United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 18-0712**
	)	**Issued: January 24, 2019**
U.S. POSTAL SERVICE, CRESTON STATION POST OFFICE, Portland, OR, Employer	)	

Appearances:
John Eiler Goodwin, Esq., 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 15, 2018 appellant, through counsel, filed a timely appeal from an August 22, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Appellant, through counsel filed a timely request for oral argument. After exercising its discretion the Board, by a June 18, 2018 order, denied her request finding that her arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 18-0712 (issued June 18, 2018).

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[4]

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of total disability commencing June 10, 2014.

FACTUAL HISTORY

On November 19, 2005 appellant, then a 41-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 18, 2005 she injured her lower back while loading trays of mail in the performance of duty. She stopped work on that day and initially received continuation of pay. OWCP accepted the claim for lumbosacral and sacroiliac sprains.[5] It initially paid appellant wage-loss compensation and medical benefits on the supplemental rolls, and then paid her wage-loss compensation on the periodic rolls commencing March 19, 2006.

On February 25, 2008 Dr. Derrick Yoshinaga, an attending osteopath Board-certified in family medicine, released appellant to return to modified work starting on March 9, 2008. Work restrictions were provided which included an initial return to work for four hours per day, gradually increasing to eight hours per day. Dr. Yoshinaga listed permanent work restrictions including: no stooping, twisting, bending; no pushing or pulling over seven pounds; no lifting repetitively over seven pounds; no squatting or kneeling; minimal walking limited to 20 minutes at one time or 4 hours per day; no climbing ladders; minimal use of stairs; no vehicle operation at work; and minimal sitting (20 minutes at a time or up to 4 hours in a day). He advised that appellant should perform sedentary work only and be allowed to change positions as needed to relieve pain.

After an extended period of time Dr. Yoshinaga, in a January 28, 2014 report, released appellant to return to sedentary work on that date with restrictions for six hours per day. He noted that other work restrictions were the same as his prior recommendation.

On April 16, 2014 the employing establishment offered appellant the position of sales retention team member working six hours per day. The duties of the position included intermittent (six hours) contacting customers by telephone; intermittent (four hours) light keyboarding or typing; intermittent (six hours) answering the telephone; and intermittent (six hours) back office

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that following the August 22, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

[5] OWCP authorized right L5-S1 microdiscectomy, which was performed on February 14, 2006; left L4-5 microdiscectomy on May 23, 2006; and L4-5 transforaminal lumbar interbody fusion, which was performed on December 26, 2006. Subsequently, on April 28 and May 2, 2011, OWCP authorized lumbar discectomy and removal of a spinal fixation device, which occurred on April 26, 2011. It thereafter authorized an L4-5 arthroplasty, which occurred on March 13, 2012.

administrative assistance-type duties. The physical duties required sitting in an office chair with a supportive back with occasional walking or standing intermittently for six hours and intermittent (four to six hours) simple grasping, intermittent use of a computer mouse, fine manipulation of a keyboard, and speaking on a telephone with a headset available.

By letter dated April 22, 2014, OWCP advised appellant that it found the offered position suitable as it was within the work restrictions set by Dr. Yoshinaga. It informed her that she had 30 days to accept the position or provide her reasons for refusing the job. Appellant was also informed of the penalty provisions under 5 U.S.C. § 8106(c) for refusing an offer of suitable work.

By correspondence dated May 2, 2014, appellant indicated that she was neither refusing nor accepting the offered position as she wanted to consult her physician about the job. She informed OWCP that she was in the process of applying for disability retirement. On June 5, 2014 appellant accepted the offered position. In a letter dated June 5, 2014, the employing establishment informed appellant that her assignment was effective June 9, 2014 and she was scheduled to attend orientation for new employees on June 9 and 10, 2014.

Subsequent to her June 5, 2014 acceptance of the offered position, appellant submitted a report dated June 4, 2014 from Dr. Kathy Y. Chang, an examining physician specializing in occupational medicine in which she summarized appellant's medical and injury histories and provided findings on physical examination. Dr. Chang noted that appellant was being offered modified work, but that she was several months from a medical disability retirement. She noted that appellant requested reassessment of her permanent restrictions as she had been offered modified work. Dr. Chang recommended a functional capacity examination (FCE) and noted that appellant would need to have her restrictions revised if she was unable to sit the 20 minutes as set forth in her permanent work restrictions.

In a June 4, 2014 form report, Dr. Chang found appellant was capable of performing sedentary work. She indicated that appellant had permanent restrictions and was capable of working six hours per day. The restrictions included: no bending, stooping, or twisting; up to seven pounds of pushing or pulling; no repetitive lifting of more than seven pounds; minimal walking limited to 2 to 4 hours of walking 20 minutes at a time; no operating a motor vehicle at work or climbing ladders; minimal use of stairs; and up to 20 minutes of sitting at a time for 2 to 4 hours per day in an 8-hour day.

The record contains a June 9, 2014 disability note from Dr. Dwight R. Hager, an examining Board-certified family medicine physician, who indicated that appellant was disabled from working for the period June 9 to 13, 2014.

In a June 10, 2014 note, Robert Schwartzkopff, a certified physician assistant, diagnosed significant low back and neck pain, which he opined rendered her unable to work. He further noted that cervical surgery would be required. This report was subsequently cosigned by Dr. Justin S. Cetas, a Board-certified neurosurgeon.

Dr. Chang, in a June 11, 2014 report, restricted appellant's work hours to four per day. She also provided new work restrictions of no pushing or pulling more than zero pounds; up to five

minutes of sitting at a time two hours per day in an eight-hour day; and ability to change positions including laying down to relieve pain.

On June 18, 2014 appellant filed a claim for intermittent wage-loss compensation (Form CA-7) for the period June 9 to 13, 2014. On the reverse-side of the claim form, the employing establishment noted that she had returned to work on June 9, 2014 and then stopped work. In an attached time analysis form (Form CA-7a), appellant noted that she worked six hours on June 9, 2014 and that she was then unable to work the offered job based on orders from her doctor.

In a letter dated July 1, 2014, OWCP noted that appellant had worked six hours on June 9, 2014 and claimed two hours of leave without pay and that she had filed a Form CA-7 indicating that she was alleging a worsening or recurrent disability effective June 10, 2014. It authorized payment for 30 hours of compensation for the period June 9 through 27, 2014 based on the accepted job offer on June 5, 2014. OWCP noted that the evidence of record was insufficient to establish total disability, as alleged, for the period commencing June 10, 2014. It advised appellant that it had reviewed the job offer dated April 16, 2014 and found it suitable and in accordance with the medical restrictions set forth by Dr. Yoshinaga in his report of January 28, 2014. OWCP advised her of the type of factual and medical evidence needed to establish entitlement to continued or recurrent disability compensation. It afforded appellant 30 days to submit the requested information.

On July 7, 2014 OWCP received a June 9, 2014 progress note from Dr. Hager diagnosing chronic pain and noting that appellant reported nausea while attempting to perform her new job.

In a July 9, 2014 report, Dr. Chang reiterated work restrictions noted in the prior form report.

Appellant, in a Form CA-7 dated July 11, 2014, filed a claim for intermittent wage-loss compensation for the period June 30 to July 11, 2014. In an attached Form CA-7a, she wrote that she was unable to perform the modified job per her physician.

On July 22, 2014 OWCP received a June 11, 2014 report from Dr. Chang. In this report Dr. Chang noted that appellant was being seen for a flare-up of symptoms following her return to modified work on June 9, 2014. Appellant related that she had been unable to work six hours on June 9, 2014 and that she had leg spasms and increased back pain after sitting for five minutes. Dr. Chang provided examination findings and opined that it seemed clear that appellant was unable to sit for 20 minutes, which was part of her permanent restrictions. She revised appellant's work restrictions to less sitting and less work time. Appellant stated that she required cervical surgery.

On August 4, 2014 OWCP received a Form CA-7, claim for compensation, for intermittent wage loss during the period July 14 to 25, 2014. On August 5, 2014 it provided appellant with notice that it had reviewed the additional materials she had submitted in support of her claim that she had not abandoned her suitable employment position. OWCP noted that the evidence submitted did not establish a worsening or recurrence of disability. It afforded appellant an additional 15 days to accept the employment position.

On August 21, 2014 OWCP received a July 18, 2014 hospital report indicating that Dr. Cetas had performed a C6-7 anterior cervical discectomy and disc replacement surgery were performed.

By decision dated August 21, 2014, OWCP expanded the acceptance of appellant's claim to include the condition of displacement of lumbar intervertebral disc without myelopathy.

By decision dated August 26, 2014, OWCP terminated appellant's compensation benefits, effective August 26, 2014 in accordance with 5 U.S.C. § 8106(c)(2) as it found she had refused an offer of suitable work. It noted that it had been notified by the employing establishment that her refusal to accept or report to the offered position continued and explained that the evidence did not support a valid reason for refusal of the suitable employment position or establish a recurrence of disability.

Appellant continued to file Form CA-7 claims for intermittent wage-loss compensation.

On September 9, 2014 OWCP received appellant's request for an oral hearing before an OWCP hearing representative, which was held on March 18, 2015.

On October 7 and November 24, 2014 OWCP received a January 22, 2014 report from Dr. Michael Sandquist, a treating Board-certified neurosurgeon, who opined that appellant was capable of working provided she was able to move about and change her position frequently.

A notification of personnel action (Form SF-50) indicated that the Office of Personnel Management (OPM) approved appellant's disability retirement effective February 9, 2015.

By decision dated May 29, 2015, a hearing representative reversed the August 26, 2014 decision finding that OWCP should have adjudicated the claim as a claim for a recurrence of disability rather than a refusal of an offer of suitable work. She reasoned that appellant had accepted the offered employment position and worked on the first day of orientation, but also presented compelling evidence that she could not continue in the position. The hearing representative instructed OWCP to refer appellant for a second opinion physician examination for an evaluation of appellant's work capacity and thereafter to adjudicate the claim as one for a recurrence of disability.

On July 16, 2015 OWCP referred appellant for an evaluation with Dr. Ronald Teed, a Board-certified orthopedic surgeon, for a second opinion examination as to the issue of appellant's work capacity.

In an August 12, 2015 report, Dr. Teed, provided a review of the medical evidence and appellant's history of injury, and noted physical examination findings. Physical examination findings included ambulating without assistance, limited range of motion due to pain, minimally tender on palpation over left lower lumbar paraspinous musculature, no tenderness over the spinous processes or sciatic notch regions, no lower back pain on rotating torso to the legs, no pain across the cervical pain with axial loading, and nontender on palpation over right lower lumbar paraspinous musculature. With respect to appellant's accepted conditions, Dr. Teed diagnosed resolved lumbosacral sprain, resolved sacroiliac sprain, resolved L5-S1 displaced lumbar disc, status post placement and removal of two lumbar neurostimulators, and status post lumbar

laminectomies, foraminotomies, and fusion with posterior instrumentation and subsequent removal. The nonwork diagnoses included lumbar and thoracic spondylosis, history of cervical spondylosis, and status post lumbar disc replacement. Dr. Teed observed that appellant's functional overlay was inconsistent with objective and physical findings. He concluded that appellant was not disabled from performing her job on and after June 10, 2014 due to accepted work injuries. In an attached work capacity evaluation form (Form OWCP-5c), Dr. Teed indicated that appellant was capable of performing her usual job with no restrictions.

In a supplemental report dated September 11, 2015, Dr. Teed observed that appellant had presented with "significant functional overweigh, presenting as inconsistent inorganic nonanatomic inorganic findings" which he opined resulted in an unreliable examination. He noted that appellant's accepted lumbosacral and sacroiliac sprains had resolved within three months of her accepted injury. Dr. Teed attributed her cervical, thoracic, and lumbar spondylosis to aging and degeneration, which he observed was an arthritic process and unrelated to her accepted work injury. He concluded that appellant had no permanent impairment or work restrictions as a result of the accepted work injuries.

By decision dated September 30, 2015, OWCP denied appellant's claim for a recurrence of disability commencing June 10, 2014, relying on Dr. Teed's second opinion examination reports. It found that the medical reports of Dr. Chang were formulated on an incomplete history wrought with inconsistences and therefore the weight of the medical evidence rested with Dr. Teed who had opined that appellant was not disabled from performing the accepted job beginning June 10, 2014.

On October 15, 2015 OWCP received appellant's request for an oral hearing before a hearing representative with OWCP's Branch of Hearings and Review. A telephonic hearing was held on June 16, 2016.

By decision dated July 29, 2016, the hearing representative set aside the September 30, 2015 decision, finding that OWCP had provided Dr. Teed with an inaccurate statement of accepted facts (SOAF), which was dated July 13, 2015, as it did not provide appellant's authorized medical procedures causing Dr. Teed to inaccurately indicate that her L4-5 disc replacement surgery had been unauthorized. On remand OWCP was instructed to provide a revised and accurate SOAF to Dr. Teed, a description of the light-duty job, and the circumstances of the recurrence.

In an October 31, 2016 addendum, Dr. Teed performed an updated examination and reviewed additional medical evidence, the job description, circumstances of the alleged recurrence, and the updated SOAF. He concluded that appellant was not disabled from performing the sales retention team position beginning June 10, 2014. In support of that conclusion, Dr. Teed noted that appellant described no changes from her original November 19, 2005 injury and she exhibited unreliable physical examination findings.

By decision dated November 23, 2016, OWCP denied appellant's claim for a recurrence of disability. It found the weight of the medical opinion evidence rested with the well-rationalized opinion of Dr. Teed.

On December 27, 2016 OWCP received appellant's request for an oral hearing before a hearing representative with OWCP's Branch of Hearings and Review. A telephonic hearing was held on June 14, 2017.

By decision dated August 22, 2017, the hearing representative affirmed the denial of appellant's recurrence claim. She found the weight of the medical opinion evidence rested with the well-rationalized opinion of Dr. Teed.

LEGAL PRECEDENT

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury.[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 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.[7]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing June 10, 2014.

In a January 22, 2014 report, Dr. Sandquist, opined that appellant was capable of working provided she was able to move about and change her position frequently. On January 28, 2014 Dr. Yoshinago found that appellant was capable of working six hours per day with restrictions, including the ability to change positions as needed to relieve pain.

On June 5, 2014 appellant accepted the position of sales retention team member for six hours a day and attended orientation for new employees on June 9, 2014. She then stopped work and filed claims for intermittent disability.

As appellant returned to a light-duty position, based upon her physician's medical restrictions, to establish total disability following her return to work she must establish 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.

The Board finds that appellant has not established a change in the light-duty requirements as there is no evidence that the physical requirements of the offered position were amended at any

[6] *W.D.*, Docket No 09-0658 (issued October 22, 2009); *Robert H. St. Onge*, 43 ECAB 1169, 1173 (1992).

[7] *C.C.*, Docket No. 18-0719 (issued November 9, 2018).

time. Therefore, it is her burden of proof to establish a change in the injury-related conditions, such that she was totally disabled as of June 10, 2014.

The only medical evidence from Dr. Chang addressing appellant's work stoppage on June 9, 2014 is a June 11, 2014 visit summary report. In this report appellant related her inability to work six hours due to complaints of increased back pain and leg spasms after sitting five minutes. Dr. Chang revised appellant's work restrictions to include less sitting and work time due to appellant's inability to sit for 20 minutes. The record also contains a June 9, 2014 disability note from Dr. Hager and a June 20, 2014 disability note signed by Mr. Schwartzkopff which was cosigned by Dr. Cetas. Dr. Hager found appellant disabled from June 9 to 13, 2014. Mr. Schwartzkopff and Dr. Cetas also opined that appellant was totally disabled. However, none of these reports provided medical rationale to explain why appellant was totally disabled from work or to support an objective worsening of appellant's accepted conditions and what specific duties of the modified-duty position working six hours per day she could no longer perform. Medical evidence that provides a conclusion that an employee is totally disabled, but does not offer a rationalized medical explanation for that disability, is of limited probative value.[8] Accordingly this evidence is insufficient to establish that appellant's claimed disability beginning June 10, 2014 is causally related to her accepted conditions.[9]

Dr. Hager's June 9, 2014 progress note contained a diagnosis of chronic pain, noted appellant complained of nausea during her attempt at performing her modified job, but did not provide an opinion on appellant's ability to work, and therefore his opinion is of no probative value.[10] Accordingly, the Board finds that there is no objective medical evidence of record to establish a recurrence of total disability on June 10, 2014.

OWCP referred appellant to Dr. Teed for a second opinion evaluation. In reports dated August 12 and September 11, 2015, and October 31, 2016, Dr. Teed concluded that appellant was not disabled on and after June 10, 2014 due to her accepted work conditions. In the September 11, 2015 report, he observed that appellant's subjective complaints were inconsistent with the objective and nonanatomic findings. Dr. Teed further found that the accepted lumbar and sacroiliac sprains had resolved. In an October 31, 2016 addendum, based on an updated SOAF, review of additional medical evidence, job description, and circumstances of the recurrence, he again concluded that appellant was not disabled from performing her modified job. Dr. Teed reiterated her unreliable physical examination findings and appellant's description of no changes from the accepted November 19, 2005 employment injury. His reports constituted probative medical evidence as he supported his opinion on appellant's disability with rationale and addressed whether appellant was disabled beginning June 10, 2014. Appellant therefore has not established that she established a recurrence of total disability commencing June 10, 2014.

[8] *J.F.*, Docket No. 09-1061, n.9 (issued November 17, 2009).

[9] *See P.T.*, Docket No. 12-1439 (issued January 23, 2013) (in which Dr. Morrison's reports were insufficient to establish causation because he did not offer any explanation regarding the objective findings).

[10] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

As appellant has not submitted rationalized medical evidence sufficient to establish disability for work commencing June 10, 2014, the Board finds that she has not met her burden of proof to establish a recurrence of disability.

On appeal counsel asserts that the issue in question is whether appellant was assigned a job outside her light-duty job restrictions, which is a factual and not a medical question. However, the Board finds that whether appellant has established a period of disability, as alleged, is a medical issue. For the reasons set forth above, appellant has not established her recurrence claim.

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 June 10, 2014.

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2019
Washington, DC

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

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

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