

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

_____)	
P.D., Appellant)	
)	
and)	Docket No. 19-0763
)	Issued: November 26, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Melville, NY, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director

ORDER REMANDING CASE

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

On February 22, 2019 appellant, through counsel, filed a timely appeal from a January 24, 2019 decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 19-0763.²

On September 30, 2017 appellant, then a 55-year-old truck trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on September 23, 2017 he sustained head, neck, back, and left shoulder injuries when his vehicle was rear ended at a traffic light. He stopped work and sought treatment for his medical condition. Appellant was released to full-time full-duty work

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 The Board notes that following the January 24, 2019 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.*

on October 9, 2017. By decision dated November 22, 2017, OWCP accepted the claim for cervical strain.

On November 30, 2017 appellant filed a recurrence claim (Form CA-2a) alleging a recurrence of disability on November 28, 2017 due to his accepted September 23, 2017 employment injury, resulting in his work stoppage on November 29, 2017. He indicated that his conditions never fully resolved. Appellant further reported that, since returning to work, he found himself working at a much slower pace when pushing the post cons in and out of the trailers and that he would experience neck pain and headache. On the reverse side of the claim form appellant's supervisor indicated that there were no adjustments or accommodations made to appellant's work assignment as his physician released him to full-duty work on October 9, 2017. However, appellant continued to complain of pain and issues from his accepted employment injury.

In a development letter dated December 28, 2017, OWCP requested that appellant submit additional evidence in support of his claim, including a physician's opinion supported by a medical explanation as to how his accepted employment-related medical condition materially changed/worsened to the extent that he was disabled from work. It provided him a questionnaire for completion and afforded him 30 days to submit a response.

In support of his claim, appellant submitted additional medical and diagnostic reports.

By decision dated January 29, 2018, OWCP denied appellant's claim for a recurrence of disability. It found that the medical evidence of record was insufficient to establish that he was disabled from work due to a material change/worsening of his accepted work-related conditions.

On October 29, 2018 appellant, through counsel, requested reconsideration. By decision dated January 24, 2019, OWCP denied modification of the January 29, 2018 decision. It found that appellant had not submitted rationalized medical opinion establishing a recurrence causally related to the accepted employment injury.

The Board, having reviewed the case record submitted by OWCP, finds that this case is not in posture for decision.³

OWCP's procedures require that, in cases where recurrent disability from work is claimed within 90 days or less from the first return to duty, the claimant is not required to produce the same evidence as for a recurrence claimed long after apparent recovery and return to work.⁴ Therefore, in cases where recurring disability from work is claimed within 90 days or less from the first return to duty, the focus is on disability rather than causal relationship.⁵ The attending physician should

³ See *T.Z.*, Docket No. 17-0679 (issued May 9, 2019).

⁴ *R.W.*, Docket No. 17-0720 (issued May 21, 2018).

⁵ *K.R.*, Docket No. 19-0413 (issued August 7, 2019).

describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability from work.⁶

In this instance, appellant stopped work following the September 23, 2017 work-related motor vehicle accident. He was released to full-duty work on October 9, 2017. Appellant filed a Form CA-2a and alleged a recurrence of disability on November 28, 2017, resulting in his work stoppage on November 29, 2017. As he claimed a recurrence of disability within 90 days of his first return to duty, OWCP should have developed and decided the claim under the proper recurrence standard, emphasizing disability rather than causal relationship.⁷ However, the December 28, 2017 OWCP development letter improperly instructed appellant to provide medical evidence in accordance with the standard for a recurrence of disability claim after 90 days of his return to duty.⁸ OWCP's January 29, 2018 and January 24, 2019 decisions did not deny his recurrence claim acknowledging that appellant's alleged recurrence occurred within 90 days of return to work.

OWCP procedures provide that OWCP is responsible for requesting evidence.⁹ The procedures further provide that the claims examiner should contact the claimant in writing to obtain evidence and should specifically request the information needed, tailored to the specifics of the individual case.¹⁰ In this instance, OWCP improperly developed appellant's claim under the standard for a recurrence of disability claim after 90 days from return to duty.¹¹ As appellant failed to receive the proper guidance from OWCP regarding the specific evidence required to establish a recurrence claim within 90 days of his return to duty, the Board finds that this case must be remanded for further development.¹² Following such further development as it deems necessary, OWCP shall issue an appropriate merit decision.¹³

⁶ A.C., Docket No. 17-0384 (issued September 11, 2017); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013).

⁷ *Id.* at Chapter 2.1500.6.

⁸ *See A.D.*, Docket No. 17-1984 (issued March 19, 2018).

⁹ FECA Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4.c(2) (June 2011).

¹⁰ *Id.* at Chapter 2.800.5. *See also V.R.*, Docket No. 16-1167 (issued December 22, 2016).

¹¹ *See J.W.*, Docket No. 17-0715 (issued May 29, 2018).

¹² *See S.S.*, Docket No. 17-0871 (issued November 6, 2017).

¹³ *See generally B.N.*, Docket No. 17-0787 (issued July 6, 2018); *C.D.*, Docket No. 17-1074 (issued August 28, 2017).

IT IS HEREBY ORDERED THAT the January 24, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this order.

Issued: November 26, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board