United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 15-0871**
	)	**Issued: December 1, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Harrisburg, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 6, 2015 appellant, through counsel, filed a timely appeal of a February 27, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 has met her burden of proof to establish a recurrence of disability on April 28, 2014 causally related to her March 3, 1992 employment injury.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

On appeal counsel argued that when the employing establishment withdrew appellant's light-duty position, OWCP should have paid her claim as a recurrence of disability. He further argued that the offered limited-duty position should have been evaluated by OWCP to determine its suitability before the claim was denied as a recurrence of disability. Counsel argued that appellant was entitled to two separate processes, the determination of whether a recurrence of disability occurred, and then a determination of whether the offered position was suitable and that without these two different analyses, appellant was denied due process under *Maggie Moore*.[3]

FACTUAL HISTORY

This case has previously been before the Board on appeal.[4] The facts and circumstances surrounding the prior appeals are incorporated by reference. The relevant facts follow.

Appellant was 30 years old when she began working as a full-time rural mail carrier on December 6, 1986. She filed an occupational disease claim (Form (CA-2) alleging that she developed carpal tunnel syndrome due to her job duties of manually sorting mail and parcels, loading her vehicle, delivering mail, and filing. Appellant first noticed pain in her right wrist on March 3, 1992. OWCP accepted her claim for lesion of the ulnar nerve on June 9, 1992. It expanded the accepted conditions to include bilateral ulnar neuropathy on November 9, 1992.

Appellant underwent cubital tunnel surgery on January 28, 1993 and returned to light duty by February 16, 1994. She worked as a modified clerk beginning January 25, 1995 and continued on May 27, 1998 for eight hours a day with an ergonomic workstation, answering telephones utilizing a speaker phone which included taking messages and assisting customers, completing time cards, recording volumes on forms, completing vehicle cards, recording postal fuel purchases and entering data into the computer, ordering and storing supplies, recording sick leave, keeping the lobby orderly and occasional typing and filing. Appellant's filing was not to exceed 20 minutes, her typing was not to exceed 20 minutes and she was to perform no repetitive motion of the hands and arms with no lifting over 10 pounds.

OWCP accepted a recurrence of disability on February 22, 1999. Appellant returned to work light duty six hours a day on March 8, 1999 performing desk and computer work.

By decision dated April 1, 2004, OWCP found that appellant's light-duty position fairly and reasonably represented her wage-earning capacity and reduced her compensation benefits based on her actual earnings.

On May 7, 2009 appellant accepted a modified-duty position at the office in Leola, PA, working six hours a day with Saturday and Sunday off. On August 11, 2010 she accepted a modified-duty position at the Leola, PA, office with Saturday and Sunday off working six hours a day.

[3] 41 ECAB 334 (1989), *reaff'd on recon.*, 43 ECAB 818 (1992).

[4] In a decision dated September 23, 1999, the Board found that appellant had no more than 16 percent impairment of her left upper extremity. Docket No. 97-2779 (issued September 23, 1999).

Appellant again filed a claim for recurrence of disability (Form CA-7) on August 27, 2010 alleging that on August 16, 2010 the employing establishment withdrew her light-duty position under the National Reassessment Process (NRP). OWCP denied her claim for recurrence on October 26, 2010 and February 17, 2011.

Appellant appealed to the Board. In an *Order Reversing Case in Part and Remanding Case*,[5] the Board found that OWCP abused its discretion in determining appellant's wage-earning capacity based on a part-time position. The Board further remanded the case for OWCP to determine if appellant's employment-related residuals and disability continued.

OWCP issued a decision on March 22, 2012 authorizing retroactive compensation benefits from August 16, 2010 through November 18, 2011.

Dr. Hartman examined appellant on February 28, 2013. He diagnosed lesion of the ulnar nerve. Dr. Hartman opined that appellant could perform sedentary duty six hours a day, lifting less than 10 pounds with limited overhead reaching and bending. He also opined that appellant should limit repetitive activities with her upper extremities. Dr. Hartman recommended that appellant work only in the morning and early afternoon and that she have a 10-minute break after three hours to stretch.

On April 25, 2013 the employing establishment involuntarily reassigned appellant to the Harrisburg office as full-time mail processing clerk. Subsequently, appellant accepted a modified-duty position on June 21, 2013 at the Columbia office working six hours a day with scheduled days off of Saturday and Sunday. This position required her to lift up to 10 pounds intermittently for one hour, to perform fine manipulation working at her own pace from one to three hours, to answer the phone for six hours a day, and to sit or stand to comfort standing one hour and sitting three to four hours.

Dr. Hartman completed additional reports on May 9, July 24, September 17, and October 30, 2013 diagnosing ulnar neuropathy. He noted that appellant could not perform repetitive motions and should work six hours a day with usual rest periods. Dr. Hartman indicated that appellant could lift 10 pounds intermittently and should work at shoulder level five percent of the time. He noted that appellant should limit overhead and over the shoulder working and should not work in the late afternoon or evening. Dr. Hartman recommended that appellant alternate sitting, standing, and walking as well as changing position as needed. He provided restrictions of standing one hour a day, sitting, three to four hours a day, and walking one to two hours a day. Dr. Hartman also limited appellant's driving to 30 minutes at a time. He indicated that she should perform simple grasping and fine manipulation for one to three hours.

Dr. Hartman completed a narrative report and work restriction evaluation on October 31, 2013 and indicated that appellant could work six hours a day. He restricted her to sitting three hours a day, walking one to two hours a day, standing one hour a day, reaching less than one hour with no reaching above the shoulder, no twisting and bending and stooping less than one hour each. Dr. Hartman further indicated that appellant should operate a motor vehicle for no more than 30 minutes at work and 30 minutes to and from work. He limited her to pushing,

[5] Docket No. 11-0865 (issued December 16, 2011).

pulling, and lifting less than 10 pounds for one hour a day. Dr. Hartman indicated that appellant could squat less than one hour a day and could not kneel, climb, or perform repetitive movements of the wrists and elbows. He indicated that she should have breaks after three hours for 10 minutes and that she should use a speaker phone.

Dr. Hartman repeated appellant's diagnosis and restrictions on December 23, 2013 and February 12, 2014. On April 23, 2014 he provided an office note which indicated that appellant could continue sedentary duty for six hours a day. Dr. Hartman provided that appellant could lift less than 10 pounds. He also found that appellant should limit overhead reaching, bending, and lifting as well as repetitive activity with her upper extremities. Dr. Hartman indicated that appellant could only work morning and early afternoon hours. He concluded that appellant's driving was limited to 30 minutes one way.

Dr. Hartman completed a duty status report on April 23, 2014 diagnosing ulnar neuropathy. He indicated that appellant could work six hours a day performing sedentary duty. Appellant's restrictions were lifting and carrying up to 10 pounds for six hours a day. She was to sit for three to four hours a day and stand for one hour. Appellant was to walk for one to two hours a day and was not to climb, kneel, or twist. Dr. Hartman indicated that appellant could bend, stoop, and squat for less than one hour a day. He provided that she could push and pull for 30 minutes and reach above the shoulder for 30 minutes. Appellant could perform grasping and fine manipulation for one to two hours each. Dr. Hartman provided that appellant could drive a vehicle for 35 to 40 minutes and could not operate machinery. He recommended an ergonomic desk, stool, and chair, a speaker phone, and no sorting mail. Dr. Hartman indicated that appellant required two days off in a row. He further found that appellant required a 15-minute break after 2 hours and 30 minutes for lunch after 3 to 4 hours of work.

On April 28, 2014 the employing establishment offered appellant a modified position in accountables, window, and retail working six hours a day. This position was located in the Lancaster Main Office and became available on April 30, 2014 with scheduled days off of Sunday and Wednesday. Appellant was required to work accountables for three hours a day and to work window, retail, and unendorsed bulk business mail (UBBM) for three hours a day. She was to perform sedentary to light work at her own work space. Appellant was to work at her own pace to minimize any repetitive work and change positions to comfort. In accountable she was to work at a desk using a pen and writing. Window/retail entailed working with customers assisting with the automated postal center.

The physical requirements of the modified assignment were walking one to two hours a day, sitting three to four hours a day, and standing one hour a day. Appellant could change position as needed. She was to perform simple grasping one to three hours a day intermittently. Appellant was to lift, push, and pull up to 10 pounds for one to six hours a day intermittently. She was required to carry 10 pounds from one to four hours a day, occasionally. The position required appellant to drive up to 30 minutes at a time. She was to perform no repetitive motion. The position indicated that appellant was required to perform limited overhead and over the shoulder work with no late afternoon or evening work.

Dr. Hartman reviewed this position on April 23, 2014 and modified the physical requirements to indicate that appellant could perform on "very limited" overhead and over

shoulder work. He added the restriction that appellant could perform work at shoulder level only five percent of her workday. Appellant accepted the position under protest on April 28, 2014 and requested modifications in accordance with her restrictions.

The employing establishment informed appellant that there was no work available within her restrictions on April 28, 2014 after 2:25 p.m. Appellant requested leave without pay for this 35-minute absence.

In a letter dated April 30, 2014, appellant rescinded her acceptance of the job offer as she believed that all the duties were not within her restrictions. She noted that she was initially given the offer on April 23, 2014 and presented it to Dr. Hartman on that date. Appellant further noted that she had requested that an ergonomic desk and chair be moved to the Lancaster Main Office for her use. She noted that she was told that this request was unacceptable, and that she was expected to sign the offer with no changes made. Appellant alleged that the duties were vague and that UBBM required repetitive motion with the upper extremities as well as throwing and pitching motions. She further alleged that a clerk was required to perform repetitive grasping if sorting mail. Appellant noted in the Lancaster Main Office the accountables were stored with at least one half of the shelves at or above shoulder level or above her head. She asserted that the writing area in accountables was too high for her ergonomic chair. Appellant requested two consecutive days off as she had in the past rather than split days off provided in the offer. She noted that Dr. Hartman recommended a 15-minute break after 2 hours and a 30-minute lunch after 3 to 4 hours. Appellant objected to the characterization of the work as sedentary to light rather than merely sedentary. She noted that sedentary work involves lifting up to 10 pounds occasionally while light work included exerting up to 20 pounds of force occasionally or 10 pounds frequently. Appellant noted that she could perform simple grasping for one to two hours intermittently rather than one to three hours, pushing and pulling for one half an hour rather than up to six hours and working at or above the shoulder for no more than five percent of her workday. She asserted that her current temporary position was withdrawn and terminated.

Appellant filed a recurrence of disability on May 1, 2014 alleging on April 28, 2014 her limited-duty position at the previous Columbia office had been withdrawn. She noted that the offered position was not within her medical restrictions.

In a letter dated April 30, 2014, the employing establishment noted that appellant had accepted the job offer under protest and duress. It noted that she submitted new medical evidence to support her request for a lunch, two consecutive days off and different hours. The employing establishment requested that OWCP provide a suitability ruling on the offered position.

In a report dated May 5, 2014, Dr. Paul Vassil, a Board-certified family practitioner, diagnosed Chiari malformation, chronic fatigue syndrome and reactive hypoglycemia. He noted that appellant could work no more than six hours a day with a 30-minute lunch break preferably after 3 hours as well as two consecutive days off to recover from the demands of her job. Dr. Vassil also noted that appellant required daytime work only.

OWCP requested additional information from appellant and the employing establishment on May 7, 2014. Appellant's modified position on June 21, 2013 required lifting up to 10

pounds intermittently up to one hour, limited fine manipulation working at her own pace for two to three hours, answering the telephone for six hours and sitting for three to four hours or standing for one hour to her comfort. The employing establishment indicated that her previous modified position entailed clerical duties such as lobby stock, insurance claims, telephone duties and permit tracking.

By decision dated June 11, 2014, OWCP denied appellant's claim for a recurrence of disability finding that the offered position was within her work restrictions.

In a statement dated June 16, 2014, appellant alleged that her recurrence was due to the withdrawal of her light-duty assignment. She noted that she worked six hours a day until her permanent rehabilitation position was withdrawn at the Leola office on June 1, 2013. Appellant was transferred to the Harrisburg office although the commute exceeded her driving restrictions. She did not work in this position and returned to work on June 21, 2013 in a temporary limited-duty assignment at the Columbia office. This position was withdrawn on April 28, 2014 and another temporary job was offered at the Lancaster office. Appellant alleged that the Lancaster position was not within her physical restrictions. She claimed that modifications needed to be made before she would accept the position. Appellant further noted that the employing establishment had not notified her that the Lancaster position was still available after April 28, 2014.

Appellant noted that following her accepted occupational disease claim, she underwent two brain, head and neck surgeries for Arnold Chiari malformation. She alleged that her Chiari malformation caused continual chronic pain, fatigue, sleep problems and muscle spasms, degenerative disc disease, facet joint arthritis and reactive hypoglycemia.

In a report dated June 26, 2014, Dr. Hartman noted that appellant could return to sedentary duty with no repetitive motion working six hours a day.

Counsel requested an oral hearing before OWCP's Branch of Hearings and Review on June 30, 2014. Appellant underwent a functional capacity evaluation on August 12, 2014. This study found that appellant could work at a sedentary capacity for eight hours a day. The functional capacity evaluation indicated that appellant employed partial submaximal effort. This study demonstrated that appellant could lift less than nine pounds at waist height, carry less than eight pounds and push less than 20 pounds.

In a statement dated September 8, 2014, appellant described her issues with the offered limited-duty position. She alleged that she could not perform accountables for three hours a day as this was too repetitive and involved drafting second notices for pieces of mail that the carriers were unable to deliver. Appellant also alleged that the mail was stored in shelving from waist height to over her head which exceeded her over the shoulder limitation. She also noted that she was unable to sort mail. Appellant noted that she would need to be able to rotate her tasks to cut down on the repetitive nature of the work. She noted that she required further clarification regarding her duties at the window or in retail. Appellant also noted that UBBM required repetitive grasping and motion with the upper extremities including repetitive through and pitching motions. She noted that her previous limited-duty positions were more clerical and

administrative assistant-type duties which made it easier to pace herself and avoid repetitive motions.

In a letter dated September 17, 2014, the employing establishment noted that it would modify the April 28, 2014 job offer to provide appellant with a computer hutch and chair as well as a 30-minute lunch. Appellant's scheduled days off would be Saturdays and Sundays. She accepted the modified position at the Lancaster office on September 17, 2014 which entailed accountables, window, retail and UBBM working six hours a day. The position was described as basically sedentary to light work with her own work space. Appellant was to work at her own pace to minimize repetitive work. She was to change position to comfort. The accountables duties required appellant to work at a desk using a pen and writing. Appellant's window and retail duties were working with customers assisting with the automated postal center.

Appellant testified at the oral hearing on January 9, 2015 and noted that on her last date at the Columbia office she was offered the position at Lancaster to begin on the following Monday. She alleged that she was not allowed to finish her work shift on April 28, 2014. Appellant noted that the first offered position had been outside her restrictions as it did not include two consecutive days off, a 30-minute lunch, and breaks every two hours as well as requiring repetitive work at a light level rather than sedentary. She noted that her supervisor noted her current position would be modified once she reached the worksite. Appellant noted that the Lancaster office was within her driving restrictions.

The employing establishment responded to appellant's testimony on February 3, 2015 and noted that appellant was initially provided with the limited-duty position on April 21, 2014. Appellant addressed its allegations on February 17, 2015 and alleged that she had previously had consecutive days off and a lunch break in her limited-duty position at Leola.

By decision dated February 27, 2015, OWCP's hearing representative found that appellant had not met her burden of proof to establish a recurrence of disability on April 28, 2014. She found that appellant was offered a light-duty job on April 28, 2014 which was within her medical restrictions.

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.[6] When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that 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 she

[6] 20 C.F.R. § 10.5(x).

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.[7]

OWCP regulations have codified this by noting that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. An employee is not entitled to compensation for any wage loss to the extent that evidence establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available.[8]

If the claim for recurrence of disability for work is based on modification of the claimant's duties or physical requirements of the job, the claimant should be asked to describe such changes. If the evidence establishes that the limited-duty position has changed such that it no longer accommodates the claimant's work restrictions, OWCP should accept the recurrence.[9]

ANALYSIS

The Board finds that appellant failed to meet her burden of proof in establishing a recurrence of disability on April 28, 2014.

Appellant was working in a light-duty position at the Columbia office until April 28, 2014. This position required working six hours a day with scheduled days off of Saturday and Sunday. The position required her to lift up to 10 pounds intermittently for one hour, to perform fine manipulation working at her own pace from one to three hours, to answer the phone for six hours a day, and to sit or stand to comfort standing one hour and sitting three to four hours.

On April 23, 2014 the employing establishment offered appellant a light-duty assignment at the Lancaster Main Office with the physical requirements of walking from one to two hours a day, sitting from three to four hours a day and standing for one hour a day, changing her position as needed. Appellant was required to perform simple grasping for one to three hours a day intermittently, to occasionally carry up to 10 pounds for one to four hours a day, to push and pull up to 10 pounds occasionally from one to six hours a day and to lift up to 10 pounds intermittently as tolerated for one to six hours a day. She was to drive no more than 30 minutes at one time with no repetitive motion, limited overhead and over the shoulder work and no late afternoon or evening work. Appellant did not have consecutive days off.

Appellant's attending physician, Dr. Hartman, completed an office note and a work restriction evaluation on April 23, 2014 as well as signing the physical requirements of the modified assignment. He indicated that appellant could work six hours a day. Dr. Hartman

[7] *Terry R. Hedman*, 38 ECAB 222 (1986).

[8] 20 C.F.R. § 10.500(a).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6.a(3) (June 2013).

restricted appellant's sitting to three to four hours a day. The offered position required that appellant sit for up to four hours a day, within her restrictions. Appellant was to reach for less than one hour with no reaching above the shoulder. Dr. Hartman indicated that appellant could reach above the shoulder for no more 30 minutes. The offered position indicated that appellant would push and pull up to 10 pounds for one to six hours a day. This requirement was within appellant's restrictions as provided by Dr. Hartman on April 23, 2014 as he provided that she could push and pull. The offered position also indicated that appellant should lift up to 10 pounds intermittently for one to six hours a day. This is within appellant's restrictions as provided by Dr. Hartman on April 23, 2014. Dr. Hartman also indicated that appellant should have breaks after three hours for 10 minutes.

As the offered position complied with appellant's established medical restrictions, the Board finds that appellant has not met her burden of proof to establish a recurrence of disability on April 28, 2014. In regard to counsel's arguments on appeal, the Board has long held that when an employee returns to a light-duty position or the medical evidence of record establish that 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 she cannot perform such light duty. The burden is on the employee to establish that the light duty is not appropriate, not on OWCP. The Board finds in this case, that appellant failed to meet her burden of proof to establish a change in the nature and extent of the light-duty requirements and has not established a recurrence of disability for the period claimed.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing a recurrence of disability as there was appropriate light duty available for her within her medical restrictions beginning on April 28, 2014.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2015 decision of the Office of Workers' Compensation Programs is affirmed.[10]

Issued: December 1, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[10] James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.