

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability, commencing April 8, 2015, causally related to her accepted January 8, 2014 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On January 16, 2014 appellant, then a 25-year-old temporary police officer,⁵ filed a traumatic injury claim (Form CA-1) alleging that on January 8, 2014 she sustained severe left foot pain due to walking approximately three-quarters of a mile in work gear while in the performance of duty. She stopped work on January 8, 2014 and returned on January 16, 2014. OWCP accepted the claim for left plantar fibromatosis and subsequently expanded acceptance of the claim to include left lower limb and left foot/ankle reflex sympathetic dystrophy (RDS).

On February 9, 2015 Dr. Joseph Agostinelli, a treating podiatrist, released appellant to return to sedentary work.

Appellant returned to a full-time modified job as a police officer with restrictions on March 3, 2015.

On April 8, 2015 Dr. Agostinelli placed appellant off work until further notice.

By notice dated May 13, 2015, OWCP related that appellant had returned to a modified-duty job as a police officer on March 3, 2015, but stopped work again on April 8, 2015. It advised her that the modified police officer position constituted suitable work, and also advised her of the provisions of 5 U.S.C. § 8106(c) for terminating wage-loss compensation and entitlement to a schedule award upon abandonment of suitable work. OWCP also informed appellant of her right to file a claim for a recurrence of disability (Form CA-2a). It afforded her 30 days to submit additional evidence or argument. No response was received.

OWCP, in a letter dated June 17, 2015, notified appellant that her reasons for abandoning the position were not valid and provided her with an additional 15 days to report to the position, or her wage-loss compensation and entitlement to schedule award benefits would be terminated. It advised her that the position remained available.

By decision dated July 29, 2015, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award effective, that date, based on her abandonment of suitable work.

⁴ Docket No. 18-0978 (issued September 6, 2019).

⁵ Appellant was hired as term employee with her term set to expire on May 20, 2016. The employing establishment removed her from employment, effective April 30, 2016, due to her inability to perform the essential functions of her position.

On August 3, 2015 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 17, 2016.

By decision dated April 28, 2016, the hearing representative found that, at the time of the July 29, 2015 decision, OWCP had met its burden of proof to terminate appellant's compensation pursuant to 5 U.S.C. § 8106(c) for abandonment of suitable work, effective July 29, 2015. However, the representative found that further medical development was required regarding appellant's work stoppage on April 8, 2015. The hearing representative instructed OWCP to address appellant's work capacity and whether she abandoned the modified position.

On May 12, 2016 appellant, through counsel, requested reconsideration of the hearing representative's April 28, 2016 decision.

On September 28 and October 12, 2016 OWCP referred appellant for a second opinion evaluation with Dr. Roman Kesler, an osteopathic physician specializing in neurology, for an evaluation of her accepted conditions, whether they had resolved, her work restrictions, and whether she was totally disabled from performing her modified-duty position beginning April 8, 2015. In a report dated November 9, 2016, Dr. Kesler, concluded that her complex regional pain syndrome (CRPS)/RSD condition had not resolved, would worsen, and was permanent. As to the diagnosis of plantar fibromatosis, he deferred to a podiatrist. Dr. Kesler opined that on the date appellant stopped work, April 8, 2015, that she was not performing any duties which would have aggravated or caused the diagnosed conditions to cause total disability. He opined that she was capable of performing the offered position as long as it was sedentary.

On January 27, 2017 OWCP referred appellant to Dr. Scott Rickoff, a podiatrist, for an opinion as to whether she continued to have residuals and disability due to the accepted left plantar fibromatosis. He was also asked to provide an opinion as to whether her work duties on April 8, 2015 caused or aggravated her accepted conditions such that she was totally disabled. Dr. Rickoff, in a report dated February 16, 2017, diagnosed plantar fascial fibromatosis, left foot pain, and left lower limb CRPS. As to appellant's work capacity, he concluded that appellant was unable to bear weight on her left foot and leg, but was capable of sitting two hours in appropriate circumstances.

By decision dated March 31, 2017, OWCP denied wage-loss compensation for the period April 8 to July 29, 2015. It noted that, both Dr. Kessler and Dr. Rickoff concluded that, while appellant's condition had worsened, she could have worked in the modified position offered to her. OWCP further noted that the remand order did not vacate the section 8106(c) termination so she that was not entitled to wage-loss compensation or a schedule award due to her refusal of a suitable position. It also concluded that both second opinion physicians determined that appellant's abandonment of the modified position was not warranted.

On April 9, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 10, 2017.

In an April 17, 2017 report, Dr. Agostinelli disagreed with Dr. Kessler's opinion that appellant had been capable of performing the duties of the modified position in March/April 2015. He indicated that she had not been released to return to work in February 2015 and that the March 2015 return to a modified position was a clerical error on the part of his office. Dr. Agostinelli opined that, following appellant's return to a modified position in February 2015, she sustained a worsening of her condition which rendered her totally disabled from performing

the duties of the modified position. Moreover, he opined that the modified position she held was outside of her work restrictions. Dr. Agostinelli concluded that appellant had been totally disabled on and after March 2015 due to her RSD condition.

By decision dated December 22, 2017, OWCP's hearing representative affirmed the March 31, 2017 decision denying appellant's recurrence claim for the period April 8 to July 29, 2015.

On April 9, 2018 appellant, through counsel, appealed to the Board. By decision dated September 6, 2019, the Board found the case not in posture for a decision.⁶ The Board found that, as OWCP undertook development of evidence, it should have procured medical evidence regarding appellant's work capacity and ability to perform the modified position. The Board remanded the case to OWCP for further development of the evidence to determine whether appellant was disabled from the modified position offered by the employing establishment commencing April 8, 2015.

On October 9, 2019 OWCP referred appellant for a second opinion evaluation with Dr. Mohamed Kamel H. Elzawahry, Board-certified in internal medicine neurology, and vascular neurology, for an opinion on her ability to perform the duties of the modified job as of April 8, 2015. The statement of accepted facts noted that the limited-duty position was primarily sedentary with duties of issuing base entry passes for individuals and vehicles, conducting background checks on contractors, requesting access proper identification credentials prior to entry for people requesting access to the installation, verifying identity of occupants and authenticity of state or federally issued credentials, use of Department of Defense and Air Force data systems to validate personnel status, verify criminal history or status, issue base entry passes for vehicles and individuals, conduct background checks on contractors, and required to perform office duties of transferring calls and answering telephones.

Dr. Elzawahry, in a report dated January 21, 2020, noted appellant's current physical examination findings and related that she had CRPS, which was severely symptomatic, and post-traumatic stress disorder (PTSD). He opined that perhaps she could perform sedentary work and deferred to the opinion of her psychiatrist regarding her ability to work based on her PTSD diagnosis. With respect to physical limitations, Dr. Elzawahry opined that appellant was capable of sedentary work with foot propped up, which he thought would not cause or worsen her symptoms.

In a February 17, 2020 report, Dr. Elzawahry summarized appellant's history of injury and medical treatment. He provided physical examination findings. Dr. Elzawahry diagnosed left foot/ankle and CRPS. He opined appellant that was capable of performing up to four hours of sedentary work, which could be increased as tolerated. However, Dr. Elzawahry noted that appellant has PTSD and deferred any opinion on her work capability due to this condition to her psychiatrist. In an attached work capacity evaluation (Form OWCP-5c) dated February 24, 2020, he opined that she was capable of performing a sedentary job on a trial basis of four hours a day. Dr. Elzawahry noted that appellant had PTSD and deferred to her psychiatrist regarding her ability to return to work. He provided work restrictions including up to four hours of sitting and no

⁶ *Supra* note 4.

walking, twisting, standing, bending/stooping, operating a motor vehicle at work or to and from work, pushing, lifting, squatting, kneeling, or climbing.

By decision dated April 3, 2020, OWCP again denied appellant's claim for a recurrence of disability commencing April 8, 2015, finding the evidence insufficient to establish that she was totally disabled from performing the modified job. It found Dr. Elzawahry's opinion that she was capable of sedentary work constituted the weight of the medical opinion evidence.

LEGAL PRECEDENT

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 accepted injury.⁷ OWCP's procedures discuss the evidence necessary if recurrent disability for work is alleged within 90 days of return to duty.⁸ The focus is on disability rather than causal relationship of the accepted condition to the employment injury.⁹

The Board has held that, if recurrent disability from work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and demonstrate objective medical findings that form the basis for the renewed disability for work.¹⁰

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary to reconsider the evidence appellant submitted prior to the issuance of OWCP's December 22, 2017 decision because the Board already considered this evidence in its September 6, 2019 decision. Findings made in prior Board decisions are *res judicata* any further review by OWCP under section 8128 of FECA.¹¹

Following the Board's remand of the case, in reports dated January 21 and February 17 and 24, 2020, Dr. Elzawahry diagnosed left foot/ankle CRPS and PTSD. Dr. Elzawahry opined that appellant was capable of a trial of up to four hours of sedentary work, which could be increased as tolerated, due to the accepted conditions, and deferred to her psychiatrist regarding her work capability due to her PTSD. However, he did not address the issue of whether she was totally

⁷ *C.B.*, Docket No. 19-0121 (issued July 2, 2019); *W.D.*, Docket No 09-0658 (issued October 22, 2009); *G.T.*, 59 ECAB 447 (2008); *Robert H. St. Onge*, 43 ECAB 1169 1992).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013); *see B.R.*, Docket No. 18-0339 (issued January 24, 2019).

⁹ *Id.*

¹⁰ *See C.B.*, *supra* note 7; *B.R.*, *supra* note 8; *J.W.*, Docket No. 17-0715 (issued May 29, 2018); *G.P.*, Docket No. 14-1150 (issued September 15, 2014); *J.F.*, 58 ECAB 124 (2006).

¹¹ *M.M.*, Docket No. 18-1366 (issued February 27, 2019). *E.C.*, Docket No. 17-1765 (issued January 24, 2018); *E.L.*, Docket No. 16-0635 (issued November 7, 2016).

disabled from work beginning April 8, 2015 or whether she was capable of working eight hours in the modified job.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.¹² Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹³ Accordingly, the Board finds that the case must be remanded to OWCP.¹⁴

On remand, OWCP shall request a supplemental report from Dr. Elzawahry addressing whether appellant was totally disabled from work commencing April 8, 2015 due to her accepted left plantar fibromatosis and left lower limb and left foot/ankle RSD. After 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 decision.

¹² *L.F.*, Docket No. 20-0459 (issued January 27, 2021); *J.R.*, Docket No. 19-1321 (issued February 7, 2020); *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

¹³ *Id.*; see also *R.M.*, Docket No. 16-0147 (issued June 17, 2016).

¹⁴ *J.R.*, *supra* note 12; *S.S.*, *supra* note 12; *J.T.*, Docket No. 18-1300 (issued March 22, 2019).

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2020 decision 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: June 30, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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