

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

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**F.M., Appellant**

**and**

**U.S. POSTAL SERVICE, WEST MILWAUKEE  
POST OFFICE, Milwaukee, WI, Employer**

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**Docket No. 22-0346  
Issued: August 9, 2022**

*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

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 5, 2022 appellant filed a timely appeal from a December 16, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> 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 to consider the merits of this case.

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<sup>1</sup> The Board notes that, following the December 16, 2021 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.*

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

## ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability, commencing October 8, 2021, causally related to his December 18, 2019 employment injury.

## FACTUAL HISTORY

On February 11, 2020 appellant, then a 50-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging on December 18, 2019 he injured his left knee when he slipped off the bottom step, while ascending stairs, and fell forward twisting his leg and hitting his knee on the stairs while in the performance of duty. He stopped work on December 23, 2019. OWCP accepted appellant's claim for contusion of the left knee. It later expanded acceptance of the claim to include tear of the left medial meniscus. OWCP paid appellant wage-loss compensation from December 23, 2020 through October 8, 2021.

On May 12, 2020 appellant underwent an OWCP-authorized surgery to repair a left knee medial meniscus tear, grade 4 chondromalacia of the medial femoral condyle and grade 3 chondromalacia of the medial tibial plateau. On June 3, 2021 he underwent an OWCP-authorized left knee medial unicondylar arthroplasty.

In a note dated October 1, 2021, Dr. Paul R., Miller, a Board-certified orthopedic surgeon, released appellant to return to work on October 4, 2021 with restrictions of lifting no greater than 30 pounds and walking and standing for no more than 15 minutes without a rest break.

On October 4, 2021 the employing establishment offered appellant a limited-duty job offer which required working eight hours a day while writing, sitting, intermittently standing, and walking for 15-minute intervals with a 5-minute rest break. The job offer did not include a specific lifting weight restriction. The listed duties included second notices, filing, lobby assistant, throwing hot case, casing mail, setting up routes, and updating edit books. Appellant accepted this position on October 8, 2021 and returned to work on that date.

In an October 16, 2021 statement, appellant's supervisor, K.P., noted that appellant had reported to work on October 8, 2021. While she was determining what work he would be performing and whether he was to be sent to another location to set routes, she walked away from her desk for a short period. When K.P. returned, appellant had left the building before performing any work duties.

In a compensation termination sheet dated October 7, 2021, OWCP determined that appellant was not entitled to further wage-loss compensation after that date as he had returned to full-time employment with no wage loss.

In an October 28, 2021 memorandum of telephone call (Form CA-110), appellant reported that the employing establishment was requiring him to work outside his medical restrictions.

On October 20, 2021 the employing establishment offered appellant a second limited-duty job working eight hours a day standing and walking for 15 minutes with breaks and pushing, pulling, and lifting no more than 30 pounds.

In an October 29, 2021 narrative statement, appellant noted that he reported to work on October 8, 2021. He asserted that he worked approximately 1.5 hours, while his supervisor attempted to find further appropriate work. K.P. had indicated that appellant might be required to deliver packages and/or go to another station where help was needed. Appellant responded by informing her of his 30-pound lifting restrictions. He waited for one hour for an additional assignment and then left the employing establishment.

Beginning on November 2, 2021, appellant filed claims for compensation (Form CA-7) for disability from work for the period October 8 through November 5, 2021.

On November 9, 2021 the employing establishment asserted that appropriate limited-duty work had been available for appellant since October 8, 2021.

In a November 10, 2021 development letter, OWCP advised appellant that the evidence of record was insufficient to establish his claim for disability beginning October 8, 2021. It requested additional factual and medical evidence in support of the claimed period of work-related disability beginning October 8, 2021. OWCP advised that a limited-duty assignment was available within appellant's medical restrictions during the period claimed and that there was conflicting evidence of whether he had returned to work. It afforded him 30 days to submit additional evidence.

On December 3, 2021 Dr. Miller indicated that appellant had reached maximum medical improvement and discharged him from care. He provided restrictions of lifting up to 20 pounds and occasionally walking, standing, lifting, and/or carrying light tools and files. Dr. Miller found that appellant could perform sedentary work with occasional walking and standing.

By decision dated December 16, 2021, OWCP denied appellant's claim for disability from work beginning October 8, 2021 due to his accepted employment injury.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>5</sup> 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.<sup>6</sup> Whether a particular injury causes an employee to become disabled from

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<sup>3</sup> *Id.*

<sup>4</sup> *M.M.*, Docket No. 21-0590 (issued December 2, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

<sup>6</sup> *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.<sup>7</sup>

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 that had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. The term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>8</sup> If the claim for recurrence of disability for work is based on modification of the claimant's duties or physical requirements of the job, the claimant should be asked to describe such changes. If the evidence establishes that the limited-duty position has changed such that it no longer accommodates the claimant's work restrictions, OWCP should accept the recurrence.<sup>9</sup>

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the limited-duty requirements.<sup>10</sup>

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.<sup>11</sup> Thus, in cases 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.<sup>12</sup>

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

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<sup>7</sup> *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>8</sup> 20 C.F.R. § 10.5(x); *see D.T.*, Docket No. 19-1064 (issued February 20, 2020).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6.a(3) (June 2013); *J.T.*, Docket No. 15-1133 (issued December 21, 2015).

<sup>10</sup> *See C.B.*, Docket No. 19-0464 (issued May 22, 2020); *R.N.*, Docket No. 19-1685 (issued February 26, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>11</sup> *Supra* note 9 at Chapter 2.1500.5 (June 2013); *see also L.L.*, Docket No. 20-0956 (issued October 19, 2021); *R.E.*, Docket No. 20-0421 (issued May 17, 2021); *R.W.*, Docket No. 17-0720 (issued May 21, 2018).

<sup>12</sup> *R.E., id.*; *K.R.*, Docket No. 19-0413 (issued August 7, 2019).

cannot perform and demonstrate objective medical findings that form the basis for the renewed disability from work.<sup>13</sup>

### ANALYSIS

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

Appellant returned to a full-time limited-duty position on October 8, 2021 and worked no more than a few hours. The evidence of record contemporaneous to the claimed recurrence includes Dr. Miller's October 1, 2021 report in which he released appellant to return to work on October 4, 2021 with restrictions of lifting no greater than 30 pounds and walking and standing for no more than 15 minutes without a rest break. The October 4, 2021 limited-duty job offer entailed working eight hours a day while writing, sitting, intermittently standing, and walking for 15-minute intervals with a 5-minute rest break. However, the job offer did not specify any lifting requirements or restrictions. Appellant alleged that when he returned to work on October 8, 2021 the employing establishment had no work available within his restrictions and that his supervisor attempted to assign him work that he believed exceeded his lifting restriction. The employing establishment contended that he reported to work on October 8, 2021, but left without performing any duties.

As appellant claimed a recurrence of disability within 90 days of his first return to duty, OWCP should have developed and decided the claim under the proper recurrence standard, emphasizing disability rather than causal relationship.<sup>14</sup> However, the November 10, 2021 OWCP development letter improperly concluded that the October 6, 2021 offered position was within his work restrictions without considering or developing the evidence to determine what the lifting requirement of that limited-duty position was and whether the employing establishment, in fact, had work available that met all of his work restrictions on October 8, 2021.

OWCP's procedures provide that OWCP is responsible for requesting evidence.<sup>15</sup> Its procedures further provide that the claims examiner should contact the claimant and employing establishment in writing to obtain evidence and should specifically request the information needed, tailored to the specifics of the individual case.<sup>16</sup> If a claimant accepts a job offer, but does not return to work, OWCP's procedures require the weight of the medical evidence must establish that the claimant is physically capable of carrying out any physical requirements of the job.<sup>17</sup> In this instance, OWCP improperly denied appellant's recurrence claim without considering whether the medical evidence established that the October 8, 2021 position was within all of his medical restrictions. The Board finds that this case must be remanded for further clarification of the

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<sup>13</sup> *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).

<sup>14</sup> *L.L.*, *supra* note 11.

<sup>15</sup> *Supra* note 9 at Chapter 2.800.4c(2) (June 2011).

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

<sup>17</sup> *Id.* at Chapter 2.814.4c(6) (June 2013).

limited-duty job requirements and the specific employment duties available for him on October 8, 2021. Following this and any 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 regarding whether appellant has met his burden of proof to establish a recurrence of disability beginning October 8, 2021 due to his accepted December 18, 2019 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 16, 2021 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: August 9, 2022  
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