United States Department of Labor
Employees' Compensation Appeals Board

S.P., Appellant	)	
and	)	**Docket No. 21-0380**
	)	**Issued: November 22, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Allentown, PA, Employer	)	

Appearances:
Russell Uliase, 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, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On January 19, 2021 appellant, through counsel, filed a timely appeal from an August 27, 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 August 27, 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 appellant has met her burden of proof to establish a recurrence of disability on May 15 or October 10, 2019 causally related to her accepted January 18, 2000 employment injury.

FACTUAL HISTORY

OWCP accepted that on January 18, 2000 appellant, then a 29-year-old letter carrier, sustained lumbar sprain/strain, displacement of the lumbar intervertebral disc without myelopathy, and an aggravation of preexisting degenerative disc disease at L2-S1 while in the performance of duty.[4] It further accepted that she sustained recurrences of disability on April 28, 2002, June 17, 2004, and January 21, 2013.[5]

In a duty status report (Form CA-17) dated February 4, 2014, Dr. Wayne Dubov, a Board-certified physiatrist, found that appellant could work full time with the following restrictions: lifting and carrying up to 15 pounds intermittently; sitting and standing for four hours per day; walking, pushing and pulling for two hours per day, driving a motor vehicle for six hours per day, and performing no twisting, bending/stooping, kneeling, or climbing stairs.

On March 24, 2014 appellant accepted a modified position as a regular city carrier, with duties of driving for four hours per day and standing with a 15-pound weight restriction for four hours per day. The position required sorting and strapping out mail and delivering pivots and express mail.

On May 15, 2019 Dr. Steven J. Valentino, an osteopath Board-certified in orthopedic surgery, discussed appellant's complaints of pain in the L3 through S1 region bilaterally with pain and numbness radiating into her right thigh. He diagnosed low back pain, a sprain of the ligaments of the lumbar spine, lumbar radiculopathy, and right-sided sciatica. Dr. Valentino noted that appellant had been off work for five days after her back pain had worsened and she had radiation into the right leg after she helped someone at work two weeks prior. He found that she should continue to work light-duty employment. In a Form CA-17 form of even date, Dr. Valentino found that appellant could work full-time with the same restrictions initially provided by Dr. Dubov. He noted that driving a vehicle was not applicable.

In a progress report dated May 28, 2019, Dr. Valentino noted that appellant continued to perform modified employment. He provided findings on examination of decreased sensation of the right anterior thigh and reduced lumbar motion. Dr. Valentino diagnosed low back pain, lumbar sprain, and lumbar sciatica.

[4] Appellant's traumatic injury claim (Form CA-1) is not contained in the case record.

[5] By decision dated October 25, 2002, OWCP reduced appellant's wage-loss compensation to zero as her actual earnings as a modified carrier, effective May 10, 2002, fairly and reasonably represented her wage-earning capacity. By decision dated April 9, 2004, OWCP granted her a schedule award for 12 percent permanent impairment of the left lower extremity and 15 percent permanent impairment of the right lower extremity.

On August 19, 2019 appellant accepted a job offer as a modified supervisor/customer service. The duties included sitting for five hours per day and walking for three hours per day.

On October 10, 2019 the employing establishment offered appellant a position as a modified city carrier lifting, pushing, and pulling up to 15 pounds for 2 hours per day, sitting and standing for 4 hours per day, and walking for 2 hours per day. The duties included casing mail/cluster boxes for four hours per day. Appellant accepted the offer, but indicated on the form that it was signed under duress and exceeded her limitations.

In a note dated October 22, 2019, Dr. Valentino provided a history of the January 18, 2000 employment injury and noted that appellant's limited-duty work hours had recently been cut such that she had to use leave. He advised that she had a permanent partial disability and required continued work restrictions. The record also contains a CA-17 form report of even date, which was signed by Dr. Valentino.

On November 14, 2019 appellant filed a notice of recurrence of disability (Form CA-2a) beginning May 15, 2019 causally related to her January 18, 2000 employment injury. She advised that she continued to have chronic pain and periodic exacerbations and had recently "been cut back on [her] hours for my limited[-]duty job…." The employing establishment indicated the date of recurrence as May 15, 2019 and noted that appellant had returned to work on May 16, 2019.

In a development letter dated November 20, 2019, OWCP informed appellant of the deficiencies of her recurrence claim. It advised her of the type of medical information necessary to establish her claim. It noted that it appeared that she was claiming a recurrence of disability due to the withdrawal of a limited-duty assignment. By separate letter of even date, OWCP also requested additional information from the employing establishment, including a description of changes to appellant's work duties and tour. It afforded both parties 30 days to respond to the request.

Thereafter, OWCP received another October 10, 2019 job offer for a modified city carrier. The position required sitting and standing for four hours, walking for two hours, pushing and pulling for two hours, and lifting up to 15 pounds for two hours. The position required casing mail up to four hours per day, taking pivots to the street up to four hours per day, and doing cluster boxes for two hours per day. Appellant accepted the position "under duress" and asserted that it was not within her restrictions.

In a progress report dated October 22, 2019, Dr. Valentino discussed appellant's symptoms of bilateral pain from L3 through S1 radiating into the right leg. He noted that she found working the modified job difficult and that her employer had limited her to two hours per day. Dr. Valentino diagnosed low back pain, sciatica on the right side, lumbar sprain, lumbar facet joint syndrome, and lumbar sciatica associated with disorders of the lumbar spine. He discussed treatment options and noted that appellant had "opted to continue with permanent work-related restrictions."

On December 4, 2019 Dr. Valentino advised that he had last evaluated appellant on October 22, 2019 for complaints of low back pain radiating into the right leg and right leg numbness. He noted that she had permanent restriction and was working two hours per day. Dr. Valentino diagnosed right-sided sciatica, lumbar sprain, lumbar facet syndrome, sciatica with

disorders of the lumbar spine, lumbar radiculopathy, and a lumbar disc herniation. He related the diagnoses to the "original mechanism of injury" and again noted that appellant had chosen to "continue with permanent work-related restrictions."

In a December 19, 2019 statement, the employing establishment indicated that appellant had been working as a city carrier driving up to four hours per day. On August 19, 2019 she began working as a customer service supervisor. On October 10, 2019 the employing establishment instructed appellant to resume her limited-duty position as a city carrier on October 10, 2019. The employing establishment questioned why she believed that her work duties exceeded her restrictions as she had previously performed the position of modified carrier.

By decision dated February 3, 2020, OWCP found that appellant had not established a recurrence of disability causally related to her accepted January 18, 2000 employment injury.

On February 14, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. On March 6, 2020 counsel asserted that the employing establishment had withdrawn appellant's limited-duty position. He resubmitted the May 15, 2019 CA-17 form from Dr. Valentino.

A telephonic hearing was held on June 12, 2020. Appellant related that she began working in a new position on September 20, 2019. She cased mail for a little over an hour, and then sat in the break room. After appellant returned from leave on October 10, 2019, she signed a job offer, but asserted that it was outside her restrictions. A couple of hours later, she received another job offer that was similar. Appellant advised that she believed that it too was outside her restrictions because she was not supposed to perform the twisting required for casing mail. She walked in circles trying to case mail without twisting and management told her that there was no work for her and sent her home. Appellant continued to be sent home after a few hours each day. She also advised that casing mail required more than intermittent lifting. Appellant indicated that she had resumed work on November 15, 2019 as a supervisor. Counsel maintained that the employing establishment had not addressed appellant's contention that she was sent home because no work was available. He argued that she was entitled to wage-loss compensation for partial disability during this period.

On July 13, 2020 the employing establishment noted that appellant had previously performed route inspections which included observing a carrier, and thus she was familiar with the duties of delivering mail. It advised that she could pivot rather than walk around to case mail. The employing establishment noted that appellant had received a diagnosis of a herniated nucleus pulposus, which it asserted was not an accepted condition.

In an August 5, 2020 response, appellant related that she had not performed route inspections for city carrier walks, but had done rural box counts. She related that she was familiar with how to deliver mail, but that it was physically outside her restrictions and was not listed on her job description. Appellant advised that her physical therapist had instructed her to walk around to case mail so that she did not twist her back.

By decision dated August 27, 2020, OWCP's hearing representative affirmed the February 3, 2020 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] 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.[7] 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.[8] 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.[9] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.[10]

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.[11]

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.[12]

An employee who claims a recurrence of disability resulting from an accepted employment injury has the burden of proof to establish that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and

[6] *Supra* note 2.

[7] *See 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).

[8] 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

[9] *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

[10] *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[11] 20 C.F.R. § 10.5(x); *see D.T.*, Docket No. 19-1064 (issued February 20, 2020).

[12] *C.B.*, Docket No. 19-0464 (issued May 22, 2020); *see R.N.*, Docket No. 19-1685 (issued February 26, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[13]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability on May 15 or October 10, 2019 causally related to her accepted January 18, 2000 employment injury.

On February 4, 2014 Dr. Dubov found that appellant could work sitting and standing up to four hours per day, walking for two hours per day, driving for six hours per day, and lifting and carrying up to 15 pounds intermittently. Beginning March 24, 2014, appellant began working as a modified city carrier driving four hours per day and standing for four hours per day with a 15-pound weight restriction. She subsequently began working as a modified customer service supervisor on August 19, 2019. On October 10, 2019 the employing establishment returned appellant to her position as a modified city carrier. It provided two job offers for the position. One required lifting, pushing, and pulling up to 15 pounds for two hours per day, sitting and standing for four hours per day, and walking for two hours per day and the subsequent job offer required sitting and standing for four hours, walking for two hours, pushing and pulling for two hours, and lifting up to 15 pounds for two hours. While appellant argued that her limited duty changed such that the position exceeded her limitations, the offered position was within her previous work restrictions. There is no evidence that the employing establishment changed or withdrew her limited-duty position. Appellant, therefore, has the burden of proof to provide medical evidence that she was disabled from work due her January 18, 2000 employment injury.[14]

On May 15, 2019 Dr. Valentino noted that appellant had sustained increased back pain and numbness radiating into the right thigh after helping someone at work two weeks earlier. He diagnosed low back pain, a sprain of the ligaments of the lumbar spine, lumbar radiculopathy, and right-sided sciatica. Dr. Valentino indicated that appellant should continue working modified employment. He did not, however, find that she was disabled from her limited-duty employment or specifically address the cause of her restrictions. Further, Dr. Valentino described an intervening event, that of appellant experiencing increased back pain beginning two weeks earlier after assisting someone at work. The Board has found that a recurrence of disability does not occur where the claimant's work stoppage is caused by a new or intervening injury, even if the new injury involves the same part of the body previously injured.[15] Consequently, Dr. Valentino's report is insufficient to meet appellant's burden of proof to establish an employment-related recurrence of disability.

In a progress report dated May 28, 2019, Dr. Valentino found decreased sensation of the right anterior thigh and reduced lumbar motion. He noted that appellant continued to perform limited-duty employment. Dr. Valentino diagnosed low back pain, lumbar sprain, and lumbar

[13] *Id*.

[14] *See N.B.*, Docket No. 21-0710 (issued August 19, 2022); *K.W.*, Docket No. 20-0230 (issued May 21, 2021); *L.S.*, Docket No. 19-1231 (issued March 30, 2021); *Cecelia M. Corley*, 56 ECAB 662 (2005).

[15] *See D.H.*, Docket No. 22-0533 (issued August 4, 2022); *K.B.*, Docket No. 19-1055 (issued January 10, 2020); *A.A.*, Docket No. 19-0957 (issued October 22, 2019); *D.B.*, Docket No. 19-0481 (issued August 20, 2019).

sciatica. As he did not address the relevant issue of whether appellant was disabled from employment during the claimed period due to her accepted employment injury, his opinion is of no probative value.[16]

On October 22, 2019 Dr. Valentino evaluated appellant for pain from L3 through S1 radiating into the right leg. He noted that she had difficulty working and that her employer had limited her to two hours per day. Dr. Valentino diagnosed low back pain, sciatica on the right side, lumbar sprain, lumbar facet joint syndrome, and lumbar sciatica associated with disorders of the lumbar spine. He noted that he had discussed treatment options with appellant and advised that she had chosen to continue working with restrictions. Dr. Valentino provided a similar report on December 4, 2019 and attributed the diagnoses to the original mechanism of injury. He did not, however, attribute any disability to appellant's work injury or address whether her condition had changed such that she required increased work restrictions. As Dr. Valentino failed to address the issue of disability from work for the period for which compensation is claimed, his reports are insufficient to meet her burden of proof to establish a recurrence of disability.[17]

In a CA-17 form dated May 15, 2019, Dr. Valentino advised that appellant could work with restrictions. However, this is merely a form report and does not contain an opinion on whether the accepted employment injury caused disability from employment; consequently, it is of no probative value on the issue of causal relationship.[18]

Appellant submitted a report and CA-17 form from Dr. Valentino dated October 22, 2019; however, they did not contain an opinion on causal relationship. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[19] This evidence is therefore of no probative value and insufficient to establish appellant's recurrence claim.

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 appellant has not met her burden of proof to establish a recurrence of disability on May 15 or October 10, 2019 causally related to her accepted January 18, 2000 employment injury.

[16] *B.B.*, Docket No. 19-0511 (issued July 22, 2019); *M.C.*, Docket No. 18-1391 (issued February 1, 2019).

[17] *See S.G.*, Docket No. 20-0828 (issued January 6, 2022); *L.V.*, Docket No. 19-1725 (issued April 5, 2021); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[18] *S.G.*, *id.*; *L.S.*, Docket No. 20-0570 (issued December 15, 2020).

[19] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board