

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

_____)	
W.H., Appellant)	
)	
and)	Docket No. 19-0168
)	Issued: May 10, 2019
U.S. POSTAL SERVICE, NEW JERSEY)	
PROCESSING & DISTRIBUTION CENTER,)	
Kearny, NJ, Employer)	
_____)	

Appearances:
James D. Muirhead, Esq., for the appellant¹
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 October 31, 2018 appellant, through counsel, filed a timely appeal from an October 10, 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 a September 25, 2018 schedule award decision is also within the Board's jurisdiction. However, appellant, through counsel, has only sought appeal from the October 10, 2018 merit decision relating to appellant's recurrence of disability claim. Thus, the Board will not review the September 25, 2018 schedule award decision. *See* 20 C.F.R. § 501.3.

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability commencing July 14, 2017 causally related to her accepted December 10, 2008 employment injury.

FACTUAL HISTORY

On December 10, 2008 appellant, then a 47-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on December 10, 2008 she sustained an injury when a postal container moved and pinned her between the container and a safety rail while in the performance of duty. She stopped work on that same date.⁴ OWCP accepted appellant's claim for contusions of her right elbow, left hip, and right hip, as well as spasm of her right shoulder muscle. It paid her disability compensation on the daily rolls commencing January 26, 2009.

On June 24, 2014 appellant accepted a light-duty job with the employing establishment as a modified mail handler. The duties of the mail handler position included engaging in surface visibility scanning for three hours per day, sorting nonmachineable mail weighing under five pounds for three hours per day, and engaging in empty equipment cleanup of mail weighing under five pounds for two hours per day. The physical requirements of the mail handler position included standing for seven hours per day, lifting limited to under five pounds, reaching above the shoulders for eight hours with the left arm and four hours with the right arm, and simple grasping for eight hours.

In a July 14, 2017 note Dr. Robert M. Palacios, an attending Board-certified orthopedic surgeon, indicated that he reevaluated appellant on that date and found that she was able to return to work as outlined in the offer of the modified mail handler assignment dated June 26, 2014.

On August 30, 2017 appellant filed a notice of recurrence (Form CA-2a) alleging that she sustained a recurrence of disability on July 14, 2017 due to her accepted employment conditions. She indicated on the recurrence claim form that she had been out of work for personal reasons and noted that she had been released to return to modified-duty or light-duty work when she was out on personal leave. On the portion of the recurrence claim form to be completed by the employing establishment, a human resources management specialist indicated that a new job offer would be drafted based on appellant's medical restrictions in her prior job offer. She advised that appellant had been performing light-duty work from June 4, 2009 through April 10, 2016 when she stopped work on April 11, 2016 due to personal reasons. Appellant had attempted to return to work on June 26, 2017.

Appellant submitted a duty status report (Form CA-17) dated July 14, 2017 in which Dr. Palacios listed various work restrictions, including lifting up to four pounds for four hours per day.

In a development letter dated September 11, 2017, OWCP requested that appellant submit additional factual and medical evidence in support of her recurrence of disability claim. It provided

⁴ Appellant's date-of-injury job required lifting up to 75 pounds and intermittently reaching above shoulder level for up to eight hours per day.

a questionnaire and asked her to submit a narrative statement from her attending physician. OWCP afforded appellant 30 days to respond.

In response, appellant submitted a statement in which she noted that she had stopped work on April 11, 2016 due to aneurysms on her brain. She asserted that the employing establishment was not allowing her to bid on her prior modified mail handler position.

Appellant submitted a June 22, 2017 report from Dr. Lillian Oyola, an attending Board-certified neurologist. Dr. Oyola indicated that appellant could return to work as of June 26, 2017 and could perform all duties as tolerated.

In a July 14, 2017 narrative report, Dr. Palacios indicated that appellant had been doing well in her modified mail handler assignment until about a year and a half ago when she needed to take a 15-month leave of absence due to multiple cerebral aneurysms. He reported the findings of the physical examination he conducted on that date, noting that “status post crush injury in 2008 resulted in residual pain pattern” and there still was some right “shoulder impingement/ residue” exhibited during the examination. Dr. Palacios diagnosed low back pain with left radiation, chronic left hip pain, and impingement syndrome of the right shoulder.

By decision dated November 30, 2017, OWCP denied appellant’s claim for an employment-related recurrence of disability commencing July 14, 2017. It found that the medical evidence submitted was insufficient to establish that she was disabled from work on or after July 14, 2017 due to her accepted December 10, 2008 employment injury. OWCP determined that appellant’s modified-duty assignment was not withdrawn by the employing establishment and noted that appellant had stopped work on April 11, 2016 due to a nonwork-related aneurysm condition.

On December 11, 2017 appellant, through counsel, requested a telephonic hearing with a representative of OWCP’s Branch of Hearings and Review. During the hearing held on May 22, 2018, appellant testified that she underwent four surgeries between June 2016 and June 2017 for her brain aneurysms. She asserted that, when she was released to return to work in June 2017, the employing establishment told her that she had to be cleared for regular work to be allowed to return to work.

By decision dated August 6, 2018, OWCP’s hearing representative affirmed OWCP’s November 30, 2017 decision. He found that appellant had not shown that she was unable to work on or after July 14, 2017 due to her December 10, 2008 employment injury, nor had she shown that her modified-duty assignment had been withdrawn by the employing establishment.

On September 28, 2018 appellant, through counsel, requested reconsideration of the August 6, 2018 decision. In a September 28, 2018 letter, counsel argued that appellant sustained a recurrence of disability on July 14, 2017 because the employing establishment withdrew her modified-duty assignment. He asserted that a September 28, 2015 report of Dr. Arthur Becan, an attending Board-certified orthopedic surgeon, supported appellant’s recurrence of disability claim. The report, which was already of record, indicated that appellant had permanent impairment of her left upper extremity and right lower extremity.

By decision dated October 10, 2018, OWCP denied modification of the August 6, 2018 decision finding that appellant had not established that she was disabled from work on or after

July 14, 2017 due to her December 10, 2008 employment injury or that her modified-duty assignment had been withdrawn.

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 compensable injury or illness and without an intervening injury or new exposure in the work environment.⁵ This 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 a reduction-in-force.⁶

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁷

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. 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.⁸ Where no such rationale is present, the medical evidence is of diminished probative value.⁹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability commencing July 14, 2017 causally related to the accepted December 10, 2008 employment injury.

⁵ 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

⁸ *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

⁹ *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

The Board notes that appellant has not shown that she was unable to work on or after July 14, 2017 due to her December 10, 2008 employment injury, which was accepted for contusions of her right elbow, left hip, and right hip, as well as spasm of her right shoulder muscle.

Much of the evidence submitted by appellant suggests that in mid-2017 she was able to perform the type of light-duty work she had been performing prior to her April 10, 2016 work stoppage due to her nonwork-related brain aneurysms. For example, in a June 22, 2017 report, Dr. Oyola noted that appellant could return to work as of June 26, 2017 and could perform all duties as tolerated. In a July 14, 2017 note, Dr. Palacios indicated that he reevaluated appellant on that date and found that she was able to return to work as outlined in the offer of modified mail handler position dated June 26, 2014.

In a duty status report dated July 14, 2017, Dr. Palacios listed various work restrictions, including lifting up to four pounds for four hours per day. However, he did not provide a rationalized medical opinion that these restrictions were necessitated by the accepted December 10, 2008 employment injury. As noted above, a claimant must submit rationalized medical evidence in support of a claim for recurrence of disability.¹⁰

In a July 14, 2017 narrative report, Dr. Palacios indicated that appellant had been doing well in her modified mail handler assignment until about a year and a half ago when she needed to take a 15-month leave of absence due to multiple cerebral aneurysms. He noted that “status post crush injury in 2008 resulted in residual pain pattern” and there still was some right “shoulder impingement/residue” exhibited during the examination. Dr. Palacios diagnosed low back pain with left radiation, chronic left hip pain, and impingement syndrome of the right shoulder. The submission of this report would not establish appellant’s claim for a recurrence of disability because Dr. Palacios has not provided an opinion on disability or otherwise provided medical rationale relating an employment condition to a period of disability commencing on or after July 14, 2017.¹¹ Although Dr. Palacios suggested that appellant had limitations due to a diagnosed right shoulder condition, OWCP has not accepted a right shoulder condition in connection with the December 10, 2008 employment injury. Dr. Palacios also mentioned pain stemming from the December 10, 2008 employment injury, but the Board has held that pain alone is a symptom, not a medical diagnosis.¹²

On appeal counsel asserts that appellant sustained a recurrence of disability on July 14, 2017 because the employing establishment withdrew her modified-duty assignment. However, appellant has not met her burden of proof to establish that the employing establishment withdrew a modified-duty assignment. Rather, she had been working as a modified mail handler since June 4, 2009 when she stopped work due to a nonwork-related condition, *i.e.*, aneurysms on her brain.

¹⁰ See *supra* notes 8 and 9.

¹¹ See *D.R.*, Docket No. 16-0528 (issued August 24, 2016).

¹² See *F.U.*, Docket No. 18-0078 (issued June 6, 2018). Counsel asserted that a September 28, 2015 report of Dr. Becan supported appellant’s recurrence of disability claim. The report indicated that appellant had permanent impairment of her left upper extremity and right lower extremity, but it does not contain any opinion on disability and is of no probative value with respect to the underlying issue of this claim. See *supra* notes 8 and 9.

As appellant has not presented any rationalized medical evidence establishing a recurrence of disability commencing July 14, 2017 causally related to her accepted December 10, 2008 employment injury, she 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 disability commencing July 14, 2017 causally related to the accepted December 10, 2008 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 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