

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

R.S., Appellant

and

**U.S. POSTAL SERVICE, TRENTON CARRIER
ANNEX, Yardville, NJ, Employer**

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**Docket No. 15-0476
Issued: February 19, 2016**

Appearances:

Jason S. Lomax, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 22, 2014 appellant, through counsel, timely appealed from a July 22, 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 the claim.²

ISSUE

The issue is whether appellant has met her burden of proof to establish temporary total disability on or after April 10, 2010.

¹ 5 U.S.C. § 8101 *et seq.*

² The record on appeal contains evidence received after OWCP issued its July 22, 2014 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP issued its final decision. 20 C.F.R. § 501.2(c)(1) (2014).

FACTUAL HISTORY

Appellant, a 36-year-old part-time flexible city carrier, injured her lower back in the performance of duty on December 18, 2008.³ OWCP initially accepted her claim for L5 subluxation (closed dislocation lumbar vertebra -- ICD-9 Code 839.20), but later expanded the claim to include L5-S1 disc herniation.

On February 3, 2009 appellant returned to work in a limited-duty capacity. She stopped work from April 8 to 10, 2009, returned to work for a two-week period, and then stopped again on April 24, 2009.⁴ Appellant resumed limited-duty work on May 12, 2009. OWCP accepted that she had sustained a recurrence of disability on April 24, 2009, and paid wage-loss compensation through May 11, 2009. Appellant stopped work again on May 18, 2009, and filed another notice of recurrence (Form CA-2a). At the time of her latest work stoppage, she was reportedly limited to only answering telephones.

By decision dated July 15, 2010, OWCP accepted appellant's May 18, 2009 recurrence claim.⁵ By the time OWCP issued the decision, appellant had filed numerous claims (Form CA-7) for compensation through April 9, 2010. However, the July 15, 2010 decision did not address entitlement to wage-loss compensation for the period May 18, 2009 through April 9, 2010.

In July 2011, appellant filed another claim (Form CA-7) for lost wages covering the period May 18, 2009 through July 21, 2011. Counsel subsequently submitted an October 20, 2011 attending physician's report (Form CA-20) from Dr. Dennis J. Bonner, a Board-certified physiatrist, who began treating appellant in August 2009. Dr. Bonner's diagnoses included chronic lower back pain and L5-S1 disc herniation, with a December 18, 2008 date of injury.⁶ He noted that appellant was currently totally disabled, which dated back to May 18, 2009.

Dr. Mohsen A. Kalliny, a Board-certified anesthesiologist with a subspecialty in pain medicine, initially examined appellant on January 20, 2012. He noted a history of injury on December 18, 2008 when appellant lifted a tray of mail and felt severe pain in her low back and

³ Appellant was injured while lifting a tray of mail to the front of her long-life vehicle (LLV). She reported having pulled something in her stomach and lower back. As a part-time flexible employee, appellant averaged 33.04 hours of work per week. She received continuation of pay for the period December 22, 2008 through January 16, 2009.

⁴ Appellant's duties as a modified city carrier included driving, delivering express mail, picking up HUB mail (up to 1.5 hours), casing mail (up to 2 hours), and answering telephones. She was expected to work a six-hour shift. The physical requirements of the modified assignment included sitting in a van and driving up to 6 hours, with 15-minute breaks every 2 hours. Additional physical requirements included standing, lifting her arm to case mail (two hours), and lifting a bucket of mail at the HUB (less than 20 pounds).

⁵ OWCP's acceptance of the latest recurrence coincided with its July 15, 2010 expansion of the claim to include L5-S1 disc herniation.

⁶ Additionally, Dr. Bonner diagnosed chronic neck pain and upper extremity radiculopathy. An April 16, 2010 cervical magnetic resonance imaging (MRI) scan revealed right, greater than left neural foraminal narrowing at C6-7, with associated uncinated spurring. In addition to the October 20, 2011 attending physician's report (Form CA-20), OWCP received Dr. Bonner's October 19, 2011 treatment notes and a duty status report (Form CA-17).

tailbone. Dr. Kalliny's lumbar-related diagnoses included intervertebral disc displacement without myelopathy, radiculopathy, facet syndrome, and disc herniation, desiccation, and annular tear at L5-S1. He recommended continued conservative treatment and did not specifically comment on appellant's ability to work. Appellant returned for follow up on January 30, February 13 and 27, and March 26, 2012. During this timeframe, Dr. Kalliny recommended a lumbar epidural steroid injection, and prescribed various pain medications, a muscle relaxant, and a sedative. The follow-up treatment notes were silent with respect to appellant's ability to work.

In a decision dated May 11, 2012, OWCP denied wage-loss compensation for the period May 18, 2009 through July 21, 2011. The claims examiner made no mention of the previous July 15, 2010 acceptance of appellant's May 18, 2009 recurrence. She also disregarded various chiropractic treatment records on the belief that "subluxation" was not one of appellant's accepted conditions.⁷

Appellant requested a hearing, which was held on August 17, 2012. By decision dated November 21, 2012, the hearing representative found appellant has established wage-loss compensation for the period May 18, 2009 through April 9, 2010.

The hearing representative initially considered whether the May 11, 2012 decision effectively rescinded OWCP's July 15, 2010 acceptance of the May 18, 2009 recurrence. The hearing representative noted that the previous claims examiner made no mention of the fact that the recurrence of disability beginning May 18, 2009 had already been approved. He questioned whether the claims examiner was simply unaware of the July 15, 2010 letter accepting the recurrence or whether she decided to readjudicate the recurrence claim. The hearing representative ultimately found that OWCP's May 11, 2012 decision offered no justification for vacating the prior acceptance of the recurrence. He further indicated that when OWCP approved the claim for recurrence in July 2010, "it [was] on notice that the claim encompassed compensation [through] April 9, 2010." As such, the hearing representative awarded compensation for the period May 18, 2009 to April 9, 2010 and for the period after April 9, 2010 he found there was insufficient medical evidence to substantiate any further injury-related disability. The hearing representative specifically noted that the periodic reports from Dr. Bonner and Dr. Kalliny failed to explain how appellant's injury-related condition prevented her from performing the modified letter carrier position she held prior to her May 18, 2009 recurrence.

On November 18, 2013 appellant's counsel requested reconsideration. He argued that the record established that appellant's employment-related disability continued beyond April 9, 2010. Counsel referenced a June 16, 2010 positive lower extremity electromyography, as well as an August 18, 2010 lumbar MRI scan. He noted that the MRI scan showed a progression of appellant's L5-S1 disc herniation, which the hearing representative previously characterized as "consistent with a worsening of the injury-related condition." Counsel also referenced Dr. Bonner's October 20, 2011 report wherein he noted that appellant was totally disabled since May 18, 2009.

⁷ OWCP's January 29, 2009 acceptance of the claim specifically identified "Subluxation at L5" as an accepted condition.

OWCP referred appellant for a second opinion examination. One of the questions presented to the referral physician was whether the medical evidence substantiated disability for the period following April 9, 2010.⁸ OWCP prepared a December 19, 2013 statement of accepted facts, which noted, *inter alia*, that appellant suffered a recurrence of disability on May 18, 2009, and had yet to return to work.

On December 23, 2013 OWCP advised appellant that her second opinion examination was scheduled for January 10, 2014. Appellant did not attend the scheduled examination. She subsequently claimed not to have received prior notification of the January 10, 2014 appointment.

Effective January 27, 2014, appellant's chiropractor, Dr. Louis Beato, released her to return to full duty.

On February 4, 2014 OWCP issued two separate decisions. In one decision, it suspended appellant's compensation pursuant to 5 U.S.C. § 8123(d) because she failed to attend the January 10, 2014 directed examination.⁹ The other decision denied modification of the hearing representative's November 21, 2012 decision. With respect to the latter decision, OWCP found there was insufficient evidence to warrant modification, particularly in light of appellant's failure to attend the second opinion examination.

On April 23, 2014 counsel requested reconsideration. He argued that the sanction under 5 U.S.C. § 8123(d) was inappropriate because OWCP neglected to inform counsel of the January 10, 2014 directed examination and appellant had also not received the notice of appointment. He advised that appellant would comply in the future, and encouraged OWCP to reschedule the second opinion examination.

OWCP also received a May 20, 2014 report from Dr. Maher Ibrahim, a pain management specialist. Dr. Ibrahim noted a December 18, 2008 history of injury while working as a mail carrier. He also noted that appellant had been out of work from May 2009 through January 2014. Appellant's current complaints included neck and low back pain. Dr. Ibrahim diagnosed cervical disc bulge/herniation, cervical radiculopathy, secondary myofascial pain syndrome, lumbar spine radiculopathy, lumbar spine facet syndrome, and right sacroiliitis. He indicated that appellant's low back and neck pain with radicular symptoms were directly related to her December 18, 2008 employment injury.

⁸ OWCP also asked the second opinion examiner to address whether additional diagnosed conditions such as sacroiliitis, lumbar radiculitis, and lumbar facet syndrome were present on examination, and if so, whether these conditions were related to appellant's December 18, 2008 employment injury.

⁹ On January 15, 2014 OWCP provided appellant a notice of proposed suspension of compensation. Appellant claimed that she first learned of the scheduled appointment when she received OWCP's January 15, 2014 notice of proposed suspension.

In a July 22, 2014 decision, OWCP vacated the February 4, 2014 decision suspending compensation under 5 U.S.C. § 8123(d). The latest decision also denied modification of the February 4, 2014 decision regarding wage-loss compensation on or after April 10, 2010.¹⁰

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.¹¹ 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.¹² 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.¹³ 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.¹⁴ 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.¹⁵

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establish that the recurrence is causally related to the original injury.¹⁶ This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.¹⁷ The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.¹⁸

¹⁰ OWCP declined to reschedule appellant for a second opinion examination.

¹¹ 20 C.F.R. § 10.5(x).

¹² *Id.*

¹³ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

¹⁴ 20 C.F.R. §§ 10.5(x), 10.104(c), and 10.509; *see id.* at Chapter 2.1500.2b.

¹⁵ *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

¹⁶ 20 C.F.R. § 10.104(b); *see supra* note 13 at Chapter 2.1500.5 and 2.1500.6.

¹⁷ *See S.S.*, 59 ECAB 315, 318-19 (2008).

¹⁸ *Id.* at 319.

ANALYSIS

OWCP accepted that appellant suffered a recurrence of disability on May 18, 2009, and thus far, has paid her wage-loss compensation through April 9, 2010. When the hearing representative issued his November 21, 2012 decision awarding compensation, appellant had not yet returned to work. It was not until January 2014 that her chiropractor, Dr. Beato, released appellant to return to full duty. The hearing representative declined to award compensation beyond April 9, 2010 notwithstanding evidence at the time from Dr. Bonner who found that appellant remained totally disabled at least through October 20, 2011.

The April 9, 2010 end date selected by the hearing representative was based on the period of compensation appellant claimed on her March 30, 2010 Form CA-7 (May 18, 2009 - April 9, 2010).¹⁹ According to the hearing representative, when OWCP approved the claim for recurrence in July 2010, “it [was] on notice that the claim encompassed compensation [through] April 9, 2010.” He did not find that appellant’s employment-related disability resolved as of April 9, 2010. Instead, the hearing representative found that appellant had failed to establish ongoing disability. As to the issue of appellant’s disability on or after April 10, 2010, the Board finds that the case is not in posture for decision.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.²⁰ There is *prima facie* evidence of record that appellant’s work-related disability continued beyond April 9, 2010. Dr. Bonner indicated as much in his October 20, 2011 attending physician’s report (Form CA-20).²¹ Accordingly, the Board finds that there is sufficient evidence to require further development of the record by OWCP.²²

On remand OWCP should refer appellant to an appropriate specialist, along with the case record, and a statement of accepted facts. The referral physician should provide an evaluation and a rationalized medical opinion on whether appellant’s accepted May 18, 2009 recurrence of disability continued beyond April 9, 2010. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

¹⁹ At the time, the record also included a July 21, 2011 Form CA-7 wherein appellant claimed lost wages for the period May 18, 2009 through July 21, 2011.

²⁰ *William J. Cantrell*, 34 ECAB 1223 (1983).

²¹ As previously noted, the October 20, 2011 form report was accompanied by Dr. Bonner’s October 19, 2011 follow-up treatment notes.

²² See *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978). OWCP has since set aside its February 4, 2014 sanction decision under 5 U.S.C. § 8123(d), and the Board notes that appellant expressed her willingness to comply with any future directed examinations.

CONCLUSION

The case is not in posture for decision regarding wage-loss compensation on or after April 10, 2010. Additionally, the Board shall not disturb OWCP's decision to vacate its February 4, 2014 decision imposing sanctions under 5 U.S.C. § 8123(d).

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2014 decision of the Office of Workers' Compensation Programs is set aside in part, and the case is remanded for further action consistent with this decision.

Issued: February 19, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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