

FACTUAL HISTORY

Appellant, a 56-year-old clerk, has an accepted claim for left plantar nerve lesion, which arose on or about August 14, 2006.³ OWCP authorized left foot surgery, which was performed on January 16, March 23, and April 7, 2007. Effective August 8, 2007, appellant returned to work in a part-time (four hours per day), limited-duty capacity. She increased to a six-hour workday in December 2007. In May 2009, appellant reverted to working four-hour days due to her left foot condition. On July 22, 2009 she stopped work entirely because of an unrelated lower back problem. OWCP subsequently accepted that appellant sustained injuries to her lumbar spine and bilateral upper extremities on or about October 28, 2009 (claim number xxxxxx607). There are numerous references in the record to appellant having received wage-loss compensation under claim number xxxxxx607; however, that information is not independently verifiable because the record in claim number xxxxxx607 is not available for review by the Board. Under the current left foot injury (claim number xxxxxx634), OWCP paid wage-loss compensation -- four hours per day -- for the period January 1 through November 19, 2010.⁴

Dr. John Kelly, a Board-certified neurologist, provided a January 6, 2011 work capacity evaluation (Form OWCP-5c) indicating that appellant was totally disabled due to her accepted left foot condition. He also treated appellant with respect to her lumbar and bilateral upper extremity conditions. Dr. Kelly's January 6, 2011 OWCP-5c did not reference appellant's October 28, 2009 employment injury; however, he noted that she had chronic lumbar pain.

On March 4, 2011 appellant accepted a limited-duty assignment as a modified clerk. The position was written as a full-time (eight hours/day) assignment; however, a handwritten notation indicated that she was only expected to work a four-hour shift. Appellant was assigned to the rewrap area where her duties included repairing damaged mail, manually facing mail into trays, and hand cancelling mail. The physical requirements of the modified clerk assignment included sitting, simple grasping, and lifting letters weighing one to three ounces. The typewritten March 3, 2011 limited-duty job offer references the current OWCP claim number; however, there is another handwritten notation referencing claim number xxxxxx607.

Appellant's return to limited-duty work was short-lived, lasting less than two weeks. On May 8, 2011 she filed a claim for wage-loss compensation (Form CA-7) for the period March 12 through May 6, 2011. Appellant requested four hours of wage-loss compensation per day with respect to her accepted left foot injury.⁵

³ Appellant attributed her left foot condition to walking and standing on concrete floors. She worked full time prior to her August 2006 left foot injury. Appellant previously underwent left foot surgery for treatment of Morton's neuroma in 2000.

⁴ Payment records for the current claim indicate that during the early part of 2010 appellant also received compensation for four hours per day under claim number xxxxxx607.

⁵ A June 20, 2011 acknowledgement/development letter from OWCP noted that appellant also requested four hours of wage-loss compensation per day with respect to her back injury under claim number xxxxxx607.

Dr. Theodore Toan Le, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant on June 27, 2011. He indicated that the only residual with respect to appellant's foot condition was chronic pain. There was no evidence of decreased sensation or weakness of the left foot. Dr. Le also noted that appellant would benefit from therapy for strengthening, followed by enrollment in a work-hardening/conditioning program. He also suggested a functional capacity evaluation to determine appellant's baseline and to see if she could perform light to medium work. Dr. Le completed a work capacity evaluation (OWCP-5c) that noted that appellant could only work four hours a day. He also noted it was unlikely she would be able to increase to an eight-hour workday. Dr. Le imposed restrictions with respect to sitting (four to six hours), walking (one to two hours), standing (one to two hours), twisting (one to two hours), and bending/stooping (one to two hours). Additionally, he precluded all squatting, kneeling, and climbing. Dr. Le also imposed a four-hour limitation with respect to pushing (no more than 20 pounds), pulling (no more than 20 pounds), and lifting (no more than 10 pounds).

In a July 8, 2011 report, Dr. Kelly indicated that appellant had restrictions with respect to her August 14, 2006 and October 28, 2009 work-related injuries. He noted that in March 2011 the employing establishment offered appellant a job that was primarily performed in a sitting position, but required her to move around from machine to machine. Dr. Kelly further noted that the position was located at a large postal facility, such that appellant had to walk a fairly long distance just to get to her workstation. After returning to work in March 2011, appellant's foot pain increased and progressively worsened. He described radiating left leg pain down to appellant's foot. It became so severe that she left work on March 12, 2011, and did not return. Dr. Kelly explained that appellant's primary issue was severe, burning, left foot pain that prevented her from standing/walking more than one hour per day. Any more than that resulted in intolerable radicular pain. Although appellant's job was part time (four hours per day) with less than one hour standing, she could only tolerate her March 2011 limited-duty assignment one day at a time. Dr. Kelly indicated that appellant could not perform her assigned duties on consecutive days without experiencing severe, intolerable pain. He further explained that the increased pain in her left foot altered appellant's gait, which in turn aggravated her lumbar conditions associated with the October 28, 2009 employment injury.

As of March 12, 2011, Dr. Kelly imposed the following restrictions: (1) no standing or walking more than 2 minutes at one time or more than 20 minutes per workday; (2) no sitting more than 30 minutes at one time or more than 3 hours per workday; (3) must be allowed to rest supine periodically and at unscheduled intervals; (4) must be allowed to elevate left leg as needed; (5) no bending, stooping, or crawling; and (6) no use of stairs or steps. He indicated that the above-noted restrictions pertained to both the 2006 and 2009 employment injuries because both conditions were presently impairing. Dr. Kelly further indicated that because these restrictions were incompatible with even light sedentary activity, appellant was temporarily totally disabled until further notice.

By decision dated July 29, 2011, OWCP denied wage-loss compensation for the period March 12 through May 6, 2011. The Branch of Hearings and Review would later affirm this decision.

In an August 11, 2011 report, Dr. Kelly clarified his earlier findings, noting that appellant's left foot pain was due to plantar neuritis. He further explained that the pain altered

her gait, which in turn aggravated appellant's lumbar sprain and degenerative disc disease associated with her October 28, 2009 work injury. Dr. Kelly reiterated appellant's July 8, 2011 work restrictions.

Appellant submitted a Form CA-7 for lost wages during the period May 7 through August 26, 2011.

In an October 21, 2011 report, Dr. Kelly continued the work restrictions previously noted in his July 8 and August 11, 2011 reports. He also noted that the employing establishment had been unable to accommodate appellant's restrictions. Additionally, Dr. Kelly explained that he originally apportioned appellant's limitations equally to her left foot and lumbar conditions, which was entirely arbitrary. He further explained that, if one were to ignore appellant's plantar lesion, she would still have to be off work solely for the conditions associated with her October 28, 2009 work injury.⁶

In a November 8, 2011 decision, OWCP denied appellant's claim for wage-loss compensation for the period May 7 through August 26, 2011. By decision dated December 12, 2011, the Branch of Hearings and Review affirmed OWCP's July 29, 2011 decision regarding entitlement to compensation for the period March 12 through May 6, 2011.

On May 7, 2012 appellant filed a claim for compensation (Form CA-7) for the period of August 27 through October 7, 2011.

In a May 15, 2012 development letter, OWCP noted that appellant was claiming four hours of compensation per day with respect to her August 14, 2006 left foot injury while currently receiving four hours of wage-loss compensation per day for her October 28, 2009 back injury. It provided a synopsis of the previously denied compensation claims dating back to March 12, 2011, and advised appellant to submit medical evidence to support her latest claim for the period August 27 through October 7, 2011.

OWCP did not receive any additional medical evidence during the allotted timeframe. Consequently, by decision dated June 20, 2012, it denied wage-loss compensation for the claimed period August 27 through October 7, 2011.

Appellant's counsel requested a hearing, which was held on October 15, 2012. In a December 6, 2012 decision, the Branch of Hearings and Review affirmed OWCP's June 20, 2012 decision. The hearing representative found that the evidence failed to establish a recurrence of disability from August 27 through October 7, 2011, causally related to appellant's August 14, 2006 left foot injury.

On January 17, 2013 appellant filed a claim for compensation (Form CA-7) for the period October 11, 2011 through February 24, 2012. She sought four hours of lost wages per day over the claimed period.

⁶ Dr. Kelly indicated that, with the exception of having to elevate her left leg, the other five work restrictions equally applied to appellant's left foot and lumbar conditions.

In a January 31, 2013 report, Dr. Kelly noted that he initially evaluated appellant on May 13, 2008 for a left plantar nerve lesion. Her prior treatment included corticosteroid injections, nonsteroidal anti-inflammatory drugs, and surgical intervention failed, which failed to improve appellant's painful lesion of the left plantar nerve. Dr. Kelly also noted that appellant's left foot pain was aggravated by work activities, which included walking, standing, lifting, pushing/pulling, and any form of weight-bearing activity. He further noted that to date, appellant's clinical signs and symptoms remained consistent with left plantar nerve lesion/impingement, secondary to inflammation and fibrosis (scar tissue). Dr. Kelly indicated that appellant's current left foot condition was a chronic residual of the plantar lesion and subsequent surgical intervention. He also described the treatment appellant received, including a recent implantation of a spinal cord stimulator, which Dr. Kelly noted had provided some positive benefit. But given the long-standing history and duration of appellant's symptoms, her prognosis for a complete recovery was poor.

Dr. Kelly chronicled appellant's foot-related limited-duty status between 2007 and 2009, when she stopped working part time (four hours/day) due to a separate work-related lumbar injury. He explained that were it not for the lumbar injury, she would still be working, and would still be restricted to four-hour workdays. Regarding the unrelated lumbar injury, Dr. Kelly noted that in March 2011, Dr. Michael A. Grefer, a Board-certified orthopedic surgeon, released appellant to return to work with the understanding that she would remain on a four-hour workday consistent with her previous permanent restriction related to the plantar nerve injury. However, appellant was unsuccessful in continuing the four-hour workday due to aggravation of both her back and foot injuries. Dr. Kelly indicated that she recently completed a work-hardening program, and with the spinal cord stimulator she was hopefully prepared to return to work on a sustained basis with permanent restrictions.

Appellant's permanent work restrictions with respect to her accepted left foot condition included: (1) no repetitive lifting of 10 pounds or greater, or more than 3 times per hour; (2) no standing or walking more than 10 minutes per hour or more than 30 minutes per work shift; and (3) no working more than 4 hours per day or more than 20 hours per week.

Regarding appellant's October 28, 2009 lumbar injury under claim number xxxxxx607, Dr. Kelly imposed the same above-noted permanent restrictions with respect to lifting and standing/walking. He also precluded bending and stooping, but did not specifically include a 4-hour workday and/or 20-hour weekly limitation.

In a March 4, 2013 development letter, OWCP noted that appellant requested four hours per day under her left foot claim, while currently receiving four hours of wage-loss compensation per day under claim number xxxxxx607. Additionally, it advised her to submit medical evidence to support disability for the claimed period (October 11, 2011 to February 24, 2012).

Appellant's counsel submitted Dr. Kelly's lumbar-related treatment records covering the period March 30 through October 17, 2011. The treatment records reveal that he initially believed appellant's March 2011 work stoppage was due to deconditioning. Dr. Kelly also initially attributed appellant's left leg and left foot complaints to lumbar radiculopathy. However, in July 2008, he noted that her severe burning pain in the left leg and left foot was

multi-factorial. Dr. Kelly explained that the pain was in part due to the plantar nerve lesion, but predominately due to lumbar radiculitis associated with appellant's 2009 claim. In his October 17, 2011 treatment notes, he reiterated that her left lower extremity pain was predominately due to lumbar radiculitis.

In an April 19, 2013 decision, OWCP denied wage-loss compensation for the period October 11, 2011 through February 24, 2012. It found, *inter alia*, that appellant admittedly stopped work due to her back condition, and Dr. Kelly indicated that she was totally disabled due to her back condition. Consequently, appellant failed to establish a recurrence of disability for the period October 11, 2011 through February 24, 2012.

Appellant's counsel requested a hearing, which was held on September 16, 2013.

By decision dated October 28, 2013, the Branch of Hearings and Review affirmed OWCP's denial of wage-loss compensation for the period October 11, 2011 through February 24, 2012.

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.⁷ 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 her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed her established physical limitations.⁸ Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty.⁹ 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.¹⁰

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.¹¹

⁷ 20 C.F.R. § 10.5(x).

⁸ *Id.*

⁹ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

¹⁰ 20 C.F.R. §§ 10.5(x), 10.104(c) and 10.509; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013).

¹¹ *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

Where an employee claims a recurrence of disability due to an accepted employment-related injury, she has the burden of establishing that the recurrence is causally related to the original injury.¹² This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.¹³ The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.¹⁴

Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists and social workers are not considered "physician[s]" as defined under FECA.¹⁵ Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.¹⁶

ANALYSIS

In early March 2011, appellant returned to work in a part-time, limited-duty capacity after having been off work since July 2009. Her return to limited-duty work lasted less than two weeks. Appellant stopped work on March 12, 2011, and subsequently filed several claims for compensation (CA-7 forms) seeking four hours of wage-loss compensation per day for the period March 12, 2011 through February 24, 2012. OWCP issued a series of decisions denying wage-loss compensation for the entire claimed period. The only period currently before the Board is October 11, 2011 through February 24, 2012. However, the record lacks sufficient evidence for the Board to render an informed decision regarding appellant's entitlement to compensation for the claimed period.

It is evident from the various decisions dating back to July 29, 2011 that OWCP relied in part on information obtained from appellant's other claim (xxxxxxx607).¹⁷ But it failed to include the relevant information it relied on in the current claim. For example, OWCP adjudicated appellant's March 12, 2011 work stoppage as a recurrence of disability based on her having returned to work in a limited-duty capacity. According to Dr. Kelly, the March 3, 2011 limited-duty job offer was based on restrictions provided by Dr. Grefer, who treated appellant for her

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

¹³ *See S.S.*, 59 ECAB 315, 318-19 (2008).

¹⁴ *Id.* at 319.

¹⁵ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

¹⁶ *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

¹⁷ The October 28, 2013 decision currently on appeal specifically referenced appellant's October 28, 2009 injury, including the accepted conditions and her receipt of wage-loss compensation under that particular claim.

lumbar condition. However, the current record does not include a contemporaneous narrative medical report from Dr. Grefer.¹⁸

To properly evaluate appellant's claim for compensation, the Board must have a thorough understanding of the type of limited-duty work made available to appellant and whether the position was consistent with her documented medical restrictions. Thus far, the only contemporaneous medical evidence regarding appellant's left foot limitations is a January 6, 2011 work capacity evaluation (OWCP-5c) from Dr. Kelly, who at the time found her totally disabled.¹⁹ To the extent the March 3, 2011 limited-duty job offer was based on contemporaneous limitations imposed by Dr. Grefer, that information should be included in the current record.

Decisions on claims are based on the written record, which may include forms, reports, letters, and other evidence of various types such as photographs, videotapes or drawings.²⁰ Evidence may not be incorporated by reference, nor may evidence from another claimant's case file be used.²¹ Evidence contained in another of the claimant's case files may be used, but a copy of that evidence should be placed into the case file being adjudicated.²² All evidence that forms the basis of a decision must be in that claimant's case record.²³ In this instance, OWCP relied on evidence and information obtained from appellant's other claim, but neglected to include that information in the current case record.

Based on the record available to the Board, it is unclear whether the limited-duty position appellant accepted on March 4, 2011 was designed in part to accommodate her left foot condition. It is also unclear from the record why the offered position, which was originally written as a full-time job, was changed to part time (four hours per day).²⁴ Furthermore, OWCP appears to have disregarded Dr. Le's June 27, 2011 findings without explanation. Dr. Le examined appellant at OWCP's behest and found that she continued to have residuals from her accepted left foot employment injury. He completed a work capacity evaluation (OWCP-5c)

¹⁸ The record includes an October 19, 2010 work status form report from Dr. Grefer indicating that appellant was capable of sedentary work. The comments section of the form includes the notation "frequent position changes."

¹⁹ There are additional treatment records from January and February 2011; however, the caregiver was not a "physician" as defined under FECA. *See supra* notes 15 and 16.

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5a (June 2011).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Accurate information regarding appellant's employment duties is essential to determining whether she suffered a recurrence of disability. The employing establishment is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. 20 C.F.R. § 10.118. As evidence appearing in the employer's files is not generally available to claimants, the employing establishment must assemble and submit such evidence. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4(b) (June 2011).

which noted that appellant could only work four hours a day with restrictions. Dr. Le also indicated that it was unlikely that she would be able to increase to an eight-hour workday. Ostensibly, his June 27, 2011 second opinion report supports appellant's claim for four hours of lost wages due to her left foot condition. However, OWCP has offered no explanation for its apparent disregard for the second opinion examiner's findings.

Because the record lacks sufficient evidence for the Board to render an informed decision, the case shall be remanded to OWCP for further development. After OWCP has developed the record consistent with the above-noted directive, it shall issue a *de novo* decision regarding appellant's claim for wage-loss compensation for the period October 11, 2011 through February 24, 2012.

CONCLUSION

The case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2013 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: July 21, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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