

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

S.W., Appellant)	
)	
and)	Docket No. 18-1489
)	Issued: June 25, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Palatine, IL, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 31, 2018 appellant, through counsel, filed a timely appeal from an April 30, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

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.*

³ The Board notes that, following the April 30, 2018 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of total disability commencing January 7, 2017 causally related to her accepted employment-related conditions.

FACTUAL HISTORY

On February 10, 2006 appellant, then a 47-year-old postage due clerk, filed an occupational disease claim (Form CA-2) alleging that she developed lower back, bilateral knee, bilateral leg, and buttocks conditions due to factors of her federal employment. OWCP accepted the claim for displaced lumbar intervertebral disc and aggravation of sprain/strain of the bilateral knees. It also authorized an arthroscopic surgery of the right knee on May 11, 2006 and an arthroscopic surgery of the left knee on July 28, 2006. OWCP placed appellant on the supplemental compensation rolls effective March 1, 2006 and on the periodic compensation rolls effective August 6, 2006.

Appellant underwent an unauthorized plasma disc decompression herniated lumbar disc L5-S1 surgery on January 15, 2010.

On February 26, 2013 the employing establishment offered appellant a modified manual distribution clerk position effective that date. The duties included distributing, weighing, computing, and processing all classes and types of postage due mail, maintaining accounts and records, and verifying mail. The physical requirements included lifting and carrying up to 30 pounds for 2 to 4 hours per day, standing and walking intermittently for 6.5 hours per day, bending, stooping, and twisting intermittently for 4 to 6 hours per day, and simple grasping, fine manipulation, and reaching above shoulders continuously for 8 hours per day. Appellant accepted the job offer and returned to work on February 26, 2013.

In an August 31, 2016 report, Dr. Robert James Fink, an orthopedic surgeon, noted that appellant was seen for follow-up care for both knees. He diagnosed degenerative joint disease of the bilateral knees and found that x-rays revealed positive tricompartmental degenerative joint disease of the bilateral knees.

In three form reports -- a work status form, attending physician's report (Form CA-20) and duty status report (Form CA-17) -- all dated January 11, 2017, Dr. Fink took appellant off work beginning January 6, 2017. He also indicated by checking a box marked "yes" on the Form CA-20 that appellant's arthritis, back pain, and herniated nucleus pulposus (HNP) of the L4-5 and L5-S1 levels were employment related. Dr. Fink explained that she worked on her feet all day and walked in her capacity as a postage due clerk.

Appellant stopped work on January 7, 2017 and filed claims for wage-loss compensation (Form CA-7) for the period January 7 to 20 and January 21 to February 3, 2017. She later filed claims for the periods February 4 to 17 and February 18 to March 3, 2017.

In a February 1, 2016 work status form, Dr. Fink took appellant off work from February 1 to March 6, 2017.

By development letter dated February 9, 2017, OWCP notified appellant that it had received her claims for compensation and it appeared that she was claiming disability due to a

material change or worsening of her accepted work-related conditions. It noted that she was “unclear” why she had stopped work on January 7, 2017 and advised her of the factual and medical deficiencies of her claim. OWCP afforded appellant 30 days to submit additional evidence and respond to its inquiries.

In response, appellant submitted a January 13, 2017 report from Dr. Fink who related that appellant’s bilateral knee pain and low back pain had worsened. He diagnosed three-compartment arthritis, left knee greater than right, and advised that she “may be now in need of total knee replacement.” Dr. Fink further advised that appellant “may have more intradis[c]al disease in her low back.”

On February 22, 2017 Dr. Fink reported that appellant had been his patient for several years and her job required a considerable amount of time walking, standing, lifting, carrying packages, and pushing and pulling carts. He opined that, because of the amount of repetitive work that was performed, there was a causal relationship between her low back pain as well as the degenerative arthritis in both knees. Dr. Fink noted that a magnetic resonance imaging (MRI) scan of the left knee was positive for a torn anterior crucial ligament as well as medial and lateral menisci and appellant had a positive MRI scan for HNP at the L5-S1 and L4-5 levels. He recommended a total left knee replacement and advised that she was not capable of performing her duties of standing, carrying, twisting, and turning.

In work status forms dated February 27 and March 6, 2017 and a duty status report (Form CA-17) dated March 20, 2017, Dr. Fink continued to advise that appellant was “off work.”

On February 27, 2017 Dr. Fink reported that an MRI scan of the lumbar spine showed an extruded lumbar disc at L5-S1 with right-sided spinal stenosis and right lateral recess stenosis at L4-5.

By decision dated April 7, 2017, OWCP denied appellant’s recurrence claim, finding that the evidence of record was insufficient to establish a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the limited-duty job requirements. It noted that, if she was alleging a new injury or new work factors, she had the right to file a new claim.

On April 11, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review.

In an August 30, 2017 report, Dr. Fink related that appellant was experiencing increased pain in her low back and left knee, as well as swelling in both legs “possibly due to meloxicam.” He diagnosed torn cartilage, left knee, and gave her a prescription for physical therapy to her left knee.

A telephonic hearing was held before an OWCP hearing representative on October 16, 2017. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

In response, appellant submitted a work status form dated December 4, 2017 from Dr. Fink who provided work restrictions of no lifting more than 10 pounds, alternate sitting and standing, minimum walking only, no bending/twisting at the waist, and no squatting/kneeling on knees.

By decision dated January 2, 2018, OWCP's hearing representative affirmed the April 7, 2017 decision, finding that the evidence of record was insufficient to establish a change in the nature and extent of appellant's accepted conditions or a change in the nature and extent of her limited-duty job requirements.

On January 31, 2018 appellant, through counsel, requested reconsideration and submitted an October 16, 2017 report from Dr. Fink who reiterated his medical opinions and opined that he could state with "absolute medical certainty that [appellant] has causal relationship with her knee condition related to the work she did as a postage due clerk, which required considerable amount of time walking, standing, lifting, and carrying packages as well as pushing and pulling carts."

By decision dated April 30, 2018, OWCP denied modification of its prior decision.

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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁴ This term 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 her 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 the established physical limitations.⁵

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. 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 limited-duty job requirements.⁶ This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the disabling condition is causally related to the employment injury. The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated, or aggravated by the accepted injury.⁷

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.⁸ The opinion of the physician must be based

⁴ *Id.* at § 10.5(x). See *T.S.*, Docket No. 09-1256 (issued April 15, 2010).

⁵ *Id.*

⁶ See *A.M.*, Docket No. 09-1895 (issued April 23, 2010).

⁷ See *L.F.*, Docket No. 14-1817 (issued February 2, 2015); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (January 2013).

⁸ See *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing January 7, 2017 causally related to her accepted employment-related injuries.

Appellant has not alleged a change in the nature and extent of her light-duty job requirements. Therefore, she must thus provide medical evidence establishing that she was disabled due to a worsening of her accepted work-related conditions.¹⁰ The Board finds that appellant did not submit medical evidence to establish that she was disabled due to a worsening of her accepted work-related conditions commencing January 7, 2017.

In his August 31, 2016 and February 22, 2017 reports, Dr. Fink diagnosed arthritis and degenerative joint disease of the bilateral knee, recommended a total left knee replacement, and took appellant off work beginning January 6, 2017. He advised that she was not capable of performing her duties of standing, carrying, twisting, and turning, and provided work restrictions of no lifting more than 10 pounds, alternate sitting and standing, minimum walking only, no bending/twisting at the waist, and no squatting/kneeling on knees as a result of her diagnosed conditions. However, OWCP did not accept arthritis or degenerative joint disease conditions in the current claim. Appellant thus has the burden of proof to establish causal relationship.¹¹ Additionally, Dr. Fink did not adequately explain how her disability on or after January 7, 2017 was due to a worsening of her accepted work-related lumbar disc condition and bilateral knee sprain/strain. Moreover, he did not explain how appellant's other diagnosed conditions were due to a worsening of her accepted work-related conditions. Without such an explanation, the reports of Dr. Fink are insufficient to establish a recurrence of disability.

Dr. Fink did not provide an opinion on causal relationship either in his work status form or Form CA-17, both dated January 11, 2017. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.¹² As such, these reports are insufficient to meet appellant's burden of proof.

Dr. Fink opined in the January 11, 2017 Form CA-20 that appellant's arthritis, back pain, and HNP of the L4-5 and L5-S1 levels were employment related because she stood all day and walked while performing her employment duties. However, he did not provide sufficient rationale explaining the pathophysiological process by which the accepted employment factors caused or

⁹ See *I.J.*, 59 ECAB 408 (2008); see also *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹⁰ *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹¹ *E.M.*, Docket No. 17-1683 (issued January 4, 2019).

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

aggravated the back conditions.¹³ The Board finds that this report is also insufficient to establish appellant's recurrence claim.

In his October 16, 2017 report, Dr. Fink opined that he could state with "absolute medical certainty that [appellant] has causal relationship with her knee condition related to the work she did as a postage due clerk, which required considerable amount of time walking, standing, lifting, and carrying packages as well as pushing and pulling carts." However, he did not explain how appellant was disabled on or after January 7, 2017 due to a worsening of her accepted work-related conditions or specifically explain whether she sustained a recurrence of disability.¹⁴ Without such an explanation, this report from Dr. Fink is also insufficient to establish a recurrence of disability, as alleged.

The Board has held that the issue of disability from work can only be resolved by competent medical evidence.¹⁵ Whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.¹⁶ The record does not contain a medical opinion of sufficient rationale to establish a recurrence of disability commencing January 7, 2017 causally related to appellant's accepted employment-related conditions.¹⁷ Consequently, appellant has not met her burden of proof.

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 January 7, 2017 causally related to her accepted employment-related conditions.

¹³ See *M.W.*, Docket No. 18-1555 (issued March 20, 2019).

¹⁴ *E.B.*, Docket No. 17-1467 (issued July 26, 2018); *D.H.*, Docket No. 18-0129 (issued July 23, 2018); see *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

¹⁵ *R.C.*, 59 ECAB 546 (2008).

¹⁶ *M.C.*, Docket No. 18-0919 (issued October 18, 2018); see also *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁷ *Supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 25, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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