United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 17-0557**
	)	**Issued: December 21, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Shasta Lake, CA, Employer	)	

Appearances:
Stephen Larkin, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 15, 2017 appellant, through her representative, filed a timely appeal from a September 27, 2016 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 over the merits of this case.

[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.*

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation to zero effective April 1, 2015 under 20 C.F.R. § 10.500(a) based on her earnings had she accepted a light-duty assignment.

FACTUAL HISTORY

On September 4, 2014 appellant, then a 62-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained a back condition causally related to factors of her federal employment. She stopped work on August 8, 2014. OWCP accepted the claim for lumbar sprain, sacroiliac sprain, and neck sprain. It paid appellant compensation on the supplemental rolls for total disability beginning August 20, 2014.

In a report dated August 20, 2014, Dr. Michael E. Hebrard, a Board-certified physiatrist, diagnosed lumbar discogenic dysfunction and sacroiliac sprain. He found that appellant could perform sedentary employment lifting no more than 10 pounds, alternating standing and sitting every half hour, and performing no repetitive bending.

By decision dated October 22, 2014, OWCP denied authorization for continued medical treatment with Dr. Hebrard as his office location was more than a reasonable distance from appellant's residence.[3]

OWCP, on October 31, 2014, referred appellant to Dr. Charles F. Xeller, a Board-certified orthopedic surgeon, for a second opinion examination.

Dr. Richard P. Musselman, an osteopath, evaluated appellant on November 3, 2014 for pain in the right knee, back, neck, left elbow, and left hand. He discussed her work duties and the results of objective testing. Dr. Musselman suggested diagnostic testing to evaluate a lipoma of the pelvis. He diagnosed cervical and lumbar radiculitis, brachial neuritis, degenerative joint disease of the right knee, vertebral retrolisthesis, anterolisthesis, facet hypertrophy, ligamentum flavum hypertrophy, lumbar canal stenosis, a bulging lumbar disc, and dextroscoliosis. Dr. Musselman also recommended electrodiagnostic testing.

In a report dated November 29, 2014, Dr. Xeller reviewed the history of injury. On examination, he found tingling in the digits of both hands and pain with back flexion and bending to the side, but normal motor and sensory function. Dr. Xeller agreed with Dr. Musselman's recommendation for electrodiagnostic testing. He also noted that appellant required a pelvic magnetic resonance imaging (MRI) scan to "workup [a] large lipomatous mass" which he advised was not employment related. Dr. Xeller diagnosed chronic low back sprain/strain superimposed on underlying spondylosis and disc degeneration and bulging. He found that appellant's "underlying comorbid arthritis would certainly be aggravated by her years

[3] Appellant, on October 20, 2014, requested a review of the written record regarding OWCP's October 22, 2014 denial of authorization for medical treatment with Dr. Hebrard. In a May 20, 2015 decision, an OWCP hearing representative affirmed the October 22, 2014 decision. She found that OWCP properly denied authorization for appellant to obtain treatment with Dr. Hebrard as his office was over 100 miles away.

at work." Dr. Xeller advised that if her electromyogram and nerve conduction study were positive she may need nerve root injections. He opined that appellant could work eight hours per day in sedentary employment pushing, pulling, and lifting less than 10 pounds, reaching over the shoulder with less than 10 pounds, and with the option to sit or stand. Dr. Xeller indicated that appellant could not perform repetitive bending.

The employing establishment, on March 3, 2015, offered appellant a modified position as a sales, services, and distribution associate working from 7:00 a.m. to 9:30 a.m. boxing letters and flats. The duties included fine manipulation and reaching up to three hours, standing and walking up to three hours, and bending up to one hour. The job included that appellant would have the option to sit and stand and that pushing, pulling, and lifting would be under 10 pounds. Appellant refused the offered position on March 18, 2015, asserting that it was not within her work restrictions.

An October 13, 2014 lumbar spine MRI scan, received by OWCP on May 6, 2015, showed severe canal stenosis at L4-5 with moderate-to-severe bilateral foraminal narrowing and bilateral and ligamentum flavum hypertrophy.

In a March 16, 2015 work status report, Dr. Musselman diagnosed cervical and lumbar radiculitis, and degenerative joint disease of the right knee. He found that appellant could return to employment performing no overhead work, repeated bending or stooping, or continual standing, walking, or sitting. Dr. Musselman related, "[Appellant] cannot stoop or repetitively bend for one hour. She can sit on a stool where she can get up and stand as necessary and move around. [Appellant] has to work at waist level and not above the shoulder at this time. She must have intermittent activities. [Appellant] cannot do any one activity for three hours at a time." In a March 16, 2015 narrative report, Dr. Musselman noted that the employing establishment had offered appellant a position which she maintained was not within her physical capacity. He provided multiple diagnoses, including lumbar stenosis, a bulging lumbar disc, facet hypertrophy, lumbar and cervical radiculitis, and retrolisthesis of the vertebrae.

In a March 26, 2015 duty status report (Form CA-17), Dr. Musselman found that appellant could perform intermittent bending and stooping less than two hours per day, sit, stand, and walk intermittently up to four hours per day, and lift up to 10 pounds. On March 30, 2015 he diagnosed anxiety and lumbar stenosis.

Electrodiagnostic studies obtained on March 16, 2015 revealed mild right carpal tunnel syndrome and moderate left carpal tunnel syndrome and mild radiculopathy on the right at S1.

An agent with the employing establishment's Office of the Inspector General (OIG) provided an April 23, 2015 report of investigation describing surveillance conducted on appellant from January 23 to April 23, 2015. Appellant performed activities during this time that included walking her dog and driving. The OIG agent showed the surveillance video to Dr. Musselman on March 26, 2015 and he related that she had psychological problems delaying improvement. He advised that he believed that the job offered by the employing establishment was "good, but that [appellant] had come in very agitated and stated [that] she could not do that work, so he tightened the restrictions and hoped [the employing establishment] would be able to

revise a job offer fitting within the new restrictions." Dr. Musselman indicated that appellant could work with restrictions and advised that she should have a psychological evaluation.

On April 25, 2015 appellant filed a claim for compensation (Form CA-7) for wage loss beginning April 1, 2015.

OWCP, in a May 11, 2015 letter, advised appellant that she had not submitted evidence to support that she was totally disabled beginning April 1, 2015. It noted that the light-duty position offered by the employing establishment on May 3, 2015 was within the limitations provided by Dr. Hebrard. OWCP advised that the position remained available as of May 4, 2015. It requested that appellant submit additional evidence explaining why she was unable to perform the offered modified position.

On May 26, 2015 Dr. Hebrard reviewed the job offer and noted that it included one hour of bending.[4] He opined that appellant was unable to bend at the waist.

In a report dated June 1, 2015, Dr. Musselman described appellant's work at the employing establishment. He advised that her disc bulges and annular bulging resulted from repetitive bending and lifting. Dr. Musselman opined that lifting and bending repetitively moving heavy packages injured appellant's lumbar and cervical discs, causing bulging discs at L4 to S1, and a disc space narrowing at C5-6. Repetitive work duties also aggravated a lumbar facet joint condition. Dr. Musselman diagnosed cervical and lumbar radiculitis, anterolisthesis, facet hypertrophy, lumbar canal stenosis, bulging lumbar discs, cervical neuritis, dextroscoliosis, de Quervain's tenosynovitis, carpal tunnel syndrome, anxiety, and cervical degenerative disc disease. Regarding the March 3, 2015 job offer, he noted that Dr. Xeller found that appellant could not repetitively bend, but the offered position specified bending of up to an hour without indicating whether it would be repetitive. Dr. Musselman also advised that she could not reach as a result of her cervical condition. He opined that appellant was totally disabled and recommended a psychological evaluation.

Dr. Hebrard, in a June 8, 2015 report, discussed his August 20, 2014 work restrictions. He asserted that appellant's work duties "increased the stress along the cervical and lumbar spine which led to bulging of the discs which pressed against the adjacent nerve endings." Dr. Hebrard diagnosed cervical and lumbar radiculopathy and spondylosis. He found that appellant could no longer perform her usual work duties and advised that she could not "tolerate prolonged sitting, bending at the waist, lifting, pushing, pulling, reaching below, at and above the level of the head, and twisting and bending of the head and neck." Dr. Hebrard opined that she was permanently disabled.

[4] Dr. James D. Tate, a Board-certified neurosurgeon, evaluated appellant on April 29, 2015 at the request of Dr. Musselman. He noted that she had not worked since an August 2014 injury. Dr. Tate found no "significant symptoms of lumbar stenosis with radiculopathy" and recommended one or two steroid injections. On May 1, 2015 he diagnosed a lesion at C4 possibly due to degenerative changes and most likely unrelated to her work injury and lumbar spondylolisthesis that was likely congenital. Dr. Tate recommended disability retirement.

Counsel, on June 9, 2015, related that the March 3, 2015 offered position was not suitable as it required bending of up to one hour and did not qualify whether the bending was repetitive.[5]

In a report dated July 28, 2015, Dr. David McGee-Williams, a clinical neuropsychologist, discussed appellant's work duties, her August 2014 work injury, and her current complaints.[6] He diagnosed chronic pain syndrome and depressive disorder and recommended cognitive behavioral therapy.

Dr. Musselman, in a September 4, 2015 progress report, diagnosed lumbar radiculitis. He advised that appellant sustained a mental condition as a "direct result of her physical problems and the stress of this case."

By decision dated October 15, 2015, OWCP denied appellant's claim for compensation beginning April 1, 2015 under 20 C.F.R. § 10.500(a) as the employing establishment had offered her a light-duty assignment in writing within her medical restrictions. It found that she had not submitted medical evidence showing that the position no longer reflected her work restrictions or was no longer available. OWCP noted that the job limited appellant to bending for one hour through the course of her workday from 7:00 a.m. to 9:30 a.m.

Appellant, on October 30, 2015, requested a telephone hearing before an OWCP hearing representative.

In a November 13, 2015 work status report, Dr. Musselman found that appellant was unable to work pending evaluation in four weeks.[7] He opined that she could not participate in questioning or interviews due to psychological stress and cognitive difficulties. In a November 13, 2015 progress report, Dr. Musselman treated appellant for cervical radiculopathy. He discussed her history of injury and found that her lumbar disc bulging, cervical disc space narrowing, and carpal tunnel syndrome resulted from repetitive work duties.

Dr. Musselman, in work status reports dated February through April 2016, found that appellant could return to work on restrictions that included no overhead work, continual sitting, standing, or walking, or repetitive bending or stooping.

At a telephone hearing, held on July 14, 2016, appellant related that Dr. Xeller, OWCP's referral physician, found that she had a permanent aggravation of arthritis as a result of her work

[5] Appellant, in an August 7, 2015 statement, related that she was disabled as the employing establishment did not accommodate Dr. Hebrard's August 20, 2014 work restrictions. She noted that Dr. Xeller and Dr. Musselman also found that she could not perform repetitive bending.

[6] Dr. Annie Purcell, an osteopath, evaluated appellant on July 17, 2015 for back pain that began "in August 2014 with gradual onset and no history of trauma." She diagnosed cervical stenosis, lumbar radiculopathy with possible sciatic neuropathy, a right gluteal lipoma or liposarcoma with sciatic nerve compression, lumbar spondylosis, and carpal tunnel syndrome and found that appellant could no longer perform her mail carrier duties as a result of her injury.

[7] In an October 16, 2015 progress report, Dr. Musselman advised that appellant was psychologically incapable of working. Dr. Tate, in an amended report dated November 4, 2015, evaluated her for low neck pain and low back pain radiating into the right and sometimes left leg. He advised against surgery.

injury, but OWCP had not expanded acceptance of her claim to include that condition. She advised that she did not accept the position offered by the employing establishment because it did not specify the bending requirement and thus was not in accordance with Dr. Xeller's restrictions. Appellant's representative asserted that an offered position must consider both work and nonwork-related conditions. He also indicated that OWCP procedures provided that the job offered must be for at least half the hours the employee was able to work. The representative maintained that the job offer did not identify whether the bending was repetitive in nature and thus violated appellant's work restrictions.

By decision dated September 27, 2016, OWCP's hearing representative affirmed the October 15, 2015 decision. She found that the March 2015 offered position was within Dr. Xeller's restrictions, that Dr. Musselman had not provided rationale for his increased restrictions, and that Dr. Hebrard's opinion was speculative in nature. The hearing representative advised that, as appellant was not on the periodic roll, the job offer did not need to be at least half of the hours she was capable of working.

On appeal appellant's representative contends that Dr. Xeller agreed that appellant required electrodiagnostic testing. He asserts that the position offered by the employing establishment did not specify whether the bending was repetitive, noting that on June 1, 2015 Dr. Musselman found that she could not perform the offered position. The representative maintains that bending for one hour of the two and a half hour a day job would be repetitive, citing *J.N.*[8] He also contends that OWCP should have expanded acceptance to include an aggravation of arthritis and that the offered position was not valid as it was for less than half of the total hours she was released for work. The representative additionally asserts that Dr. Musselman explained in his June 1, 2015 report why appellant could not perform the offered position and that Dr. Hebrard found that she could not bend at the waist. He contends that the position offered was temporary and thus not suitable and that it did not take into account all her conditions, including her psychological difficulties.

LEGAL PRECEDENT

Section 10.500(a) states that appellant is only entitled to wage-loss compensation for the periods during which an employee's work-related medical condition prevents her from earning the wage earned before the work-related injury. It further provides:

> "[A]n employee is not entitled to compensation for any wage loss claimed on [Form] CA-7 to the extent that evidence contemporaneous with the period claimed on [a] CA-7 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."[9]

[8] Docket No. 09-1621 (issued July 14, 2010). In *J.N.*, the Board reversed a termination of appellant's compensation for refusing suitable work under 5 U.S.C. § 8106(c). It found that the medical evidence indicated no bending, but the offered position contained a discrepancy regarding whether bending was required.

[9] 20 C.F.R. § 10.500(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9(a) (June 2013).

When it is determined that an appellant is no longer totally disabled from work and is not on the periodic roll, OWCP procedures provide that the claims examiner should determine whether light-duty work was available within the claimant's medical restrictions during the period for which compensation is claimed and a development letter should be sent to the claimant setting forth the standards under section 10.500(a) including medical evidence required to establish a claim for wage-loss compensation.[10] The claims examiner, when adjudicating the claim for wage-loss compensation, must also determine whether the evidence of record establishes that appellant was provided with written notification of a light-duty job assignment, that the job was within her restrictions, and that the job was available during the period wage-loss compensation was claimed.[11]

Proceedings under FECA are not adversarial in nature is OWCP a disinterested arbiter.[12] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[13] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[14]

ANALYSIS

OWCP accepted that appellant sustained lumbar sprain, sacroiliac sprain, and neck sprain causally related to factors of her federal employment. It paid her compensation for total disability on the supplemental rolls as of August 20, 2014.

Dr. Hebrard, in an August 20, 2014 report, diagnosed sacroiliac sprain and lumbar discogenic dysfunction. He determined that appellant could work lifting no more than 10 pounds, alternating sitting and standing, and performing no repetitive bending.

On October 31, 2014 Dr. Xeller, an OWCP referral physician, diagnosed low back sprain/strain superimposed on preexisting spondylosis and disc bulging and degeneration. He indicated that appellant's work duties would have aggravated her arthritis, but that she also had a "nonwork-related component to this condition." Dr. Xeller concurred with Dr. Musselman's recommendation for electrodiagnostic testing. He found that appellant could work full time in sedentary employment reaching over her shoulder with less than 10 pounds, pushing, pulling, and lifting less than 10 pounds, having an option to sit or stand, and performing no repetitive bending. Dr. Xeller did not directly address the conditions to which he attributed her limitations.

On March 3, 2015 the employing establishment offered appellant a modified position as a sales, services, and distribution associate working for two and a half hours per day boxing letters

[10] *Id*. at Chapter 2.814.9(b)(2) (June 2013).

[11] *Id*.

[12] *See B.S.*, Docket No. 17-0070 (issued September 14, 2017); *Vanessa Young*, 55 ECAB 575 (2004).

[13] *Richard E. Simpson*, 55 ECAB 490 (2004).

[14] *See M.E.*, Docket No. 16-0770 (issued July 26, 2016); *Melvin James*, 55 ECAB 406 (2004).

and flats. The requirements consisted of reaching up to three hours, standing and walking up to three hours, and bending for one hour. The job provided the option to sit or stand and required lifting under 10 pounds above the shoulder and pushing, pulling, and lifting up to 10 pounds.

Appellant refused the position, asserting that it was outside of her work restrictions. The Board finds that the evidence fails to establish that the offered position was within the limitations set forth by Dr. Xeller, OWCP's referral physician. OWCP found that appellant was not entitled to disability compensation beginning April 1, 2015 as the weight of the evidence, represented by the opinion of Dr. Xeller, established that she could perform the light duty offered by the employing establishment. Dr. Xeller, however, found that she could not perform repetitive bending and the offered position required bending for up to one hour per day during a two and a half hour work period. Dr. Musselman and Dr. Hebrard also opined that appellant was unable to perform repetitive bending. The March 3, 2015 job offer did not clarify whether the bending for one hour was repetitive and thus, it is not clear that it was within claimant's work restrictions.[15]

As discussed, proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. 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.[16] Dr. Xeller found that employment factors, including moving boxes and repeated lifting, aggravated her underlying arthritis and further diagnosed low back strain/sprain and underlying spondylosis with disc degeneration and bulging. OWCP accepted only lumbar, neck, and sacroiliac sprains. It did not seek clarification from Dr. Xeller regarding whether appellant's claim should be expanded to include additional work-related conditions. OWCP further did not provide him with the results of the October 13, 2014 lumbar MRI scan study or the March 16, 2015 electrodiagnostic testing even though he found that appellant might need nerve root injections if she had positive electrodiagnostic testing.[17] Additionally, as noted, it is unclear whether appellant can perform the duties of the position based on the bending restrictions found by Dr. Xeller. As OWCP failed to obtain medical evidence sufficient to resolve the relevant medical issues in this case, the Board finds that OWCP failed to meet its burden of proof.

[15] *See generally E.B.*, Docket No. 13-0319 (issued May 14, 2013) (finding that OWCP improperly terminated appellant's compensation under section 8106(c) as the medical evidence restricted her to two hours a day of bending and the job offer did not identify the extent of bending required by the position).

[16] *See R.H.*, Docket No. 15-1696 (issued April 7, 2016); *Richard F. Williams*, 55 ECAB 343 (2004).

[17] Counsel contends that OWCP erred in finding the offered position suitable as it was for less than half of the total hours appellant was able to work, was temporary in nature, and did not consider all of her conditions, including a psychological condition. Regarding temporary positions, OWCP procedures provide that if a claimant is on the periodic roll, the position must take into account her employment-related condition as well as preexisting and subsequently arisen conditions, and must be for a least half of the total hours that the claimant was released for work. If the claimant is not on the periodic roll, the evidence must show that work was provided within appellant's injury-related restrictions. *Supra* note 10 at Chapter 2.814.9(b)(1) and (c)(2) (June 2013). Appellant was not paid on the periodic roll, and thus there was no requirement for OWCP to consider nonemployment-related conditions or the amount of hours offered by the employing establishment.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero, effective April 1, 2015, under 20 C.F.R. § 10.500(a) based on her earnings had she accepted a light-duty assignment.

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2016 decision of the Office of Workers' Compensation Programs is reversed.[18]

Issued: December 21, 2017
Washington, DC

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[18] Colleen Duff Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.