United States Department of Labor
Employees' Compensation Appeals Board

C.G., Appellant	)	
and	)	**Docket No. 21-0171**
	)	**Issued: November 29, 2021**
DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU, Dallas, TX, Employer	)	

Appearances:
Appellant, pro se
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 November 9, 2020 appellant filed a timely appeal from an October 7, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective October 7, 2020, pursuant to 20 C.F.R. § 10.500(a).

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the October 7, 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*

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 2, 2010 appellant, then a 58-year-old census enumerator, filed a traumatic injury claim (Form CA-1) alleging that on July 13, 2010 she sustained bruising to both knees when she tripped and fell while in the performance of duty. She stopped work on July 14, 2010. OWCP accepted appellant's claim for neck, back, and knee sprains and subsequently expanded the acceptance of her claim to include bilateral internal knee derangement, left knee medial meniscus tear, and left knee Baker's cyst. It paid her wage-loss compensation benefits and placed her on the periodic rolls, effective July 3, 2011.

Appellant continued to receive medical treatment. She underwent OWCP-approved left knee arthroscopic surgery on December 28, 2011 and right knee arthroscopic surgery on November 6, 2013.

On July 26, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding whether she continued to have residuals of the accepted July 13, 2010 employment injury and if she was able to return to work. In an August 16, 2019 report, Dr. Dinenberg indicated that he had reviewed the SOAF and noted her accepted conditions for cervical, lumbar, and bilateral knee sprains, bilateral internal knee derangement, left knee medial meniscus tear, and left knee Baker's cyst. On examination he observed that appellant used a walker for ambulation and had a "very unsteady slow gait." Dr. Dinenberg reported that physical examination of her cervical spine revealed diffuse tenderness to light touch throughout the paraspinous region and in the midline extending down onto the bilateral trapezius. On physical examination of appellant's lumbar spine, he noted tenderness to palpation primarily in the lower paraspinous region. Examination of her bilateral knees demonstrated positive medial and lateral joint line tenderness and no effusion, erythema, or ecchymosis.

In response to OWCP's questions, Dr. Dinenberg indicated that appellant's cervical, lumbar, and bilateral knee sprains had resolved. Regarding her bilateral knee conditions, he opined that she remained symptomatic and explained that she had undergone two knee arthroscopic surgeries without relief. Dr. Dinenberg also indicated that appellant suffered from degenerative disc disease of the cervical and lumbar spines and the bilateral knees, which were not related to the July 13, 2010 employment incident. He concluded that she could not return to her date-of-injury position because she could not perform the duties of intermittent driving, walking, or climbing up and down stairs, and occasional bending and stooping. Dr. Dinenberg completed a work capacity evaluation form (OWCP-5c form) and noted "no work."

[3] Docket No. 13-0036 (issued April 9, 2013).

In a September 12, 2019 letter, the employing establishment, requested that OWCP obtain a supplemental report from Dr. Dinenberg, which specifically addressed whether appellant could return to sedentary or light-duty work.

The employing establishment also submitted a September 11, 2019 report by Dr. James Caviness, a Board-certified occupational medicine physician, who alleged that Dr. Dinenberg's August 16, 2019 second opinion report was not well reasoned. Dr. Caviness noted that Dr. Dinenberg had indicated that appellant's subjective complaints outweighed her objective findings and asserted that Dr. Dinenberg did not provide any medical rationale to support his opinion that she was totally disabled from work.

On September 24, 2019 OWCP requested that Dr. Dinenberg provide a supplemental opinion clarifying appellant's ability to work. It specifically requested that he opine on whether she was able to work in a sedentary or light-duty position.

In an October7, 2019 supplemental report, Dr. Dinenberg indicated that he would complete a new OWCP-5c form to reflect the restrictions that appellant had secondary to her work-related knee injury and that it was "probably best" to alter the restrictions rather than noting that she could not work. In an OWCP-5c form, he noted that she could work full time with restrictions of walking and standing for 30 minutes a day, pushing, pulling, and lifting up to 10 pounds for 3 hours a day, and no operating a motor vehicle, squatting, kneeling, or climbing. Dr. Dinenberg further reported "permanently sitting duties, no walk or stand [more than 15 minutes at] a time, allow to use a walker."

OWCP received an offer of modified assignment dated April 3, 2020. The assignment title was "modified field representative." The job offer letter noted that the position was a temporary appointment, not-to-exceed 90 days, and would be available on August 4, 2020. It indicated that appellant would work a part-time schedule, up to 20 hours per week, by telephone only from her home. The duties of the job position required interviewing respondents to collect data required for current surveys, one-time surveys, and special census. The physical requirements of the modified-duty position included intermittent sitting up to 3 to 4 hours per day, intermittent repetitive movements, including keyboarding, up to 1 to 2 hours per day, intermittent walking and standing up to 30 minutes per day, but no more than 15 minutes at a time, lifting, carrying, pushing, and pulling up to five pounds for less than 15 minutes per day, intermittent reaching up to 30 minutes per day, bending and turning up to 15 minutes per day, and no stooping, squatting, kneeling, climbing, and driving.

On May 4, 2020 the employing establishment confirmed that the job offer for a modified field representative position remained available.

On May 4, 2020 OWCP informed appellant that it found the April 3, 2020 job offer suitable and in accordance with the work restrictions provided by Dr. Dinenberg. It noted that the employing establishment confirmed that the position remained open and available to her. OWCP advised appellant that an employee who refuses an offer of suitable work without reasonable cause is not entitled to further compensation for total wage loss. It afforded her 30 days to accept the assignment and report to duty or provide a written explanation of her reasons for not accepting the assignment.

In a June 5, 2020 letter, OWCP advised appellant that she had an additional 30 days to respond to its May 4, 2020 letter and submit additional evidence.

In a July 7, 2020 letter, appellant asserted that any job offered was unfit due to her deteriorating health conditions and physical requirements. She submitted medical reports previously of record dated 2010 through 2018, previous correspondence with OWCP, postal service tracking information, and copies of prior OWCP decisions.

On August 25, 2020 the employing establishment confirmed that the April 3, 2020 job offer remained available.

On August 26, 2020 OWCP issued another letter, which informed appellant that the April 3, 2020 job offer was found suitable and remained open and available to her. It provided her an additional 30 days to accept the position or provide her reasons for refusal in writing.

In a September 18, 2020 letter, appellant noted her disagreement with OWCP's August 26, 2020 letter. She asserted that the history provided was inaccurate and also described the inconsistencies and inaccuracies she had with Dr. Dinenberg's examination and report. Appellant submitted various medical reports previously of record dated from 2011 to 2017.

By decision dated October 7, 2020, OWCP terminated appellant's wage-loss compensation, effective that date, pursuant to 20 C.F.R. § 10.500(a).

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[4]

OWCP regulations at 20 C.F.R. § 10.500(a) provides in relevant part:

> "(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any 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 any 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 restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing [establishment] had offered, in accordance with OWCP

[4] *T.C.*, Docket No. 20-1163 (issued July 13, 2021); *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

procedures, a temporary light-duty assignment within the employee's work restrictions."[5]

When it is determined that an employee is no longer totally disabled from work and is on the periodic rolls, OWCP's procedures provide that the claims examiner should evaluate whether the evidence of record establishes that light-duty work was available within his or her restrictions. The claims examiner should provide a pretermination or prereduction notice if appellant is being removed from the periodic rolls.[6] When the light-duty assignment either ends or is no longer available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.[7]

OWCP's procedures further advise: "If there still would have been wage loss if the claimant had accepted the light-duty assignment, the claimant remains entitled to compensation benefits based upon the temporary actual earnings WEC [wage-earning capacity] calculation (just as if he/she had accepted the light-duty assignment)."[8]

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective October 7, 2020, pursuant to 20 C.F.R. § 10.500(a).

By decision dated October 7, 2020, OWCP terminated appellant's wage-loss compensation benefits, pursuant to 20 C.F.R. § 10.500(a), based on the opinion of Dr. Dinenberg, the second opinion examiner.

In an August 16, 2019 report, Dr. Dinenberg provided examination findings and opined that appellant's accepted cervical, lumbar, and bilateral knee sprains had resolved. He further reported that she continued to suffer residuals of her bilateral knee conditions and opined that she could not return to her date-of-injury position. Dr. Dinenberg completed an OWCP-5c form and noted "no work." In a supplemental October 7, 2019 report, he indicated that it was "probably best" to alter appellant's work restrictions on the OWCP-5c form rather than indicating that she could not work. Dr. Dinenberg completed a new OWCP-5c form with restrictions of walking and standing for 30 minutes a day, pushing, pulling, and lifting up to10 pounds for 3 hours a day, and no operating a motor vehicle, squatting, kneeling, or climbing.

The Board finds, however, that Dr. Dinenberg's opinion was conclusory in nature and did not contain sufficient medical reasoning to establish that appellant was capable of working in a modified-duty, sedentary position.[9] Rationalized medical evidence must include rationale

[5] 20 C.F.R. § 10.500(a).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9(c)(1) (June 2013).

[7] *Id*.

[8] *Id*. at Chapter 2.814.9(c)(8).

[9] *See C.G.*, Docket No. 20-0808 (issued April 23, 2021); *J.W.*, Docket No. 19-1014 (issued October 24, 2019).

explaining how the physician reached the conclusion he or she is supporting.[10] Dr. Dinenberg did not provide medical explanation as to how appellant's physical examination findings established that she was capable of working sedentary duty or how she was capable of working even though he determined that she continued to suffer residuals of her work-related bilateral knee conditions.[11] He merely noted that it was "probably best" to alter her work restrictions even though he had previously reported that she was totally disabled from work. Inconsistent and contradictory reports from the same physician lack probative value.[12] Accordingly, the Board finds that Dr. Dinenberg's report lacks sufficient medical reasoning to establish that appellant was capable of working in a modified-duty, sedentary position.

Once OWCP undertook development of the record, it was required to complete development of the record by procuring medical evidence that would resolve the relevant issue in the case.[13] As it did not request that Dr. Dinenberg provide a supplemental opinion clarifying his opinion, the Board finds that OWCP did not meet its burden of proof in terminating appellant's wage-loss compensation benefits based on his reports.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective October 7, 2020, pursuant to 20 C.F.R. § 10.500(a).

[10] *B.B.*, Docket No. 19-1102 (issued November 7, 2019); *Beverly A. Spencer*, 55 ECAB 501 (2004).

[11] *See C.B.*, Docket No. 20-0629 (issued May 26, 2021); *G.G.*, Docket No. 20-0513 (issued January 12, 2021).

[12] *See J.O.*, Docket No. 19-0850 (issued October 22, 2020); *K.S.*, Docket No. 11-2071 (issued April 17, 2012); *Cleona M. Simmons*, 38 ECAB 814 (1987).

[13] *See J.F.*, Docket No. 17-1716 (issued March 1, 2018).

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 29, 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