

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

R.R., Appellant

and

**U.S. POSTAL SERVICE, PATTERSON
PROCESSING & DISTRIBUTION CENTER,
Kentwood, MI, Employer**

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**Docket No. 20-1338
Issued: April 16, 2021**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On June 26, 2020 appellant, through counsel, filed a timely appeal from a June 4, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the June 4, 2020 decision, appellant submitted additional evidence to OWCP. 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability for the period February 16 through May 11, 2018 causally related to her accepted July 7, 1998 employment injury.

FACTUAL HISTORY

On August 24, 1998 appellant, then a 35-year-old part-time flexible automation clerk, filed a traumatic injury claim (Form CA-1) alleging that on July 7, 1998 she sustained an injury in the form of right hand/forearm pain and swelling due to working approximately two hours into her shift while in the performance of duty. She stopped work on July 7, 1998 and returned to limited-duty work without wage loss shortly thereafter. OWCP initially accepted appellant's claim for right carpal tunnel syndrome, right lateral epicondylitis, right wrist sprain, tenosynovitis of the right thumb flexor tendon/hand/wrist, and exostosis of an unspecified site. It later expanded the accepted conditions to include reflex sympathetic dystrophy (RSD) of the right upper extremity. Appellant stopped work again on March 30, 1999 and underwent OWCP-authorized right carpal release and tenosynovectomy of the right thumb on that date. She returned to limited-duty work without wage loss on April 19, 1999. Appellant stopped work for intermittent periods between March 9, 2004 and December 13, 2005 and received appropriate wage-loss compensation on the supplemental rolls for this intermittent disability.

On November 12, 2010 appellant commenced working in the limited-duty position of service/distribution associate on a full-time basis. The position required her to handle articles weighing up to five pounds and to engage in repetitive motion with her left hand.

In a January 3, 2018 report, Dr. Thomas Basch, a Board-certified anesthesiologist, referenced appellant's RSD condition and described the stellate ganglion block injection he administered on her right side. On January 31, 2018 he indicated that appellant developed back and joint pain several years ago, but this had "always been overshadowed by her [RSD], her cardiac issues, and most recently the death of her grandson." In a February 12, 2018 report, Dr. Basch noted that appellant reported her right hand was more sensitive than usual and that it appeared a bit more reddened and mottled than usual.

Appellant stopped work on February 16, 2018.

In a March 1, 2018 report, Dr. Basch noted that appellant had a couple weeks off work "dealing with bad pain" and advised that he suspected "some of this is from her ongoing struggle with the death of her grandson." He indicated that he had asked appellant if she felt that it might be time to retire and noted, "Given her heart condition, her back problems, left shoulder problem, etc., I just wonder how much longer this severe right upper extremity pain can be endured without systemic complications." Dr. Basch diagnosed RSD/complex regional pain syndrome (CRPS) of the right upper extremity.

In a March 12, 2018 report, Dr. Basch reported that appellant's right upper extremity was "ludicrous, allodynic, and weak," but indicated that this was the usual presentation. He noted, "We talked a bit today about where she is, in terms of her long-term outlook, and I think we are in agreement that she is approaching the time where she will need to stop working." In a March 26, 2018 report, Dr. Basch indicated that, although appellant's right upper extremity pain had

escalated over the past few days, he was encouraged that her having been off work had kept the worst of the pain in check. He continued to diagnose RSD/CRPS of the right upper extremity.

In a March 28, 2018 work release note, Dr. Basch indicated that appellant had been completely incapacitated from work since February 15, 2018 and would continue to remain out of work due to a work-related injury until further notice. On March 29, 2018 he reported that appellant developed migraines, which were partially secondary to the muscle tension that was generated when she guarded her right upper extremity.

In an April 9, 2018 report, Dr. Basch indicated that appellant had ongoing pain from her work-related RSD/CRPS (type I) and noted that, on physical examination, her right hand was dusky and cyanotic, and her right upper extremity was stiff from the forearm down. Appellant's right fingers had perhaps 30 percent of their expected range of motion and she was unable to execute a power grip with her right hand. Dr. Basch noted that, over the past year, appellant's fingers had stiffened, her strength had decreased, and her dependence upon stellate blocks injections had increased. He expressed his belief that appellant had reached the point when retirement was necessary.

On May 2, 2018 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence of total disability commencing February 16, 2018 causally related to her accepted July 7, 1998 employment injury.⁴ She asserted that, since July 7, 1998, she experienced pain/swelling in her right upper extremity/hand and noted that the severity of her symptoms had increased such that she was unable to use her right hand. Appellant later filed a claim for compensation (Form CA-7) claiming wage-loss compensation for disability from work for the period February 16 through May 11, 2018 due to her July 7, 1998 employment injury.

In a May 2, 2018 development letter, OWCP requested that appellant submit additional evidence in support of her claim, including a physician's opinion supported by a medical explanation as to the relationship between the claimed recurrence of disability and the accepted July 7, 1998 employment injury. It provided a questionnaire for her completion, which posed questions regarding the circumstances of the claimed recurrence of disability. OWCP afforded appellant 30 days to respond.

Appellant subsequently submitted an April 9, 2018 letter from Dr. Basch who indicated that appellant had asked him to explain why her retirement from the employing establishment at this time was necessary. Dr. Basch discussed the conditions that appellant developed in 1998, including right-sided tendinitis and carpal tunnel syndrome. He indicated that, at the point he began treating appellant, she had probable RSD/CRPS (type I) of the right upper extremity. Dr. Basch noted that, over the years he treated her, appellant struggled not only with right upper extremity nerve pain, but also had to overuse her left upper extremity to make up for what her right upper extremity was unable to do. He advised that appellant had guarded her right upper extremity with her neck and shoulder musculature for so long that she developed tension and migraine headaches. Dr. Basch maintained that, despite appropriate medication, occupational therapy, and injections, appellant's condition had never entered a remission. Appellant's pain had slowly built up and reached a point where it interfered with both work and nonwork activities. Dr. Basch indicated that, over the past year, appellant's right upper extremity function had steadily

⁴ Appellant advised that she had been performing limited-duty work, which restricted her from lifting, pushing, and pulling more than five pounds and from engaging in repetitive work with her right hand.

deteriorated despite transient reductions in pain from injection treatment. He reported that, during the April 9, 2018 physical examination, the range of motion of appellant's right hand and fingers was limited to the point that repetitively grasping and manipulating even light items was impossible. Appellant's left shoulder, elbow, and wrist were quite sore because she had to use them to take up the slack for the right upper extremity. Dr. Basch expressed his opinion that it was time for appellant to retire. He indicated that appellant had become overwhelmed by the declining usefulness of her right upper extremity and by the recent deterioration of her left upper extremity's ability to compensate.

In an April 23, 2018 report, Dr. Basch noted that appellant had considerable allodynia, reddening, and swelling in her right hand and forearm, and indicated that she had pushed things beyond what would be physically recommended over the past year. In a May 7, 2018 report, he advised that, a few months prior, it became apparent to him and appellant that continuing to work was going to cause physical damage to appellant's areas of overuse, including her shoulders, elbows, and wrists. Dr. Basch noted that they both agreed that she should stop working on a permanent basis. On May 21, 2018 he reported that, on physical examination, appellant was unable to execute a power grip with her right hand.

By decision dated June 4, 2018, OWCP denied appellant's claim, finding that she had not submitted sufficient medical evidence to establish a recurrence of disability for the period February 16 through May 11, 2018 causally related to her accepted July 7, 1998 employment injury. It concluded, "[Y]our claim for recurrence is denied because you have not established that you are disabled/further disabled due to a material change/worsening of your accepted work-related conditions."

On June 14, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Appellant submitted a May 31, 2018 letter from Dr. Basch who noted that the purpose of the letter was to clarify appellant's lost work/disability for the period February 16 through May 11, 2018 and continuing. He advised that appellant sustained RSD/CRPS (type 1) at work in 1998, and noted that her right hand was dusky and cyanotic, and her right upper extremity was stiff from the elbow down. Appellant's right fingers had perhaps 30 percent of their expected range of motion and she was unable to execute a power grip with her right hand. Dr. Basch reported that appellant had severe allodynia from the elbow to the fingertips of her right upper extremity, but she could oppose her right thumb and pinky finger with effort. He noted that, over the years he treated her, appellant struggled not only with right upper extremity nerve pain, but also had to overuse her left upper extremity to make up for what her right upper extremity would not do. Dr. Basch advised that appellant had guarded her right upper extremity with her neck and shoulder musculature for so long that she developed tension and migraine headaches. He maintained that, despite physical therapy, occupational therapy, and injections, appellant's pain had reached a point where it interfered with both work and nonwork activities. Dr. Basch indicated that appellant's right upper extremity function had deteriorated despite transient reductions in pain from injection treatment. He reported that the range of motion of appellant's right hand and fingers was limited to the point that her ability to grasp and manipulate even light items had deteriorated. Appellant's left shoulder, elbow, and wrist were quite sore because she had to use them to take up the slack for the right upper extremity. Dr. Basch indicated that the declining usefulness of appellant's right upper extremity and the continued deterioration of her left upper extremity's ability to compensate overwhelmed appellant and left her unable to work. He advised that appellant's functionality continued to decline despite

her high pain tolerance. Dr. Basch indicated that her left shoulder, elbow, and wrist remained painful because of the overuse caused by the CRPS of her right upper extremity.

Appellant submitted reports dated June 4 and 18, July 2, 16, and 30, August 13, September 6 and 20, October 3 and 18, November 1, 12, and 29, and December 13 and 27, 2018, and January 9 and 24, 2019, from Dr. Basch who diagnosed RSD/CRPS (type 1) of the right upper extremity.

On December 19, 2018 OWCP referred appellant for a second opinion examination to Dr. Robert S. Schaefer, a Board-certified orthopedic surgeon. The primary purpose of the referral was to assess appellant's use of opioid medication, rather than to evaluate any period of claimed work-related disability.

By decision dated January 29, 2019, OWCP's hearing representative set aside the June 4, 2018 decision and remanded the case to OWCP for further development of the medical evidence. The hearing representative found that the submission of Dr. Basch's April 9 and May 31, 2018 letters required further development of appellant's claim for a work-related recurrence of disability for the period February 16 through May 11, 2018. The hearing representative directed OWCP to review any second opinion report produced by Dr. Schaefer⁵ for an opinion on work-related disability for the period February 16 through May 11, 2018, and to request a supplemental report if his report did not address the matter.⁶ The hearing representative also directed OWCP, after carrying out any further development deemed necessary, to issue a decision regarding appellant's disability claim.

Appellant submitted reports, dated February 7 and 21, March 7 and 21, April 4 and 18, and May 2 and 16, 2019, from Dr. Basch who continued to diagnose RSD/CRPS of the right upper extremity.

On March 14, 2019 OWCP received a January 8, 2019 report from Dr. Schaefer who indicated that appellant continued to have work-related RSD/CRPS of the right upper extremity. The report primarily addressed appellant's use of opioid medication.

By decision dated June 10, 2019, OWCP denied appellant's claim that she sustained a recurrence of disability for the period February 16 through May 11, 2018 causally related to her accepted July 7, 1998 employment injury.⁷

On June 19, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

⁵ Appellant attended a second opinion examination with Dr. Schaefer on January 8, 2019, but OWCP had not received a report from Dr. Schaefer by the time the January 29, 2019 decision was issued.

⁶ OWCP's hearing representative also directed OWCP to develop the question of whether appellant sustained a left upper extremity condition as a consequence of her accepted right upper extremity conditions. The case record does not contain a final decision of OWCP regarding this matter and it is not currently before the Board. *See* 20 C.F.R. § 501.2(c).

⁷ OWCP noted that Dr. Schaefer's January 8, 2019 report addressed appellant's use of opioid medication. There is no evidence in the case record that OWCP requested a supplemental report from Dr. Schaefer regarding work-related disability.

Appellant submitted reports dated May 30, June 13 and 27, July 25, August 8, September 5 and 19, October 3, 17, and 31, November 14 and 27, and December 11, 2019, from Dr. Basch who diagnosed RSD/CRPS (type 1) of the right upper extremity.

In an October 17, 2019 report, Dr. Basch indicated that, by 2018, the chronic pain from the work-related RSD/CRPS (type 1) of appellant's right upper extremity made it impossible for appellant to continue to work. He indicated that RSD/CRPS (type 1) was a permanent injury to the nervous system with no cure. Dr. Basch advised that appellant sought early retirement on medical grounds. He maintained that appellant worked very hard and noted, "Everyone has a limit, and [appellant] has reached hers."

By decision dated December 20, 2019, OWCP's hearing representative affirmed the June 10, 2019 decision.

On March 11, 2020 appellant, through counsel, requested reconsideration of the December 20, 2019 decision.

Appellant submitted reports dated December 17 and 23, 2019 and January 6 and 20, February 3 and 17, and March 2 and 16, 2020, from Dr. Basch who diagnosed RSD/CRPS (type 1) of the right upper extremity. In a February 2, 2020 report, Dr. Basch discussed the nature of the condition of RSD/CRPS (type 1) and detailed appellant's medication regimen.

By decision dated June 4, 2020, OWCP denied modification of the December 20, 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.⁸ 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. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.⁹

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.¹⁰

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

⁹ *Id.*

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

An employee who claims a recurrence of disability due to an accepted work-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 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.¹¹ Where no such rationale is present, the medical evidence is of diminished probative value.¹²

When an employee who is disabled from the job he or she held when injured on account of work-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.¹³ 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 this case is not in posture for decision.

Appellant submitted a May 31, 2018 letter from Dr. Basch who noted that the purpose of the letter was to clarify appellant's lost work/disability for the period February 16 through May 11, 2018, the period of the claimed recurrence of disability in the present case. Dr. Basch advised that appellant sustained RSD/CRPS (type 1) at work in 1998, and noted that, due to this condition, her right upper extremity was stiff from the elbow down, her right fingers had perhaps 30 percent of their expected range of motion, and she was unable execute a power grip with her right hand. Dr. Basch reported that appellant also had severe allodynia from the elbow to the fingertips of her right upper extremity due to RSD/CRPS (type 1). He noted that, over the years he treated her, appellant struggled not only with right upper extremity nerve pain, but also had to overuse her left upper extremity to make up for what her right upper extremity would not do. Dr. Basch advised that appellant had guarded her right upper extremity with her neck and shoulder musculature for so long that she developed tension and migraine headaches. He maintained that, despite physical therapy, occupational therapy, and injections, appellant's pain had reached a point where it interfered with both work and nonwork activities. Dr. Basch indicated that appellant's right upper extremity function had deteriorated despite transient reductions in pain from injection treatment. He reported that the range of motion of appellant's right hand and fingers was limited to the point that her ability to grasp and manipulate even light items had deteriorated. Dr. Basch indicated that the declining usefulness of appellant's right upper extremity and the continued deterioration of her left upper extremity's ability to compensate overwhelmed appellant and left her unable to work.

In a March 28, 2018 work release note, Dr. Basch advised that appellant had been completely incapacitated from work since February 15, 2018 and would continue to stay off work

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

¹² *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

¹³ *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).

due to a work-related injury until further notice. In an April 9, 2018 letter, he provided an assessment of appellant's limitations due to work-related RSD/CRPS that was similar to the assessment provided in his May 31, 2018 letter. In an October 17, 2019 report, Dr. Basch indicated that, by 2018, the chronic pain from the work-related RSD/CRPS of appellant's right upper extremity made it impossible for appellant to continue to work.

The Board notes that proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter.¹⁴ The Board finds that while Dr. Basch's reports are insufficient to meet appellant's burden of proof, they raise an uncontroverted inference of causal relationship between her claimed recurrence of disability for the period February 16 through May 11, 2018 and her accepted July 7, 1998 employment injury. Further development of appellant's claim is therefore required.¹⁵

On remand, OWCP shall prepare a statement of accepted facts and request that Dr. Schafer supply a supplemental opinion regarding whether she sustained a recurrence of disability for the period February 16 through May 11, 2018 causally related to her accepted July 7, 1998 employment injury. If the Dr. Schafer opines that appellant does not have work-related disability for the claimed period, he must explain with rationale how or why the opinion differs from that of Dr. Basch. If Dr. Schafer is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, together with a SOAF and a list of specific questions, to a second opinion physician in the appropriate field of medicine to resolve the issue of appellant's permanent impairment.¹⁶ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's claim for a work-related recurrence of disability.

CONCLUSION

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

¹⁴ See *B.B.*, Docket No. 18-1321 (issued April 5, 2019).

¹⁵ See *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁶ See *F.K.*, Docket No. 19-1804 (issued April 27, 2020).

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2020 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: April 16, 2021
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