United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 21-1207**
	)	**Issued: July 22, 2022**
DEPARTMENT OF VETERANS AFFAIRS, DORIS MILLER VA MEDICAL CENTER, Waco, TX, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 4, 2021 appellant, through counsel, filed a timely appeal from a June 29, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] 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 OWCP received additional evidence following the June 29, 2021 decision. 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 terminate appellant's wage-loss compensation, effective September 13, 2020, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary light-duty assignment.

FACTUAL HISTORY

On October 3, 2018 appellant, then a 39-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a groin muscle strain, ankle sprain, right knee bruise, shoulder pain, and back pain, when the wheels locked on a tall cart, causing heavy pans to fall on her while in the performance of duty. She stopped work at the time of injury.

In an October 12, 2018 report, Dr. Gilbert Mayorga, a family practitioner, provided a history of injury and noted findings on examination. He diagnosed cervical, thoracic, and lumbosacral spine sprains, sprains of the right hip, right knee, right shoulder, left ankle, left wrist, and left hand, and contusions of the right shoulder and right knee. Dr. Mayorga submitted periodic reports through December 7, 2018 holding appellant off from work.[4]

On November 19, 2018 OWCP accepted the claim for sprains of the left ankle, left wrist, right shoulder, right hip, right knee, cervical spine, thoracic spine, and lumbar spine, and contusions of the right shoulder and right knee. It paid appellant wage-loss compensation on the supplemental rolls, effective December 8, 2018, and on the periodic rolls, effective January 6, 2019. Appellant continued to receive medical treatment.[5]

In reports dated from January 22 through May 29, 2019 reports, Dr. Raymond R. Fulp, an osteopathic physician Board-certified in orthopedic surgery, provided a history of injury. He diagnosed a lumbar spine sprain, cervical spine sprain, other cervical disc displacement, cervical radiculopathy, and a left ankle sprain.

On January 23, 2019 OWCP expanded its acceptance of the claim to include other lumbar vertebral disc displacement.[6]

In a January 25, 2019 work capacity evaluation report (Form OWCP-5c), Dr. Mayorga opined that appellant was totally disabled from work for an indefinite period due to the previously

[4] Dr. Mayorga ordered imaging studies. A November 20, 2018 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated minimal facet arthropathy at L1-2, mild facet arthropathy at L2-3 with minimal disc displacement, mild to moderate facet arthropathy at L3-4, a diffuse disc bulge and moderate facet arthropathy at L4-5, mild degenerative disc disease, slight retrolisthesis, diffuse disc bulge, subtle central disc protrusion, moderate facet arthropathy at L5-S1, degenerative changes at L4-5 and L5-S1 also known as Baastrup's Disease, and a tiny focal T2 hyperintensity. A November 28, 2018 MRI scan of the left foot and ankle demonstrated findings indicative of a prior low grade strain.

[5] On February 7 and March 6, 2019, appellant underwent OWCP-authorized cervical medial branch block injections. From April 4 through September 5, 2019, appellant underwent a series of OWCP-authorized greater and lesser occipital nerve blocks, trigger point injections to the trapezius, rhomboid, cervical paraspinous, and rhomboid muscles, cervical medial branch blocks, and thoracic medial branch blocks.

[6] A January 23, 2019 MRI scan of the cervical spine demonstrated mild degenerative disc disease at C4-5 and C5-6.

diagnosed conditions. He submitted periodic reports through September 23, 2019 holding appellant off work. Dr. Mayorga also diagnosed a left medial malleolar fracture and cervical intervertebral disc disease attributable to the October 3, 2018 employment incident.

On May 6, 2019 OWCP received an August 24, 2016 official position description for appellant's date-of-injury position as a food service worker. The physical demands included the ability to lift, push, and/or pull heavy equipment and supplies, frequent lifting up to 45 pounds, continuous standing and walking, frequent stooping, and climbing ladders.

In a June 25, 2019 report, Dr. Shawn A. Fyke, a chiropractor, diagnosed cervical paraspinal pain and recommended traction, mobilization, and home exercises.

On July 19, 2019 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a list of questions to Dr. James Elmer Butler, III, a Board-certified orthopedic surgeon, for a second opinion on the nature and extent of the accepted conditions and appellant's work capacity. In a September 12, 2019 report, Dr. Butler reviewed the medical record, SOAF, and provided findings on examination. He opined that appellant had minimal residuals of the accepted injuries. Dr. Butler completed a Form OWCP 5c indicating that appellant could perform full-time, light-duty work with permanent restrictions with walking, standing, twisting, bending, stooping, pulling, pushing, and lifting up to two hours a day, squatting, kneeling, and climbing up to one hour a day, and pushing, pulling, and lifting limited to 20 pounds.

In an October 15, 2019 addendum report, Dr. Butler indicated that an OWCP-authorized September 25, 2019 functional capacity evaluation (FCE) demonstrated that appellant could perform light-duty work with lifting, pulling, and pushing limited to 20 pounds for up to two hours a day, twisting, bending, stooping, squatting, kneeling, and climbing limited to two hours a day, and walking limited to four hours a day.

Commencing September 23, 2019, appellant underwent a series of OWCP-authorized thoracic medial branch blocks, performed by Dr. David Martincheck, an anesthesiologist specializing in pain management.[7]

On October 7, 2019 OWCP found a conflict in the medical opinion evidence between Dr. Butler, for the government, and Dr. Mayorga, for appellant, regarding appellant's work capacity. To resolve the conflict, on October 17, 2019, it referred appellant, the medical record, a SOAF, and a list of questions to Dr. Terry J. Beal, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion.

Dr. Beal provided a January 13, 2020 report of his December 17, 2019 examination. He reviewed the medical record and SOAF. On examination Dr. Beal observed limited range of motion throughout the spine, significantly limited active range of motion of the right shoulder, normal muscle testing throughout the bilateral upper extremities, normal sensory examination of

[7] On November 14, 2019 Dr. Martincheck performed cervical medial branch blocks at C3, C4, C5, and C6 on the left. On December 5, 2019 he performed thoracic medial branch radiofrequency ablation. A January 8, 2020 MRI scan of the thoracic spine demonstrated a tiny left central disc protrusion at T6-7, and disc desiccation and right central disc protrusions at L4-5 and L5-S1. A January 15, 2020 left ankle x-ray was within normal limits. January 15, 2020 spinal x-rays demonstrated mild disc space narrowing at C4-5 with reversal of the cervical curvature, a minimal rightward curvature of the thoracic spine possibly attributable to positioning, mild disc space narrowing at L4-5, moderate disc space narrowing at L5-S1, and moderate facet hypertrophy at L4-5 and L5-S1.

both lower extremities, and the ability to heel and toe walk. He opined that the accepted cervical spine sprain remained symptomatic, but required no further treatment. Dr. Beal explained that appellant's lumbar symptoms were due to chronic axial back problems unrelated to the employment injuries, and that the other accepted injuries had resolved without residuals. He completed a Form OWCP-5c on January 13, 2020 indicating that appellant was able to perform light-duty work for eight hours a day, with walking, standing, kneeling, pushing, and pulling limited up to two hours a day, twisting, bending, and stooping limited up to one hour a day, pushing, pulling, and lifting limited up to 20 pounds, and no climbing.

On March 24, 2020 the employing establishment offered appellant a full-time, temporary, limited-duty assignment as a food service worker, with wages of $15.30 an hour. The assigned duties entailed wrapping silverware and bread in a seated position on Wednesday, Thursday, and Friday, and greeting arriving patients in a seated position at a table or information booth on Saturday and Sunday. The position required walking, standing, kneeling, lifting, pulling, and pushing for up to two hours per day, twisting, bending, and stooping up to one hour per day, and no climbing. Lifting, pulling, and pushing were limited to 20 pounds. The employing establishment indicated that it based the position on work restrictions provided by Dr. Beal in his January 13, 2020 report. It instructed appellant to report for duty on April 1, 2020.

In an April 1, 2020 statement, appellant noted that she neither accepted nor declined the offered position as she had been advised to comply with a recent duty status report (Form CA-17). She submitted a March 20, 2020 report by Dr. Mayorga, who reviewed the March 24, 2020 job offer. Dr. Mayorga opined that appellant required an updated FCE to determine if the offered position exceeded appellant's medical limitations. He held appellant off from work.

In an April 30, 2020 letter, the employing establishment enclosed a copy of Dr. Beal's January 13, 2020 impartial medical report, and advised appellant that her duties during her period of recovery would not exceed the physical requirements listed in the job offer. It enclosed a new job offer, dated May 11, 2020, for a full-time, temporary, light-duty assignment as a food service worker, with wages of $15.30 an hour. The assigned duties entailed working in a kitchen wrapping silverware and bread from a seated position Monday through Friday. The position required walking, standing, kneeling, lifting, pushing, and pulling up to two hours a day with lifting, pulling, and pushing limited to 20 pounds, twisting, bending, and stooping for up to one hour a day, and no climbing. The employing establishment instructed appellant to report for duty on May 11, 2020.

Appellant responded on May 8, 2020 that she neither accepted nor declined the position as she was awaiting further testing to determine her work capacity. She noted that her physician continued to hold her off work.

On May 28, 2020 the employing establishment noted that appellant's pay rate for her job and step when injured was $15.39 an hour. It confirmed that the offered position remained open and available.

Dr. Martincheck provided progress notes dated from May 26 through June 16, 2020. He administered a series of trigger point injections in the trapezius, rhomboid, and cervical paraspinous muscles, and cervical medial branch blocks.[8]

On July 29, 2020 the employing establishment confirmed that an offered light-duty food service worker position remained open and available.

By notice of proposed termination dated August 4, 2020, OWCP informed appellant that it had found the March 24, 2020 job offer "appropriately accommodates your current work restrictions" as provided by Dr. Beal on January 13, 2020. It noted that the position required "wrapping silverware and bread in a seated position in the kitchen." OWCP explained that, although appellant had been a permanent employee at the time of injury, as Dr. Beal's restrictions were temporary in nature, a temporary light-duty position may be provided to an employee during a period of recovery. It advised appellant that, pursuant to 20 C.F.R. § 10.500(a), an employee who "declines a temporary light[-]duty assignment deemed appropriate by OWCP (or fails to report for work when scheduled) is not entitled to compensation for total wage loss for the duration of the assignment." OWCP afforded her 30 days to accept the assignment.

In response, appellant submitted an August 14, 2020 report by Dr. Mayorga. Dr. Mayorga noted that, based on a June 9, 2020 OWCP-authorized FCE, appellant could perform work at the sedentary level with lifting limited to 10 pounds. He disagreed with Dr. Beal's opinion that appellant could lift up to 20 pounds. Dr. Mayorga found appellant able to perform sedentary work with no lifting greater than 10 pounds, no forceful pulling/pushing, no repetitive bending/stooping, alternate standing and walking, and 15-minute breaks every 2 hours.

On September 9, 2020 the employing establishment notified OWCP that the offered position remained open and available to appellant.

By decision dated September 10, 2020, OWCP terminated appellant's wage-loss compensation benefits, effective September 13, 2020, pursuant to 20 C.F.R. § 10.500(a), as she failed to accept a light-duty position offered to her on March 4, 2020. It explained that had she accepted the assignment, she would not have sustained any wage loss as the actual earnings in that assignment either met or exceeded the current wages of her date-of-injury position. OWCP advised appellant that she remained entitled to medical benefits.

In a September 22, 2020 letter, Dr. Mayorga opined that August 27, 2020 MRI scans of the cervical and lumbar spine demonstrated new, significant lesions, including a cervical inferior disc extrusion and possible impingement of the L5 and S1 nerve roots. He opined that appellant was disabled from all work.

In a letter dated September 28, 2020, Dr. Mayorga requested that OWCP expand its acceptance of the claim to include cervical intervertebral disc disease and intervertebral disc disorder with myelopathy.

[8] June 2, 2020 left ankle x-rays were within normal limits.

OWCP received additional reports from Dr. Martincheck dated December 8, 2020 through June 9, 2021, noting continued cervical and thoracic spine pain attributable to the October 3, 2018 employment injury. He administered additional injections.

In a March 18, 2021 report, Dr. Ray Dustin Luis, a Board-certified orthopedic surgeon, opined that appellant sustained bilateral carpal tunnel syndrome, bilateral trigger thumb, and a left wrist sprain "while at work when she tried to catch a heavy food cart that fell."

In an April 27, 2021 report, Dr. David Masel, a Board-certified neurosurgeon, opined that appellant's continued, worsening low back pain with numbness and tingling in both lower extremities was status post the October 3, 2018 accepted injury. He recommended a right-sided lumbar rhizotomy.

On June 15, 2021 appellant, through counsel, requested reconsideration and requested that OWCP expand its acceptance of the claim to include cervical intervertebral disc disease and intervertebral disc disorder without myelopathy.

On June 23, 2021 OWCP received a June 14, 2021 report by Dr. Fyke, who reviewed his treatment regimen.

By decision dated June 29, 2021, OWCP denied modification of the September 10, 2020 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[9]

OWCP regulations at 20 C.F.R. § 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 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

[9] *C.G.*, Docket No. 21-0171 (issued November 29, 2021); *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."[10]

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.[11] OWCP's procedures require that, if an employee declines an offered appropriate assignment, it shall issue "a notice of proposed termination or reduction of compensation for the duration of the temporary assignment, whether specified or indefinite, and provide the claimant with 30 days to respond."[12] The notice should advise the claimant of the requirements of section 10.500, and identify the light-duty assignment by its name and/or date.[13] 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.[14]

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)."[15]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective September 13, 2020, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary light-duty assignment.

OWCP properly declared a conflict in the medical opinion evidence between Dr. Butler, for the government, and Dr. Mayorga, for appellant, regarding appellant's work capacity, and referred her to Dr. Beal for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a). On January 13, 2020 Dr. Beal found that appellant was able to perform full-time, light-duty work with pushing, pulling, and lifting up to 20 pounds, walking, standing, kneeling, pushing, and pulling limited to two hours a day, twisting, bending, and stooping limited to one hour a day, and no climbing. Based on these restrictions, the employing establishment offered appellant a temporary light-duty position on March 24, 2020 as a food service worker. The assigned duties involved wrapping bread and utensils three days a week and screening and greeting patients, providing masks, directions, and other information as needed, two days a week. As appellant did not accept the March 24, 2020 position on April 30, 2020, the employing establishment offered appellant a

[10] 20 C.F.R. § 10.500(a).

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

[12] *Id*. at Chapter 2.814.9(c)(5).

[13] *Id*.

[14] *Id*.

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

different temporary light-duty position as a food service worker, wrapping bread and silverware five days a week, commencing May 11, 2020. Appellant did not accept the April 30, 2020 position.

In a notice of proposed termination dated August 4, 2020, OWCP advised appellant that the March 24, 2020 job offer appropriately accommodated Dr. Beal's work restrictions; however, OWCP attached the job description from the April 30, 2020 job offer to the decision. Additionally, it did not confirm that the March 24, 2020 position was still available to appellant. While the employing establishment confirmed on July 29, 2020 that an offered light-duty food service worker position remained open and available, it did not indicate whether it was referring to the March 24, 2020 position or the subsequent April 30, 2020 job offer. Thus, the August 4, 2020 pretermination notice does not comply with OWCP's procedures.[16] The Board, therefore, finds that OWCP improperly terminated appellant's wage-loss compensation, effective September 13, 2020.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective September 13, 2020, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary light-duty assignment.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 22, 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

[16] *Supra* note 15.