

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

C.C., Appellant	)	
	)	
and	)	<b>Docket No. 18-0719</b>
	)	<b>Issued: November 9, 2018</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Trenton, NJ, Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
*Jessica Rogers, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On February 16, 2018 appellant, through counsel, filed a timely appeal from a September 8, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of total disability commencing October 5, 2013 causally related to her accepted brachial, thoracic, and lumbosacral neuritis/radiculitis conditions.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 20, 2013 appellant, then a 51-year-old mail processing clerk in light-duty status, filed an occupational disease claim (Form CA-2) alleging that sometime before October 1, 2010 she sustained conditions of her neck, both arms, both wrists, both hands, and back due to repetitive reaching, pulling, bending, and lifting while in the performance of her federal employment. She did not stop work. On September 27, 2013 OWCP accepted the claim for brachial, thoracic, and lumbosacral neuritis or radiculitis. Appellant stopped work on October 6, 2013.

Appellant filed claims for compensation (Form CA-7) for wage loss commencing October 5, 2013.

In a report dated September 23, 2013, Dr. Nasser Ani, an attending Board-certified orthopedic surgeon, related that he restricted appellant to light-duty work, with lifting limited to 15 pounds and driving restricted to 20 minutes at a time. He opined that repetitive upper extremity motions at work caused C4-5, C5-6, C6-7, and L3-4 disc herniations, brachial neuritis, thoracic and lumbosacral radiculitis, and bilateral carpal tunnel syndrome. On January 15, 2014 Dr. Ani released appellant to work with restrictions of working no more than four hours a day, with no pulling, twisting, bending, repetitive lifting, sitting from a standing position, standing and walking for unspecified periods, climbing stairs, or driving for more than 20 minutes at a time.

By decision dated February 27, 2014, OWCP denied appellant's claim for ongoing wage-loss compensation commencing October 5, 2013, as the medical evidence of record was insufficient to support total disability for the claimed period.<sup>4</sup>

On April 21, 2014 appellant submitted a November 26, 2013 notice of recurrence (Form CA-2a) claiming ongoing total disability commencing October 6, 2013. She contended that the employing establishment informed her that no work was available within Dr. Ani's restrictions. Appellant submitted notes from Dr. Ani dated from April 16 to June 12, 2014, finding her neck, spine, and bilateral carpal tunnel syndrome symptoms unchanged. Dr. Ani released her to limited-duty work for four hours a day. By decision dated July 17, 2014, OWCP denied appellant's

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<sup>3</sup> Docket No. 15-1582 (issued November 9, 2015).

<sup>4</sup> On March 6, 2014 appellant, through counsel, requested a review of the written record by OWCP's Branch of Hearings and Review. By decision dated July 9, 2014, OWCP's Branch of Hearings and Review affirmed the February 27, 2014 denial of appellant's claim for compensation.

recurrence claim, finding that the medical evidence of record was insufficient to establish that she was totally disabled from work commencing October 6, 2013 due to the accepted conditions.

Appellant subsequently requested an oral hearing. Following a hearing held on December 5, 2014, she submitted notes from Dr. Ani dated from July 23, 2013 to November 6, 2014, finding her condition unchanged. Dr. Ani released appellant to modified-duty work on November 6, 2014 within her previous restrictions.

By decision dated February 26, 2015, an OWCP hearing representative affirmed the July 17, 2014 decision, finding that the medical evidence of record was insufficient to establish the claimed recurrence of disability. Also, appellant had not submitted sufficient evidence to establish that she had no other means of commuting to and from work.

On July 15, 2015 appellant, through counsel, appealed to the Board.<sup>5</sup>

By decision dated November 9, 2015, the Board affirmed OWCP's February 26, 2015 decision, finding that appellant had not established a worsening of the accepted conditions, or that her light-duty position had been withdrawn.

On November 25, 2015 appellant, through counsel, requested reconsideration with OWCP. She contended that the employing establishment had withdrawn appellant's light-duty position as there were no jobs available, within her restrictions, located within a 20-minute drive of her residence.

In support of appellant's request, counsel submitted September 29 and October 30, 2014 letters from the employing establishment notifying appellant and her elected representative that there was no vacancy "in any bargaining unit craft within a 20-minute drive of [appellant's] residence" where she could perform "the essential functions of the position with or without an accommodation." She also provided chart notes from Dr. Ani dated October 28 and November 25, 2015, finding appellant's condition unchanged.

By decision dated December 8, 2015, OWCP denied reconsideration of the merits of her claim as the evidence submitted was irrelevant, immaterial, or repetitious.

On June 15, 2016 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In notes dated from January 4 to August 8, 2016, Dr. Ani continued to note upper and lower back pain, and pain and paresthesias in both wrists and hands. He administered epidural injections.<sup>6</sup>

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<sup>5</sup> During the pendency of the prior appeal, appellant submitted additional chart notes from Dr. Ani dated through September 23, 2015. Dr. Ani found her conditions unchanged and recommended bilateral carpal tunnel releases.

<sup>6</sup> Appellant also provided physical therapy notes dated from April through June 2016. A May 14, 2016 lumbar magnetic resonance imaging (MRI) scan showed a tiny annular tear at L1-2, L3-4 disc herniation, and bilateral facet osteoarthritis at L4-5 and L5-S1 slightly progressed from an August 16, 2013 study.

In a report dated May 23, 2016, Dr. Ani explained that his September 23, 2013 work restrictions were “medically necessary due to worsening of her work-related injury which she sustained at work on October 1, 2010.” He opined that appellant’s neck, back, and bilateral wrist conditions were caused by repetitive activities at work.

By decision dated September 8, 2016, OWCP denied modification of its December 8, 2015 decision, finding that the additional medical evidence submitted was insufficient to establish a spontaneous worsening of the accepted conditions or withdrawal of her light-duty position. It noted that appellant had filed a separate claim under OWCP File No. xxxxxx418 for hand and wrist conditions, including carpal tunnel syndrome, and that she should pursue her appeal rights under that claim.

On June 12, 2017 appellant, through counsel, requested reconsideration, contending that new medical evidence from Dr. Ani established that the increased work restrictions he prescribed in September 2013 were necessitated by a worsening of the accepted conditions.

Dr. Ani provided notes dated September 8, 2016 onward noting continued thoracic and lumbar spine pain, and bilateral hand and wrist pain.

In an April 20, 2017 report, Dr. Ani opined that prolonged standing, walking, and repetitive upper extremity motions caused appellant’s accepted brachial, thoracic, and lumbosacral neuritis or radiculitis, and bilateral carpal tunnel syndrome. He indicated that commencing October 1, 2010, appellant’s bilateral hand and wrist pain, neck pain, and lumbar pain with radiculopathy had worsened. Dr. Ani explained that “decreasing her driving time was medically necessary to decrease the compression of the spine.” He opined that, due to appellant’s “accepted conditions of brachial neuritis/radiculitis and lumbosacral neuritis/radiculitis, [appellant] has been unable to drive more than 20 minutes at a time since September 23, 2013 and remains unable to do so.” Dr. Ani explained that driving for longer than 20 minutes would “put additional and significant pressure on the already weakened and damaged discs in her cervical and lumbar spine,” causing increased disc protrusion, “leading to additional compression or impingement of the surrounding nerves and increased radiculopathy and loss of function for this patient.” He found appellant able to perform light-duty work for four hours a day, with driving to and from work or at work to less than one hour.

In a June 2, 2017 statement, appellant contended that, on September 23, 2013, she had provided the employing establishment with Dr. Ani’s updated work limitations, which restricted her to driving no more than 20 minutes continuously. She explained that she had notified the employing establishment on October 6, 2013 that OWCP had accepted her claim. The employing establishment then advised appellant that it no longer had light-duty work available within her restrictions.

An August 19, 2017 lumbar MRI scan showed moderate left and minimal right foramina stenosis at L3-4, and minimal disc bulges at L4-5 and L5-S1. The remainder of the examination was unchanged.

Appellant also submitted copies of evidence previously of record.

By decision dated September 8, 2017, OWCP denied modification of its September 8, 2016 decision. It found that the additional medical evidence submitted was insufficient to establish that appellant's claimed disability commencing October 6, 2013 was a result of an objective worsening of her condition without intervening cause. OWCP further found that the factual evidence of record was insufficient to establish that the employing establishment changed or withdrew appellant's light-duty job on October 6, 2013.

### **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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>7</sup> This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the 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 his or her established physical limitations.<sup>8</sup>

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that, light duty can be performed, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.<sup>9</sup>

An employee who claims a recurrence of disability resulting from an accepted employment injury has the burden of proof to establish that the disability is causally related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>10</sup>

### **ANALYSIS**

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing October 5, 2013 causally related to her accepted brachial, thoracic, and lumbosacral neuritis/radiculitis conditions. Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's February 26, 2015 decision because the Board has already considered this evidence in

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<sup>7</sup> 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

<sup>8</sup> *Id.*

<sup>9</sup> *Shelley A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>10</sup> *S.S.*, 59 ECAB 315 (2008).

its November 9, 2015 decision and found that it failed to establish a worsening of the accepted conditions, or that her light-duty position had been withdrawn. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>11</sup>

Appellant contended that the opinions of Dr. Ani, her attending Board-certified orthopedic surgeon, established that her accepted conditions had worsened as of October 5, 2013 such that she was unable to perform her light-duty position.

Dr. Ani provided notes dated from October 2015 through April 2017 finding appellant's condition had remained stable, with chronic cervical, thoracic, and lumbosacral neuritis or radiculitis, and bilateral carpal tunnel syndrome. The Board notes that OWCP has not accepted carpal tunnel syndrome as occupationally related.

In an April 20, 2017 report, Dr. Ani opined that appellant's cervical, thoracic, and lumbar spine pain, as well as bilateral hand and wrist pain, had worsened as of October 1, 2010. He therefore decreased her allowed driving time as of September 23, 2013 to no more than 20 minutes continuously to avoid additional compressive forces on the spine. Dr. Ani did not indicate that he imposed the new driving limitation on September 23, 2013 due to an objective worsening of the accepted conditions. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.<sup>12</sup> Dr. Ani failed to provide any medical explanation, based on medical rationale, as to how her accepted condition had materially changed or how her disability arose without intervening injury.<sup>13</sup> Also, he did not opine that appellant was totally disabled for work commencing October 5, 2013.<sup>14</sup> As such Dr. Ani did not support appellant's recurrence claim.

Appellant also asserts that the employing establishment's withdrawal of her light-duty position on October 6, 2013 constituted a recurrence of disability. It is her burden of proof to establish that light-duty employment was, in fact, withdrawn.<sup>15</sup> However, appellant did not provide factual evidence to support this allegation. She submitted September 29 and October 30, 2014 letters in which the employing establishment notified appellant that there was no work available within a 20-minute drive of her residence. However, the 20-minute driving restriction prescribed by Dr. Ani on September 23, 2013 was not shown to be related to an objective worsening of the accepted conditions. Therefore, the lack of available work within this limitation does not constitute a withdrawal of light-duty work.<sup>16</sup>

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<sup>11</sup> See *B.R.*, Docket No. 17-0294 (issued May 11, 2018).

<sup>12</sup> See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>13</sup> *E.B.*, Docket No. 17-1467 (issued July 26, 2018); see *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

<sup>14</sup> *E.B.*, *id.*; see *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>15</sup> *L.M.*, Docket No. 17-0159 (issued September 27, 2017); *J.F.*, 58 ECAB 124 (2006).

<sup>16</sup> *Terry R. Hedman*, *supra* note 9.

On appeal, counsel contends that appellant has established that she sustained a recurrence of disability as the medical evidence of record established a worsening of the accepted conditions such that she could no longer drive herself to and from work. In support of this assertion, she cites to the Board's holding in *G.L.*,<sup>17</sup> in which the Board found that the claimant asserted a period of disability due to a condition not accepted by OWCP. This issue is not relevant to the present claim. Counsel also cited to the Board's decision in *E.B.*,<sup>18</sup> which involved a refusal of an offered position where the position description was too vague for the job to have been deemed suitable work. The present claim, however, does not implicate a suitable work issue.

Alternatively, counsel asserts that employing establishment withdrew appellant's light-duty position on October 6, 2013, entitling appellant to ongoing wage-loss compensation for total disability commencing October 6, 2013. In support of this argument, counsel cites to *K.J.*,<sup>19</sup> in which the Board remanded a recurrence claim to OWCP for additional development of the medical evidence. The Board notes that *K.J.* may be distinguished from the case at bar as the claimant had not alleged a withdrawal of light duty, whereas appellant does argue that the employing establishment withdrew her light-duty position.

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing October 5, 2013 causally related to her accepted brachial, thoracic, and lumbosacral neuritis/radiculitis.

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<sup>17</sup> Docket No. 13-0975 (issued August 12, 2013).

<sup>18</sup> Docket No. 13-0309 (issued May 14, 2013).

<sup>19</sup> Docket No. 10-0457 (issued September 15, 2010).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 8, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 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