

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability commencing June 28, 2016 causally related to her accepted employment injury.

FACTUAL HISTORY

On January 20, 2010 appellant, then a 51-year-old laundry worker, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral upper extremity symptoms while in the performance of duty. She explained that she transported heavy carts throughout the entire hospital several times a day. OWCP accepted the claim for bilateral carpal tunnel syndrome. Appellant underwent an OWCP-authorized right carpal tunnel release on September 9, 2013 and left carpal tunnel release on October 7, 2013. She returned to work for approximately three weeks in November 2013. OWCP paid compensation for temporary total disability as of December 11, 2013.

In May 2014, Dr. Jawad Bhatti, a Board-certified physiatrist, started prescribing medication for appellant's chronic pain. He continued palliative opioid therapy to allow appellant to continue to carry out daily activities without interruption.

In March 2016, OWCP referred appellant to Dr. James Schwartz, a Board-certified orthopedic surgeon, for a second opinion examination to determine, in part, whether she was capable of returning to work.

In a March 19, 2016 report, Dr. Schwartz diagnosed bilateral carpal tunnel syndrome (CTS) and marked nonphysiologic pain behavior that was not complex regional pain syndrome (CRPS) Type 2. He indicated that the physical examination was "too bizarre" to relate to CTS or CRPS as the findings and complaints on examination were not physiologically possible. Dr. Schwartz opined that appellant's nonphysiologic pain behavior was not connected to any type of injury or aggravation of a preexisting condition. He indicated that subjectively appellant could not perform her regular duties. However, appellant could perform sedentary duty with limited lifting not to exceed 10 pounds. Dr. Schwartz also completed a work capacity evaluation form (OWCP-5c).

Based upon Dr. Schwartz's restrictions, on June 7, 2016 the employing establishment offered appellant a temporary full-time assignment performing secretarial-type duties. The assignment was sedentary in nature. The physical demands of the position included minor lifting no more than 10 pounds, intermittent/limited repetitive gripping hand motion with breaks, standing, and walking. Appellant accepted the temporary-duty assignment on June 14, 2016.

In a June 17, 2016 attending physician's report (Form CA-20), Dr. Bhatti noted that appellant had permanent bilateral nerve damage. He reported that she had accepted temporary duties and that she could return to work in the offered temporary secretarial position. Dr. Bhatti also indicated that appellant had CRPS Type 2 which he opined was caused by her occupational injury.

Appellant reported to the temporary modified position on June 27, 2016. She stopped work the next day.

In June 28 and July 22, 2016 attending physician's reports (Form CA-20), Dr. Bhatti diagnosed CRPS Type 2 and opined that appellant was incapacitated.

In an August 10, 2016 letter, OWCP advised appellant that the June 7, 2016 job offer was medically suitable in accordance with the medical limitations provided by Dr. Schwartz and that the position remained open and available. It advised her of the provisions under 5 U.S.C. § 8106(c)(2) regarding abandonment of suitable employment. OWCP also advised appellant that, if she stopped work because of a worsening in her injury-related condition, then additional factual and medical evidence was needed to establish a recurrence of disability. It afforded appellant 30 days to submit the additional information.

On August 17, 2016 appellant filed a Form CA-7 claiming disability compensation for the period June 14 to August 12, 2016.

In an August 18, 2016 letter, appellant indicated that she had seen Dr. Bhatti once a month since March 9, 2014 and that she had been taking oxycodone twice a day since that time. She noted that her carpal tunnel releases did not improve her condition and that her hands were the same as they had been before the surgery. Appellant asserted that she did not abandon her job. She indicated that, when she saw Dr. Bhatti on June 28, 2016, he advised her to apply for medical disability due to bilateral nerve damage, which she did on July 13, 2016.

On August 19, 2016 OWCP received Dr. Bhatti's June 28, 2016 progress report. Dr. Bhatti diagnosed carpal tunnel syndrome, median neuropathy, and reflex sympathetic dystrophy of the upper limb. He continued to prescribe oxycodone. In his June 28, 2016 report, Dr. Bhatti noted that appellant came to his office due to worsening pain in her wrists and arms after she went back to work on June 27, 2016. He noted that appellant was unable to fully work because of her medications. Dr. Bhatti opined that appellant was unable to work due to severe pain in all her joints and chronic pain in her wrists and arms which caused chronic fatigue, decreased motion, swelling, muscle spasms, sweating and numbness. July 22 and August 22, 2016 progress reports and CA-20 attending physician's reports were also received from Dr. Bhatti, with the CA-20 reports noting a diagnosis of CRPS Type 2 and that appellant was incapacitated.

In an August 22, 2016 letter, OWCP advised appellant that the temporary light-duty assignment appropriately accommodated her current work restrictions as provided by Dr. Schwartz. It notified her that under the provisions of 20 C.F.R. § 10.500(a) she would not be entitled to compensation for total wage loss for the duration of the temporary light-duty assignment if she failed to report for work deemed appropriate by OWCP. OWCP afforded appellant an additional 30 days to either accept the assignment and report to duty or submit evidence that the assignment was no longer available or no longer accommodated her medical work restrictions as provided by Dr. Schwartz.

OWCP thereafter received a July 13, 2016 statement in which B.R., appellant's supervisor, noted that a light-duty work order/administrative function was developed for appellant and required her to answer work order calls and radio supervisors. B.R. indicated that appellant worked one day, but got very sleepy and unbalanced due to her medication. She indicated that they could not reasonably accommodate appellant due to the effect of her medications and inability to stay alert.

In an August 23, 2016 letter, the employing establishment noted that the physical demands of the limited-duty assignment did not require appellant to perform any activities outside of the restrictions set by Dr. Schwartz. Specifically, the assignment did not involve pushing or pulling.

By decision dated September 28, 2016, OWCP denied entitlement to compensation from June 28 through August 12, 2016. It found that the medical evidence of record was insufficient to support that appellant was disabled from the limited-duty position as a result of her accepted work-related medical condition.³

In an October 4, 2016 telephone message, the employing establishment confirmed that the job offer was temporary.

On October 8, 2016 appellant requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on May 16, 2017. Appellant testified that she had returned to work on June 27, 2016, but because of her medication for her carpal tunnel syndrome, her supervisor had allowed her to go to the employee health unit. She indicated that she was addicted to oxycodone and should not have been allowed to return to work. Appellant confirmed that, while a coworker had attempted to train her to perform secretarial work, she kept nodding off because of her medication. She noted that she took oxycodone twice a day to help her pain, but it made her fall asleep. Appellant also testified that she could not perform the limited-duty position because she had tried the job for over an hour and a half and her hands were in pain and she had a lot of tingling. She indicated that she had bilateral nerve damage in both hands.

In May 29 and June 9, 2017 statements, appellant corrected the hearing transcript and expanded on her testimony. She clarified that on June 28, 2016 Dr. Bhatti had cancelled her return to the light-duty work assignment due to her incapability to use her hands, her lack of concentration, focus/alertness, and the heavy sedation due to her medication. Appellant noted that she had remained for the full eight-hour shift on June 27, 2016. The shift started with training of the assigned duties, which included answering telephones, documentation filing, and putting paper files in numerical order for about an hour and a half. Appellant indicated that during this period, her head was nodding and she was unable to concentrate/focus and that she could not retain the training information. She noted that she told the trainer and the supervisor, B.R., that the medication made her sleepy and that B.R. had her go to the employee health unit. Appellant also indicated that her hands tingled and hurt even though she had taken her morning dose. She noted that she had difficulty trying to do the assigned work and that her doctor determined that she was unable to perform the limited-duty job.

On June 30, 2017 OWCP received Dr. Bhatti's June 26, 2016 prescription note. Dr. Bhatti diagnosed bilateral carpal tunnel syndrome and indicated that appellant was unable to lift anything over two pounds. He further advised that she was also not able to sit, stand, and walk longer than five minutes due to her severe back pain. Appellant was also limited from extreme movement.

Medical reports and CA-20 forms from Dr. Bhatti dated September 23, October 21, November 21, December 16, 2016 and January 20, February 21, March 21, April 21, May 23, June 23 and July 20, 2017 were received. Dr. Bhatti continued to prescribe pain medication. In

³ OWCP authorized payment for June 14 through 26, 2016.

his October 21 and December 16, 2016 and January 20, February 21, March 21 and May 23, 2017 CA-20 forms, Dr. Bhatt diagnosed CRPS Type 2 which he opined was caused or aggravated by appellant's work duties, which caused bilateral nerve damage to the carpal tunnel. In his April 21, June 23 and July 20, 2017 CA-20 forms, Dr. Bhatti diagnosed CRPS Type 2 which he opined, with a checkmark "yes" was caused or aggravated by the employment activity.

By decision dated July 27, 2017, an OWCP hearing representative affirmed OWCP's September 28, 2016 decision.

OWCP received additional CA-7 forms from appellant claiming disability compensation from August 15, 2016 and continuing.

On August 9, 2017 appellant requested reconsideration.

In an August 8, 2017 report, Dr. Bhatti indicated that appellant, a patient since March 2014 secondary to a work-related injury of both her hands, was being treated for severe median neuropathy. He diagnosed bilateral CTS, opioid dependence, bilateral CRPS of upper limbs, and other lesions of median nerve, right and left upper limb. Dr. Bhatti indicated that appellant still suffered from severe pain even after the surgery, noting that a nerve conduction study showed severe neuropathy in bilateral median nerve in both wrists after surgery. He opined that appellant was unable to return to work because the narcotic medication affected her cognitive functions. Dr. Bhatti noted that on July 27, 2016 appellant was only able to complete two hours of sedentary work with restrictions and experienced drowsiness from medication, lack of focus and alertness, and severe pain in both wrists and arms. He indicated that because of appellant's CTS, she was unable to perform the repetitive hand and wrist motions of the modified position involving use of telephone, e-mail and house data base, retrieve work orders from printer, use of hand held radio, proof read data and information, and sustain work order spread/reports. Based on physical examination history, the findings of nerve conduction studies, and appellant's use of narcotic medications, Dr. Bhatti opined that appellant was unable to return to work.

CA-20 forms from Dr. Bhatti dated August 23, September 22, 28 and October 23, 2017 were received. He continued to prescribe pain medication. In his CA-20 reports, Dr. Bhatti diagnosed CRPS Type 2 and opined that appellant was incapacitated.

In a September 7, 2017 report, Dr. Bhatti related that appellant's bilateral surgical release did not resolve her symptoms and that July 7, 2015 electromyogram (EMG) study and an October 21, 2016 nerve conduction study showed severe neuropathy in bilateral median nerve in both wrists and arms after surgery. He noted that he had upgraded appellant's diagnosis to CRPS I of bilateral upper limb as she experienced constant, excessive severe pain with little or no stimuli. This diagnosis was confirmed in the above mentioned studies as well as blood tests and Sudomotor Axon Reflex Test. Dr. Bhatti concluded that appellant was unable to perform sedentary tasks due in part to her inability to use her hands and the side effects from medication which affected her cognitive functions. He noted that appellant's disability also limited her ability to perform major life activities, perform manual tasks and hindered her concentration and thinking proficiencies. Dr. Bhatti opined that appellant was totally disabled, that she had met maximum medical improvement and that her prognosis was poor.

By decision dated November 9, 2017, OWCP denied modification of its July 27, 2017 decision. It found that appellant failed to establish disability compensation for the claimed period as Dr. Bhatti had failed to provide medical rationale, supported by objective findings, as to how appellant's accepted conditions prevented her from working the light-/limited-duty job offer and how she was totally disabled from work.

By decision dated November 14, 2017, OWCP denied appellant's claim for disability compensation for the period August 15, 2016 and continuing. It found that Dr. Bhatti failed to provide medical rationale, supported by objective findings, establishing that appellant's accepted condition prevented her from working the light-/limited-duty job offer.

OWCP received additional Form CA-7 claims for compensation for the period November 22, 2017 onwards.

Additional CA-20 forms from Dr. Bhatti dated November 21 and December 21, 2017, January 22, February 22, and March 22, 2018, and prescription forms were received.

On March 1, 2018 appellant requested reconsideration.

In a February 15, 2018 letter, Dr. Bhatti advised that the intent of his letter was to substantiate that appellant's disability was caused by the work-related injury. He noted that appellant's bilateral surgical release did not resolve her symptoms and that she was diagnosed with possible CRPS Type 2 secondary to carpal tunnel surgery. Dr. Bhatti noted that July 7, 2015 EMG and October 21, 2016 nerve conduction studies showed severe neuropathy in bilateral median nerve in both wrists and arms, even after surgery, and that her diagnosis was upgraded to CRPS Type 1 bilateral of the upper limbs. Dr. Bhatti noted that the above diagnostic tests as well as blood tests and Sudomotor Axon Reflex Tests confirmed the diagnosis. He also noted that appellant had objective positive findings for pain on palpation, a withdrawal response and abnormal nerve conduction testing, which revealed severe C8 nerve injury. Dr. Bhatti indicated the criteria to determine CRPS was based on appellant's history, physical examination, and conduction blocks. He opined that appellant was totally disabled and unable to perform sedentary tasks due in part to her inability to use her hands, as well as the side effects from medication, which affected her cognitive functions. Furthermore, appellant's disability limited her ability to perform major life activities, perform manual tasks, and hindered her concentration and thinking proficiencies.

By decision dated March 28, 2018, OWCP denied modification. It found that Dr. Bhatti failed to provide medical rationale, supported by objective findings, of how appellant's condition prevented her from working the light-/limited-duty job offer.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which

⁴ See *supra* note 1.

compensation is claimed is causally related to the employment injury.⁵ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁶

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 of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show an inability to 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 requirements.⁷

ANALYSIS

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

The record supports that appellant was prescribed oxycodone and that the medication had side effects. Dr. Bhatti has reported that the oxycodone was prescribed for appellant's bilateral carpal tunnel syndrome, which developed into chronic regional pain syndrome. If the accepted conditions of bilateral CTS necessitated the use of such medication, appellant would be entitled to compensation for the period that the use of that medication was needed and caused disability. OWCP's second opinion physician, Dr. Schwartz had however diagnosed carpal tunnel syndrome, but had opined that appellant's pain behavior was not CRPS. Dr. Schwartz had indicated that appellant could not perform her regular job duties, but could perform sedentary work.

The evidence of record reflects that on June 26, 2016 appellant returned to temporary job assignment which was sedentary in nature and based on medical restrictions established by Dr. Schwartz. Appellant stopped work on June 27, 2016, after returning to limited-duty for one day. While she stayed for the full eight-hour shift, the evidence reflects that she worked only an hour and a half to two hours before being sent to the health unit due to the side effects of her medication. In a July 13, 2016 statement, B.R., appellant's supervisor, confirmed that appellant worked one day, but got very sleepy and unbalanced due to her medication. She indicated that the employing establishment could not reasonably accommodate appellant due to the effects of her medications and inability to stay alert.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.⁸ The nonadversarial policy of proceedings

⁵ *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury, but no loss of wage-earning capacity).

⁷ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁸ *See G.C.*, Docket No. 18-0842 (issued December 20, 2018); *see also Jimmy A. Hammons*, 51 ECAB 219 (1999).

under FECA is reflected in OWCP's regulations at section 10.121.⁹ Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.¹⁰

OWCP did not ask Dr. Schwartz to address as part of his second opinion evaluation whether appellant's medication would affect her ability to work. After appellant was sent home from work on June 27, 2016, he was not asked to clarify whether appellant required oxycodone for her accepted conditions, and if so whether this medication's side effects would affect appellant's ability to perform the duties of the temporary sedentary position.

On remand, OWCP should seek clarification from Dr. Schwartz as to whether appellant's use of the medication oxycodone, led to her inability to perform the limited-duty job and was necessitated by the accepted conditions. After this and such further development as may be deemed necessary, OWCP shall issue a *de novo* opinion.

CONCLUSION

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

⁹ 20 C.F.R. § 10.121.

¹⁰ See *G.C.*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2018 and November 14 and 9, 2017 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: February 4, 2019
Washington, DC

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

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

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