

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

M.W., Appellant)

and)

U.S. POSTAL SERVICE, MONTICELLO POST)
OFFICE, Williamsburg, VA, Employer)

**Docket No. 20-0881
Issued: January 13, 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
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 16, 2020 appellant, through counsel, filed a timely appeal from a January 30, 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 January 30, 2020 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish entitlement to intermittent wage-loss compensation for the period December 1, 2018 through November 22, 2019, causally related to her accepted September 22, 2018 employment injury.

FACTUAL HISTORY

On October 2, 2018 appellant, then a 42-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on September 22, 2018 she sustained sacroiliac (SI) joint pain, inguinal pain, and hip/thigh and lower back pain when she pulled and lifted a package from her vehicle, felt a pop and sharp pain up her thigh and back while in the performance of duty. She was initially treated in urgent care and released to sedentary-duty work beginning September 27, 2018.

In a November 26, 2018 progress report, Dr. Zachary Tan, a Board-certified orthopedic surgeon, noted appellant's complaints of low back pain that developed two months before that date. He reviewed appellant's history and indicated that approximately four years' prior appellant underwent lumbar laminectomy surgery with annular repair. Upon examination of appellant's lumbar spine, Dr. Tan observed marked tenderness and moderate reduced range of motion (ROM). He diagnosed lumbar strain. Dr. Tan reported that appellant could work with restrictions of carrying up to 15 pounds and completed a duty status report (Form CA-17).

In a December 24, 2018 progress report, Dr. Tan recounted that appellant's condition had improved, but "gets aggravated by lifting at work." Examination of appellant's lumbar spine revealed marked tenderness upon palpation and moderate reduced ROM. Dr. Tan diagnosed lumbar strain. He increased her work restrictions to no lifting.

On January 15, 2019 appellant began physical therapy treatments and submitted physical therapy treatment records dated January 15, 21, 23, 28, and 30, 2019 and February 4, 6, and 11, 2019.

In a January 21, 2019 progress report, Dr. Tan reviewed appellant's history and noted her complaints of continued back pain with left-sided radicular symptoms. He conducted a physical examination and diagnosed lumbar strain and lumbar radiculopathy. Dr. Tan reported "work restrictions at 10 pounds to remain."

Dr. Tan also completed a January 21, 2019 attending physician's report (Form CA-20). He diagnosed degenerative disc disease with lumbar radiculopathy. Dr. Tan indicated that appellant was partially disabled beginning October 22, 2018 and advised that appellant could work with restrictions of lifting up to 10 pounds and no prolonged standing or bending.

A January 25, 2019 lumbar spine magnetic resonance imaging (MRI) scan report revealed mild posterior annular bulge and small central disc protrusion with a posterior annular fissure at L4-5 and mild-to-moderate left foraminal narrowing with mild nerve root compression at L5-S1.

In a February 18, 2019 progress report and Form CA-17 report, Dr. Tan noted his review of appellant's recent MRI scan and provided examination findings. He diagnosed lumbar strain and lumbar radiculopathy. Dr. Tan noted that appellant could return to work with restrictions of lifting and carrying up to 10 pounds.

By decision dated February 26, 2019, OWCP accepted appellant's claim for lower back strain.

In reports and Form CA-17 reports dated March 18 and April 15, 2019, Dr. Tan noted appellant's complaints of continued back pain aggravated by bending, carrying heavy objects, climbing stairs, lifting, prolonged standing, and walking long distances. He reviewed appellant's history and provided examination findings. Dr. Tan diagnosed lumbar strain and lumbar radiculopathy. He recommended that appellant work with restrictions of lifting up to 10 pounds.

OWCP received additional Form-CA-17 reports dated December 29, 2018 through March 18, 2019 and a Form CA-20 report dated November 6, 2018, which indicated that appellant could work with restrictions.

Appellant also submitted a December 24, 2018 medical note by Dr. Tan who noted that appellant also "missed work due to extreme pain" on December 15, 20, 21, 22, and 24, 2018.

On May 16, 2019 appellant filed a claim for intermittent wage-loss compensation (Form CA-7) for the period December 1, 2018 through May 10, 2019.⁴ On the reverse side of the claim form, D.W., an employing establishment human resource specialist, confirmed that appellant was claiming 287.27 hours. She also reported "medical restrictions -- no work available."

In attached time analysis forms (Form CA-7a), appellant claimed 75.74 hours of leave without pay (LWOP) for December 1, 3, 4, 8, 10, 11, 14, 15, 20, 21, 26, 27, 28, 29, and 30, 2018; 43.62 hours of LWOP for January 4, 19, 21, 25, 26, 28, 29, and 30, 2019; 22.34 hours of LWOP for February 1, 4, 12, and 25, 2019; 71.67 hours of LWOP for March 1, 11, 12, 18, 19, 20, 22, 25, 26, and 30, 2019; 41.87 hours of LWOP for April 1, 3, 8, 15, 16, 19, and 23, 2019; and 31.94 hours of LWOP for May 1, 6, 7, and 10, 2019. She indicated that her reason for using leave was "limited duty, disabled, Dr. appts, physical therapy."

In a May 13, 2019 progress report and Form CA-17 report, Dr. Tan noted that appellant was evaluated for intermittent back pain that had become more frequent. He reviewed appellant's history and noted lumbar examination findings of trigger point tenderness and moderate, reduced ROM. Dr. Tan diagnosed lumbar strain and lumbar radiculopathy. He recommended that appellant be restricted to the pushing or pulling up to five pounds.

Appellant submitted a series of urgent care work status notes dated September 23, 2018 through April 30, 2019. The notes indicated that appellant was treated for complaints of constant lower back pain and released to work with restrictions.

OWCP also received an emergency department work excuse note by Dr. Shannon M. McDonnell, a Board-certified emergency medicine specialist, who indicated that appellant was

⁴ Appellant also indicated that she was receiving earnings from employment with Lyft doing ride share work daily as needed.

seen in the emergency department on March 16, 2019 and requested that she be excused from work on that date.⁵

In a May 21, 2019 letter, OWCP requested that the employing establishment verify which dates listed on the CA-7a forms were for limited duty and which dates were for medical appointments.

On June 5, 2019 the employing establishment responded to OWCP's development letter and provided a list of dates of appellant's "unscheduled call outs." D.W., a human resource specialist for the employing establishment, also indicated on the CA-7a forms dated June 4, 2019 that there was "no work" for the dates of December 1, 3, 4, 8, 10, 11, 14, 15, 20, 21, 26, 27, 28, 29, and 30, 2018; January 4, 19, 26, and 29, 2019; February 1, 4, 13, and 25, 2019; March 1, 11, 12, 18, 19, 20, 22, 25, 26, and 30, 2019; April 1, 3, 15, 16, 19, and 23, 2019; and May 1, 6, 7, 10, 14, 15, 20, 21, 22, 24, 2019. D.W. reported that appellant had doctor's appointments or physical therapy on January 21, 25, 28, and 30, 2019; and May 13, 2019.

On June 13, July 18, and August 15, 2019 appellant additionally filed Form CA-7 reports requesting intermittent wage-loss compensation for the period May 25 through August 2, 2019.⁶ On the reverse side of the claim form, the employing establishment confirmed that appellant had claimed 60.5 hours of LWOP. In an attached Form CA-7a, appellant claimed 30.24 hours of LWOP for May 25, 27, 28, and 29, 2019; 45.34 hours of LWOP for June 3, 4, 5, 7, 8, 11, 24, and 25, 2019; 33.16 hours of LWOP for July 12, 15, 17, 19, 22, 24, 26, and 30, 2019; and 4.13 hours of LWOP for August 2, 2019. She indicated that her reason for using leave was "no work." Appellant claimed 2.4 hours of LWOP on June 10, 2019 due to a doctor's appointment and 20.6 hours of LWOP on June 22, 27, 28, and 29, 2019 due to "called out." In the Form CA-7a dated August 15, 2019, appellant claimed 4.16 hours of LWOP on July 8, 2019 for a doctor's appointment and 8.29 hours of LWOP on July 13 and 23, 2019 due to "called out." C.W., a human resource specialist for the employing establishment, reported that there was no medical evidence provided for call-outs.

Appellant continued to receive medical treatment from Dr. Tan for her back pain and submitted progress reports and Form CA-17 reports dated June 10 and July 8, 2019. Dr. Tan provided examination findings and diagnosed lumbar strain and lumbar radiculopathy. He indicated that appellant could work with restrictions of lifting or pulling up to 10 pounds.

In a July 18, 2019 development letter, OWCP informed appellant that it received her claim for wage-loss compensation for the period beginning December 1, 2018. It advised her that the evidence submitted was insufficient to establish her claim and requested that she submit additional evidence to establish that she was unable to work modified duty during the period claimed due to her September 22, 2018 employment injury. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant submitted a July 30, 2019 physical therapy treatment record.

⁵ Appellant provided a printout of appellant's physical therapy appointments, which indicated that appellant had physical therapy appointments on January 15, 21, 23, 28, and 30, 2019, February 4, 6, 11, 18, and 27, 2019, and March 11 and 13, 2019.

⁶ Appellant also indicated that was receiving earnings from employment working in food delivery daily as needed.

By decision dated August 20, 2019, OWCP denied appellant's claim for intermittent wage-loss compensation for the period beginning December 1, 2018.

Appellant continued to receive physical therapy treatment and submitted records dated August 12 and 16, 2019.

Appellant additionally filed CA-7 forms requesting intermittent wage-loss compensation for the period August 3 through September 27, 2019.⁷

OWCP received additional progress reports and Form CA-17 reports dated September 18, October 16, and 21, 2019 by Dr. Tan who recounted that appellant was evaluated for low back pain. He provided examination findings and diagnosed lumbar strain and lumbar radiculopathy. Dr. Tan indicated that appellant could work with restrictions of lifting and carrying up to 10 pounds. He also referred appellant for continued physical therapy treatment.

In an October 10, 2019 Form CA-20 report, Dr. Tan noted the September 22, 2018 employment injury and reported diagnoses of lumbar strain and lumbar radiculopathy. He indicated that appellant was totally disabled from June 27 to 29, 2019; July 1, 13, and 23, 2019; and September 9, 17, and 18, 2019. Dr. Tan also reported a period of partial disability from September 18 through October 16, 2019.

On November 1, 2019 appellant requested reconsideration. She described the September 22, 2018 employment injury and the difficulties she had in filing claim forms for continuing wage-loss compensation payments. Appellant asserted that she had been in tremendous pain since the date of injury and had to resort to taking a second job in order to make her minimum payments on her bills. She alleged that she had done everything asked of her by OWCP and submitted all the required documents.

In an October 25, 2019 Form CA-20 report, Dr. Tan noted the date of injury of September 22, 2018 and diagnoses of lumbar strain and radiculopathy. He reported that appellant was out of work on November 17, 19, and 23, 2018; December 15, 20, 21, 22, and 24, 2018; June 27 through 29, 2019; July 1, 13, and 23, 2019; and September 9, 17, and 18, 2019.

In an October 30, 2019 urgent care work status note and Form CA-17 report, Larry Washburn, a physician assistant, noted diagnoses of low back pain and lumbar radiculopathy. He reported that appellant could work "desk work only."

Appellant submitted an April 30, 2019 Form CA-17 report by a nurse practitioner, which noted that appellant could work with restrictions and a Referral to Reasonable Accommodation Committee form.

On November 5, 2019 appellant accepted a full-time, modified job offer as a rural carrier associate.

⁷ On the CA-7a forms, appellant claimed 27.66 hours of LWOP on August 3, 21, 23, 26, 27, and 30, 2019 and 5.54 hours of LWOP on September 17, 2019. She indicated that her reason for using leave was "called out." Appellant claimed 25.02 hours of LWOP on August 5, 6, 9, 13, 16, and 20, 2019 and 22.16 hours of LWOP on September 16, 25, 26, and 27, 2019. She indicated that her reason for using leave was "scheduled off." Appellant claimed 5.54 hours of LWOP on September 23, 2019 for a doctor's appointment.

On November 17 and December 5, 2019 appellant additionally filed CA-7 forms requesting intermittent wage-loss compensation for the period October 26 through November 22, 2019.⁸

Appellant submitted additional progress reports and Form CA-17 reports dated November 18 and December 16, 2019, by Dr. Tan who reviewed appellant's history and noted lumbar examination findings of markedly reduced and marked pain on ROM. He diagnosed lumbar strain and lumbar radiculopathy. Dr. Tan reported that appellant could work with restrictions of no lifting or carrying and "desk work only."

A November 20, 2019 lumbar spine MRI scan report revealed postoperative findings with suspected moderate recurrent left disc extrusion at L5-S1 and mild annular bulging with small annular fissure at L4-5.

In a December 11, 2019 Form CA-20 report, Dr. Tan noted the date of injury of September 22, 2018 and diagnoses of lumbar strain and lumbar radiculopathy. He indicated that appellant was partially disabled beginning November 27, 2019. Dr. Tan reported that appellant could work with restrictions of lifting and pulling up to 10 pounds.

By decision dated January 30, 2020, OWCP denied modification of the August 20, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁹ has the burden of proof to establish the essential elements of his or her claim.¹⁰ The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.¹¹ 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.¹² Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.¹³

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

⁸ On the CA-7a forms, appellant claimed 24.12 hours of LWOP on October 26, 28, and 30, 2019; 16.14 hours of LWOP on November 6, 11, and 18, 2019. She indicated that her reason for using leave was "no work." Appellant claimed 16.82 hours of LWOP on November 1, 2, and 4, 2019. She indicated that her reason for using leave was "doctor removed me." Appellant claimed 11.75 hours of LWOP on November 11 and 18, 2019. She noted that her reason for using leave was "scheduled off."

⁹ *Supra* note 2.

¹⁰ *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

¹¹ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

¹² *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

¹³ *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹⁴

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 establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden of proof, 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.¹⁵ This burden of proof includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.¹⁶ Where no such rationale is present, the medical evidence is of diminished probative value.¹⁷

OWCP's procedures provide that wages lost for compensable medical examinations or treatment may be reimbursed.¹⁸ A claimant who has returned to work following an accepted injury or illness may need to undergo examination or treatment and such employee may be paid compensation for wage loss while obtaining medical services and for a reasonable time spent traveling to and from the medical provider's location.¹⁹ Wage loss is payable only if the examination, testing, or treatment is provided on a day which is a scheduled workday and during a scheduled tour of duty. Wage-loss compensation for medical treatment received during off-duty hours is not reimbursable.²⁰ The evidence should establish that a claimant attended an examination or treatment for the accepted work injury on the dates claimed in order for compensation to be payable.²¹ For a routine medical appointment, a maximum of four hours of compensation may be allowed. However, longer periods of time may be allowed when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain the medical care. The claims for wage-loss should be considered on a case-by-case basis.²²

¹⁴ *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

¹⁵ *S.F.*, Docket No. 19-1735 (issued March 12, 2020); *J.B.*, Docket Nos. 18-1752, 19-0792 (issued May 6, 2019); *C.G.*, Docket No. 16-1503 (issued May 17, 2017); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁶ *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

¹⁷ *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Wages Lost for Medical Examination or Treatment*, Chapter 2.901.19 (February 2013).

¹⁹ *Id.* at Chapter 2.901.19.a.

²⁰ *Id.* at Chapter 2.901.19.a(2).

²¹ *Id.* at Chapter 2.901.19.a(3).

²² *Id.* at Chapter 2.901.19.c.

ANALYSIS

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

OWCP accepted appellant's claim for a lumbar strain due to a September 22, 2018 employment injury. The record reflects that appellant was released to sedentary-work only beginning September 27, 2018. On May 16, 2019 appellant began to file CA-7 forms claiming wage-loss compensation for intermittent periods of disability beginning December 1, 2018. In the attached CA-7a forms, appellant indicated that her reason for using leave was because there was "no work" on specific dates from December 1, 2018 through May 24, 2019 and from October 26 through November 18, 2019. A human resource specialist for the employing establishment certified that the time analysis forms were correct. She also reported "medical restrictions -- no work available."

The Board finds that the factual evidence of record is insufficient to determine whether appellant is claiming wage-loss compensation due to a withdrawal of her light-duty position or because of a change in her accepted September 22, 2018 employment injury.²³ As noted above, OWCP's regulations allow for a claimant to establish a recurrence of disability under either scenario.²⁴ Accordingly, the evidence of record must be fully developed so that it contains accurate information regarding appellant's claim in order to determine whether she was unable to work on any of the claimed dates, because of a change or withdrawal of her limited-duty assignment due to an employment injury or because of a change and worsening of her accepted September 22, 2018 employment injury.²⁵

Furthermore, in June 4 and July 19, 2019 CA-7a forms, appellant indicated that she had doctor appointments or physical therapy on January 21, 25, 28, and 30, 2019, May 13, June 10, and July 8, 2019. In a December 4, 2019 CA-7a form, she also claimed five hours of LWOP on November 18, 2019 and noted that her reason for using leave was "scheduled off." The record also contains evidence documenting that she had a medical appointment or physical therapy treatment on the specific dates claimed. As noted above, OWCP's procedures provide that wages lost for compensable medical examinations or treatment may be reimbursed.²⁶ OWCP, however, further denied appellant's claims for compensation for intermittent periods of disability without addressing whether she was entitled to wage-loss compensation for the medical examination or treatment.

Is it well established that, proceedings under FECA are not adversarial in nature and, while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.²⁷

²³ See *L.F.*, Docket No. 19-0519 (issued October 24, 2019); see also *M.S.*, Docket No. 18-0130 (issued September 17, 2018).

²⁴ *Supra* notes 14 and 15.

²⁵ See *D.M.*, Docket No. 18-0527 (issued July 29, 2019); *J.G.*, Docket No. 17-0910 (issued August 28, 2017); *M.A.*, Docket No. 16-1602 (issued May 22, 2017).

²⁶ *Supra* note 17.

²⁷ *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

Accurate information regarding whether appellant's limited-duty assignment was available on specific dates during the claimed period is essential to determine whether she sustained a recurrence of total disability.²⁸ This evidence is of the character normally obtained from the employing establishment and is more readily accessible to OWCP than to her.²⁹ On remand, OWCP shall request that the employing establishment furnish documentation clarifying when appellant began to work modified duty and whether her modified-duty assignment was available or had been withdrawn for the specific dates during the claimed period. It shall further obtain the necessary information to determine whether reimbursement shall be allowed for attendance at medical appointments. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 13, 2021
Washington, DC

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

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

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

²⁸ See *K.T.*, Docket No. 17-0009 (issued October 8, 2019); *Y.R.*, Docket No. 10-1589 (issued May 19, 2011).

²⁹ *J.T.*, Docket No. 15-1133 (issued December 21, 2015); *J.S.*, Docket No. 15-1006 (issued October 9, 2015).