United States Department of Labor
Employees' Compensation Appeals Board

N.F., Appellant	)	
and	)	**Docket No. 16-1856**
	)	**Issued: February 10, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Paterson, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 20, 2016 appellant, through counsel, filed a timely appeal from a June 6, 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 appellant has established a recurrence of disability from February 27, 2010 to August 31, 2012 causally related to her January 3, 2005 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to this appeal will be set forth.

On January 21, 2005 appellant, then a 47-year-old letter carrier, filed a recurrence of disability claim (Form CA-2a) commencing January 3, 2005, causally related to a May 18, 2001 work injury. OWCP determined that she had alleged a new injury based on her description of the work factors that caused her condition. It assigned the claim File No. xxxxxx125 and accepted that appellant sustained a lumbar strain on January 3, 2005. OWCP previously accepted that she had a lumbar strain due to a May 18, 2001 traumatic injury under File No. xxxxxx350, which it combined under the current File No. xxxxxx125.

The employing establishment, on February 27, 2006, offered appellant a position as a modified city carrier.

By decision dated October 13, 2006, OWCP reduced appellant's compensation to zero based on its finding that her actual earnings as a modified city carrier, effective March 11, 2006, fairly and reasonably represented her wage-earning capacity. The restrictions were working an eight-hour day with restrictions of no lifting over 20 pounds, no bending, squatting, kneeling, or climbing. The duties included delivering auto parts, filing, and answering the telephone for eight hours a day.

The employing establishment, on January 5, 2010, offered appellant an interim modified position pending reassessment under the National Reassessment Process (NRP). The position required lifting and carrying up to 10 pounds, standing six hours, climbing four hours, kneeling two hours, twisting one hour, sitting two hours, walking four hours, bending and stooping two hours, and pushing and pulling one hour.

In a duty status report dated January 21, 2010, Dr. John Ambrose, an attending Board-certified orthopedic surgeon, diagnosed lumbar radiculitis. He provided work restrictions of lifting and carrying up to 10 pounds for four hours per day, sitting for two hours per day, reaching above the shoulder for two hours per day, driving a vehicle for three hours per day, kneeling, bending, twisting, pulling, and pushing for one hour per day, climbing for two hours per day intermittently, standing for six hours per day, and walking for four hours per day.

On February 4, 2010 the employing establishment offered appellant a full-time position as a modified city carrier. The position required standing up to six hours, operating a motor

[3] Docket No. 13-0846 (issued July 3, 2013).

vehicle up to three hours, picking up mail and reaching above or at shoulder level for two hours per day, and walking up to four hours per day, and lifting and carrying 10 pounds for no more than four hours a day. The duties included casing mail up to two hours, delivering mail up to four hours, and collections up to four hours. OWCP advised that the assignment would remain within the limitations set forth by appellant's attending physician on January 21, 2010. Appellant refused the position, noting that she had attempted delivering her route, but had to return with the mail due to right shoulder and back pain.

In an April 18, 2010 statement, appellant asserted that the employing establishment removed her limited-duty position and returned her to work as a letter carrier. She tried to deliver her route on January 8, 2010, but was unable to complete the route due to back pain.

Dr. Ambrose, in a July 15, 2010 report, discussed appellant's May 2001 work injury and diagnosed a disc herniation at L3-4 on the left side, degenerative disc disease, high blood pressure, diabetes, and obesity. He found that she was disabled from her regular job as a letter carrier as she could not do "prolonged standing, walking, bending, and reaching which may involve lifting heavy containers of mail…." Dr. Ambrose related, "While it is conceivable that [appellant] could engage in the light duties with those restrictions that I have already enumerated, she is not fit for the full duties of a letter carrier as I have enumerated them above."

On July 19, 2010 Dr. Ambrose discussed his initial treatment of appellant for a back injury on May 18, 2001. He related:

> "Please be advised that I have recommended that [appellant] be restricted to light duties which involve working at waist level, avoidance of bending and lifting, avoidance of carrying objects greater than 20 pounds and avoidance of climbing as far back as 2005. When [she] returned to full duties as a letter carrier in January of this year, she encountered tasks and chores beyond the limits of what [it was an interim position] her spinal disability could tolerate…."

Dr. Ambrose opined that appellant had "residuals of a herniated disc and ongoing degeneration of other discs in her lumbar spine which render her incapable [of] engaging in the full duties of a letter carrier." He advised that she had sustained a recurrence of her back condition.

In a January 27, 2011 report, Dr. Ambrose diagnosed lumbar spondylosis and lumbar radiculitis. He noted that appellant's arthritis would "persist indefinitely." In a January 21, 2011 duty status report, Dr. Ambrose diagnosed lumbar radiculitis and provided work restrictions. He found that she was disabled from work as a letter carrier.

Appellant, on March 10, 2011, filed a recurrence of disability claim (Form CA-2a) alleging that she sustained disability beginning January 8, 2010, causally related to her January 3, 2005 work injury. She related that the employing establishment took away her limited-duty employment under NRP and returned her to work as a letter carrier for four hours per day. Appellant asserted that she was unable to perform her letter carrier duties. The employing establishment indicated on the form that it provided a modified job offer to her within her restrictions on February 4, 2010, but that she refused the position.

Dr. Ambrose, in a progress report dated April 11, 2011, diagnosed a herniated disc at L3-4 with lumbar radiculitis and spondylosis. He attributed the condition to lifting incidents in May 2001 and January 2005.

By letter dated April 27, 2011, appellant's supervisor related that the positions that had been offered appellant on January 5 and February 4, 2010 were well within her physical restrictions. Appellant began working in the new position on January 8, 2010, but stopped in the afternoon, citing back pain. She refused the second offer made on February 4, 2010.

By decision dated June 13, 2011, OWCP denied modification of its October 13, 2006 wage-earning capacity determination. On June 17, 2011 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. During the telephone hearing, held on October 12, 2011, counsel argued that the original wage-earning capacity determination was in error.

By decision dated December 30, 2011, OWCP's hearing representative affirmed the June 13, 2011 decision. She found that there was no evidence that the original determination was in error or that appellant's condition worsened such that she was unable to perform the modified position.

Appellant retired from the employing establishment on disability, effective February 28, 2012.

On June 14, 2012 appellant, through counsel, requested reconsideration. In a decision dated September 6, 2012, OWCP denied modification of its December 30, 2011 decision. On September 13, 2012 counsel again requested reconsideration. In a nonmerit decision dated December 11, 2012, OWCP denied appellant's request for reconsideration, finding that the evidence of record was insufficient to warrant reopening the case for further merit review under section 8128.[4]

Appellant appealed to the Board. In a July 3, 2013 decision, the Board set aside the September 6 and December 11, 2012 decisions.[5] It remanded the case for OWCP to follow the guidance in FECA Bulletin No. 09-05 regarding a claim for total disability following a wage-earning capacity determination when a light-duty job is withdrawn under NRP.[6]

On October 31, 2013 OWCP found that it issued the October 13, 2006 wage-earning capacity determination in error as the position offered had not been established to be a *bona fide* position as the employing establishment had not responded to its request. It advised appellant that she could submit claims for compensation (Form CA-7) for wage-loss after her notice of recurrence of disability.

[4] The record contains progress reports from Dr. Ambrose dated December 31, 2012 and January 21, 2013 discussing his treatment of appellant for back pain.

[5] *See supra* note 2.

[6] FECA Bulletin No. 09-05 (issued August 18, 2009).

On June 17, 2014 appellant filed a claim for compensation (Form CA-7) for intermittent wage-loss compensation from February 27, 2010 to August 31, 2012.

By letter dated July 11, 2014, OWCP requested that appellant explain why she refused the modified position offered by the employing establishment on February 4, 2010.[7]

Appellant, in a response dated August 1, 2014, maintained that she refused the offered position as she could not perform the duties because of her back injury. In a statement dated August 2, 2014, counsel noted that OWCP found the wage-earning capacity determination in error. He asserted that the employing establishment took away appellant's limited-duty position and that she was not able to perform the duties set forth in the February 4, 2010 job offer as it required delivering mail.

OWCP, in a letter dated June 9, 2015, informed appellant that the medical evidence of record was insufficient to show that she was disabled from February 27, 2010 through August 31, 2012. It afforded her 30 days to submit a rationalized medical opinion supporting disability for the period claimed as a result of her work injury.

On June 22, 2015 counsel, resubmitted July 15, 2010 and January 27, 2011 reports from Dr. Ambrose, which he asserted that they established that appellant was permanently disabled from working as a letter carrier.

By decision dated July 10, 2015, OWCP denied appellant's claim for wage-loss compensation from February 27, 2010 through August 31, 2012. It found that she had not submitted medical evidence sufficient to show that she could not perform the duties of the February 4, 2010 modified position.

On July 17, 2015 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. At the telephone hearing, held on July 17, 2015, she discussed her May 2001 work injury. Appellant worked limited-duty from 2006 until 2010 when the employing establishment withdrew her employment.

By decision dated June 6, 2016, OWCP's hearing representative affirmed the July 10, 2015 decision. She noted that Dr. Ambrose did not find that appellant was unable to perform her limited-duty assignment, but instead determined that she was unable to perform her usual duties as a letter carrier.

On appeal counsel contends that the employing establishment withdrew her limited-duty employment and, thus, she has established a recurrence of disability. He maintains that Dr. Ambrose found that appellant could not work as a letter carrier.

LEGAL PRECEDENT

Where 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 establishes

[7] OWCP also requested clarification regarding why she used annual leave from July 11 to 23, 2010.

she can perform the light-duty position, he or she has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that she 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 job requirements.[8]

OWCP regulations provide that 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.[9] 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, (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed her established physical limitations.[10]

ANALYSIS

OWCP accepted that appellant sustained lumbar strain as a result of a January 3, 2005 employment injury. It previously accepted that she sustained lumbar strain on May 18, 2001 under File No xxxxxx350.

On February 27, 2006 appellant accepted a position as a modified city carrier lifting no more than 20 pounds. OWCP, in a decision dated October 13, 2006, reduced her compensation to zero after finding that her actual earnings as a modified city carrier, effective March 11, 2006, fairly and reasonably represented her wage-earning capacity. It subsequently modified the October 13, 2006 wage-earning capacity determination, after finding that the offered position was not *bona fide*.

Appellant worked as a modified city carrier until January 5, 2010, when the employing establishment withdrew her position as part of NRP. On February 4, 2010 the employing establishment offered her another position as a modified city carrier. Appellant did not accept the offered position. She stopped work and filed a claim for compensation from February 27, 2010 to August 31, 2012. Appellant advised that she was unable to perform the duties of the position due to back pain. She alleged a recurrence of disability as the employing establishment withdrew the limited-duty position she performed from 2006 to 2010.

Although the employing establishment changed appellant's job description, the new position offered in February 2010 did not exceed the limitations set forth by her attending physician. Dr. Ambrose, on January 21, 2010, diagnosed lumbar radiculitis and found that she could lift and carry up to 10 pounds for four hours per day, sit for two hours per day, reach above

[8] *Richard A. Neidert*, 57 ECAB 474 (2006); *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[9] 20 C.F.R. § 10.5(x).

[10] *Id*.

the shoulder for two hours per day, drive a vehicle for three hours per day, kneel, bend, twist, pull and push for one hour per day, climb for two hours per day intermittently, stand for six hours per day, and walk for four hours per day. On February 4, 2010 the employing establishment offered appellant a position as a modified city carrier casing mail, delivering mail, and performing collections. The duties consisted of standing for six hours per day, operating a motor vehicle for three hours per day, picking up mail and reaching above the shoulder for two hours per day, and walking for four hours per day. The employing establishment advised that the assignment would stay within the physical restrictions set forth by her attending physician on January 21, 2010. There is no evidence demonstrating that the employing establishment failed to provide appellant work within her restrictions and thus she has not demonstrated a recurrence of disability based on the withdrawal of limited-duty employment.[11]

Appellant further has not shown that she was disabled due to a worsening of her accepted lumbar sprain. In a report dated July 15, 2010, Dr. Ambrose diagnosed an L3-4 left disc herniation and found that she was unable to work in her position as a letter carrier, noting that she also had degenerative disc disease, high blood pressure, diabetes, and obesity. He did not address the issue of whether appellant could perform her modified position. Additionally, Dr. Ambrose found that she was disabled by conditions other than the accepted lumbar strain. Where appellant claims that a condition not accepted or approved by OWCP was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.[12] Dr. Ambrose did not provide a reasoned opinion explaining how the disc herniation and degenerative disc disease were related to the work injury and thus his opinion is of little probative value.[13]

On July 19, 2010 Dr. Ambrose discussed appellant's history of a May 18, 2001 back injury. He noted that she returned to her usual work duties in January 2010, but was unable to perform the employment as a result of her back condition. Dr. Ambrose attributed appellant's disability to the 2001 injury. He, however, relied upon an inaccurate history of injury, that of her resuming her usual employment as a letter carrier in 2010 rather than returning to a modified position. It is well established that medical reports must be based on a complete and accurate factual and medical background and that medical opinions based on an incomplete or inaccurate medical history are of diminished probative value.[14]

In a January 27, 2011 progress report, Dr. Ambrose diagnosed lumbar spondylosis and radiculitis and opined that appellant's arthritis would continue indefinitely. He indicated in a duty status report of January 2011 that she could not perform her usual work as a letter carrier. Dr. Ambrose provided work restrictions. On April 11, 2011 he diagnosed a herniated disc at L3-4, lumbar radiculitis, and lumbar spondylosis due to appellant's May 2001 and January 2005 injuries. As noted, OWCP did not accept a herniated disc, radiculitis, or spondylosis as work

[11] *See H.H.*, Docket No. 15-0304 (issued July 28, 2015).

[12] *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

[13] *See John W. Montoya*, 54 ECAB 306 (2003).

[14] *See W.S.*, Docket No. 15-0602 (issued August 11, 2016); *Joseph M. Popp*, 48 ECAB 624 (1997).

related. Dr. Ambrose did not provide any rationale for his opinion that the work injuries caused the diagnosed conditions. Medical conclusions unsupported by rationale are of little probative value.[15]

On appeal counsel contends that the employing establishment withdrew appellant's limited-duty employment. As discussed, however, while it changed her job description it provided her work within the restrictions set forth by her attending physician, and thus she has not shown a recurrence of disability due to the removal of her limited-duty position.[16]

Counsel also maintains that Dr. Ambrose found that appellant could not work as a letter carrier. The relevant issue, however, is whether appellant could perform the duties of her modified employment, not her usual duties as a regular letter carrier.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established a recurrence of disability from February 27, 2010 to August 31, 2012 causally related to her January 3, 2005 employment injury.

[15] *Willa M. Frazier*, 55 ECAB 379 (2004); *Jimmy H. Duckett*, 52 ECAB 332 (2001).

[16] *See supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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