United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
and	)	**Docket No. 19-1611**
	)	**Issued: October 26, 2020**
U.S. POSTAL SERVICE, FORT MILL POST OFFICE, Fort Mill, SC, Employer	)	

Appearances:
Erik B. Blowers, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 24, 2019 appellant, through counsel, filed a timely appeal from a July 17, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Together with her appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated October 21, 2020, the Board denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 19-1611 (issued October 21, 2020).

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of total disability for the period October 13 through 31, 2018 causally related to her accepted August 8, 2017 employment injury.

FACTUAL HISTORY

On August 10, 2017 appellant, then a 47-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained injury to her head, neck, and spine on August 8, 2017 when her postal vehicle was hit head on by another vehicle while in the performance of duty. She indicated that her body jerked forward and backward injuring her neck and spine, and she hit her head on the dashboard. Appellant stopped work on August 8, 2017.

After development of the evidence, OWCP accepted appellant's claim for sprains of ligaments of the cervical, thoracic, and lumbar areas of the spine, cervical disc disorder with radiculopathy, and intervertebral disc disorder with radiculopathy of the lumbar spine. Appellant returned to light-duty work in a modified position. The position restricted her from lifting over 10 pounds, and engaging in bending/twisting or prolonged standing. OWCP paid appellant wage-loss compensation on the supplemental rolls for intermittent periods of disability from work between October 13, 2017 and July 24, 2018.

In an October 8, 2018 report, Dr. Eric B. Laxer, a Board-certified orthopedic surgeon, noted that appellant complained of pain in her neck, upper/lower back, left arm, and left leg which she associated with her employment-related August 8, 2017 vehicular accident. He noted that she reported that she recently fell and sustained a fracture of her left foot. In the physical examination portion of the report, Dr. Laxer observed that appellant's left foot was splinted and that she was using crutches and a wheelchair for ambulation.

Appellant stopped work on October 13, 2018 and, on October 23, 2018, she filed a notice of recurrence (Form CA-2a) alleging a recurrence of total disability, commencing on October 13, 2018, causally related to her accepted August 8, 2017 employment injury. She indicated that on October 8, 2018 an attending physician changed her work restrictions to include no jumping in and out of her postal vehicle and no delivering mail. Appellant asserted that, on October 12, 2018, the Postmaster at the employing establishment stated that she was "too much of a liability and told

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that following the July 17, 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.*

her to go home." She noted that she was off work awaiting authorization for surgery from OWCP.[5] In response to a portion of the Form CA-2a requesting that she describe all injuries, appellant suffered between the date she returned to work after the original injury and the date of the claimed recurrence, appellant indicated, "No additional injuries."

On October 25, 2018 the employing establishment offered appellant a new light-duty position as a modified rural carrier, a job which involved casing mail, answering telephones, filing, and assisting customers at the window. The physical requirements included lifting up to 10 pounds, reaching over the shoulder level with one piece of mail at a time, and alternating between sitting and standing for a half hour at a time for each action. On the same date, counsel indicated that appellant would not accept the offered position until her attending physician had reviewed it.

In a development letter dated October 30, 2018, OWCP requested that appellant submit additional factual and medical evidence in support of her recurrence claim. It afforded her 30 days to submit the requested evidence.

In response, appellant submitted an October 10, 2018 work status form report from Dr. Laxer who advised that appellant could return to modified-duty work on October 12, 2018 with restrictions of lifting/pushing/pulling up to 10 pounds, lifting up to 5 pounds to shoulder level, no overhead lifting, and no carrying mail. Dr. Laxer noted that appellant was able to case mail. In an October 18, 2018 report, Dr. Richard I. Park, a Board-certified anesthesiologist, advised that appellant reported injuring her left foot/ankle on an unspecified date and then slipping and injuring her right foot a week after the left foot injury. He noted that appellant's right foot was wrapped in a bandage.

Appellant filed a claim for compensation (Form CA-7) for disability for the period she was in leave without pay (LWOP) status from October 13 through 28, 2018. She continued to file CA-7 forms for disability for periods of LWOP subsequent to that period.

A November 1, 2018 work/school release form, by a staff member for Dr. Garath A. Maenpaa, a Board-certified orthopedic surgeon, indicated that appellant would be off work from November 1 through December 15, 2019. In a November 28, 2018 work/school release form, he noted that appellant was unable to lift, twist, turn, bend, drive, or squat because these actions might cause more damage to an existing injury. Dr. Maenpaa indicated that appellant was unable to return to work for at least 60 to 90 days.

In a December 3, 2018 report, Dr. Kenechukwu Ugokwe, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), noted his agreement with the need for fusion surgery at the C5-6 level, but not at the C6-7 level.

By decision dated December 11, 2018, OWCP denied appellant's claim for a recurrence of total disability, commencing on October 13, 2018, causally related to her accepted August 8, 2017 employment injury. It determined that she had not submitted sufficient medical evidence to establish that her employment-related condition worsened such that she could no longer perform

[5] The case record contains an October 23, 2018 request for authorization from Dr. Laxer for cervical spine fusion surgery at C5 through C7.

the duties of her light-duty assignment. OWCP further found that appellant failed to demonstrate that management withdrew her light-duty assignment such that she sustained a recurrence of total disability commencing October 13, 2018, or that she had restrictions during the claimed period of disability.

On January 9, 2019 appellant, through counsel, requested reconsideration of the December 11, 2018 decision. Counsel asserted that appellant was totally disabled commencing October 13, 2018 because her light-duty assignment had been withdrawn.

Appellant submitted several medical reports predating the claimed recurrence of total disability, including August 8, 2017 emergency room reports, an August 8, 2017 computerized tomography (CT) scan of the thoracic spine, a March 6, 2018 report of Dr. Seth L. Jaffe, an osteopath Board-certified in orthopedic surgery, and a June 28, 2018 magnetic resonance imaging (MRI) scan of the cervical spine.

In a December 31, 2018 report, Dr. Maenpaa advised that appellant had been under his care since shortly after her August 8, 2017 employment injury. He indicated that he examined appellant on November 1, 2018 and posited that the examination findings revealed a worsening of her employment-related cervical condition. Dr. Maenpaa advised that he then concluded that appellant needed to avoid lifting and repetitive activity. On January 17, 2018 OWCP advised appellant that it had granted authorization for cervical fusion surgery at the C5-6 level.

In a February 28, 2019 report, Dr. Laxer indicated that appellant was seen in his office on October 10, 2018 to receive ongoing care until cervical surgery was approved by OWCP. He noted that, at that time, he determined that she had a worsening of her cervical condition and believed that restricting her activities, including no engaging in repetitive activities and decreasing the amount of weight she could lift, was warranted. Dr. Laxer indicated that it was his understanding that the employing establishment sent appellant home as a result of these increased restrictions. He advised that he understood that Dr. Maenpaa determined that appellant was unable to continue to work due to increased pain from her August 8, 2017 injury and the fear of additional complications. Dr. Laxer noted, "I agree with that assessment and find that it was medically warranted for [appellant] to remain out of work from October 10, 2018 until her surgery is completed." He opined that she remained disabled due to concern about the worsening of her cervical injuries.

Appellant submitted a December 12, 2018 statement from a coworker who indicated that on October 12, 2018 appellant came to the employing establishment and had a meeting with the Postmaster. He indicated that, after the meeting, appellant "informed me that she was being sent home by the Postmaster because of her worsening medical condition."

By decision dated April 9, 2019, OWCP vacated the December 11, 2018 decision in part and modified the decision to reflect that appellant had submitted sufficient medical evidence to demonstrate that she had employment-related total disability commencing November 1, 2018 and

continuing.[6] However, it affirmed the December 11, 2018 decision in part to reflect that appellant had not established a recurrence of total disability for the period October 13 through 31, 2018 causally related to her accepted August 8, 2017 employment injury.

On May 8, 2019 appellant, through counsel, requested reconsideration of the April 9, 2019 decision. Counsel continued to argue that the employing establishment withdrew appellant's light-duty work effective October 13, 2018.

Appellant submitted several reports, dated between September 11, 2017 and May 13, 2019, from attending physicians, including Dr. Maenpaa, Dr. Glenn L. Scott, a Board-certified orthopedic surgeon, and Dr. Puneet Kumar Aggarwal, a Board-certified physical medicine and rehabilitation physician. A February 26, 2019 emergency room report addressed the treatment of burns that appellant received on her left trunk from a heating pad. In a June 24, 2019 report, Dr. Scott recommended that she undergo back surgery.

By decision dated July 17, 2019, OWCP denied modification of the April 9, 2019 decision.

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.[7] This term also means an inability to work because a 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.[8]

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.[9]

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

[6] OWCP noted that this determination was based on the reports of Dr. Maenpaa. It then paid appellant wage-loss compensation for total disability from work on the supplemental rolls effective November 1, 2018. Appellant received wage-loss compensation for total disability on the periodic rolls commencing April 28, 2019.

[7] 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[8] *See id.* A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force. *Id.*

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

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.[10] Where no such rationale is present, the medical evidence is of diminished probative value.[11]

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work.[12] As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.

ANALYSIS

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

Before OWCP and on appeal, counsel has argued that appellant established her claim for recurrence of total disability for the period October 13 through 31, 2018 because the Postmaster at her workplace told her to go home on October 12, 2018, thereby establishing the withdrawal of a light-duty assignment which was specifically designed to accommodate her employment-related physical limitations.[13] The Board finds that once appellant alleged that the offered light-duty employment position was withdrawn by the Postmaster, OWCP should have requested that the employing establishment confirm or deny in a statement from a knowledgeable supervisor as to the correctness of her assertion.

Further, in support of her recurrence claim, appellant submitted a February 28, 2019 report from Dr. Laxer who indicated that appellant was seen in his office on October 10, 2018 to receive ongoing care until cervical surgery was approved by OWCP. Dr. Laxer noted that, at that time, he determined that appellant had a worsening of her cervical condition and believed that restricting her activities, including not engaging in repetitive activities and decreasing the amount of weight she could lift, was warranted. He advised that he understood that Dr. Maenpaa determined that she was unable to continue to work due to increased pain from her August 8, 2017 employment injury and the fear of additional complications. Dr. Laxer noted, "I agree with that assessment and find that it was medically warranted for [appellant] to remain out of work from October 10, 2018

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

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

[12] *See D.W.*, Docket No. 19-1584 (issued July 9, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

[13] *See supra* note 8.

until her surgery is completed."[14] He opined that she remained disabled due to concern about the worsening of her cervical injuries.

The Board notes that proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter.[15] The Board finds that while Dr. Laxer's February 28, 2019 report is insufficient to meet appellant's burden of proof, it raises an uncontroverted inference of causal relation between her claimed recurrence of total disability for the period October 13 through 31, 2018 and her accepted August 8, 2017 employment injury. Further development of appellant's claim in therefore required.[16]

On remand, OWCP shall prepare a statement of accepted facts and refer appellant to an appropriate Board-certified specialist for a second opinion examination and an evaluation regarding whether appellant sustained a recurrence of total disability for the period October 13 through 31, 2018 causally related to her accepted August 8, 2017 employment injury. If the physician opines that appellant did not sustain an employment-related recurrence of disability during this claimed period, he or she must explain with rationale how or why the opinion differs from that of Dr. Laxer. Additionally, OWCP shall obtain a statement from a knowledgeable supervisor as to appellant's allegation that her light-duty employment position was withdrawn. Following any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[14] The Board notes that, on January 17, 2018, OWCP advised appellant that it had granted authorization for cervical fusion surgery at the C5-6 level. Dr. Maenpaa had determined that appellant had total disability commencing November 1, 2018 due to her worsening employment-related cervical condition and OWCP paid appellant wage-loss compensation for total disability from work on the supplemental rolls effective beginning November 1, 2018. She received wage-loss compensation for total disability on the periodic rolls commencing April 28, 2019. There is no indication in the case record that appellant has yet undergone the authorized fusion surgery.

[15] *See B.B.*, Docket No. 18-1321 (issued April 5, 2019).

[16] *See C.M.*, Docket No. 17-1977 (issued January 29, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the July 17, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: October 26, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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