

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

_____)	
L.L., Appellant)	
)	
and)	Docket No. 20-0956
)	Issued: October 19, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Tolowa, NJ, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
James D. Muirhead, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 18, 2020 appellant, through counsel, filed a timely appeal from a September 27, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's September 27, 2019 decision was March 25, 2020. Because using the March 26, 2020 date of receipt would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 18, 2020, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a recurrence of disability as of June 28, 2017 causally related to her accepted May 31, 2016 employment injury; and (2) whether appellant has met her burden of proof to establish recurrences of disability commencing June 2, 2018 and July 3, 2018 causally related to her accepted May 31, 2016 employment injury.

FACTUAL HISTORY

On June 3, 2016 appellant, then a 36-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 31, 2016 she was involved in a motor vehicle accident in the performance of duty. She stopped work on May 31, 2016. On June 17, 2016 OWCP accepted the claim for neck sprain/strain, lumbar sprain/strain, right knee contusion, right ankle sprain, right shoulder contusion, and right hip contusion. It paid appellant wage-loss compensation on the supplemental rolls from July 16 through October 15, 2016 and on the periodic rolls from October 16, 2016. On March 29, 2017 OWCP accepted additional conditions of radiculopathy, cervical region, and herniated disc at C4-5 and C5-6. Appellant returned to a full-time modified letter carrier position on June 19, 2017. By decision dated March 14, 2018, OWCP determined that the modified letter carrier position fairly and reasonably represented her wage-earning capacity. As appellant had no loss of wage-earning capacity (LWEC), it terminated her entitlement to wage-loss compensation.

In a June 20, 2018 report, Dr. William A. Matarese, a Board-certified orthopedic surgeon, indicated that appellant had recurring problems of neck pain, lower back pain, and right shoulder pain, with the neck and back pain more severe. He noted examination findings and provided an assessment of sprain of ligaments of lumbar spine, unchanged; other specific joint derangements of right shoulder, unchanged, and sprain of ligaments of cervical spine, unchanged. Dr. Matarese recommended physical therapy. He indicated that appellant could return to modified duty as of June 25, 2018 with no lifting, pushing, or pulling more than 10 pounds. In a June 22, 2018 attending physician's report (Form CA-20), Dr. Matarese noted that appellant was disabled from June 2 through 25, 2018 and that she could return to light duty with restrictions of no lifting, pushing, or pulling on June 25, 2018.

In a July 11, 2018 report, Dr. Matarese diagnosed cervical disc disorder at C5-6 level with radiculopathy (primary), other specific joint derangements of right shoulder, sprain of ligaments of cervical spine, and sprain of ligaments of lumbar spine (primary and subsequent encounters).

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the September 27, 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.*

He prescribed a course of physical therapy and referred appellant for a cervical magnetic resonance imaging (MRI) scan.

On October 12, 2018 appellant filed a notice of recurrence (Form CA-2a) alleging that on June 28, 2017 she stopped work due to a time loss from work as a result of her May 31, 2016 employment injury. She indicated that when she woke up on June 28, 2017 her back was in a spasm and would not allow her to stand straight up or walk. Appellant noted that she has not received any medical care since being discharged in May 2017. Evidence of record revealed that she underwent a course of physical therapy. In a July 6, 2017 report, Dr. Steven H. Dane, a Board-certified neurologist, noted a May 31, 2016 date of injury and that appellant was on modified duty. He indicated that she had a flare-up of the neck and lower back pain that kept her out of work for five days. Dr. Dane described examination findings, noting no significant change from her prior cervical and lumbar examinations, and provided provisional diagnoses of cervical radiculopathy, disc displacement with radiculopathy. He indicated that appellant could return to work on July 8, 2017.

On October 16, 2018 appellant filed two additional CA-2a forms claiming recurrences of disability due to a worsening of her employment-related conditions on June 2, 2018 and July 3, 2018. She indicated that she experienced pain while working and daily pain after finishing work. Appellant noted that she was unable to stand straight and that this had been happening since the original injury.

OWCP received claims for compensation (Form CA-7) from appellant, claiming intermittent disability from work from July 3 through December 27, 2018.

In development letters dated October 23, 2018, OWCP advised appellant that it received her CA-2a forms completed on October 12 and 16, 2018. It noted that, following her May 31, 2016 work-related accident, she returned to work on June 19, 2017 in a full-time modified-duty capacity. Appellant had work stoppages on June 28, 2017 and June 2 and July 3, 2018. OWCP noted the deficiencies of the evidence received and to submit additional evidence showing a change in the nature and extent of her limited-duty employment or a change in the extent of her injury-related condition. It provided a questionnaire for appellant's completion. OWCP afforded her 30 days to respond.

Appellant subsequently submitted two narrative statements indicating that she had physical therapy and was disabled from work from June 28 to July 31, 2017, June 2 through 24 and July 3, 2018 to present. She also advised that every recurrence happened while she was asleep and, when she woke up, she could not move her neck or back or shoulder.

In a November 14 and 30, 2018 reports, Dr. Matarese indicated that cervical pain had been a recurring problem. He noted examination findings of the cervical spine, lumbar spine and right shoulder and diagnosed cervical disc disorder at C5-6 with radiculopathy, other specific joint derangements of right shoulder, and sprain of ligaments of lumbar spine. Dr. Matarese indicated that appellant was unable to work for three weeks.

By decision dated December 11, 2018, OWCP denied appellant's claim for a recurrence of disability commencing June 28, 2017. By separate decision also dated December 11, 2018, it

denied her claim for recurrence of disability commencing June 2, 2018. By third decision dated December 11, 2018 decision, OWCP denied appellant's claim for recurrence of disability commencing July 3, 2018.

On July 1, 2019 appellant, through counsel, requested reconsideration of OWCP's three December 11, 2018 decisions and submitted additional evidence.

In a December 4, 2018 report, Dr. Matarese described the May 31, 2016 employment incident and appellant's course of treatment, noting that she did not improve with conservative treatment. He also discussed findings of cervical diagnostic testing. Dr. Matarese diagnosed cervical C5-6 disc herniation with radiculopathy. He indicated, from an orthopedic standpoint, that appellant exhausted a full course of conservative treatment two years subsequent to the May 31, 2016 employment incident and that she remained symptomatic. Dr. Matarese advised that she required operative intervention and suggested C5-6 discectomy and fusion.

In progress notes dated August 22 and November 14 and 30, 2018, and January 30, February 22, March 30, May 8 and 13, and July 3, 2019, Dr. Matarese noted physical examination findings and indicated that appellant's neck and back pain have been a recurring problem, discuss findings from diagnostic testing, and provide diagnoses of cervical disc disorder at C5-6 level with radiculopathy (primary), sprain of ligaments of cervical spine (initial and subsequent encounters), sprain of ligaments of lumbar spine (initial and subsequent encounters), other specific joint derangements of right shoulder, not elsewhere classified, sprain. In an August 22, 2018 and subsequent reports, Dr. Matarese opined that appellant was unable to work.

In an August 1, 2019 report, Dr. Ivan Chen, a physical medicine and rehabilitation specialist, reported a history of the May 31, 2016 employment-related motor vehicle accident and noted that appellant's low back and neck pain began after such accident. He presented examination findings and provided an assessment of low back pain, cervicalgia, and other cervical disc displacement, unspecified cervical region. Dr. Chen recommended right cervical epidural injections with fluoroscopy to treat discogenic pain.

An August 10, 2019 MRI scan report of the lumbar spine revealed disc displacement at the L3-4, L4-5, L5-S1 levels without significant central canal or neural foraminal narrowing.

By decision dated September 27, 2019, OWCP denied modification of its three December 11, 2018 decisions.

LEGAL PRECEDENT -- ISSUE 1

OWCP's procedures require that in cases where recurrent disability for work is claimed within 90 days or less from the first return to duty, the claimant is not required to produce the same evidence as a recurrence claimed long after apparent recovery and return to work.⁵ Thus, in cases

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013); *see also R.E.*, Docket No. 20-0421 (issued May 17, 2021); *R.W.*, Docket No. 17-0720 (issued May 21, 2018).

where a recurrence is claimed within 90 days of the first return to duty, the focus is on disability rather than causal relationship of the accepted condition(s) to the work injury.⁶

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 from work.⁷

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether appellant has met her burden of proof to establish a recurrence of disability beginning June 28, 2017 causally related to her accepted May 31, 2016 employment injury.

OWCP's procedures provide that, in cases where recurrent disability from work is claimed within 90 days or less from the first return to duty, the claimant is not required to produce the same evidence as for a recurrence claimed long after apparent recovery and return to work.⁸ In cases where recurring disability from work is claimed within 90 days or less from the first return to duty, the focus is on disability rather than causal relationship.⁹ The attending physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability from work.¹⁰

On March 29, 2017 OWCP accepted additional conditions of radiculopathy, cervical region, and herniated disc at C4-5 and C5-6. Appellant returned to a full-time modified letter carrier position on June 19, 2017 and claimed a recurrence of disability on June 28, 2017. The evidence of record contemporaneous to the claimed recurrence include physical therapy reports and Dr. Dane's July 16, 2017 report, in which he noted that appellant had a flare-up of her neck and lower back pain that kept her out of modified-duty work for five days and provided provisional diagnoses of cervical radiculopathy, disc displacement with radiculopathy. As appellant claimed a recurrence of disability within 90 days of her first return to duty, OWCP should have developed and decided the claim under the proper recurrence standard, emphasizing disability rather than causal relationship.¹¹ However, the October 23, 2018 OWCP development letter improperly instructed her to provide medical evidence in accordance with the standard for a recurrence of

⁶ *R.E., id.*; *K.R.*, Docket No. 19-0413 (issued August 7, 2019).

⁷ *M.H.*, Docket No. 19-1552 (issued February 2, 2021); *A.B.*, Docket No. 18-0978 (issued September 6, 2019); *J.F.*, 58 ECAB 124 (2006).

⁸ *Supra* note 5 at Chapter 2.1500.5(a) (June 2013); *M.H., id.*; *R.W., supra* note 5.

⁹ *Id.*; *K.R., supra* note 6.

¹⁰ *Supra* note 5 at Chapter 2.1500.5(b). *M.H., supra* note 7; *A.C.*, Docket No. 17-0384 (issued September 11, 2017).

¹¹ *Id.*; *Order Remanding Case*, Docket No. 18-0604 (issued October 21, 2019).

disability claim after 90 days of her return to duty, which required that she establish a change in her medical condition.¹²

OWCP's procedures provide that OWCP is responsible for requesting evidence.¹³ Its procedures further provide that the claims examiner should contact the claimant in writing to obtain evidence and should specifically request the information needed, tailored to the specifics of the individual case.¹⁴ In this instance, OWCP improperly developed appellant's claim under the standard for a recurrence of disability claim after 90 days from return to duty.¹⁵ The Board finds that this case must be remanded for further development.¹⁶ Following any further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁷

LEGAL PRECEDENT -- ISSUE 2

The Board has held that OWCP may accept a limited period of disability without modification of a formal LWEC determination.¹⁸ OWCP's procedures provide that this occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant a modification of an LWEC determination.¹⁹ This narrow exception is only applicable for brief periods of medical disability.²⁰ If the claimant is off work for a brief period due to his or her temporary inability to perform the duties of the rated position, this period of medical disability can be paid without modification of the LWEC determination.²¹

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.²² This term also means an inability to work because a light-duty assignment made

¹² *Supra* note 5 at Chapter 2.1500.6.

¹³ *Id.* at Chapter 2.800.4(c)(2) (June 2011).

¹⁴ *Id.* at Chapter 2.800.5. *See also V.R.*, Docket No. 16-1167 (issued December 22, 2016).

¹⁵ *Order Remanding Case, P.D.*, Docket No. 19-0763 (issued November 26, 2019).

¹⁶ *Id.*

¹⁷ *See generally B.N.*, Docket No. 17-0787 (issued July 6, 2018); *C.D.*, Docket No. 17-1074 (issued August 28, 2017).

¹⁸ *D.R.*, Docket No. 18-1197 (issued April 30, 2020); *S.J.*, Docket No. 16-1195 (issued January 4, 2017); *Katherine T. Kreger*, 55 ECAB 633 (2004).

¹⁹ *Supra* note 5 at Chapter 2.1501.10 (June 2013). *See Order Remanding Case, G.P.*, Docket No. 19-1258 (issued July 14, 2020); *T.G.*, Docket No. 18-1064 (issued April 26, 2019).

²⁰ *Id.*; *L.T.*, Docket No. 18-0797 (issued March 14, 2019).

²¹ *Supra* note 19; *see J.M.*, Docket No. 18-0196 (issued July 12, 2018).

²² 20 C.F.R. § 10.5(x); *T.J.*, Docket No. 18-0831 (issued March 23, 2020); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

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.²³

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. 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 employment injury, and supports that conclusion with medical reasoning.²⁴ Where no such rationale is present, the medical evidence is of diminished probative value.²⁵

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish recurrences of disability commencing June 2 and July 3, 2018 causally related to her accepted May 31, 2016 employment injury.

The medical evidence of record is insufficient to establish that appellant's accepted neck, back, and shoulder conditions had worsened to the extent that she was totally disabled as of the claimed recurrences of June 2 and July 3, 2018.

Appellant stopped work June 2, 2018. In a June 20, 2018 report, Dr. Matarese noted that she had recurring problems of neck pain, lower back pain, and right shoulder pain, with the neck and back pain more severe. He provided an assessment of unchanged sprain of ligaments of lumbar spine, other specific joint derangements of right shoulder, and sprain of ligaments of cervical spine. In a June 22, 2018 Form CA-20, Dr. Matarese noted that appellant was disabled from June 2 through 25, 2018 and that she could return to light duty with restrictions of no lifting, pushing, or pulling on June 25, 2018. However, he did not provide medical reasoning explaining whether, how, and why her recurrent disability and current work restrictions were due to the accepted May 31, 2016 injury.²⁶ Thus, Dr. Matarese's report is insufficient to meet her burden of proof.²⁷

In his December 4, 2018 report, Dr. Matarese described the May 31, 2019 employment-related motor vehicle incident and provided a diagnosis of cervical C5-6 disc herniation with radiculopathy. He noted that appellant had exhausted a two-year course of conservative treatment

²³ *Id.*

²⁴ *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *C.C.*, Docket No. 18-0719 (issued November 9, 2018); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

²⁵ *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

²⁶ *Id.*

²⁷ *Id.*

post the motor vehicle accident, she remained symptomatic and required operative intervention. In his prior report of August 22, 2018 and subsequent reports from January through July 2019, Dr. Matarese diagnosed cervical disorder at C5-6 level with radiculopathy, specific joint derangements of right shoulder, not elsewhere classified, and initial and subsequent encounters of sprain of ligaments of cervical and lumbar spine. He also opined that appellant was unable to work. However, Dr. Matarese does not provide an opinion on whether the accepted employment injury caused a recurrence of disability or otherwise provide rationale as to how work factors caused or aggravated appellant's disability, such that she could no longer perform her modified work duties.²⁸ Therefore, his reports are insufficient to meet appellant's burden of proof.

Appellant also submitted an August 10, 2019 MRI scan. The Board has held that reports of diagnostic tests, standing alone, lack probative value as they do not provide an opinion on causal relationship between the accepted employment factors and a diagnosed condition.²⁹

As the medical evidence of record is insufficient to establish that appellant's accepted neck, back, and right shoulder conditions had worsened to the extent that she was totally disabled from work commencing on either June 2 or July 3, 2018, she has not met her burden of proof to establish a recurrence of disability causally related to her May 31, 2016 employment injury.

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 this case is not in posture for decision regarding whether appellant has met her burden of proof to establish a recurrence of disability commencing June 28, 2017 causally related to her accepted May 31, 2016 employment injury. The Board further finds that appellant has not met her burden of proof to establish a recurrence of disability commencing June 2 and July 3, 2018 causally related to her accepted May 31, 2016 employment injury.

²⁸ *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

²⁹ *See J.M.*, Docket No. 17-1688 (issued December 13, 2018).

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 19, 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