

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective August 18, 2019; and (2) whether appellant has established continuing disability on or after August 18, 2019 due to her accepted February 28, 2018 employment injury.

FACTUAL HISTORY

On March 1, 2018 appellant, then a 52-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 27, 2018 she sustained injuries to her left hip and leg when a vehicle struck the side of her delivery vehicle while she was in the performance of duty. She stopped work on the date of injury. Appellant was transported to a hospital by ambulance immediately following the accident. In reports dated February 27, 2018, Drs. Timothy Muchnok and Eric L. Wissinger, both Board-certified in emergency medicine, diagnosed cervical spine strain, multiple contusions, left hip pain, abdominal pain, acute chest wall pain, and right ankle pain.

On March 7, 2018 OWCP accepted a sprain of cervical spine ligaments. It thereafter paid appellant wage-loss compensation on the supplemental rolls commencing April 14, 2018 and on the periodic rolls commencing December 9, 2018, based on a weekly pay rate of \$1,028.06.

Dr. Gilbert Perez, a Board-certified family practitioner, treated appellant beginning on March 8, 2018.⁴ In periodic reports through July 25, 2018, he observed a left hip contusion and swelling in proximal interphalangeal joint of the long finger of the right hand interfering with grip strength. Dr. Perez also noted appellant's complaints of pain in the lumbar and cervical spine, right forearm, and left hip. He prescribed physical therapy. Dr. Perez held appellant off work. Effective July 25, 2018, he released her to sedentary duty for four hours a day, with lifting with the right hand limited to one pound.

On July 30, 2018 OWCP expanded its acceptance of the claim to include contusion of the right middle finger without damage to nail, and sprain of ligaments of lumbar spine.

In a report dated August 24, 2018, Dr. Perez indicated that appellant could perform modified duty up to four hours a day, with limited use of the right upper extremity and minimal lifting. He held her off work effective October 10, 2018 due to severe lumbar and right long finger pain.⁵

Dr. Jocelyn R. Idema, an osteopathic physician Board-certified in orthopedic surgery, obtained lumbar x-rays on November 20, 2018 which demonstrated mild scoliosis, moderate facet arthrosis bilaterally at L5-S1, and decreased disc height at L5-S1. She held appellant off from

⁴ Appellant was also followed by Dr. Patrick T. McCulloch, a Board-certified orthopedic surgeon specializing in surgery of the hand. In a June 25, 2018 report, Dr. McCulloch administered an injection to the right long finger. In an August 3, 2018 report, he noted that the injection had improved appellant's symptoms.

⁵ A December 14, 2018 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated a central disc herniation at L4-5 toward the left with moderate narrowing of the left neural foramen, and a minimal central disc bulge at L5-S1.

work. In a December 28, 2018 report, Dr. Idema reviewed a December 14, 2018 lumbar MRI scan and diagnosed lumbar degenerative disc disease with radiculopathy.⁶

In December 2018, OWCP referred appellant to Dr. Victoria M. Langa, a Board-certified orthopedic surgeon, for a second opinion examination as to whether appellant had attained maximum medical improvement. The statement of accepted facts (SOAF) provided to Dr. Langa listed the cervical sprain as the only accepted condition.

In a January 11, 2019 report, Dr. Langa reviewed the medical record and SOAF. She noted that appellant's neck, shoulder, and hip complaints had resolved. Appellant related lumbar pain symptoms with radiation to the coccyx and right lower extremity, and mild symptoms of the right middle digit. Dr. Langa noted a history of spina bifida occulta, and that appellant wore a back brace. She diagnosed persistent radicular low back pain by history, preexisting lumbar degenerative disc/joint disease with a left-sided L4-5 disc herniation, status post sprain/contusion of the PIP joint of the right middle digit, and status post neck/right shoulder/left hip injuries, resolved. Dr. Langa opined that, as the accepted cervical spine sprain, the only condition accepted in the claim, had resolved, appellant could return to her date-of-injury job as a rural carrier. She recommended that OWCP accept a lumbar condition as the medical record documented "that her chief issue from the date of injury onwards has been the lower back and [appellant] has no prior history of injuries or complaints with regard to the lower back." Dr. Langa opined that the lumbar condition required additional treatment and recommended a pain management program with a series of epidural steroid injections. She completed a work capacity evaluation (Form OWCP-5c) and determined that appellant could perform full-time modified duty at the light physical demand level, with pulling, pushing, and lifting up to 20 pounds for up to two hours a day, bending and stooping for up to one hour a day, frequent changes of position, and no climbing ladders.

In a report dated March 19, 2019, Dr. Perez disagreed with Dr. Langa's opinion that appellant could return to full-time work. He asserted in a March 20, 2019 report that Dr. Langa did not explain why appellant's occupational lumbar conditions did not warrant restriction of the repetitive squatting required by appellant's date-of-injury position. Dr. Perez noted that appellant would require frequent breaks. He opined that she was totally disabled from work due to lumbar pain with bilateral radiculopathy.

In a May 1, 2019 letter, OWCP requested that Dr. Langa review Dr. Perez' March 20, 2019 report and an updated SOAF which included acceptance of cervical sprain, contusion of right middle finger without damage to nail, and sprain of ligaments of lumbar spine.

On May 8, 2019 the employing establishment offered appellant a full-time modified assignment as a rural carrier, with wages of \$1,066.46 a week. The duties required casing mail one to two hours, delivering a route six to eight hours, and express mail delivery two to three hours. The physical requirements included pushing and pulling within medical restrictions for two hours, driving and sitting up to eight hours, standing and walking up to eight hours, and bending and

⁶ In a January 16, 2019 report, Dr. Jesse Sally, an osteopathic physician Board-certified in physiatry, diagnosed a lumbar strain/sprain. On February 18, 2019 he performed authorized right L4-5 and L5-S1 facet joint injections. Dr. Sally administered a right sacroiliac joint injection on March 21, 2019 and a right L5-S1 interlaminar epidural injection on April 15, 2019.

stooping up to one hour. Appellant declined the position on May 8, 2019 contending that she could not drive the number of hours required.

In reports dated May 9 and June 6, 2019, Dr. Perez noted chronic lumbar pain unrelieved by injections. Appellant noted that driving aggravated her lumbar symptoms and that she had difficulty putting on her socks and shoes. Dr. Perez continued to hold appellant off work.

In a May 21, 2019 report, Dr. Idema diagnosed lumbar degenerative disc disease and lumbar disc displacement with radiculopathy. She returned appellant to sedentary duty.

In an addendum report received by OWCP on June 17, 2019,⁷ Dr. Langa noted reviewing Dr. Perez' March 20, 2019 report. She disagreed with Dr. Perez' opinion that appellant was "incapable of returning to work in any capacity." Dr. Langa affirmed her January 11, 2019 opinion, regarding appellant's work capacity. Based on her examination of appellant, and a review of diagnostic studies, she opined that "with regard to the accepted condition of the cervical sprain alone," appellant could return to her date-of-injury position. Regarding appellant's lumbar condition, Dr. Langa indicated that appellant could return to restricted duty within the limitations noted on the January 11, 2019 Form OWCP-5c.

In a notice dated June 26, 2019, OWCP proposed to reduce appellant's compensation based on her refusal of the May 8, 2019 modified position. It advised appellant that it had reviewed the work restrictions provided by Dr. Langa and found that her opinion represented the weight of the medical evidence. OWCP further determined that the position offered appellant was within her restrictions. It informed her of the provisions of 20 C.F.R. § 10.500(a) and advised her that any claimant who declined a temporary light-duty assignment deemed appropriate by OWCP was not entitled to compensation for total wage loss. OWCP noted that the offered pay rate was greater than that when disability began and, therefore, there was no loss of wage-earning capacity. It afforded appellant 30 days to accept the assignment and report to duty or provide a written explanation of her reasons for not accepting the assignment.

In response, appellant submitted reports by Dr. Perez dated July 3 and 29, 2019, finding her disabled from full-time work at the employing establishment due to lumbar pain with radiculopathy into both lower extremities, and right long finger dysfunction.

On July 31, 2019 Dr. David DeChellis, an osteopathic physician Board-certified in physiatry and pain management, performed lumbar provocative discography at L3-4 and L4-5 under fluoroscopic guidance.

By decision dated August 15, 2019, OWCP finalized the June 26, 2019 proposal and terminated appellant's wage-loss compensation, effective August 18, 2019, because she failed to accept the May 8, 2019 temporary light-duty assignment in accordance with 20 C.F.R. § 10.500(a). It found that the weight of the medical evidence rested with Dr. Langa, who provided temporary restrictions. OWCP indicated that its procedures provided that a temporary light-duty assignment could be provided to an employee during a period of recovery, and that on August 12, 2019 appellant's employing establishment confirmed that the assignment remained available. Since

⁷ On its face, Dr. Langa's report is dated March 20, 2019. However, as it referenced OWCP's May 1, 2019 request to review Dr. Perez' March 20, 2019 report, the date appears to be a typographical error.

appellant would have sustained no wage loss had she accepted the assignment, OWCP determined that she was not entitled to compensation.

On August 22, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. She submitted additional medical evidence.⁸

Dr. DeChellis provided reports dated from August 6 through December 6, 2019, diagnosing an L4-5 disc protrusion, right lower limb radiculopathy, chronic pain syndrome status post motor vehicle accident, lack of clinical benefit from previous therapies, and negative provocative discography at L4-5 and L3-4. He recommended a trial of a spinal cord stimulator. Dr. DeChellis held appellant off work.

In reports dated from August 20 through December 17, 2019, Dr. Idema diagnosed lumbar spondylosis and lumbar degenerative disc disease. She returned appellant to sedentary duty effective August 20, 2019 and referred her for pain management.

Appellant also provided reports from Dr. Perez dated from August 26 through December 27, 2019, holding her off work due to worsening lumbar pain with bilateral radiculopathy, aggravated by pressing the accelerator pedal in her car. She also reported difficulties opening jars and twisting with her right hand.

In a letter dated September 4, 2019, the employing establishment advised that appellant reported to her duty station on August 28, 2019 and indicated that she would accept the May 8, 2019 job offer. Appellant reported for duty on September 3, 2019, but provided Dr. Idema's August 20, 2019 report returning her to sedentary duty and Dr. DeChellis' August 30, 2019 report holding appellant off from work. The employing establishment provided a copy of the job offer signed by appellant on August 28, 2019 indicating that she had accepted the offered position.

By decision dated January 24, 2020, OWCP's hearing representative affirmed the August 15, 2019 termination decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.⁹

OWCP regulations at section 10.500(a) provide in relevant part:

“(a) Benefits are available only while the effects of a work-related condition continue.

⁸ Appellant also submitted imaging studies. A July 31, 2019 CT scan of the lumbar spine demonstrated diffuse annular thinning with broad-based degenerative disc bulges at L3-4 and L4-5 levels with mild degenerative spinal stenosis at both levels, a broad-based degenerative disc bulge with vacuum disc phenomenon at L2-3 with mild spinal stenosis, and degenerative disc and facet changes at L5-S1 without significant spinal or foraminal stenosis. A November 22, 2019 MRI scan of the thoracic spine demonstrated disc herniations at T7-8, T9-10, and T10-11.

⁹ *D.K.*, Docket No. 19-1178 (issued July 29, 2020); *C.W.*, Docket No. 18-1779 (issued May 6, 2019); *S.F.*, 59 ECAB 642 (2008).

“Compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents [him or her] from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage loss claimed on a [Form] CA-7 to the extent that evidence contemporaneous with the period claimed on a [Form] CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing [establishment] had offered, in accordance with OWCP procedures, a temporary light-duty assignment within the employee’s work restrictions.”¹⁰

When it is determined that an appellant is no longer totally disabled from work and is on the periodic rolls, OWCP’s procedures provide that the claims examiner should evaluate whether the evidence of record establishes that light-duty work was available within his or her restrictions. The claims examiner should provide a pretermination or prereduction notice if appellant is being removed from the periodic rolls.¹¹ When the light-duty assignment either ends or is no longer available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant’s wage-loss compensation, effective August 18, 2019.

The record indicates that appellant was on the periodic rolls on May 8, 2019 when the employing establishment offered her the modified rural carrier position. The offer was temporary and in writing. It, therefore, comported with the procedural requirements of 20 C.F.R. § 10.500(a).¹³

The evidence of record establishes that, as of August 18, 2019, the date OWCP terminated appellant’s wage-loss compensation, there remained a disagreement between Dr. Langa, OWCP’s second opinion orthopedic surgeon, and appellant’s physicians Dr. Perez, a treating family practitioner, and Dr. Idema, a Board-certified orthopedic surgeon, as to whether appellant had the ability to perform the duties of the offered temporary modified rural carrier position.¹⁴

Dr. Perez began treating appellant on March 8, 2018. He initially held her off work, and on July 25, 2018 returned her to sedentary duty for four hours a day. Dr. Perez again held appellant

¹⁰ 20 C.F.R. § 10.500(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1). (June 2013).

¹² *Id.*

¹³ *Id.*

¹⁴ *D.K.*, *supra* note 9; *R.C.*, Docket No. 18-0463 (issued February 7, 2020).

off work effective October 10, 2018 and continuing. He advised that her lumbar pain with bilateral radiculopathy, and right long finger dysfunction, had totally disabled her from work.

Dr. Idema began treating appellant on November 20, 2018. She diagnosed degenerative lumbar disc disease, lumbar disc disease with radiculopathy, and lumbar disc displacement with radiculopathy. Dr. Idema opined that appellant could perform full-time sedentary duty as of May 21, 2019.

In January 11 and June 17, 2019 reports, Dr. Langa opined that the occupationally-related lumbar condition necessitated work restrictions including frequent changes of position, and limitations on lifting, pulling, pushing, bending, and stooping. She found appellant able to perform full-time modified-duty work within those limitations.

The Board thus finds that there is an unresolved conflict of medical evidence between the opinions of Dr. Langa and Drs. Perez and Idema as to whether appellant could perform the duties of the offered position on August 18, 2019, the effective date of the termination of appellant's wage-loss compensation. Therefore, OWCP has not met its burden of proof to terminate appellant's wage-loss compensation as it should have referred appellant for an impartial medical evaluation to resolve the conflict prior to a termination of wage-loss compensation benefits.¹⁵

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective August 18, 2019.

¹⁵ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 1, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board