

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of disability, commencing June 1, 2015, causally related to his accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 14, 2013 appellant, then a 50-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that on or about May 26, 2012 he sustained a herniated disc (L5) as a result of driving a mail truck as a duty of his federal employment.⁵ On July 31, 2013 OWCP accepted his claim for lumbar intervertebral disc displacement and thoracic or lumbosacral neuritis or radiculitis. It paid wage-loss compensation benefits on the supplemental rolls beginning August 1, 2013. On August 20, 2013 appellant accepted a part-time modified letter carrier position working six hours per day.⁶ OWCP paid wage-loss compensation for the remaining two hours per day.

In a June 1, 2015 progress note and duty status report (Form CA-17), Dr. Thomas Martens, an osteopath specializing in family medicine, related appellant's complaints of increased lumbar pain. He indicated that appellant had been working limited duty for six hours per day since September 2013, but appellant believed that his condition had worsened when the new Postmaster instructed him to carry his mailbag and dismount with the bag while delivering mail. Dr. Martens noted examination findings of decreased range of motion of the lumbar spine and positive straight leg raise testing on the right. He diagnosed displacement of the lumbar intervertebral disc without myelopathy, thoracic or lumbosacral neuritis or radiculitis, right shoulder internal derangement, and right knee internal derangement. Dr. Martens recommended that appellant work limited duty for four hours per day with restrictions of lifting, carrying, simple grasping, and sitting for four hours per day; fine manipulation for two hours per day; and standing, walking, bending, stooping, twisting, pushing, pulling, and driving a vehicle for one hour per day.

On June 15, 2015 appellant filed a claim for compensation (Form CA-7) claiming additional wage-loss for the period May 30 to June 12, 2015. On the accompanying time analysis form (Form CA-7a) he claimed four hours of daily leave without pay (LWOP) beginning June 3, 2015. Appellant remarked that the reason for leave use was "working (Limited Duty)."

⁴ Docket No. 16-1811 (issued May 17, 2017).

⁵ On April 3, 2013 appellant underwent lumbar surgery.

⁶ The part-time modified-duty assignment was based on the medical restrictions of Dr. Francisco Batlle, a neurosurgeon. In an August 12, 2013 duty status report (Form CA-17), Dr. Batlle advised that appellant could return to work with restrictions of driving up to seven hours, simple grasping up to six hours, standing, walking, climbing, and fine manipulation up to three hours, sitting, twisting, and reaching above the shoulder up to two hours, bending, stooping, pushing, and pulling up to one hour, and lifting and carrying up to 20 pounds.

He continued to file additional CA-7 forms claiming wage-loss compensation for four hours of LWOP.

By decision dated July 28, 2015, OWCP denied appellant's claim for wage-loss compensation beginning on May 16, 2015 and continuing. By decision dated June 24, 2016, an OWCP hearing representative affirmed the July 28, 2015 decision in part and denied claim for recurrent disability and wage-loss compensation beginning June 1, 2015. She found that the medical evidence of record was insufficient to establish that appellant's reduction in work hours was causally related to his accepted lumbar and thoracic conditions.

Appellant filed an appeal to the Board.

By decision dated May 17, 2017, the Board affirmed the June 24, 2016 decision denying appellant's recurrence of disability claim.⁷ The Board determined that the evidence of record was insufficient to establish a recurrence of disability beginning June 1, 2015 due to a worsening or change of his accepted conditions.

On June 5, 2017 appellant, through counsel, requested reconsideration. OWCP received additional evidence regarding the claimed June 1, 2015 recurrence of disability, which included progress notes and duty status reports (Form CA-17) dated June 27, 2016 to August 17, 2017 by Dr. Martens. Dr. Martens noted clinical findings and a diagnosis of lumbar disc displacement and indicated that appellant could work limited duty for four hours per day with restrictions of: lifting and carrying up to 20 pounds intermittently, sitting, and simple grasping for four hours per day; fine manipulation for two hours per day; standing, walking, bending, stooping, twisting, pushing, pulling, reaching above the shoulder, and driving a vehicle for one hour per day; and no operating of machinery.

In an August 29, 2016 narrative report and letter, Dr. Battle, a neurosurgeon, described the May 26, 2012 employment injury and the medical treatment that appellant had received. He reported that appellant had experienced a resolution of his symptoms until he "returned to work modified, then my new supervisor changed the routine and I had to do a [park-and-] loop for two hours delivering mail." Dr. Battle noted appellant's current complaints of primary low back pain radiating into the bilateral lower extremities, right side greater than left. Upon examination of appellant's lumbar spine, he observed decreased range of motion and positive straight leg raise testing. Dr. Battle diagnosed recurrent lumbar radiculitis and lumbago, status post lumbar surgery. He reported that appellant had "recurrent symptomatology beginning May 29, 2015."

The record also contains several e-mails from the employing establishment regarding appellant's modified-duty position. In an e-mail dated December 27, 2016, an OWCP claims examiner requested information from the employing establishment relative to when appellant began to work four hours per day and whether there was a limited-duty job offer at that time. It also requested a copy of the most recent limited-duty job offer.

In a separate e-mail dated February 28, 2017, an OWCP claims examiner again requested that the employing establishment provide a copy of the last signed job offer. She also requested

⁷ *Supra* note 4.

information regarding appellant's pay rate and actual earnings. In an e-mail dated April 17, 2017, a health and resource management specialist for the employing establishment provided his pay rate and earnings information.

A June 12, 2017 functional capacity evaluation report demonstrated that appellant could work part time at a light physical demand level.

On July 6, 2017 OWCP received a report from Dr. James E. Butler, III, and a Board-certified orthopedic surgeon serving as an OWCP second-opinion examiner. In a May 18, 2017 report, Dr. Butler noted appellant's current complaints of lower back pain radiating down the leg, knees, neck, and shoulders. Upon examination of appellant's lumbar spine, he observed tenderness upon palpation from L4-S1 and restricted range of motion. Dr. Butler diagnosed thoracic or lumbosacral neuritis or radiculitis and displacement of lumbar intervertebral disc without myelopathy. He reported that appellant's work-related conditions had not resolved and that he remained disabled due to his accepted conditions. In an attached work capacity evaluation form (OWCP-5c), Dr. Butler indicated that appellant could work with restrictions of: driving up to four hours; lifting, pushing, or pulling no more than 20 pounds up to two hours; standing and walking up to two hours; squatting, kneeling, and climbing up to one hour; and no bending, twisting, or stooping.

In a July 28, 2017 report and work excuse note, Dr. Johnny White, an anesthesiologist, indicated that appellant worked as a part-time mail carrier and currently complained of neck and right arm pain. He provided examination findings and diagnosed lumbar radiculopathy and chronic myofascial pain.

In an August 17, 2017 report, Dr. Clayton Adams, a Board-certified anesthesiologist, noted appellant's 2012 work-related injury. Upon examination of appellant's lumbar spine, he reported no spasms, tenderness, or trigger points. Dr. Adams diagnosed chronic pain syndrome, lumbar radiculopathy, postlaminectomy syndrome, and other intervertebral disc degeneration of the lumbar region.

By decision dated August 29, 2017, OWCP denied modification of the May 17, 2017 decision. It found that the medical evidence of record was insufficient to establish that appellant was unable to work his part-time limited-duty assignment for six hours per day beginning June 1, 2015 due to the accepted conditions in his claim.

On September 11, 2017 appellant, through counsel, requested reconsideration. Counsel submitted additional medical reports relative to treatment for appellant's continued back and neck symptoms.

OWCP received several reports by Dr. Carl J. D'Agostino, a pain management specialist. In reports dated August 25, 2016 through September 21, 2017, Dr. D'Agostino conducted an examination of appellant's lumbar and cervical spine and diagnosed lumbar displacement, L5 vertebral fracture, annular tear of the L5-S1, left L5-S1 radiculopathy, and cervical displacement with radiculitis.

In reports dated August 28 to October 24, 2017, Dr. White provided examination findings and diagnosed lumbar radiculopathy and chronic myofascial pain. He completed a September 22, 2017 work excuse note which requested that appellant be excused from work that day.

In reports dated August 17 to October 24, 2017, Dr. Adams noted appellant's complaints of worsening low back pain radiating down the bilateral lower extremities. He provided examination findings and diagnosed lumbar radiculopathy, chronic pain syndrome, postlaminectomy syndrome, and other intervertebral disc degeneration.

By decision dated December 8, 2017, OWCP denied modification of the August 29, 2017 decision. It found that the medical evidence of record was insufficient to establish that appellant sustained a recurrence of disability causally related to his accepted conditions such that he was unable to perform his modified duty six hours per day beginning June 1, 2015.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁸ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.⁹ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.¹⁰ This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.¹¹

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.¹² The term also means an inability to work because a modified-duty or light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or reduction-in-force.¹³

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is

⁸ *Supra* note 2.

⁹ See *B.K.*, Docket No. 18-0386 (issued September 14, 2018); see also *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

¹⁰ *W.H.*, Docket No. 19-0168 (issued May 10, 2019); see *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹¹ *J.D.*, Docket No. 18-0616 (issued January 11, 2019); see *C.C.*, Docket No. 18-0719 (issued November 9, 2018).

¹² 20 C.F.R. § 10.5(x).

¹³ *Id.*

claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹⁴

ANALYSIS

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

The Board finds that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's June 24, 2016 decision because the Board has already considered this evidence in its May 17, 2017 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁵

OWCP accepted appellant's occupational claim for lumbar intervertebral disc displacement and thoracic or lumbosacral neuritis or radiculitis. Appellant stopped work and returned to modified-duty work on August 21, 2013 working six hours per day. OWCP paid wage-loss compensation for the remaining two hours per day. On June 1, 2015 appellant began to work four hours per day and filed various Forms CA-7 claiming compensation for the remaining four hours of LWOP. In a June 1, 2015 progress note, Dr. Martens related that appellant had been working limited duty for six hours per day, but recently the new Postmaster had asked appellant to carry and dismount with his mailbag. He updated appellant's work restrictions, which included limiting appellant to working four hours per day. In his August 29, 2016 report, Dr. Battle recounted that appellant's new supervisor had changed his routine and required that he perform park and loop duties while delivering mail.

The Board finds that factual evidence of record is insufficient to determine whether appellant is claiming a recurrence of disability due to a change in his light-duty position or because Dr. Martens increased her work restrictions and limited her to working four hours.¹⁶ As noted above, OWCP's regulations allow for appellant to establish a recurrence of disability under either scenario.¹⁷ Accordingly, the evidence of record must contain accurate information regarding his claim in order for the Board to determine whether he sustained a recurrence of disability beginning June 1, 2015 because of a change in his limited-duty assignment or because of a change and worsening of his accepted conditions.¹⁸

The record indicates that, in e-mails dated December 27, 2016 and February 28, 2017, OWCP requested information from the employing establishment regarding appellant's limited-duty assignment. The Board finds, however, that the employing establishment did not respond to OWCP's e-mails dated December 27, 2016 and February 28, 2017 when it requested a copy of his

¹⁴ See *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁵ See *K.K.*, Docket No. 17-1061 (issued July 25, 2018). The Board will, therefore, not review the evidence addressed in the prior appeal.

¹⁶ See *A.W.*, Docket No. 18-0589 (issued May 14, 2019).

¹⁷ *Supra* note 12.

¹⁸ See *J.G.*, Docket No. 17-0910 (issued August 28, 2017); *M.A.*, Docket No. 16-1602 (issued May 22, 2017).

most recent modified job offer and also sought clarification on when he began to work four hours per day.

It is well established that, proceedings under FECA are not adversarial in nature and, while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁹ Once OWCP undertook development of the evidence by requesting additional information from the employing establishment, it had a duty to secure appropriate information addressing the relevant issues.²⁰ Accurate information regarding appellant's work status and whether his limited-duty assignment had changed is essential to determine whether he sustained a recurrence of disability beginning on June 1, 2015. OWCP must, therefore, make proper factual findings as to whether appellant's limited-duty assignment had changed and resulted in a recurrence of disability beginning June 1, 2015.²¹ His evidence is of the character normally obtained by the employing establishment and is more readily accessible to OWCP than to appellant.²² Upon remand, OWCP should request that the employing establishment furnish documentation regarding appellant's work status for the applicable period and also clarify whether appellant's modified-duty assignment had changed to include park and loop duties.

The Board further finds that additional development of the medical evidence is also required. In March 2017, OWCP referred appellant for a second-opinion examination. In a May 18, 2017 report, Dr. Butler discussed appellant's history of injury and provided examination findings. He reported that appellant's work-related conditions had not resolved and that appellant remained disabled due to his accepted conditions. In an attached work capacity evaluation form (OWCP-5c), Dr. Butler indicated that appellant could work with restrictions of: driving up to four hours, lifting, pushing, or pulling no more than 20 pounds up to two hours; standing and walking up to two hours; squatting, kneeling, and climbing up to one hour; and no bending, twisting, or stooping. His second-opinion report related that appellant still had residuals and disability causally related to his accepted conditions. Furthermore, Dr. Butler provided increased work restrictions and seemed to suggest that appellant was only capable of working four hours. The Board finds that his opinion supports that appellant work-related conditions had worsened such that his work restrictions had changed and he was no longer able to work limited duty for six hours per day.²³

As previously noted, OWCP shares responsibility in the development of the evidence.²⁴ Once it undertook development of the evidence by referring appellant to a second opinion physician, it has a duty to secure an appropriate report addressing the relevant issues.²⁵ While Dr. Butler's opinion supports that appellant's work-related conditions had worsened, he did not

¹⁹ *Donald R. Gervais*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

²⁰ *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

²¹ *See Y.R.*, Docket No. 10-1589 (issued May 19, 2011).

²² *J.T.*, Docket No. 15-1133 (issued December 21, 2015); *J.S.*, Docket No. 15-1006 (issued October 9, 2015).

²³ *See B.B.*, Docket No. 18-1321 (issued April 5, 2019); *J.D.*, Docket No. 17-1520 (issued February 20, 2018).

²⁴ *Supra* note 19.

²⁵ *Supra* note 20.

address whether appellant sustained a recurrence of disability commencing June 1, 2015. Accordingly, his report requires clarification regarding whether appellant was unable to work his part-time limited-duty position for six hours per day, commencing June 1, 2015.²⁶

The Board, therefore, will remand the case for OWCP to obtain a supplemental report from Dr. Butler addressing appellant's ability to work and restrictions commencing June 1, 2015. After such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 29, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²⁶ See *B.B.*, *supra* note 23.