

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of total disability, commencing January 28, 2017, causally related to her accepted January 21, 2015 employment injury.

FACTUAL HISTORY

On January 23, 2015 appellant, then a 47-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right ankle fracture when she slipped on ice underneath snow while in the performance of duty. She stopped work on January 22, 2015 and received continuation of pay beginning January 27, 2015. On the reverse side of the claim form, the employing establishment indicated that appellant was in the performance of duty when injured, that she had received medical treatment on January 22, 2015 and that she had not yet returned to work.

On March 9, 2015 OWCP accepted her claim for right malleolus fracture. It subsequently expanded acceptance of her claim to include right sacroiliitis. Appellant received wage-loss compensation benefits for temporary total disability commencing March 8, 2015, and OWCP placed her on the periodic compensation rolls effective May 1, 2016.

On August 10, 2015 appellant returned to part-time, limited-duty work for two hours per day.³ She continued to receive wage-loss compensation for temporary partial disability for the remaining hours.

On December 12, 2015 appellant stopped work completely because no work was available within her restrictions. OWCP paid wage-loss compensation for total disability. On October 3, 2016 appellant accepted a part-time limited-duty position as a city carrier. The duties of the position required casing mail up to four hours, driving up to one hour, and delivering express mail up to one hour. The physical requirements of the position were simple grasping for four hours, twisting for three hours, and pulling/pushing and bending/stooping for two hours.

On November 8, 2016 appellant stopped work again. She filed various claims for wage-loss compensation (Form CA-7) for total disability.

Appellant continued to receive medical treatment. In a February 2, 2017 report, Dr. Tim Nice, a Board-certified orthopedic surgeon, related that she was seen for severe pain in her right sacroiliac joint. Appellant recounted that she was “unable to do her duties at work and can barely get up and down from a chair.” Upon examination of her lumbar spine, Dr. Nice observed exquisite tenderness over the right sacroiliac joint. He reported that they were going to take appellant off work for two to four weeks.

³ In an August 7, 2015 report, Dr. Neal A. Marks, a podiatrist, authorized appellant to return to part-time work of two hours per day for three weeks, four hours per day for three weeks, and then full-time status without restrictions on September 22, 2015.

In progress notes dated February 24 and March 2, 2017, Dr. Nice continued to report that appellant should remain off work due to her current OWCP injury.

On March 10, 2017 appellant filed a notice of recurrence (Form CA-2a) of disability commencing January 28, 2017 due to her accepted January 21, 2015 employment. She described that, since returning to work, she was always in pain and on pain medication. Appellant indicated that the recurrence happened when she felt a sharp pain in her right sacroiliac joint, which was the same accepted condition.

In a March 13, 2017 development letter, OWCP advised appellant that additional evidence was needed to establish her recurrence claim, including an attending physician's opinion supported by medical rationale explaining how her claimed recurrence of disability occurred. It also requested that she complete an attached questionnaire with various questions regarding why she believed that she had sustained a recurrence of disability due to her accepted January 21, 2015 employment injury. OWCP afforded appellant 30 days to submit the necessary evidence.

In a March 20, 2017 narrative report, Dr. Nice related that appellant was receiving treatment in his office for her current OWCP injury. He indicated that she was "off work from January 28, 2017 and still is currently off work due to this OWCP injury. Appellant is off work due to the constant pain she is having currently."

On March 22, 2017 OWCP received appellant's response to its development questionnaire. Appellant described that the claimed recurrence occurred on January 27 when she was unable to get out of bed and move for the whole day because of sharp pain in her right sacroiliac joint. She explained that she could not use her right-side lower extremities because of pain in her right sacroiliac joint.

By decision dated April 27, 2017, OWCP denied appellant's claim for a recurrence of disability finding that the medical evidence of record was insufficient to establish a recurrence of disability due to her accepted January 21, 2015 employment injury.⁴

On May 4, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a June 13, 2017 narrative report, Dr. Nice noted that he disagreed with OWCP's denial decision and found that there were no satisfactory findings to substantiate that appellant had right sacroiliitis. He recounted that on February 2, 2017 he reported that she was unable to perform her duties at work. Dr. Nice related that in subsequent examinations he continued to observe tenderness over the right sacroiliac joint and paraspinal muscle spasms on the right side. He opined that appellant was not capable of returning to her original job and carrying a mailbag.

By decision dated August 30, 2017, a hearing representative from OWCP's Branch of Hearings and Review set aside the April 27, 2017 decision and remanded the case for OWCP to

⁴ OWCP noted that appellant had stopped work on November 18, 2016 due to a depression/panic disorder and had filed an occupational disease claim (Form CA-2) under OWCP File No. xxxxxx781.

further develop the medical evidence regarding whether appellant was totally disabled from work, commencing January 28, 2017, as a result of her accepted January 21, 2015 employment injury.

On August 31, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF) and record to Dr. Gerard Papp, a Board-certified orthopedic surgeon, for a second-opinion examination. In an October 19, 2017 report, Dr. Papp noted his review of the SOAF and that her claim had been accepted for right lateral malleolus fracture and right-sided sacroiliitis. He related appellant's complaints of right buttock and right sacroiliac pain and provided examination findings. Dr. Papp opined that appellant had not suffered residuals of her right lateral malleolus fracture. He further explained that, although her claim had been accepted for right sacroiliitis, there was nothing to support the objective findings of sacroiliitis from her work injury. In response to OWCP's questions of whether appellant was totally disabled from work beginning January 28, 2017, Dr. Papp explained that appellant was totally disabled for six months following her accepted right ankle fracture injury. He concluded that she no longer required treatment for her accepted conditions and was able to work with temporary restrictions.

In a November 20, 2017 addendum report, Dr. Papp again noted that there was no medical documentation to support the diagnosis of right sacroiliitis and that "[it] never should have been allowed." He further concluded that appellant was not totally disabled commencing January 28, 2017 due to her work-related injury.

OWCP determined that a conflict in the medical opinion evidence existed between Dr. Papp and Dr. Nice regarding appellant's disability status. It referred her to Dr. Nasimullah Rehmayullah a Board-certified orthopedic surgeon, for an impartial medical examination. In a December 11, 2017 report, Dr. Rehmayullah discussed the history of injury and the medical reports of record. He noted the accepted conditions of right lateral malleolus fracture and right sacroiliitis. Dr. Rehmayullah related that, after the January 21, 2015 employment injury, appellant returned to part-time modified-duty working between one to four hours per day with job duties consisting of up to four hours of casing mail, up to one hour of driving, and up to one hour of delivering express mail. He noted that her current complaints included right ankle pain with driving and right buttock and right sacroiliac pain and discomfort.

In response to OWCP's questions, Dr. Rehmayullah opined that appellant continued to have residuals of her accepted right lateral malleolus fracture and sacroiliitis conditions. He also opined that she was not totally disabled for work commencing January 28, 2017 as a result of her January 21, 2015 employment injury. Dr. Rehmayullah noted that Dr. Nice indicated in his August 10, 2015 report that appellant had reached maximum medical improvement (MMI). He also noted that she stopped work on November 18, 2016 due to the conditions of stress and depression. Dr. Rehmayullah concluded that appellant was unable to work her original job, but was able to work limited duty with restrictions.

Appellant continued to receive medical treatment from Dr. Nice. In notes dated November 27, 2017 and January 2, 2018, Dr. Nice reported examination findings of tenderness over the right sacroiliac joint. He indicated that appellant would not be able to return to her original job, but explained that she was able to perform sedentary work. Dr. Nice also completed several duty status reports indicating that appellant could work part-time, limited duty.

In a January 2, 2018 addendum report, Dr. Rehmayullah indicated that Dr. Papp's examination findings were erroneously included instead of his own examination findings. He reported that appellant walked with a mild limp on the right and noted normal range of motion of the hips and knees with pain in the right sacroiliac area. Dr. Rehmayullah also observed tenderness over the sacroiliac joint and mild-to-moderate discomfort of the right sacroiliac joint with her supine stressing. Examination of appellant's right ankle demonstrated tenderness over the lateral side and anterior talo-fibular ligament. Dr. Rehmayullah opined that she was not totally disabled commencing January 28, 2017. He explained that appellant's right ankle and sacroiliitis conditions were stable, as her treating physician had previously documented that she had reached MMI on August 10, 2015. Dr. Rehmayullah opined that she could work limited duty.

In a January 25, 2018 narrative report, Dr. Nice related that appellant had been off work since February 2, 2017 due to "ongoing back symptoms, especially in the sacroiliac joint." He opined that she could perform more sedentary-type work, but not carrying a 40-pound mailbag.

By decision dated February 6, 2018, OWCP denied appellant's recurrence of disability claim finding that the medical evidence of record was insufficient to establish that she experienced a material change or worsening of her accepted January 21, 2015 employment injury on January 28, 2017. It found that the special weight of medical evidence rested with the December 11, 2017 and January 2, 2018 reports of Dr. Rehmayullah, the impartial medical examiner, who opined that she was not totally disabled, commencing January 28, 2017, due to her accepted January 21, 2015 employment injury.

On February 13, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on July 13, 2018.

Dr. Nice continued to provide duty status reports and progress notes dated February 8 to August 23, 2018, which related his treatment of appellant for continued right sacroiliac symptoms.

On March 30, 2018 appellant accepted a part-time limited-duty job offer as a city carrier.

By decision dated September 25, 2018, an OWCP hearing representative affirmed the February 6, 2018 decision denying appellant's recurrence claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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.⁶ 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.⁷ Whether a particular injury causes an employee to become disabled from work, and the duration of that

⁵ *Supra* note 1.

⁶ *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).

⁷ *See D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson, id.*

disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.⁸

OWCP's implementing regulations define a recurrence of disability as 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 injury or illness without an intervening injury or new exposure to the work environment.⁹ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or 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 such that they exceed the employee's physical limitations.¹⁰

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 claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹¹

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹² This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹³ For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹⁴ Where OWCP has referred the case to an impartial medical examiner to resolve the conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.¹⁵

ANALYSIS

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

⁸ See *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

⁹ 20 C.F.R. § 10.5(x).

¹⁰ *Id.*

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

¹² 5 U.S.C. § 8123(a); see *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹³ 20 C.F.R. § 10.321.

¹⁴ *R.P.*, Docket No. 17-0428 (issued April 19, 2018); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁵ *Gary R. Sieber*, 57 ECAB 414, 416 (2006).

The Board finds that OWCP improperly determined that a conflict in medical opinion evidence existed between Dr. Nice, appellant's treating physician, and Dr. Papp, an OWCP second-opinion examiner, regarding whether appellant was totally disabled from work, commencing January 28, 2017, as a result of her January 21, 2015 employment injury.

In reports dated February 2 to June 13, 2017, Dr. Nice noted an exacerbation of appellant's sacroiliitis symptoms and recommended that she was unable to work beginning February 2, 2017. In reports dated October 19 and November 20, 2017, Dr. Papp opined that she no longer suffered residuals of her right ankle fracture. He also reported that he found no objective evidence or medical document to support that appellant sustained sacroiliitis due to her work injury. Dr. Papp further concluded that she was not totally disabled from work commencing January 28, 2017 as a result of her work-related injury.

The Board finds that Dr. Papp's October 19 and November 20, 2017 reports were not sufficiently rationalized and, accordingly, were not of equal weight to Dr. Nice's reports as OWCP had determined. The SOAF clearly provided that OWCP had accepted, as work related, appellant's conditions of right lateral malleolus fracture and right-sided sacroiliitis. In his October 29 and November 20, 2017 reports, however, Dr. Papp reported that appellant had not sustained sacroiliitis as a result of her January 21, 2015 employment injury and that "[it] never should have been allowed." OWCP procedures provide that, when the DMA, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁶ As Dr. Papp disregarded the accepted conditions noted in the SOAF, his opinion lacked a proper factual background, and thus, his report is of diminished probative value and is insufficient to create a conflict in medical evidence with Dr. Nice.¹⁷ As there was no conflict in medical evidence between Dr. Nice and Dr. Papp pursuant to 5 U.S.C. § 8123(a), the referral to Dr. Rehmayullah shall be considered as a referral for a second opinion examination.¹⁸

In reports dated December 11, 2017 and January 2, 2018, Dr. Rehmayullah reviewed the medical evidence of record and provided examination findings. He opined that appellant still had residuals of her accepted right ankle and right sacroiliitis injury. Dr. Rehmayullah also reported that she was not totally disabled, commencing January 28, 2017, as a result of her January 21, 2015 employment injury because her treating physician had previously documented that her accepted conditions had reached MMI on August 10, 2015. The Board finds that there is now a conflict in medical evidence between Dr. Nice and Dr. Rehmayullah regarding whether appellant

¹⁶ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements of Medical Reports*, Chapter 3.0600.3 (October 1990).

¹⁷ *M.C.*, Docket No. 18-1199 (issued April 5, 2019); *E.W.*, Docket No. 17-0707 (issued September 18, 2017).

¹⁸ See *B.T.*, Docket No. 16-1319 (issued April 25, 2017) (the Board found that at the time of the referral for a permanent impairment rating there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); see also *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (the Board found that, as there was no conflict in medical opinion evidence, the report of the physician designated as the impartial medical examiner was not afforded the special weight of the evidence, but was considered for its own intrinsic value as he was a second opinion specialist).

sustained a recurrence of disability, commencing January 28, 2017, due to her January 21, 2015 employment injury.

Because there is an unresolved conflict in medical opinion the case shall be remanded to OWCP for referral to an impartial medical examiner pursuant to section 8123(a) of FECA.¹⁹ After this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: September 12, 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

¹⁹ *Supra* notes 14 and 16.