United States Department of Labor
Employees' Compensation Appeals Board

E.L., Appellant	)	
and	)	**Docket No. 22-0324**
	)	**Issued: September 29, 2022**
DEPARTMENT OF VETERANS AFFAIRS, JESSE BROWN VA MEDICAL CENTER, Chicago, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 21, 2021 appellant filed a timely appeal from an October 20, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the issuance of the October 20, 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*.

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective October 20, 2021, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

FACTUAL HISTORY

On March 9, 2020 appellant, then a 38-year-old certified nursing assistant, filed a traumatic injury claim (Form CA-1), alleging that on February 16, 2020 she was assisting a nurse during an admissions process and lifted a patient's heavy suitcase when she felt a sudden pressure in her left hand while in the performance of duty. She stopped work on February 21, 2020.

On May 12, 2020 OWCP accepted the claim for strain of the left hand. It paid appellant wage-loss compensation on the supplemental rolls from April 9, 2020 to April 6, 2021.[3]

On November 12, 2020 OWCP referred appellant, along with a statement of accepted facts and a series of questions, for a second opinion examination and evaluation with Dr. Steven A. Chandler, an osteopath Board-certified in orthopedic surgery, to evaluate whether she continued to have residuals or disability due to the accepted February 16, 2020 employment injury.

In a January 9, 2021 report, Dr. Chandler noted appellant's history of injury and medical treatment. He diagnosed osteoarthritis, first carpometacarpal (CMC) joint of left hand and left wrist sprain. Dr. Chandler opined that appellant had residuals from the work-related strain of the left hand, noting pain specifically at the first CMC joint and swelling in the hand compared to the contralateral hand. He noted that she still had some mild weakness in grip compared to the contralateral hand and recommended another six to eight weeks of therapy, work with restrictions, and then a return to full-duty work. Dr. Chandler opined that appellant was unable to return to her date-of-injury position, but could work in a light-duty capacity and eventually return to full duty. He completed a work capacity evaluation (Form OWCP-5c) prescribing light-duty restrictions for work, which included a 20-pound weight restriction, limitations on repetitive movements of pushing, pulling, and lifting, no operating a motor vehicle for more than four hours at work, and no more than two hours to and from work.

Appellant received medical treatment from Dr. Shanu Kondamuri, Board-certified in pain medicine. In a report dated January 13, 2021, Dr. Kondamuri related that she had sustained a work-related injury. He provided assessments of complex regional pain syndrome of the left upper extremity, left wrist sprain, and bilateral post-traumatic osteoarthritis of the first CMC joint.

On February 12, 2021 OWCP requested a supplemental report from Dr. Chandler to evaluate whether appellant had complex regional pain syndrome causally related to the February 16, 2020 employment injury and if she was able to perform light duty with the previously provided restrictions.

[3] OWCP again resumed payment of wage-loss compensation on the supplemental rolls as of December 20, 2021.

In February 15 and 22, 2021 treatment notes, Dr. Kondamuri related that, on February 16, 2020 while at work, appellant heard a "pop" and noted onset of pain at the base of her left thumb to the base of the index finger. He opined that her work status should be modified with restrictions of no lifting, pushing, or pulling over 5 pounds with the left hand. Dr. Kondamuri recommended physical therapy and indicated that he anticipated maximum medical improvement (MMI) in eight weeks, if treatment was authorized and initiated in a timely manner.

In a February 22, 2021 e-mail, the employing establishment informed appellant that it had a position available as a hall monitor that would meet her medical restrictions. Appellant would be required to sit in front of the hallways and monitor all activities in the hallways and day areas and would be relieved during designated meal breaks. She would not participate in any tasks other than to keep track of hallway activities and would immediately report safety concerns to the charge nurse. The employing establishment advised appellant that at no time was she to engage in any activity that could harm or aggravate her condition and that it was her responsibility to communicate her restrictions to anyone who might inadvertently request that she exceed her restrictions. It also advised her that she was obligated to work in an available temporary light-duty assignment that met her medical restrictions, and if she refused to accept the employment offer or to perform the temporary-duty assignment that met her medical restrictions, this would result in termination of her workers' compensation benefits. The employing establishment provided appellant with a copy of the job offer on that same date.

Dr. Kondamuri provided an addendum on February 23, 2021 advising that he had reviewed appellant's job offer and opined that she could work as a hall monitor as described in the job offer, but only during the night shift. His addendum advised, in part: "[Appellant] is allowed to work on mental health floor, BUT ONLY DURING NIGHT SHIFT HOURS (11PM-7AM). This is pertinent, that patient ONLY be given Night Shift, as this is a personal safety concern. Please notify this office, if job duty shift will change, as this will need to be re-evaluated." (Emphasis in the original.)

In a March 10, 2021 report, Dr. Kondamuri indicated that appellant's work status was "no work."

In a March 16, 2021 memorandum of telephone call (Form CA-110), the nurse care manager at the employing establishment requested that the case be developed as a recurrence. She explained that on February 22, 2021 appellant accepted the limited-duty job offer and returned to work for one day, but did not return to work thereafter.

In a March 30, 2021 addendum, Dr. Chandler indicated that he had not been provided with any records pertaining to whether appellant was diagnosed with complex regional pain syndrome. He noted that he had already completed the Form OWCP-5c and his recommendation did not change.

In an April 1 2021 report, Dr. Kondamuri noted that he reviewed the report from Dr. Chandler. He opined that appellant could not return to her original job as she could not handle disturbed psychiatric patients. Dr. Kondamuri opined that light-duty work was reasonable, as long as there was no use of the affected hand. He indicated that appellant's return to work status should be "modified, sedentary/desk duty; NO use of left hand." (Emphasis in the original.)

In a letter dated April 7, 2021, the employing establishment notified appellant that it, "has an assignment that would meet your medical restriction (No use of left hand)." It further noted that she would be "working as a Hall Monitor" and that her duties would be "to sit in front of the hallways and monitor ALL activities in the hallways and day areas." (Emphasis in the original.)

In an April 8, 2021 report, Dr. Kondamuri noted that he was in receipt of a copy of appellant's job offer. He opined that the assignment was within her medical restrictions as outlined in his April 1, 2021 work status form, which included no use of the left hand. However, Dr. Kondamuri further opined, "I am unsure how medically safe it would be, for appellant to work, as a Hall Monitor, on this particular psychiatric floor, with having to possibly come in contact, or restrain aggressive/disturbed patients. This is the main concern." He noted that he agreed with Dr. Chandler that appellant could not return to her prior position, which included being able to physically restrain disturbed psychiatric patients. Dr. Kondamuri opined that she could return to light duty, as long as there was no use of the affected hand, and that her return-to-work status should be modified to sedentary/desk duty, with no use of left hand. However, he further opined that appellant should be assigned as a hall monitor on a floor other than the psychiatric floor that was offered, as she wanted to return to work safely within her current work restrictions. Dr. Kondamuri indicated that he would further review appellant's work status and restrictions, once appellant underwent additional treatment and noted that surgery was not an option at this point.

In a May 25, 2021 supplemental report, Dr. Chandler opined that appellant developed complex regional pain syndrome from her work injury and that implantation of a stimulator would be successful. He noted that she had a satellite ganglion block which gave her some relief, but was only temporary.

On July 26, 2021 OWCP expanded the acceptance of appellant's claim to include complex regional pain syndrome of left upper limb.

On July 28, 2021 OWCP confirmed that the job offer remained available.

In a notice of proposed reduction of wage-loss compensation dated August 27, 2021, OWCP proposed to reduce appellant's wage-loss compensation in accordance with 20 C.F.R. § 10.500(a), based on her refusal of the temporary, light-duty position of a hall monitor. It advised her that it had reviewed the work restrictions provided by Dr. Kondamuri and found that his opinion represented the weight of the medical evidence. OWCP further found that the position offered was within appellant's restrictions. It informed her of the provisions of 20 C.F.R. § 10.500(a), and advised her that a claimant who declined a temporary, light-duty assignment deemed appropriate by OWCP, was not entitled to compensation for total wage loss. OWCP noted that the offered pay rate of $940.88 per week for 40 hours was the same as her date-of-injury pay, and she would not be entitled to ongoing wage-loss compensation. It afforded appellant 30 days to accept the assignment and report to duty or provide a written explanation of her reasons for not accepting the assignment.

In an August 23, 2021 report, Dr. Kondamuri diagnosed complex regional pain syndrome of the left upper limb. He also indicated that appellant would proceed with a spinal cord stimulator trial.

OWCP received an August 27, 2021 e-mail from the employing establishment, confirming the job offer was open and would remain available.

The record reflects that on September 13, 2021 the notice of proposed reduction of compensation benefits dated August 27, 2021, was returned to OWCP as undeliverable.

On September 30, 2021 OWCP received an undated statement in which appellant indicated that she had "never denied a position." Appellant also notified OWCP of her current address.

OWCP also received an October 5, 2021 report from Dr. Kondamuri noting that he had provided appellant with an epidural injection and inserted a spinal cord stimulator.

In an October 14, 2021 report, Dr. Kondamuri reiterated appellant's diagnosis of complex regional pain syndrome of the left upper limb.

By decision dated October 20, 2021, OWCP finalized the August 27, 2021 proposed reduction of appellant's wage-loss compensation, effective that date, because she failed to accept the April 7, 2021 temporary, modified-duty assignment in accordance with 20 C.F.R. § 10.500(a). It found that the weight of the medical evidence rested with Dr. Kondamuri, who provided temporary work restrictions. OWCP found that appellant would have sustained no wage loss had she accepted the assignment and determined that she was not entitled to wage-loss compensation.[4] It mailed the decision to her prior address, instead of her current address, as notified to OWCP in her September 30, 2021 e-mail. The record reflects that the decision was returned as undeliverable on November 3, 2021.

LEGAL PRECEDENT

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

[4] OWCP explained that, if appellant had accepted this temporary light-duty assignment, she would have worked 40 hours per week with wages of $978.72 per week.

restrictions. (The penalty provision of 5 U.S.C. 8106(c)(2) will not be imposed on such assignments under this paragraph)."[5]

OWCP's procedures further advise, "If there would have been wage loss if the claimant had accepted the light-duty assignment, the claimant remains entitled to compensation benefits based on the temporary actual earnings WEC [wage-earning capacity] calculation (just as if he/she had accepted the light-duty assignment)."[6]

OWCP regulations provide that a copy of a decision shall be mailed to the employee's last known address.[7] In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient.[8] This presumption is commonly referred to as the "mailbox rule."[9] It arises when the record reflects that the notice was properly addressed and duly mailed.[10] However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.[11] Also, it is axiomatic that the presumption of receipt does not apply where a notice is sent to an incorrect address.[12]

ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation, effective October 20, 2021.

OWCP mailed the August 27, 2021 notice of proposed reduction of compensation benefits to appellant and it was returned as undeliverable on September 13, 2021. On September 30, 2021 appellant notified OWCP of her current address. On October 20, 2021 OWCP issued a decision which finalized the August 27, 2021 proposed reduction of wage-loss compensation, effective that date, because she failed to accept the April 7, 2021 temporary, modified-duty assignment in accordance with 20 C.F.R. § 10.500(a). However, it mailed the October 20, 2021 decision to appellant's prior address, despite having received notice of her current address on September 30, 2021. The October 20, 2021 decision was returned to OWCP as undeliverable and

[5] 20 C.F.R. § 10.500(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.2)(a) (June 2013).

[6] *Id*. at Chapter 2.814.8(c)(10).

[7] *See E.W.*, Docket No. 20-0357 (issued December 8, 2020); *D.C.*, Docket No. 13-1503 (issued December 17, 2013); *J.R.*, Docket No. 13-0313 (issued August 15, 2013).

[8] *G.A.*, Docket No. 18-0266 (issued February 25, 2019); *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

[9] *See J.F.*, Docket No. 19-1893 (issued April 17, 2020); *D.R.*, Docket No. 19-1899 (issued April 15, 2020); *Kenneth E. Harris*, *id*.; *Newton D. Lashmett*, 45 ECAB 181 (1993) (mailbox rule).

[10] *See J.F.*, *id*.; *D.R.*, *id*.; *Kenneth E. Harris*, *id*.

[11] *M.C.*, Docket No. 12-1778 (issued April 12, 2013); *see C.O.*, Docket No. 10-1796 (issued March 23, 2011).

[12] *M.C.*, *id*.

unable to forward. The record does not indicate that OWCP attempted to reissue the decision to the correct mailing address.

The facts, therefore, establish that the mailbox rule was effectively rebutted in this case because OWCP sent its notice of proposed reduction of wage-loss compensation to an incorrect address. Both the August 27, 2021 notice of proposed reduction of compensation benefits and the October 20, 2021 final decision were returned to OWCP as undeliverable. OWCP therefore improperly issued its October 20, 2021 decision.[13]

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation, effective October 20, 2021.

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 29, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[13] *See L.G.*, Docket No. 17-0004 (issued April 17, 2017); *Tammy J. Kenow*, 44 ECAB 619 (1993).