rutherford also summarized various treatment records from Dr. Rizk and Dr. Morse.

When she saw Dr. Rutherford that day, appellant's chief complaints included lower back pain radiating into the bilateral buttocks and down the right leg to the foot. Appellant also reported constant pain in the right shoulder frequently radiating down the right arm to the hand and frequent bilateral knee pain -- severe on the right and moderate on the left. Dr. Rutherford provided physical examination findings with respect to her neck, bilateral upper extremities, her lumbar spine and bilateral lower extremities. He found that appellant had not reached maximum medical improvement (MMI) regarding either the January 2010 injury or the May 2012 injury. Dr. Rutherford stated that she had been unable to work even in a sedentary capacity since July 9, 2012 due to her accepted injuries under both claims. He further indicated that appellant's January 19, 2010 employment injury should be expanded to include right rotator cuff tear. With respect to the May 21, 2012 employment injury, Dr. Rutherford advised that additional

[14] OWCP also received additional treatment notes from Mr. Otto.

[15] Dr. Rutherford identified the respective claim numbers, as well as the accepted conditions involving appellant's right shoulder, right buttock, lumbar region and her right lower extremity.

diagnostic studies would be beneficial in determining whether to accept L2-3 disc prolapse and L4-5 spondylolisthesis as employment related.[16] Regarding appellant's June 2008 bilateral total knee arthroplasty, he indicated that there was a poor result on the right and only a fair result on the left. Considering all of appellant's orthopedic conditions, Dr. Rutherford believed she was permanently and totally disabled.

In an October 9, 2013 decision, OWCP denied modification of its prior decisions.

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[17] Recurrence of disability 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.[18] A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties or other downsizing or where a loss of wage-earning capacity determination is in place.[19]

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.[20]

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.[21] This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally

[16] Dr. Rutherford noted that neither condition was present on appellant's preinjury October 29, 2009 lumbar MRI scan.

[17] 20 C.F.R. § 10.5(x).

[18] *Id.*

[19] *Id.* at §§ 10.104(c) and 10.509; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013).

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

[21] 20 C.F.R. § 10.104(b); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5a and 2.1500.6b (June 2013).

related to the employment injury.[22] The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.[23]

ANALYSIS

Following her May 21, 2012 employment injury, appellant returned to work in a limited-duty capacity on May 25, 2012. The employing establishment provided work as a modified business mail technician based on Dr. Kalb's May 24, 2012 work restrictions. Dr. Kalb subsequently modified appellant's work restrictions, resulting in a new limited-duty assignment as a modified bulk mail technician, which appellant accepted on June 26, 2012. According to Dr. Kalb's June 19, 2012 restrictions, appellant could perform a sit down job only. She was precluded from bending, stooping, and climbing and could not carry anything in excess of 20 pounds. Also, appellant was not permitted to drive at work. Appellant's duties as a modified bulk mail technician included data input on the employing establishment's computer system. The position required her to sit for seven hours. Appellant weighed items on a scale, performed required webinars and was responsible for other requirements necessary to perform her duties on the computer. She was not expected to drive, bend, stoop, climb or carry anything over 20 pounds. Appellant performed the duties of a modified bulk mail technician until July 31, 2012, when her supervisor, Tonia Matamoros, sent her home.

Generally, the withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for duty.[24] However, there is no evidence that the employing establishment withdrew appellant's limited-duty assignment on July 31, 2012. Ms. Matamoros sent appellant home that day and placed her on leave without pay status based on appellant's presentation of the July 9, 2012 FCE and Dr. Kalb's July 31, 2012 work restrictions. Dr. Kalb, while referencing the FCE in his report, failed to adequately address whether appellant was totally disabled or the permanent work restrictions that prevented appellant from performing her limited-duty position. Sending appellant home under these circumstances was not tantamount to a withdrawal of her June 26, 2012 limited-duty assignment. Consequently, she failed to establish a withdrawal of her limited-duty assignment effective July 31, 2012. The record does not establish that the employing establishment altered the physical requirements of the June 26, 2012 limited-duty assignment so as to exceed her physical limitations, as recommended by Dr. Kalb.[25]

Appellant may also establish a recurrence of disability by demonstrating a change in the nature and extent of her injury-related condition such that she could no longer perform her June 26, 2012 limited-duty assignment. Mr. Nickey, the physical therapist who conducted the July 9, 2012 FCE, indicated that appellant would be unable to complete a job in the sedentary

[22] *See S.S.*, 59 ECAB 315, 318-19 (2008).

[23] *Id.* at 319.

[24] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

[25] The record does not establish that the light-duty position was withdrawn pursuant to the National Reassessment Program of the postal service.

category due to difficulty sitting for greater than 30 minutes. He found that she was disabled from all work. Yet appellant continued to perform her sedentary, sit down job for another three weeks. As a physical therapist, Mr. Nickey is not a physician as defined under FECA; his opinion is not sufficient to establish total disability.[26] Dr. Kalb subsequently reviewed the FCE in a July 31, 2012 report which contradicts Mr. Nickey's finding of total disability. He did not state that appellant was totally disabled from work; rather, he indicated that she had permanent work restrictions. Dr. Kalb's response was under the heading "May [return to work] with restrictions...." He explained that appellant's work restrictions were permanent per FCE, but he did not identify any specific limitations which rendered her totally disabled. Dr. Kalb's July 31, 2012 follow-up treatment notes did not identify specific work limitations or otherwise state that she could no longer perform her modified bulk mail technician duties. He previously advised that she could perform a "sit down job only," which she had been doing without incident since June 26, 2012. Dr. Kalb saw appellant for a follow-up examination on October 2, 2012, but did not address her ability to work. His January 10, 2013 report noted that the July 9, 2012 FCE indicated that she was totally disabled; but he did not further address this issue. Thus, it is unclear how appellant's May 21, 2012 injury-related condition materially changed such that she could no longer perform her modified bulk mail technician position commencing July 31, 2012.

Dr. Goyal, Dr. Rizk, Dr. Lai, and Dr. Morse each saw appellant subsequent to her July 31, 2012 work stoppage, but none of them addressed her capacity for work. Dr. Rutherford was the only physician of record to address the issue of disability. His July 16, 2013 report addressed appellant's January 19, 2010 and May 21, 2012 employment injuries. Dr. Rutherford expressed familiarity with a number of her previous positions, but her June 26, 2012 limited-duty assignment was not among them. Also, he was under the mistaken belief that Dr. Kalb administered the July 9, 2012 FCE. Dr. Rutherford indicated that appellant had been unable to work at even a sedentary capacity since July 9, 2012 due to her accepted injuries under both claims. However, elsewhere in his report he noted that she last worked on July 31, 2012. Appellant continued to perform her sedentary, sit down job for several weeks following the July 9, 2012 FCE. The above-noted discrepancies and omissions undermine the probative value of Dr. Rutherford's July 16, 2013 report.

The Board finds that the medical evidence of record does not establish a change in the nature and extent of appellant's injury-related condition such that she could no longer perform her modified bulk mail technician duties as of July 31, 2012. There is no evidence that the employing establishment altered appellant's limited-duty position or withdrew the position effective July 31, 2012.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision.[27]

[26] *See supra* note 24. The January 25 and May 22, 2013 treatment notes from Mr. Otto, a physician assistant, are similarly insufficient for purposes of establishing entitlement under FECA.

[27] *See* 5 U.S.C. § 8128(a); 20 C.F.R. §§ 10.605 -- 10.607.

CONCLUSION

Appellant failed to establish a recurrence of disability beginning July 31, 2012.

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2014
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