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

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| **M.J., Appellant** | ) | |
| **and** | ) | **Docket No. 18-1043** |
| | ) | **Issued: November 28, 2018** |
| **U.S. POSTAL SERVICE, POST OFFICE, Bassett, VA, Employer** | ) | |

*Appearances:*
*Tommi Nevin*, for the appellant[1]
*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 April 24, 2018 appellant, through his representative, filed a timely appeal from a November 27, 2017 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 met her burden of proof to establish a recurrence of disability beginning on or after February 25, 2017 due to her accepted March 18, 2008 employment injury.

## ***FACTUAL HISTORY***

On April 16, 2008 appellant, then a 49-year-old part-time flexible clerk, filed a traumatic injury claim (Form CA-1) alleging that, on March 18, 2008, she injured her back unloading packages at work. She began performing modified-duty work on April 17, 2008 without wage loss. OWCP accepted appellant's claim for lumbar sprain.[3] On June 23, 2008 appellant started working in another modified-duty position for the employing establishment.

On March 23, 2010 the employing establishment offered appellant a modified assignment (limited duty) as a part-time flexible sales, services, and distribution associate for six hours a day, five days a week.[4] The job offer was made under the National Reassessment Program (NRP). The language of the March 23, 2010 job offer indicated that the job was subject to revision: "This assignment is currently available and is subject to revision based on changes in your physical restrictions and/or the availability of adequate work."

The job offer was based on work restrictions provided by Dr. Brian A. Torre, a Board-certified orthopedic surgeon serving as an impartial medical specialist, who examined appellant on October 26, 2009 and found that she could work with 30-pound lifting/pushing/pulling restrictions which he expected to last two months. Appellant accepted the job offer on March 23, 2010.

By decision dated November 17, 2010, OWCP terminated appellant's wage-loss compensation effective March 23, 2010 because appellant had been reemployed in a permanent modified position, with no loss of wage-earning capacity (LWEC).[5]

On April 7, 2017 appellant filed a notice of recurrence (Form CA-2a) claiming a recurrence of disability beginning March 3, 2017 due to her March 18, 2008 employment injury. She also submitted a series of claim for compensation forms (Form CA-7) claiming compensation for wage loss beginning February 25, 2017. The employing establishment indicated on the notice of recurrence form that its needs had changed and noted that, on March 3, 2017, it offered appellant an updated light-duty job offer, which she refused. It indicated that appellant had not worked since March 3, 2017.

[3] Appellant stopped work from June 6 to 18, 2008 and received disability compensation on the daily rolls for this period.

[4] The modified position did not require lifting, pushing, or pulling more than 30 pounds.

[5] OWCP noted: "This employment was effective on June 23, 2008, which were [sic] made permanent March 23, 2010 and the position fairly and reasonably represents your wage-earning capacity."

Appellant submitted an April 6, 2017 statement indicating that she was accepting the job offer with reservations, but contended that the position was not suitable because it required split shifts which would result in a 15-hour day. She claimed that the split shifts placed undue hardship on her because she was unable to take her medication as prescribed or get the required rest. Appellant indicated that her supervisor withdrew her previous light-duty assignment on February 27, 2017.

In an April 14, 2017 development letter, OWCP advised appellant of the type of factual and medical evidence needed to establish her recurrence of disability claim. It afforded appellant 30 days to submit the requested evidence. Appellant submitted an April 24, 2017 statement in which she asserted that she had established her claim, but she did not submit any medical evidence within the allotted period.

By decision dated May 18, 2017, OWCP denied modification of its November 17, 2010 LWEC decision because appellant had not established an increase in her injury-related disability, or a change in, or withdrawal of her limited-duty assignment.

In a June 23, 2017 letter, the postmaster of appellant's workplace indicated that the modified position of part-time flexible sales, services, and distribution associate, offered by the employing establishment on March 23, 2010, was not a permanent position. The postmaster noted:

> "You have been supporting your claim for a limited job by referring to one sentence in a letter sent to you by the [U.S. Department of Labor (DOL)] on November 17, 2010 states: 'This employment was effective on June 23, 2008, which were [sic] made permanent March 23, 2010 and the position fairly and reasonably represents your wage-earning capacity.' This was an error by the DOL's OWCP office. The Postal Service has never made you a permanent limited or light[-]duty job offer, and the DOL has never determined that we must offer you a permanent light[-]duty position."

Appellant submitted an April 3, 2017 note from Dr. Mark C. Hermann, an attending Board-certified orthopedic surgeon, who indicated that appellant could work light duty with unspecified long-term restrictions "that are not being followed." In a July 11, 2017 work capacity evaluation form (Form OWCP-5c), Dr. Hermann provided work restrictions which restricted appellant to working four hours per day due to severe pain in her neck, mid spine, and lower back with prolonged activity. Appellant's reaching was limited and she was restricted from pushing, pulling, and lifting more than eight pounds. Dr. Hermann indicated that appellant was experiencing severe depression and progressive weight loss.[6]

Appellant also submitted a July 10, 2017 report from Dr. Eduardo M. Fraifeld, a Board-certified anesthesiologist. Dr. Fraifeld diagnosed appellant with lumbar degenerative disc disease, lumbar radiculopathy, lumbar spondylosis, cervical spondylosis, and cervical radiculopathy. He indicated that diagnostic studies showed degenerative disc disease of the cervical and lumbar spine with multilevel disc bulges. Dr. Fraifeld noted that appellant was taking medications which she

[6] On September 6, 2017 OWCP received undated work restrictions from Dr. Hermann on September 6, 2017 which were identical to the work restrictions dated July 11, 2017.

could not take if she were working because they are sedating. He reported that appellant's neck pain was doing well until 2007 then she started to have progressive neck pain which radiated bilaterally to her scapular area. Dr. Fraifeld reported that appellant's low back pain had been present since at least 2009 and recently had been worsening.

Appellant disagreed with the May 18, 2017 decision and requested a hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on October 11, 2017, appellant testified that she had been performing the same limited-duty assignment from March 23, 2010 until February 27, 2017. She asserted that the limited-duty position was withdrawn under the NRP and that she was told that she could not return to work until she had provided updated medical evidence. Appellant testified that on April 6, 2017 she accepted a new modified job offer, and that on June 23, 2017 her postmaster withdrew that job offer and she has not worked since that date. She claimed that the periods for which she had not received payment were February 27 to April 6, 2017 and June 23, 2017 and continuing.

By decision dated November 27, 2017, OWCP's hearing representative vacated OWCP's November 17, 2010 LWEC determination and affirmed its May 18, 2017 decision as modified to deny appellant's recurrence of disability claim. She vacated OWCP's November 17, 2010 LWEC determination because the position offered by the employing establishment on March 23, 2010, which served as the basis for the LWEC determination, was not permanent in nature. The hearing representative then considered the medical evidence of record and explained that it did not meet the criteria identified in FECA Bulletin No. 09-05 to establish an employment-related recurrence of disability beginning February 25, 2017, as claimed by appellant.

## ***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.[7] 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 his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[8] 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.[9] A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties or other downsizing or where an LWEC determination is in place.[10]

[7] 20 C.F.R. § 10.5(x).

[8] *Id.*

[9] *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

[10] 20 C.F.R. §§ 10.5(x), 10.104(c), and 10.509; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b.

A claim for recurrence of disability is not available where OWCP has issued an LWEC determination.[11] Under that circumstance, the only method for claiming additional wage-loss compensation is through a request to modify that determination.[12]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[13]

## ***ANALYSIS***

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability beginning on or after February 25, 2017 due to her accepted March 18, 2008 employment injury.

The Board first finds that OWCP's November 17, 2010 LWEC determination was issued in error and that OWCP properly vacated that determination.

The Board has held reemployment may not be the basis of a wage-earning capacity decision when the job is temporary, where the employee's job when injured was permanent. A job is considered temporary when expressly indicated in the job offer, position description, or other supporting documentation.[14]

The Board notes that the language of the March 23, 2010 job offer made by the employing establishment to appellant indicated that the job was subject to revision: "This assignment is currently available and is subject to revision based on changes in your physical restrictions and/or the availability of adequate work." A June 23, 2017 letter from the postmaster at appellant's workplace indicated that the job offered on March 23, 2010 was not a permanent position. As the job offer issued on March 23, 2010 was not permanent, it could not form the basis of the November 17, 2010 LWEC decision.[15]

With the LWEC decision of November 17, 2010 set aside, the issue is whether appellant has established a recurrence of disability beginning on or after February 25, 2017 due to her accepted March 18, 2008 employment injury.

OWCP has issued specific guidance for employees affected by the NRP of the postal service. FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to the NRP. Regarding claims for total disability when a valid wage-earning capacity decision has not been issued, FECA Bulletin No. 09-05 provides that, if appellant has been on light duty due to

[11] *Id*. at § 10.104(c).

[12] *Id.*

[13] *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

[14] *Charles D. Thompson*, 35 ECAB 220 (1983), *Elmer Strong*, 17 ECAB 226 (1965).

[15] *See id.*

an injury-related condition without an LWEC rating (or if the LWEC rating has been set aside), payment for total wage loss should be made based on the Form CA-7 as long as certain described criteria are met. First, the current medical evidence within the file establishes that injury-related residual conditions continue. There must be sufficient medical evidence in the record within the prior six months to make this determination. In addition, the evidence in the file must support that light duty is no longer available. There must be no indication that a retroactive LWEC determination should be made. Where a retroactive LWEC is considered, an OWCP district director must approve any such decision to perform one. In the event OWCP's claims examiner finds that the evidence of file is not sufficient to determine whether total wage-loss benefits should continue, current medical evidence should be requested from appellant and the employer.[16]

The Board finds that appellant has not established a recurrence of disability beginning on or after February 25, 2017 due to her accepted March 18, 2008 employment injury.

In a July 11, 2017 report, Dr. Hermann provided work restrictions which restricted appellant to working four hours per day due to severe pain in her neck, mid spine, and lower back with prolonged activity. Appellant's reaching was limited and she was restricted from pushing, pulling, and lifting more than eight pounds. Dr. Hermann indicated that appellant was experiencing severe depression and progressive weight loss. However, he did not clearly identify the diagnoses causing the severe neck, mid spine, and lower back pain and therefore his July 11, 2017 report has no probative value with respect to showing employment-related disability for any period. The Board has held that medical evidence which does not offer an opinion regarding the cause of an employee's disability/condition is of no probative value on the issue of causal relationship.[17] On September 6, 2017 OWCP received undated work restrictions from Dr. Hermann on September 6, 2017 which were identical to work restrictions dated July 11, 2017. These work restrictions also do not indicate that the accepted March 18, 2008 condition of lumbar sprain was still active.

Appellant also submitted a July 10, 2017 report from Dr. Fraifeld who diagnosed with lumbar degenerative disc disease, lumbar radiculopathy, lumbar spondylosis, cervical spondylosis, and cervical radiculopathy. Dr. Fraifeld indicated that diagnostic studies showed degenerative disc disease of the cervical and lumbar spine with multilevel disc bulges. He reported that appellant's neck pain was doing well until 2007 then she started to have progressive neck pain which radiated bilaterally to her scapular area. Dr. Fraifeld reported that appellant's low back pain had been present since at least 2009 and recently had been worsening.

The Board notes that Dr. Fraifeld's July 10, 2017 report is of no probative value in establishing appellant's recurrence of disability claim because he has not indicated that the accepted March 18, 2008 employment injury of lumbar sprain was still ongoing on or after February 25, 2017. Dr. Fraifeld diagnosed appellant with degenerative cervical and lumbar conditions, but these conditions have not been accepted as causally related to the March 18, 2008

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

[17] *See Charles H. Tomaszewski*, 39 ECAB 461 (1988). In an April 3, 2017 note, Dr. Hermann indicated that appellant could work light duty with long-term restrictions that were not being followed. The Board notes, however, that Dr. Hermann did not identify those restrictions.

employment injury. As noted above, the Board has held that medical evidence which does not offer an opinion regarding the cause of an employee's disability/condition is of no probative value on the issue of causal relationship.[18]

For these reasons, the medical evidence of record is insufficient to determine that appellant experienced residual effects and disability on or after February 25, 2017 causally related to the March 18, 2008 employment injury, rather than being due to other medical conditions which have not been accepted as employment related. Therefore, the medical evidence of record does not meet the criteria identified in FECA Bulletin No. 09-05 and appellant has not met her burden of proof to establish a recurrence of disability beginning on or after February 25, 2017 due to her accepted March 18, 2008 employment injury.[19]

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 disability beginning on or after February 25, 2017 due to her accepted March 18, 2008 employment injury.

[18] *See supra* note 17.

[19] The Board notes that OWCP complied with FECA Bulletin No. 09-05 by providing appellant an opportunity to submit evidence sufficient to establish her recurrence of disability claim and by explaining why the medical reports of record failed to establish an employment-related recurrence of disability after February 25, 2017 under the standards of the bulletin. *See supra* note 16.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 28, 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