

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

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<b>B.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-1293</b>
	)	<b>Issued: May 27, 2021</b>
<b>U.S. POSTAL SERVICE, ROSEBURG POST</b>	)	
<b>OFFICE, Roseburg, OR, Employer</b>	)	
_____	)	

*Appearances:*  
*Kelley Craig, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On June 11, 2020 appellant, through counsel, filed a timely appeal from a December 18, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the December 18, 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.*

## **ISSUE**

The issue is whether appellant has met her burden of proof to establish total disability from work during the period October 21 through 28, 2016 causally related to her accepted June 16, 2016 employment injury.

## **FACTUAL HISTORY**

On June 16, 2016 appellant, then a 40-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she developed a middle upper back pain when she picked up a tall collection tub and dumped it into a hamper. She stopped work on the date of injury. On July 19, 2016 OWCP accepted the claim for a muscle and tendon strain of the back wall of the thorax. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls from August 13 through October 20, 2016.

Dr. Cory Russell, an osteopathic physician specializing in family medicine, provided reports dated June 16, 2016. In a report dated June 16, 2016, he noted appellant's history of injury, physical examination findings, diagnosis of thoracic strain, and noted that she would be placed on light duty. In a June 16, 2016 work status form, Dr. Russell diagnosed thoracic strain and released her to modified work on June 17, 2016 with restrictions of no lifting or bending or operating heavy machinery or working near heavy equipment.

In a July 22, 2016 report, Dr. John Powell, a Board-certified family medicine physician, diagnosed thoracic region strain, thoracic radiculitis, due to a lifting and handling injury. He, in a work status report of even date, released appellant to return to sedentary work, with a 15-pound lifting limit as of that date.

Appellant was seen by Dr. Russell in follow-up visits through September 28, 2016 with examination findings detailed and diagnosis of thoracic strain. Dr. Russell, in work status forms, work capacity evaluation forms (Form OWCP-5c), and duty status report forms (Form CA-17) covering the period June 20 through October 13, 2016 released appellant to modified or light-duty work, with a 15-pound lifting limit.

In a letter dated October 21, 2016, T.R., postmaster, informed appellant that he was obligated to offer her the attached modified assignment of work based on her medical work restrictions in lieu of her resignation submitted on October 20, 2016. The job offer bore the heading "Offer of Modified Assignment (Limited Duty)" for the position of city carrier assistant. The effective/available work date was noted as October 21, 2016. The employing establishment noted that the position was for 40 plus hours with Sunday as a scheduled day off. The location of the position was at the employing establishment. The position involved casing mail one to two hours and delivering mail within 15-pound weight restrictions between two to seven hours day. The physical requirements of the position included intermittent lifting of no more than 15 pounds.

On November 14, 2016 appellant filed a claim for compensation (Form CA-7) for disability during the period October 15 to 28, 2016.

A Notification of Personnel Action PS Form 50 dated November 18, 2016 noted that appellant resigned from the employing establishment effective October 20, 2016.

In a letter dated November 22, 2016, OWCP acknowledged receipt of appellant's claim for wage-loss compensation for the period October 15 to 28, 2016. It advised that the evidence indicated that a temporary light-duty assignment was available within appellant's medical restrictions for the period of claimed lost time, which she declined. OWCP informed her of the provisions of 20 C.F.R. § 10.500(a) that an employee is not entitled to any wage-loss compensation claimed on a Form CA-7 where the employee has medical work restriction in place, that light duty is available within those restrictions, and the employee received written notification that work was available within those restrictions. It further advised that no wage-loss compensation was payable to a claimant who declined a temporary light-duty assignment OWCP deemed appropriate. Lastly, OWCP informed appellant of the medical and factual evidence required to establish entitlement to wage-loss compensation. It afforded appellant 30 days to accept the position or to submit evidence as to why the work assignment did not accommodate her medical restrictions.

In response to OWCP's letter, appellant submitted progress notes and a work status notification form dated November 11, 2016 from Dr. Russell. Dr. Russell released appellant to return to light-duty work for 30 days as of that day with restrictions of no lifting more than 20 pounds.

By decision dated January 6, 2017, OWCP terminated appellant's wage-loss compensation, effective October 21, 2016, because she failed to accept the October 21, 2016 temporary light-duty assignment in accordance with 20 C.F.R. § 10.500(a).

Subsequent to OWCP's January 6, 2017 decision, it continued to receive progress notes from Dr. Russell.

In a work capacity evaluation form (Form OWCP-5c) dated November 20, 2017, Dr. Ruth Lowengart, a physician Board-certified in internal medicine and occupational medicine, diagnosed thoracic strain and thoracic segmental dysfunction causally related to the accepted employment injury and indicated that appellant was capable of performing modified work with no lifting more than 25 pounds for eight hours.

On January 5, 2018 appellant requested reconsideration.

Dr. Lowengart provided additional reports and OWCP-5c forms regarding appellant's condition and work capability.

By decision dated April 4, 2018, OWCP denied modification.

On July 25, 2018 appellant, through counsel, requested reconsideration. By decision dated October 5, 2018, OWCP denied modification.

On September 20, 2019 appellant requested reconsideration. By decision dated December 18, 2019, OWCP vacated in part and affirmed in part the January 6, 2017 decision. It found that it erred in denying ongoing wage-loss compensation for the period October 15 through 20, 2016, but affirmed the denial of wage-loss compensation for the period of October 21 to 28, 2016.

## LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>4</sup> In general the term, disability under FECA means incapacity because of injury in employment to earn the wages, which the employee was receiving at the time of such injury.<sup>5</sup> This meaning, for brevity, is expressed as disability for work.<sup>6</sup>

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.<sup>7</sup> The opinion of the physician must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship.<sup>8</sup>

Section 10.500(a) of OWCP's regulations provides that benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for wage-loss claimed on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place, that light duty within those work restrictions was available, and that the employee was previously notified in writing that such duty was available.<sup>9</sup>

OWCP's procedures provide that, when a claimant is not on the periodic rolls, a claim for wage-loss compensation may be received on a Form CA-7 when a temporary light-duty assignment has been provided by the employing establishment. These procedures further provide that, when a formal loss of wage-earning capacity has not been issued, OWCP's claims examiner should follow certain specified procedures. If the evidence establishes that injury-related residuals continue and result in work restrictions, that light duty within those work restrictions was available, and that the employee was notified in writing that such light duty was available, then wage-loss benefits (effective the date of the written notification of light-duty availability) are not payable for the period covered by the available light-duty assignment. Such benefits are payable only for

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<sup>4</sup> *B.M.*, Docket No. 19-1075 (issued February 10, 2021); *B.T.*, Docket No. 19-1331 (issued April 30, 2020); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

<sup>5</sup> *See* 20 C.F.R. § 10.5(f).

<sup>6</sup> *See B.M.*, *supra* note 4; *S.W.*, *supra* note 4. *See also A.M.*, Docket No. 09-1895 (issued April 23, 2010); *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>7</sup> *B.T.*, *supra* note 4; *J.M.*, Docket No. 19-0478 (issued August 9, 2019).

<sup>8</sup> *Id.*

<sup>9</sup> 20 C.F.R. § 10.500(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Offers and Return to Work*, Chapter 2.814.9a (June 2013).

periods during which an employee's work-related medical condition prevent him or her from earning the wages earned before the work-related injury.<sup>10</sup>

### ANALYSIS

The Board finds that appellant has not established that she entitlement to wage-loss compensation for the period October 21 to 28, 2016.

OWCP denied appellant's claim for wage-loss compensation for the period October 21 to 28, 2016 pursuant to 20 C.F.R. § 10.500(a).

OWCP paid appellant wage-loss benefits on the supplemental roll through October 20, 2016. On October 21, 2016 the employing establishment provided appellant an offer for a temporary full-time modified city carrier assistant position beginning that date, within her 15-pound lifting restriction provided by Dr. Russell. The document effectuating the offer bore the heading "Offer of Modified Assignment (Limited-Duty)." The assignment was for a city carrier assistant working 40 plus hours a week. The cover letter for the written job offer from the postmaster advised that he was obligated to provide her a job offer based on her work restrictions. Appellant had resigned from the employing establishment effective October 20, 2016. Appellant did not establish that the light work offer, as of October 21, 2016, was outside her work restrictions, or that the position was not actually available. While OWCP subsequently received reports from Dr. Lowengart, these reports did not establish that the offered position was outside of appellant's work restrictions during the period October 21 to 28, 2016.

The evidence establishes that appellant had the ability to perform the offered light-duty employment.<sup>11</sup> Appellant had, however, submitted her resignation as of October 20, 2016 and chose not to accept the written offer of employment. The Board, therefore, finds that appellant was not entitled to receive wage-loss compensation under 20 C.F.R. § 10.500(a) during the period October 21 to 28, 2016.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### CONCLUSION

The Board finds that appellant has not established that she was entitled to wage-loss compensation from October 21 to 28, 2016.

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<sup>10</sup> *Id.* at Chapter 2.814.9b (June 2013).

<sup>11</sup> *See T.A.*, Docket No. 18-0431 (issued November 7, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 18, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 27, 2021  
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