United States Department of Labor
Employees' Compensation Appeals Board

K.Y., Appellant	)	
and	)	**Docket No. 21-0746**
	)	**Issued: January 26, 2022**
U.S. POSTAL SERVICE, CLEVELAND PROCESSING & DISTRIBUTION CENTER, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 21, 2021 appellant, through counsel, filed a timely appeal from a November 4, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[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] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the November 4, 2020 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 OWCP has met its burden of proof to reduced appellant's wage-loss compensation effective March 16, 2020, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary part-time limited-duty assignment.

FACTUAL HISTORY

On March 14, 2018 appellant, then a 57-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2018 she injured her right ankle when she tripped and fell while in the performance of duty. She stopped work on March 13, 2018. OWCP accepted the claim for a closed fracture of the distal end of the right fibula. It paid appellant wage-loss compensation on the supplemental rolls effective April 28, 2018 and on the periodic rolls effective June 24, 2018.

On April 4, 2018 Dr. Sara Lyn Miniaci-Coxhead, an orthopedic surgeon, performed an open reduction and internal fixation of the right fibula and right syndesmosis and a right deltoid ligament repair.

OWCP subsequently expanded the acceptance of the claim to include a right ankle syndesmosis disruption and a right ankle sprain of the deltoid.

A November 1, 2018 magnetic resonance imaging (MRI) scan of the right ankle demonstrated a healed fracture of the lateral malleolus, small osseous fragments distal to the medial malleolus like due to a remote avulsion fracture, mild stress marrow edema within the medial malleolus and calcaneus, a chronic deltoid ligament tear, Achilles tendinosis with a possible small intrasubstance partial tear within the tendon, and subcutaneous edema.

In a work capacity evaluation (Form OWCP-5c) dated February 1, 2019, Dr. Miniaci-Coxhead advised that she would determine appellant's work restrictions after a functional capacity evaluation (FCE).

On April 1, 2019 OWCP referred appellant to Dr. David K. Halley, a Board-certified orthopedic surgeon, for a second opinion examination.

In an April 24, 2019 response to an inquiry from the employing establishment, Dr. Miniaci-Coxhead indicated that appellant could return to work with restrictions on standing and lifting up to four hours per day and climbing for two hours per day.

In a report dated April 25, 2019, Dr. Halley discussed appellant's history of injury and medical treatment received. He described her symptoms of pain with walking and noted that she used a wheelchair and crutches. Dr. Halley found mild swelling over the lateral malleolus and decreased sensation to light touch of the second and third toes of the right foot. He diagnosed a right fibular fracture, right ankle syndesmosis, and a complete rupture of the deltoid ligament, all surgically repaired. Dr. Halley further diagnosed a superficial peroneal nerve injury causing continued symptoms, which he attributed to the employment-related surgical procedure. He opined that appellant could perform sedentary employment with the option to elevate her foot. In a work capacity evaluation (Form OWCP-5C) of even date, Dr. Halley found that she could work four hours per day constantly sitting and walking and standing for a half hour.

A May 10, 2019 FCE indicated that appellant could perform light-duty employment working up to 1 hour and 49 minutes per day alternating sitting and standing.

On September 24, 2019 OWCP referred appellant to Dr. Bienvenido D. Ortega, a Board-certified neurosurgeon, for a second opinion examination.

In a report dated October 25, 2019,[4] Dr. Ortega reviewed the history of injury and complaints of right ankle pain. He diagnosed healed right fibula fractures, syndesmosis of the right ankle, a repaired complete rupture of the deltoid ligament, and superficial peroneal neuropathy. Dr. Ortega attributed the superficial peroneal neuropathy to the accepted surgical treatment. In an accompanying Form OWCP-5c, he found that appellant could work up to four hours per day with restrictions, including walking and standing for half an hour, twisting for two hours, and performing occasional lifting up to 10 pounds. In an addendum report dated December 5, 2019, Dr. Ortega opined that she could not return to her usual employment without physical conditioning, but could start working four hours per day increasing her hours as tolerated. He provided a Form OWCP-5c of even date, finding that appellant could work for four hours per day, sitting up to four hours, walking and stand up to one-half hour, lifting up to 10 pounds for four hours per day, and pushing, pulling, squatting, kneeling, and climbing as tolerated.

On December 18, 2019 OWCP expanded the acceptance of appellant's claim to include a peroneal nerve injury of the right foot.

On January 4, 2020 the employing establishment offered appellant a position as a modified mail processing clerk for four hours per day. The physical requirements included sitting at a manual case/table for two to four hours per day, lifting up to 10 pounds for 2 to 4 hours per day, walking and standing up to 30 minutes per day, and pushing, pulling, squatting, kneeling, and climbing as tolerated. The employing establishment advised that the position was subject to revision based on changes in appellant's work restrictions.

On January 16, 2020 the employing establishment informed OWCP that appellant had not responded to the job offer.

In a report dated January 27, 2020, Dr. Todd S. Hochman, a Board-certified internist, obtained a history of appellant falling at work on March 13, 2018. On examination he found some ankle swelling, an equivocal Tinel's sign, tenderness, and weakness. Dr. Hochman diagnosed a right ankle deltoid ligament sprain, an injury of the deep peroneal nerve at the right ankle, a fracture, and a right tibiofibular ligament sprain. He reviewed Dr. Ortega's restrictions and opined that appellant could return to work for four hours per day lifting up to 10 pounds intermittently, sitting for four hours per day with breaks, walking and standing up to one hour a day with breaks, and pushing and pulling up to 10 pounds for one hour a day with breaks.

On February 11, 2020 OWCP advised appellant of its notice of proposed reduction of her wage-loss compensation in accordance with 20 C.F.R. § 10.500(a) based on her refusal of the January 4, 2020 temporary light-duty position for 20 hours per week offered by the employing establishment. It advised her that it had reviewed the work restrictions provided by Dr. Ortega and found that his opinion represented the weight of the medical evidence. OWCP further

[4] Dr. Ortega indicated that the date of his evaluation was August 22, 2019 and the date of the report was August 25, 2019; however, it appears these were typographical errors.

determined that the offered position was within appellant's restrictions. It noted that the employing establishment had confirmed on January 16, 2020 that the position remained available. OWCP informed appellant of the provisions of 20 C.F.R. § 10.500(a) and advised her that any claimant who declined a temporary light-duty assignment deemed appropriate by OWCP was not entitled to compensation for total wage loss. It indicated that it would pay her compensation for the difference between the current pay for her date-of-injury position and the pay of her temporary light-duty assignment. OWCP afforded appellant 30 days to accept the assignment and report to duty or demonstrate that her refusal was justified.

Subsequently, OWCP received an undated letter from appellant advising that she had neither accepted nor declined the offered position.

By decision dated March 16, 2020, OWCP finalized the February 11, 2020 proposed notice and reduced appellant's wage-loss compensation, effective that date, because she failed to accept the January 4, 2020 temporary light-duty assignment in accordance with 20 C.F.R. § 10.500(a). It found that the weight of the medical evidence rested with Dr. Ortega, who provided temporary work restrictions. OWCP indicated that its procedures provided that a temporary light-duty assignment could be provided to an employee during a period of recovery, and if appellant had accepted the position she would have earned wages of $645.50 per week. It advised appellant that her entitlement to medical benefits was not affected.

On March 17, 2020 appellant advised OWCP that she had return to work, but was sent home "due to [appellant's] unsteady gait." On March 18, 2020 the employing establishment informed OWCP that she had arrived at work seeming irrational and acting like she was unable to walk. OWCP requested that the employing establishment submit a detailed statement regarding the incident.

In a progress report dated March 9, 2020, Dr. Hochman noted that the employing establishment had not taken appellant back to work due to her restrictions. He asserted that he would update a duty status report (Form CA-17) with Dr. Ortega's restrictions and see how she did, and if she had difficulty, modified the restrictions based on an FCE.[5]

On March 18, 2020 S.S., a manager, advised that appellant had returned to the employing establishment in a wheelchair because of balance issues and indicated that she could not walk from the parking lot or climb the ramp. Appellant asked to use the supervisor's entry door so she could "walk down the hallway while holding on to the walls to get to her assignment." She told S.S. that she wanted to work. S.S. related, "I told [appellant] that I was not prepared to offer her a job assignment because she stated [that] she was unable to walk without losing her balance."

In a March 20, 2020 statement, appellant advised that she had returned to work on March 16, 2020, but was told to leave after an hour because of her unsteady gait.

In an e-mail dated March 20, 2020, K.L., a supervisor, informed management that appellant had stated that she had difficulty walking and needed to hold on to the wall to make it to the restroom.

[5] Dr. Hochman completed a Form CA-17 on March 9, 2020.

Appellant received treatment from a physician assistant on March 22, 2018.

On March 23, 2020 the employing establishment advised that on March 16, 2020 appellant had indicated that she was unable to perform her assigned duties.

In an e-mail dated March 25, 2020, a vocational rehabilitation counselor, related that he had met with appellant on March 13, 2020 and that she was "seeking advice regarding the process for her return to work." He contacted K.S., a manager, for advice, but she was not in the office. On March 16, 2020 appellant told M.A. that she was scheduled to return to work that evening. On March 17, 2020 she told him that she had been sent home.

On April 15, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a statement dated April 15, 2020, appellant related that K.H., a manager with the employing establishment, had told her to come in at 10:00 p.m. on March 16, 2020. She believed that she was at the employing establishment to accept the offered position. Appellant was concerned about the ramp to the building and entered it in a wheelchair. A supervisor asked appellant about machines that she could work on and told appellant that she needed to figure out if she could use a walker or hold onto equipment to get around. K.H. told appellant that she needed to leave since she was a fall risk. Appellant advised that she did not refuse the position or say that she could not walk, but only asked for more time due to her unbalanced gait. She questioned how OWCP found that she had refused the job offer as she had accepted the offer on March 10, 2020 and reported for duty on March 16, 2020.

In an April 20, 2020 progress report, Dr. Hochman noted that appellant had attempted to return to work, but was sent home. On examination he found an antalgic gait, tenderness over the plantar fascia and distal Achilles, and trace effusion. Dr. Hochman recommended an FCE.

On June 10, 2020 Dr. Hochman indicated that appellant had seen a physician who wanted updated diagnostic studies.

A June 23, 2020 FCE indicated that appellant could perform light-duty work with restrictions, including lifting up to five pounds occasionally. It noted that she had poor balance, an antalgic gait, the inability to stand independently, and poor balance.

On July 13, 2020 Dr. Michael Canales, a podiatrist, reviewed appellant's history of a right ankle injury on March 13, 2018 at work. He diagnosed a right lower extremity Achilles tendon rupture, peroneal tendon tendinosis of the right lower extremity, post-traumatic arthritis of the right ankle after surgery, posterior tibial tendon dysfunction of the right lower extremity, and an insufficient deltoid ligament of the right lower extremity.

In a report dated August 3, 2020, Dr. Canales advised that an MRI scan had demonstrated a "rupture of the Achilles tendon and severe peroneal tendon tendinosis" causing appellant's unsteady gait. He recommended surgery.

A telephonic hearing was held on September 10, 2020. Appellant related that she arrived at work and informed management that she could not walk from the parking lot so she was given

a wheelchair. K.H. indicated that she was a high-fall risk and sent her home. Appellant related that Dr. Canales had identified her problem.

By decision dated November 4, 2020, OWCP's hearing representative affirmed the March 16, 2020 decision. He found that OWCP had reduced appellant's wage-loss compensation without knowledge of her attempt to return to work. The hearing representative found that the termination was correct at the time of issuance, but noted that she was subsequently sent home. He noted that, if a temporary light-duty assignments ends or is withdrawn, and the medical evidence supports continuing residuals, the claimant should be returned immediately to the periodic rolls. The hearing representative found that there was sufficient evidence of record to show that the employing establishment had withdrawn the modified assignment. He also noted that appellant had submitted evidence showing that she had an Achilles tendon rupture that might be directly related or a consequence of the accepted employment injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[6]

OWCP's regulations at section 10.500(a) provide 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 work 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 procedures, a temporary light-duty assignment within the employee's work restrictions."[7]

When it is determined that, an appellant 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 she is being

[6] *D.K.*, Docket No. 19-1178 (issued July 29, 2020); *S.F.*, 59 ECAB 642 (2008).

[7] 20 C.F.R. § 10.500(a).

removed from the periodic rolls.[8] 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.[9]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation effective March 16, 2020, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary part-time limited-duty assignment.

The evidence of record establishes that on March 16, 2020 the date OWCP reduced appellant's wage-loss compensation, she had accepted the offered position and returned to work. Evidence received subsequent to the termination indicated that appellant had met with her OWCP vocational rehabilitation counselor on March 13, 2020 asking for advice on the process for resuming work. The vocational rehabilitation counselor had contacted appellant's manager, K.S., who was not in the office. On March 16, 2020 appellant informed her vocational rehabilitation counselor that she was scheduled to resume work that evening. She returned to work on March 16, 2020. OWCP's procedures provide that, after issuing a notice of proposed termination or reduction of compensation, if no reply is received from the claimant and the claimant does not return to work, it should prepare a formal decision.[10] As appellant had accepted the position and resumed work, OWCP improperly reduced her compensation for failing to accept a light-duty position under 20 C.F.R. § 10.500(a).[11]

CONCLUSION

The Board finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation, effective March 16, 2020, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary part-time limited-duty assignment.

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

[9] *Id*.

[10] *Supra* note 8 at Chapter 2.814.9(c)6(b) (issued July 2013).

[11] *See generally D.M.*, Docket No. 17-1235 (issued February 15, 2018) (finding that OWCP erred in terminating appellant's compensation under 5 U.S.C. § 8106(c) when the employing establishment had authorized her absence from duty).

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 26, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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