

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

_____)	
G.P., Appellant)	
)	
and)	Docket No. 19-1258
)	Issued: July 14, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Morristown, NJ, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On May 13, 2019 appellant filed a timely appeal from an April 2, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ The Clerk of the Appellate Boards assigned Docket No. 19-1258.

On September 6, 2002 appellant, then a 47-year-old modified carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 5, 2002 she sustained a lumbar injury when a heavy parcel she was carrying slid and pinned her beneath the package while in the performance of duty. By decision dated July 15, 2003, OWCP accepted the claim for lumbosacral sprain,² and paid her wage-loss compensation on the supplemental rolls as of August 20, 2003, and on the periodic rolls as of January 25, 2004.

¹ The Board notes that appellant submitted additional evidence to the Board. 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.*

² The record reflects that appellant has a prior work-related traumatic injury under OWCP File No. xxxxxx166. On October 11, 1990 she picked up a tray of flyers turned and tripped on the floor. OWCP accepted the claim for lumbar disc displacement and intervertebral disc displacement. Appellant stopped work on the date of injury and returned to full-time modified duty on November 1, 1993 performing clerical work.

Appellant was subsequently referred to vocational rehabilitation services and she accepted a job offer for a customer care agent position as of May 2, 2016. By decision dated September 30, 2016, OWCP issued a formal loss of wage-earning capacity (LWEC) determination finding that the position of customer care agent fairly and reasonably represented her wage-earning capacity as she had been working in the position for two or more months. It further found that appellant was reemployed with no loss in earning capacity as her actual earnings in her accommodated position met or exceeded the current wages of the job she held when injured. Therefore, OWCP reduced her LWEC to zero and terminated her wage-loss compensation payments effective May 2, 2016.

Beginning April 14, 2018, appellant filed claim for compensation forms (Form CA-7) for leave without pay (LWOP) on March 13 and May 2, 3, 4, and 7 to 25, 2018. Accompanying time analysis forms (Form CA-7a) reflected time off for medical appointments on March 13 and May 2, 3, 9, and 14, 2018.³

On May 25 and June 4, 2018 appellant also filed notices of recurrence of disability (Form CA-2a) citing time loss from work on March 13 and May 2 and 7, 2018. She noted a chronic condition that flared up from her original injury under OWCP File No. xxxxxx166.

OWCP received a May 14, 2018 report from Dr. Mikhail Solomonov, Board-certified in interventional pain medicine and anesthesiology. Dr. Solomonov provided physical examination findings and diagnosed lumbar disc displacement and lumbar radiculopathy. He reported that appellant was injured at work on September 5, 2002 and had a longstanding history of low back pain with paresthesia and numbness in the right lower extremity. Dr. Solomonov indicated that appellant had a recent flare up two weeks prior and she had progressively worsened. He advised that she was not able to return to work. A lumbar epidural steroid injection was recommended.

By decision dated July 26, 2018, OWCP denied modification of its September 30, 2016 LWEC determination “(and any resulting claim for compensation).” It found that the evidence of record failed to establish any of the three criteria for modifying an LWEC determination and, as such, there was no entitlement to additional compensation.

On August 23, 2018 appellant requested an oral hearing before an OWCP hearing representative.

Appellant also submitted additional Form CA-7’s for intermittent LWOP from May 8 to October 2, 2018.

In a May 14, 2018 note, Dr. Solomonov advised that appellant was incapacitated and unable to work from May 14 to June 4, 2018.

A hearing was held on January 16, 2019. Appellant testified that she was unable to work due to severe back pain, causing her to seek medical treatment with Dr. Solomonov in early 2018.

³ The record reflects that OWCP approved appellant’s compensation up to four hours for medical appointments on March 13, May 2, and 3, 2018.

She reported that Dr. Solomonov kept her out of work until she could receive the treatment which was pending approval by OWCP.

By decision dated April 2, 2019, OWCP's hearing representative affirmed the July 26, 2018 decision denying modification of the September 30, 2016 LWEC determination.

The Board has duly reviewed the matter and finds that the case is not in posture for decision.⁴

The Board notes initially that appellant has an accepted lumbar strain under this claim, but she also has an accepted displacement of lumbar intervertebral disc without myelopathy under OWCP File No. xxxxxx166. Appellant has claimed intermittent disability for periods beginning March 13, 2018, due to increased pain and medical treatment of her lumbar conditions. At the January 16, 2019 hearing, she testified that she sought treatment with Dr. Solomonov due to increased back pain in early 2018. Appellant explained that he placed her off work pending OWCP approval of an epidural steroid injection to treat her lumbar conditions. She has related that at no time did she request or want a modification of her LWEC determination. Rather, appellant was requesting wage-loss compensation during a limited period of disability due to required medical treatment. The Board notes that OWCP developed and adjudicated the claim as a request for modification of an LWEC determination. However, the record reflects that appellant has requested wage-loss compensation for limited intermittent periods of disability, due to her accepted lumbar conditions.⁵

The Board has held that OWCP may accept a limited period of disability without modification of a formal LWEC determination.⁶ This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of an LWEC determination.⁷ This narrow exception is only applicable for brief periods of medical disability.⁸ OWCP procedures provide if the claimant is off work for a brief period due to his/her temporary inability to perform the duties of the rated position, this period of medical disability can be paid without modification of the LWEC determination.⁹ However, if a formal LWEC determination has been issued, and the claimant requests resumption of compensation for total wage loss, OWCP should evaluate the request according to the customary criteria for modifying a formal LWEC determination.¹⁰

⁴ A.S., Docket No. 18-0370 (issued March 5, 2019).

⁵ C.f., Docket No. 18-1081 (issued May 22, 2020).

⁶ S.J., Docket No. 16-1195 (issued January 4, 2017); *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁷ T.G., Docket No. 18-1064 (issued April 26, 2019).

⁸ L.T., Docket No. 18-0797 (issued March 14, 2019).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501.10 (June 2013). See *J.M.*, Docket No. 18-0196 (issued July 12, 2018).

¹⁰ *Id.*

In its July 26, 2018 and April 2, 2019 decisions, OWCP evaluated the claim without proper consideration of the standard for a limited period of disability, finding that the evidence of record failed to establish any of the three criteria for modifying an LWEC determination.

As appellant has submitted evidence documenting intermittent claims for wage-loss compensation and medical treatment, in accordance with its procedures, OWCP must evaluate the evidence under the standard for a limited period of disability.¹¹ On remand OWCP shall combine the case records for this claim with the accepted prior claim under OWCP File No. xxxxxx166 and determine whether appellant has established that her disability for the period in question was causally related to either accepted employment injury.¹² Following such further development of the case as OWCP deems necessary, it shall issue a *de novo* decision.¹³

IT IS HEREBY ORDERED THAT the April 2, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for proceedings consistent with this order of the Board.

Issued: July 14, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹¹ *T.M.*, Docket No. 16-0343 (issued September 19, 2017).

¹² The Board also notes that OWCP's procedures provide that cases should be doubled when a new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body. *See supra* note 9 at Chapter 2.400.8(c)(1) (February 2000).

¹³ *D.R.*, Docket No. 18-1197 (issued April 30, 2020).