

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

M.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Show Lo, AZ, Employer**

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**Docket No. 15-0245
Issued: September 4, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 12, 2014 appellant filed a timely appeal from a May 20, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 met her burden of proof to establish that she sustained a recurrence of total disability on or after June 30, 2011 causally related to her January 12, 2011 employment injuries.

FACTUAL HISTORY

This case has previously been before the Board.² In an August 28, 2013 decision, the Board affirmed an OWCP hearing representative's August 29, 2012 decision, which found that

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 13-807 (issued August 28, 2013).

appellant did not sustain a recurrence of disability on or after June 30, 2011 causally related to her accepted employment-related injuries. The Board found that the evidence of record was insufficient to establish a change in the nature and extent of her employment-related conditions, or a change in the nature and extent of her light-duty job requirements. The facts of the case, as set forth in the prior decision, are hereby incorporated by reference. The relevant facts are set forth below.

On February 17, 2011 OWCP accepted that on January 12, 2011 appellant, then a 51-year-old rural carrier, sustained a contusion of the left hip and concussion without loss of consciousness when she slipped on snow and ice and fell, hitting the back of her head on the ground. On June 3, 2011 appellant accepted the employing establishment's job offer for a modified-duty assignment. The assignment was for four hours a day with restrictions of a daily average of one hour each of sitting, walking, grasping, and fine manipulation and five hours standing. OWCP paid disability compensation for four hours from July 2 through November 16, 2013.³

Subsequent to the issuance of the hearing representative's August 29, 2012 decision, OWCP proceeded to further develop the issue of appellant's total disability. On October 17, 2012 it referred her, together with a statement of accepted facts and the medical record, to Dr. Ronald S. Bennett, a Board-certified neurologist, for an impartial medical examination to resolve a conflict in medical opinion between Dr. Mitchell A. Major, an attending anesthesiologist, and Dr. Scott C. Forrer, a Board-certified neurologist and second opinion physician, regarding appellant's capacity to perform full-time regular-duty work. In an October 25, 2011 work capacity evaluation (Form OWCP-5c), Dr. Major opined that appellant was not capable of performing her usual job secondary to loss of function of the right upper extremity and complex regional pain syndrome secondary to her fall and occipital nerve damage. In a May 21, 2012 medical report, Dr. Forrer diagnosed concussion without loss of consciousness and contusion of the left hip and advised that appellant was capable of returning to her rural carrier position without restrictions.

In an April 2, 2012 work capacity evaluation (Form OWCP-5c), Dr. Aaron C. Bornstein, an attending family practitioner, advised that appellant could not perform her usual job for an indeterminate period due to her neuropathy and chronic pain secondary to her January 12, 2011 trauma.

In a November 15, 2012 report, Dr. Bennett reviewed a history of the January 12, 2011 employment injuries and appellant's medical treatment, social, and family background. He also reviewed the medical record. Dr. Bennett provided essentially normal findings on physical examination with the exception of slightly decreased lateral rotation and forward flexion of the neck, extreme sensitivity on compression of the right greater occipital nerve, and sensory hypesthesia over the anterolateral aspect of the left thigh. He reported that electromyogram studies of the upper and lower extremities revealed no evidence of cervical or lumbar radiculopathy and were consistent with his diagnosis of occipital nerve neuralgia and meralgia paresthetica. Dr. Bennett advised that appellant suffered from a greater occipital nerve injury

³ The Board notes that appellant retired on disability from the employing establishment effective October 11, 2013 and elected to receive retirement benefits from the Office of Personnel Management.

secondary to her fall with right-sided headaches. By history there was some altered mental status, but that was difficult to evaluate after the fact. Dr. Bennett noted that appellant complained about tingling and numbness in her anterolateral left thigh and hip. He stated that the left hip issue was related to meralgia paresthetica that was post-traumatic with tingling and numbness in the thigh. Appellant's dizziness was related to position and fulfilled criteria of benign positional vertigo with dizziness and nausea secondary to her fall. Dr. Bennett stated that this was due to a concussion of the inner ear that could occur with head injuries. He related that further work up revealed very mild nonsurgical discogenic disease in the cervical and lumbar spine that was unrelated to the fall. Dr. Bennett suspected that appellant had post-traumatic stress disorder due to prolonged symptomatology and disability and medical treatments, but stated that this was not his area of expertise and suggested further evaluation. He addressed her treatment plan which included use of an occipital nerve stimulator. Dr. Bennett concluded that she was temporarily disabled. He recommended reevaluation in three months.

In an addendum report of even date, Dr. Bennett stated that he reviewed appellant's position description and the statement of accepted facts regarding her rural mail carrier activities. He advised that she could perform all of these activities except loading mail onto a vehicle which depended on how frequent this activity was performed, the weight of the mail, and whether there was a positive response to the occipital nerve stimulator. Dr. Bennett concluded that all other work activities were possible at that time. In an accompanying OWCP-5c form dated November 15, 2012, he stated that appellant could work eight hours a day with restrictions which included no pushing, pulling, or lifting more than 10 pounds.

Appellant, on January 3, 2013, submitted a January 3, 2012 report by Dr. Major who assessed appellant as being status post the accepted work-related January 12, 2011 fall. She had considerable cervicgia, right greater than left which was absent prior to her fall. Appellant also had right shoulder pain related to her fall and left thigh pain of unknown etiology. Dr. Major concluded that appellant's activities of daily living and quality of life were greatly diminished and her family life was significantly impinged upon.

By letter dated March 25, 2013, OWCP expanded the acceptance of appellant's claim to include traumatic occipital neuralgia of the right cervical region.

Following the issuance of the Board's August 28, 2013 decision, appellant, in a letter dated February 28, 2014, requested reconsideration of the August 29, 2012 denial of her recurrence claim. She contended that the Board's decision did not mention Dr. Bennett's findings which established her entitlement to disability compensation.⁴

⁴ The Board did not review Dr. Bennett's reports or any other new evidence submitted after the hearing representative's August 29, 2012 decision in its August 28, 2013 decision as the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293, 295 n.1 (2008); *G.G.*, 58 ECAB 389, 391 n.7 (2007); *Donald R. Gervasi*, 57 ECAB 281, 284 n.1 (2005); *Rosemary A. Kayes*, 54 ECAB 373, 375 n.8 (2003). Therefore, this additional evidence was not considered on appeal. See *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

In OWCP-5c forms dated November 7, 2012 to November 4, 2013, Dr. Bornstein reiterated that appellant was unable to perform her usual job due to her accepted employment injuries.

In a May 20, 2014 decision, OWCP denied modification of the denial of appellant's recurrence of disability claim. It found that the weight of the medical evidence rested with Dr. Bennett's impartial medical opinion and established that she could perform her rural carrier duties, except loading mail. OWCP stated that appellant was partially disabled and not totally disabled.

LEGAL PRECEDENT

OWCP's definition of 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. The term also means the 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.⁵

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish a recurrence of total disability and that he or she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁶ To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a rationalized medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.⁷

In situations where there exist 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 upon a proper factual background, must be given special weight.⁸

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental

⁵ See *John I. Echols*, 53 ECAB 481 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *PA.*, Docket No. 10-1225 (issued April 20, 2011); *Maurissa Mack*, 50 ECAB 498 (1999).

⁷ *Vanessa Young*, 55 ECAB 575 (2004).

⁸ *L.S.*, Docket No. 12-139 (issued June 6, 2012); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

report from the examiner for the purpose of correcting the defect in the original opinion.⁹ If an impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.¹⁰

ANALYSIS

The Board finds that the case is not in posture for a decision on whether appellant sustained a recurrence of disability because of an unresolved conflict in medical opinion. OWCP found that appellant did not sustain a recurrence of total disability commencing June 30, 2011 because of a worsening of her accepted employment-related conditions based on the opinion of Dr. Bennett, an impartial medical specialist.

OWCP determined that a conflict existed between appellant's attending physician, Dr. Major, and Dr. Forrer, an OWCP referral physician, as to whether appellant was totally disabled. To resolve the conflict, it referred the claim to Dr. Bennett, for an impartial medical examination. In a November 15, 2012 report, Dr. Bennett listed his examination findings and diagnosed occipital nerve neuralgia and benign positional vertigo with dizziness and nausea as a consequence of the accepted January 12, 2011 employment injury. He found appellant temporarily totally disabled for work. In addition, Dr. Bennett advised that further treatment was necessary to return her to work. He recommended that she be reevaluated in three months to consider long-term disability. Dr. Bennett did not find that appellant no longer had any residuals or disability causally related to her accepted employment-related injuries. On the contrary, he found that she did.

The Board finds that OWCP's reliance on Dr. Bennett's opinion in denying appellant's recurrence of disability claim was misplaced given his actual opinion that appellant's ongoing residuals and disability were employment related. In an undated addendum to his November 15, 2012 report, Dr. Bennett stated that appellant could return to her rural mail carrier activities. In the addendum, his opinion lacks detail about the required work activities she could perform. Dr. Bennett generally found that she could perform all work activities, except loading mail onto a vehicle. However, he further stated that appellant's ability to perform this activity depended on the frequency of the activity, the weight of the mail, and a positive response to an occipital nerve stimulator. Dr. Bennett did not explain what he meant regarding the required activities she could perform upon her return to work.

For reasons stated above, the Board finds that Dr. Bennett's reports cannot be given the special weight afforded an impartial medical examiner, and do not resolve the conflict of medical opinion on the issue of whether appellant sustained a recurrence of total disability on or after June 30, 2011. Therefore, the case will be remanded for OWCP to obtain detailed clarification

⁹ *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

¹⁰ *Giuseppe Aversa*, 55 ECAB 164 (2003); *Harold Travis*, 30 ECAB 1071, 1078 (1979); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(e) (September 2010).

from Dr. Bennett on whether appellant had any continuing disability as of June 30, 2011 that could be causally related to the accepted January 12, 2011 employment injury. If it is unable to obtain such clarification, then appellant should be referred to another Board-certified specialist for an examination and an opinion on this matter.¹¹ After such further development of the case record as OWCP deems necessary, it should issue a *de novo* decision on appellant's recurrence claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 4, 2015
Washington, DC

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

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

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

¹¹ *Id.*