

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

L.N., Appellant)	
)	
and)	Docket No. 17-1513
)	Issued: March 19, 2018
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION PLANT, Anaheim, CA, Employer)	
)	

Appearances:

Daniel M. Goodkin, Esq., for the appellant¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 30, 2017 appellant, through counsel, filed a timely appeal from a January 18, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

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 services 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.*

³ The Board notes that, following the January 18, 2017 decision, OWCP received additional evidence. However, the Board's jurisdiction is limited to the evidence that was of record at the time OWCP issued its final decision. Thus, the Board is precluded from considering this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-0176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of disability from June 5, 2012 to December 17, 2014 causally related to her accepted August 7, 2010 employment injury.

FACTUAL HISTORY

On August 9, 2010 appellant, then a 39-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on August 7, 2010 she injured the left side of her head “when the door on the OTS machine hit her hard on her head.” OWCP initially accepted the claim for open scalp wound with complications and concussion without loss of consciousness.⁴ Appellant stopped work on August 8, 2010, and returned to her regular duties working four hours per day on January 20, 2011. She was released to unrestricted work for eight hours per day on January 31, 2012.

On July 21, 2012 appellant filed a claim for a recurrence of disability (Form CA-2a) beginning June 5, 2012, indicating intermittent hours of wage loss. She noted that following the injury she worked four hours per day with restrictions, which increased to six hours per day with restrictions. Appellant returned to full duty, working eight hours per day, on February 11, 2012. She reported increased neck pain following her return to work eight hours per day.

In a June 5, 2012 work restriction form, Dr. Ram Mudiya, a treating Board-certified orthopedic surgeon, related that appellant could work six hours per day with restrictions. In a narrative report of even date, he noted appellant’s physical examination findings and related that appellant’s magnetic resonance imaging (MRI) scan revealed moderate left disc osteophyte encroachment at C6-7 neural foramen, with moderate foraminal stenosis, with less pronounced findings at the C4-5 level.

By development letter dated July 24, 2012, OWCP informed appellant that the evidence submitted was insufficient to establish her claim for a recurrence of partial disability. It advised her as to the definition of recurrence and the type of evidence required to establish such a claim. Appellant was afforded 30 days to submit the necessary evidence. OWCP received additional medical evidence.

In forms dated July 19, August 28, and September 25, 2012, Dr. Mudiya reiterated that appellant was capable of working six hours per day with restrictions, due to her cervical condition.

By decision dated September 20, 2012, OWCP denied appellant’s claim for a recurrence of disability commencing June 2, 2012. It found that the evidence of record was insufficient to establish disability due to a material change or worsening in her work-related conditions.

In a January 30, 2013 report, Dr. Hosea Brown, II, a treating Board-certified internist, related that, following her injury, appellant worked part-time modified duty while gradually increasing her hours until February 11, 2012 when she began working an eight-hour day. He

⁴ OWCP paid appellant wage-loss compensation and medical benefits on the supplemental rolls from September 22, 2010 until July 1, 2011. It paid her compensation on the periodic rolls from July 3 until October 22, 2011, and then intermittent benefits again on the supplemental rolls commencing October 23, 2011.

described both the duties of appellant's original job and her modified job. Diagnoses included cervical intervertebral disc syndrome with myelopathy, cervical degenerative disc disease, postconcussion syndrome with headaches, and cervical radiculopathy.

On March 12, 2013 appellant requested reconsideration.

On April 3, 2013 OWCP received progress reports dated December 4 and 26, 2012 and January 23, 2013 from Dr. Brown diagnosing cervical intervertebral disc syndrome with myelopathy, cervical degenerative disc disease, postconcussion syndrome with headaches, and cervical radiculopathy. Dr. Brown, in the December 4 and 26, 2012 and January 23, 2013 progress notes, provided examination findings were provided in both reports and reported that appellant continued to work six to eight hours per day with restrictions. Appellant was released to return to modified work in both reports.

OWCP also received a January 18, 2013 report by Dr. Serge Obukhoff, an examining Board-certified neurosurgeon, who noted that appellant had been referred by Dr. Brown for evaluation of her neck injuries sustained at work on August 7, 2010. Dr. Obukhoff reviewed an MRI scan which revealed significant problems include cord compression caused by C4-5 herniated discs with ventral spinal cord effacement and bilateral foraminal stenosis, C6-7 bulging disc herniation. According to Dr. Obukhoff the MRI scan findings explained appellant's complaints of myelopathy, neck stiffness, neck pain, and left-sided radiculopathy. Diagnoses included C4-5 and C6-7 cervical disc herniations and cervical myelopathy. With respect to her work status, he noted that appellant was performing modified work as prescribed by her treating physician.

By decision dated April 17, 2013, OWCP denied modification of its prior decision. It also noted that the date the claimed recurrence was June 5, 2012 and not June 2, 2012.

In progress notes dated April 17 and May 17, 2013, Dr. Brown's findings and diagnoses remained unchanged. He indicated that appellant was restricted to working six hours per day with restrictions.

Dr. Obukhoff, in an April 29, 2013 follow-up report, noted that appellant had been diagnosed with severe cervical stenosis as the result of C6-7 disc herniation and C5-6 spinal cord effacing and an accepted condition of cervical strain. He provided examination findings and requested appellant's claim be expanded to include C4-5 and C6-7 cervical disc herniations and cervical myelopathy. Dr. Obukhoff referenced the Form CA-17 from appellant's treating physician with respect to her work status.

In progress notes dated May 22, 2013, Dr. Brown diagnosed cervical intervertebral disc syndrome with myelopathy, cervical degenerative disc disease, postconcussion syndrome with headaches, and cervical radiculopathy. He noted appellant's complaints and physical examination findings. Dr. Brown indicated that appellant was capable of working six hours per day with restrictions.

In a May 21, 2013 letter, Dr. Edward Mittleman, a treating physician specializing in family medicine, explained that appellant's condition was not a recurrence or new injury, but rather an aggravation of her accepted August 7, 2010 injury. He requested that appellant's claim be expanded to include the condition of permanent aggravation of cervical disc protrusions.

On July 3, 2013 appellant requested reconsideration. In progress notes dated June 24 and July 15, 2013, Dr. Brown's diagnoses and examination findings were unchanged. He indicated that appellant was capable of performing modified work.

By decision dated August 1, 2013, OWCP denied appellant's request for reconsideration of the merits of her claim as appellant failed to submit new and relevant evidence or identify the grounds for her reconsideration request.

Subsequent to the August 1, 2013 decision, OWCP received a June 28, 2013 report from Dr. Obukhoff requesting authorization for surgery and noting work restrictions.

On August 22, 2013 OWCP received a November 21, 2012 report from Dr. Brown in which he reported a May 17, 2012 MRI scan showed C4-5 and C6-7 cervical disc protrusion causing severe spinal cord compression and that a September 21, 2011 nerve conduction study showed evidence of acute left C7 radiculopathy.

On August 28, 2013 OWCP received a September 25, 2012 report from Dr. Mudiyam, who noted that appellant was capable of working eight hours of modified work until he reduced her to six hours on June 5, 2012. Dr. Mudiyam explained that the reduction of appellant's work hours was due to her complaints of increased left-sided neck pain and left arm weakness. A review of a cervical spine MRI scan showed moderate-sized left disc osteophyte at the C6-7 neural foramen with moderate foraminal stenosis. Dr. Mudiyam concluded that appellant's disability was due to her accepted employment injury. He recommended appellant continue with working six hours per day as she was capable of managing her pain.

In an August 29, 2013 report, Dr. Mittleman noted that OWCP had accepted the claim for neck sprain, open scalp wound, and concussion without complications. Medical reports were reviewed. He opined that appellant was capable of working eight hours with restrictions. Due to the inability of the employing establishment to provide her work for eight hours within her restrictions, appellant was currently working two hours per day. Dr. Mittleman concluded that the appropriate permanent diagnoses had not been properly adjudicated by OWCP and requested OWCP expand her claim to include cervical spondylosis with myelopathy and C4-5 and C6-7 cervical disc herniation.

On September 26, 2013 OWCP received an August 26, 2013 report from Dr. Brown requesting expansion of her claim to include postconcussion syndrome with headaches, cervical radiculopathy, cervical intervertebral disc syndrome with myelopathy, and permanent aggravation of cervical degenerative disc disease. Dr. Brown concluded that appellant was capable of working an eight-hour day with the restrictions provided.

OWCP subsequently received Dr. Brown's August 26, 2013 progress report on September 30, 2013. Dr. Brown noted that appellant continued working two hours per day with restrictions, which she was tolerating. He provided examination findings and diagnosed cervical radiculopathy, cervical intervertebral disc syndrome with myelopathy, postconcussion syndrome with headaches, permanent aggravation of cervical disc degeneration disease, neck sprain, open scalp wound without complications, and concussion without loss of consciousness. Appellant was released to return to modified work on August 26, 2013. Dr. Brown continued to submit progress reports with similar findings.

On March 18, 2014 appellant requested reconsideration of the August 1, 2013 decision.

By decision dated June 11, 2014, OWCP expanded acceptance of the claim to include cervical disc protrusion at C4-5 and C6-7, and neck sprain.

By separate decision dated June 11, 2014, OWCP denied modification of its August 1, 2013 decision. It found the medical evidence of record failed to contain a rationalized opinion explaining how appellant's increased disability was due to her accepted August 7, 2010 work injury.

On December 29, 2014 OWCP appellant again requested reconsideration.

On February 5, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, to determine the extent of disability and nature of her condition.

In a February 13, 2015 report, Dr. Einbund, based upon a review of the medical evidence, history of treatment, statement of accepted facts (SOAF), and physical, diagnosed history of concussion and scalp laceration, C4-5 and C6-7 disc protrusions with radiculopathy, and neck sprain. He noted the requirements of appellant's position and that she worked eight hours of modified work from January 2011 to February 2012, returned to her regular work in February 2012, and from June 2012 to December 2014 she worked a modified job. In December 2014, appellant stopped working as light-duty work was unavailable. Dr. Einbund opined that appellant had reached maximum medical improvement (MMI) sometime in September 2012. He also advised that he was unaware of any nonindustrial or preexisting disability, except that there was some evidence of underlying degenerative disc disease. In an attached work capacity evaluation form (OWCP-5c), Dr. Einbund noted that appellant had reached MMI and was capable of working eight hours per day with restrictions. The restrictions included up to 15 pounds of lifting, pushing, pulling for up to three hours per day, and a limitation on reaching above the shoulder.

By decision dated March 25, 2015, OWCP denied modification of its prior decision. It found that the medical evidence of record failed to establish how the recurrence of disability was causally related to the accepted August 7, 2010 work injury.

In a report dated September 28, 2015, Dr. Brown opined that appellant's accepted work injury had worsened. In support of this conclusion, he noted a progression of neck pain radiating into both upper extremities including numbness and tingling and decreased C4-5 and C6-7 sensation.

On October 19 2015 appellant, through counsel, requested reconsideration.

Subsequent to appellant's reconsideration request, OWCP received progress notes dated September 28 and November 24, 2015 and February 23, June 7, August 2 and 31, and September 28, 2016 from Dr. Brown reiterating findings, work capability, and diagnoses from prior reports.

In a March 22, 2016 report, Dr. Basimah Khulusi, an examining Board-certified orthopedic surgeon, provided physical examination findings and injury history. He also noted medical

evidence reviewed including Dr. Einbund's second opinion report. Dr. Khulusi referenced Dr. Einbund's work restrictions opinion, which he observed would amount to working four hours per day. Next, he opined, based on the medical records, that appellant has been constantly symptomatic since the injury and physical examination findings showed limited neck range of motion and tenderness. Dr. Khulusi summarized findings from physicians and the need for appellant to remain on restrictions. He concluded that appellant has been unable to perform her usual job due to the neck injury sustained on August 7, 2010.

OWCP continued to receive progress reports from Dr. Brown including reports dated June 7, August 2, 31, September 28, and November 30, 2016. Dr. Brown reiterated findings, work capability, and diagnoses from prior reports.

By decision dated January 18, 2017, OWCP denied modification of its prior decision denying her claim or a recurrence of partial disability. It found the evidence of record failed to establish an objective or material worsening of the accepted conditions due to the accepted August 7, 2010 work injury.

LEGAL PRECEDENT

OWCP's implementing regulations define a "recurrence of disability" as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁵

OWCP procedures state that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁶

When an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports this conclusion with sound medical reasoning.⁷

⁵ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2.a (June 2013). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

⁶ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1500.3(c)(5) (June 2013); *see also G.B.*, Docket No. 15-1319 (issued December 8, 2015)

⁷ *A.W.*, Docket No. 17-0638 (issued August 29, 2017); *Ricky S. Storms*, 52 ECAB 349 (2001); *Helen Holt*, 50 ECAB 279 (1999).

ANALYSIS

OWCP initially accepted that appellant sustained a scalp wound with complications and a concussion on August 7, 2010 when the door of an OTS machine hit her on the head. It subsequently expanded acceptance of the claim on June 11, 2014 to include neck sprain and cervical disc protrusion at C4-5 and C6-7. However OWCP continued to find that appellant had not established disability after June 5, 2012 causally related to the accepted injury.

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

Appellant's treating physicians Drs. Mudiyam, Brown, Obukhoff, Mittleman, and Khulusi, in multiple reports, opined that appellant had sustained a recurrence of disability after June 5, 2012. They provided examination findings, reviewed objective tests, and noted her injury history. Drs. Mudiyam, Brown, Obukhoff, Mittleman, and Khulusi's reports specifically related appellant's disability to her cervical conditions. However, OWCP did not accept a cervical condition as causally related to the August 7, 2010 injury until June 11, 2014.

Thereafter OWCP referred appellant to Dr. Einbund to determine appellant's disability status.

Dr. Einbund, in a February 13, 2015 report, diagnosed concussion and scalp laceration, C4-5 and C6-7 disc protrusions with radiculopathy and neck sprain. Based on his examination he concluded that appellant had reached MMI sometime in September 2012 and was capable of working eight hours per day with restrictions per the February 13, 2015 OWCP-5c. However, the Board notes that OWCP did not specifically request that Dr. Einbund make findings regarding appellant's disability status as of the date of the alleged recurrence, June 5, 2012, and OWCP did not request that he provide an opinion as to whether the newly accepted cervical conditions caused any period of recurrence of disability, causally related to the accepted injury.

It is well established that proceedings under FECA are not adversarial in nature and that while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence in order to see that justice is done.⁸ 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.⁹ After undertaking development by scheduling a second opinion examination with Dr. Einbund on the issue of appellant's disability status, OWCP was responsible for obtaining a rationalized medical opinion on the issue of whether appellant sustained a recurrence of disability on June 5, 2012 due to her August 7, 2010 accepted employment injury. As Dr. Einbund was not asked and did not provide such opinion, the office shall request a supplemental or additional medical opinion regarding appellant's disability status commencing June 5, 2012. After such further development as deemed necessary, OWCP shall issue a *de novo* decision.

⁸ *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

⁹ *See B.C.*, Docket No. 15-1853 (issued January 19, 2016).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 18, 2017 is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: March 19, 2018
Washington, DC

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

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

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