United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 15-0581**
	)	**Issued: June 8, 2016**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On January 16, 2015 appellant, through counsel, timely appealed from an October 7, 2014 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 this case.[2]

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability on or after July 26, 2008 due to her accepted bilateral upper extremity condition.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The case record provided to the Board includes evidence received after OWCP issued its October 7, 2014 decision. However, 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

This case has previously been before the Board.[3] Appellant, a 60-year-old mail processing clerk, sustained several employment-related upper extremity injuries between 2006 and 2008. Her accepted conditions include a January 9, 2006 left wrist sprain (OWCP File No. xxxxxx698), bilateral carpal tunnel syndrome, which arose on or about December 18, 2006 (OWCP File No. xxxxxx519), and an August 6, 2008 aggravation of bilateral carpal tunnel syndrome (OWCP File No. xxxxxx177).[4]

Beginning February 2008, appellant went from working full-time regular duty, to working six hours limited duty, to four hours limited duty until July 26, 2008, when she stopped work entirely.[5] The employing establishment represented that prior to the July 26, 2008 work stoppage, she had been assigned part-time (four hours) work casing letters weighing 12 ounces or less to a distribution case. It further noted that appellant was not required to case more than 12 inches high. On at least one occasion, appellant reportedly advised the employing establishment that casing mail was a little uncomfortable. In response, it claimed to have allowed her to take more frequent breaks.[6]

Dr. Scott M. Fried, a Board-certified orthopedic surgeon, excused appellant from all work effective July 26, 2008 due to her bilateral upper extremity condition. A month prior, he had reported that her part-time (four hours), limited-duty casing responsibilities exacerbated her underlying condition.[7] Dr. Fried also noted that repetitive reading exacerbated appellant's condition. He recommended a modified assignment that allowed her to avoid significant repetitive activities. Dr. Fried specifically noted that appellant needed to "come off ... casing." He recommended that she be assigned to "tape repair mail." Dr. Fried further noted that if the employing establishment could not accommodate appellant's latest limitations, she may well need to be removed from work entirely.

Under OWCP File No. xxxxxx519, OWCP paid appellant four hours of lost wages per day for the period June 11 through July 26, 2008. Although she claimed temporary total disability following her July 26, 2008 work stoppage, it compensated her for only two hours of lost wages per day, effective July 31, 2008.

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[3] Docket No. 12-1342 (issued June 11, 2013).

[4] All three upper extremity injury claims have been combined under OWCP File No. xxxxxx519 (Master).

[5] Appellant filed her claim for bilateral carpal tunnel syndrome on July 12, 2008, just two weeks prior to her July 26, 2008 work stoppage. OWCP selected August 6, 2008 as the "date-of-injury" regarding her accepted "aggravation" of bilateral carpal tunnel syndrome. The Board notes, however, that appellant had last performed work on July 26, 2008 and had filed her (Form CA-2) on July 12, 2008.

[6] The above-noted information was reported on the back of appellant's June 10, 2009 notice of recurrence (Form CA-2a). OWCP subsequently incorporated the information in its June 24, 2011 statement of accepted facts (SOAF). Additionally, the June 24, 2011 SOAF characterized appellant's duties as "repetitive," and noted that she had not returned to work since July 2008.

[7] Dr. Fried had advised against casing mail as early as October 1, 2007.

The award for partial disability was based on the opinion of Dr. Robert F. Draper Jr., a Board-certified orthopedic surgeon and OWCP-referral physician. He had examined appellant on April 29, 2010 and found that, at the time of her July 2008 work stoppage, she would have been capable of performing six hours of limited-duty work. However, when Dr. Draper reexamined her in August 2011, he believed that she would have been capable of performing her July 26, 2008 modified duties on a full-time basis. Despite Dr. Draper's latest finding, OWCP continued to pay appellant wage-loss compensation for partial disability (two hours per day).

When the case was last on appeal, the Board found that the issue regarding the extent of appellant's wage-loss compensation for temporary total disability was not in posture for decision. At that time counsel urged the Board to declare a conflict in medical opinion and remand the case for an impartial medical evaluation. The Board did not find a conflict because neither appellant's physician, nor OWCP's referral physician "provided a particularly well-reasoned opinion regarding appellant's ability to work on or after July 26, 2008." The Board further noted that Dr. Draper twice examined appellant and offered conflicting findings, with no attempt to reconcile his differing opinions. Under the circumstances, the Board found OWCP's development of the record deficient, and therefore, set aside the March 21, 2012 decision. The Board remanded the case to OWCP for further medical development, with specific instructions to refer appellant to another second opinion specialist for an opinion regarding the existence and extent of any employment-related disability on or after July 26, 2008.[8]

On remand, OWCP referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon. Dr. Smith examined appellant on July 12, 2013 and noted that her claim was accepted for bilateral carpal tunnel syndrome. He reported that appellant had a relatively benign examination with regard to her hands and wrists. Dr. Smith did not think she had any tendinitis based on the current physical examination. He further noted that from an objective standpoint, there did not appear to be much in the way of residual findings of the hands to suggest a significant or severe nerve entrapment condition. According to Dr. Smith, appellant's prognosis was good and she was not totally disabled. He advised that she could certainly work in a situation where there was not heavy repetitive hand use over a long period of time. Dr. Smith further noted that if appellant's duties were varied and limited to 20 pounds of lifting, then she could immediately return to gainful employment. He opined that total disability would have ceased within 30 days of July 26, 2008. Dr. Smith also provided a work capacity evaluation (Form OWCP-5c). He noted that appellant was unable to perform her regular duties, but she could work full time with a two-hour restriction on repetitive wrist movements, and an eight-hour, 20-pound limit on pushing, pulling, and lifting.

Appellant's physician, Dr. Fried, provided results from August 1 and September 19, 2013 examinations. On both occasions, he reported that appellant remained symptomatic and was unable to return to her regular work activities.

In September 2013, OWCP sought clarification from Dr. Smith regarding whether appellant's condition worsened on July 26, 2008 to the point that she became totally disabled. It

[8] The facts and circumstances outlined in the Board's June 11, 2013 decision are incorporated herein by reference.

provided him a copy of its June 24, 2011 SOAF, which noted that she had been working four hours per day prior to July 26, 2008.

In a supplemental report dated September 20, 2013, Dr. Smith noted that although appellant's duties were repetitive in nature, they did not seem to be of such intensity to aggravate what appeared to be relatively mild carpal tunnel syndrome. He explained that based on his recent examination, which was essentially normal, he did not consider her to be totally disabled or to have experienced a worsening of her accepted condition as of July 26, 2008. Dr. Smith further explained that although the electromyography (EMG) showed nerve entrapment, there was little correlation between the test results and the actual clinical findings on physical examination. In conclusion, he opined that if appellant has carpal tunnel syndrome, it is relatively mild and may have been temporarily aggravated on occasion. Dr. Smith reiterated that there did not appear to be evidence of a worsening of her condition given the lack of atrophy in the median nerve distribution and the fact that she never required surgical intervention.

In a September 30, 2013 decision, OWCP found that Dr. Smith's opinion established that appellant's work-related condition had not worsened to the point where she was unable to perform her light-duty position in July 2008. Consequently, it denied wage-loss compensation for temporary total disability.[9]

Appellant requested a hearing, which was held on June 11, 2014.

OWCP received additional medical evidence, including follow-up examination reports from Dr. Fried. When he reexamined appellant on November 14, 2013, Dr. Fried reported that she remained symptomatic, limited, and unable to return to her regular work activities. In a March 27, 2014 follow-up report, he noted that OWCP recently approved his request for right carpal tunnel chemoneurolysis to destruct her diseased peripheral nerve. Dr. Fried recommended that appellant remain off work until the April 22, 2014 procedure. He also noted that her most recent work capacity evaluation did not even bare out sedentary work capabilities, noting that she was unable to perform simple grasping or lifting. Dr. Fried further noted that appellant was unable to key more than 48 seconds before stopping due to pain. He was hopeful that the upcoming chemoneurolysis procedure would improve her capabilities.

According to Dr. Fried, the April 22, 2014 right carpal tunnel chemoneurolysis revealed, *inter alia*, perineural scarring and flexor tenosynovitis, which was consistent with carpal tunnel and compression neuropathy.

In a July 24, 2014 report, Dr. Fried noted that appellant reported a severe flare-up of the right carpal tunnel, with shooting pain from the right volar wrist into the palm and up through the arm, with tingling and numbness in the middle three digits. Additionally, appellant's thumb was reportedly sore again. She also complained of burning in the ulnar hand. The pain was constant and had reached level 10 over the past week. Dr. Fried noted that appellant was frustrated and upset because she initially experienced some benefit from the procedure, but now her condition had really flared-up, despite appellant having been careful and continuing with her treatment.

[9] OWCP further advised that appellant remained entitled to medical benefits and wage-loss compensation for partial disability (two hours).

Presently, appellant felt no benefit from the chemoneurolysis procedure, and she wanted to move forward with surgery. Dr. Fried noted that appellant was currently out of work due to her injuries and could not return to her regular work activities.

In an October 7, 2014 decision, the hearing representative affirmed OWCP's September 30, 2013 decision. She similarly relied on Dr. Smith's second opinion examination to find that appellant had not established a material worsening or total disability due to her December 18, 2006 accepted work injury. The hearing representative further found that the additional medical records reiterated prior reports and offered no new reasoned opinion supporting a recurrence of disability.[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 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.[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]

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.[14]

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 is causally related to the original injury.[15] This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.[16] The

[10] Although the hearing representative mentioned that OWCP had referred appellant to Dr. Thompson for a new second opinion examination, she did not consider Dr. Thompson's August 15, 2014 findings in her denial of the pending claim. Additionally, she did not mention that in September 2014 OWCP had declared a conflict in medical opinion between Dr. Fried and Dr. Thompson.

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

[15] 20 C.F.R. § 10.104(b); *see supra* note 13 at Chapter 2.1500.5 and 2.1500.6.

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

physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.[17]

ANALYSIS

The Board finds that this case is not in posture for decision. On July 12, 2008 appellant filed a claim for carpal tunnel syndrome, noting that she first became aware of her employment-related condition on December 18, 2006. When she filed her July 12, 2008 claim she had been working part time, four hours a day. Appellant stopped work altogether in July 2008.

OWCP ultimately accepted appellant's claim for bilateral carpal tunnel syndrome in January 2009 and in August 2009 she received a lump-sum payment for her wage loss for partial disability (four hours) during the accepted period of June 11 through July 26, 2008. The contemporaneous medical evidence demonstrated an ability to return to part-time work as a mail processing clerk on or after July 26, 2008. Appellant worked six hours a day and was paid wage-loss compensation for two hours per day beginning July 31, 2008, and continued to do so at least through October 7, 2014 when the hearing representative issued the decision currently on appeal.

The hearing representative's October 7, 2014 decision affirming OWCP's denial of appellant's claim for total disability on or after July 26, 2008 is based on Dr. Smith's September 20, 2013 supplemental second opinion medical report. Dr. Smith had explained that the recent examination was essentially normal and, after a review of the SOAF and the medical record, he determined that any disability would have concluded 30 days after July 28, 2008. He did not consider appellant to be totally disabled or to have experienced a worsening of her accepted condition as of July 26, 2008. In his supplemental report on September 20, 2013, Dr. Smith reiterated that she was no longer disabled, and that there would have been no disability after July 26, 2008.

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.[18] As a second opinion physician, Dr. Smith failed to provide a sufficiently well-reasoned opinion explaining why appellant would not have been disabled after July 2008. In his first report, he claimed that she would have been disabled for at least 30 days, whereas in his September 2008 report, he found that there would have been no disability. Further, Dr. Smith failed to explain how he could make this finding in 2013 for disability that was alleged to have occurred in 2008. His medical opinion also is not consistent with the fact that she continued to be paid partial wage-loss compensation through July 2008 when appellant stopped work.

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[19] Based upon the

[17] *Id.* at 319.

[18] *William J. Cantrell*, 34 ECAB 1223 (1983).

[19] *Richard F. Williams*, 55 ECAB 343, 346 (2004).

medical evidence of record, it failed to meet its obligation and further development is necessary in view of Dr. Smith's opinion.

On remand, OWCP shall request further rationale from Dr. Smith regarding the existence and extent of any employment-related disability on or after July 26, 2008. Should Dr. Smith be unable to provide such rationale, it should send appellant to another independent medical examination. After OWCP has developed the medical record consistent with this decision, it shall issue a *de novo* decision regarding her eligibility for wage-loss compensation for temporary total disability beginning July 26, 2008.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2014 decision of the Office of Workers' Compensation is set aside, and the case is remanded for further action consistent with this decision.

Issued: June 8, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board