

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

D.S., Appellant)	
)	
)	
and)	Docket No. 21-0996
)	Issued: July 14, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
Lehighton, PA, Employer)	

Appearances: Case Submitted on the Record
Jason S. Lomax, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 18, 2021 appellant, through counsel, filed a timely appeal from a May 19, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the 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 May 19, 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 terminate appellant's wage-loss compensation benefits, effective January 3, 2021, pursuant to 20 C.F.R. § 10.500(a).

FACTUAL HISTORY

On October 2, 2019 appellant, then a 52-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 16, 2019 she injured her right wrist and thumb when the door of her long life vehicle (LLV) slipped from her left hand and struck her right wrist and hand while in the performance of duty. She stopped work on October 2, 2019. On October 7, 2019 appellant accepted a modified-duty assignment as a rural carrier which required duties including answering the telephones, making copies and shredding papers, "maintaining the red book," and "filing keys," while lifting five pounds or less. However, she did not return to work. OWCP accepted the claim for traumatic rupture/tear of the scapholunate ligament of the right wrist. It authorized wage-loss compensation on the supplemental rolls from November 2 through December 27, 2019.

In a November 15, 2019 note, Dr. Jon Hernandez, a Board-certified orthopedic and hand surgeon, reported that appellant was right-hand dominant and described her history of injury. He diagnosed right carpometacarpal arthritis and tear of the right scapholunate ligament.

On December 2, 2019 appellant's attending physician, Dr. Andrew Sobel, II, an orthopedic surgeon, released her to return to light duty with no lifting, pulling, pushing, or carrying more than five pounds with her right hand, effective November 29, 2019.

By decision dated December 16, 2019, OWCP found that the medical evidence of record was sufficient to establish that appellant could perform light-duty work beginning October 7, 2019.

On December 20, 2019 appellant accepted a temporary modified rural carrier position working 7.33 hours per day with a five-pound weight restriction. The duties of the position included answering telephones, making copies, "red books/labels," shredding paper, and filing cluster box unit (CBU) keys.

In a note dated December 31, 2019, Dr. Sobel found that appellant was totally disabled from work commencing December 27, 2019.

On January 21, 2020 appellant filed a notice of recurrence (Form CA-2a) of disability and of a medical condition, effective December 27, 2019. She asserted that her most recent diagnostic testing demonstrated a fracture of her right thumb. On January 27, 2020 OWCP accepted appellant's recurrence of disability claim effective December 27, 2019, and expanded acceptance of her claim to include unilateral primary osteoarthritis of the first carpometacarpal joint of the right hand. It paid her wage-loss compensation on the supplemental rolls beginning December 30, 2019 and on the periodic rolls effective March 1, 2020.

In a February 14, 2020 note, Dr. Sobel found that appellant could return to light-duty work with no use of her right hand.

On April 30, 2020 appellant returned to a temporary, light-duty modified rural carrier position, working eight hours per day with no use of the right hand. The duties of the position included answering the telephone, making copies, shredding papers, red books, and filing CBU unit keys. The physical requirements included simple grasping with the left hand.

On July 8, 2020 Dr. Ashkon Razavi, a hand surgeon, performed an OWCP-authorized interposition arthroplasty of the right thumb carpometacarpal joint, right wrist trapeziectomy, and right de Quervain's release. OWCP paid appellant wage-loss compensation on the supplemental rolls as of July 5, 2020, and on the periodic rolls as of October 15, 2020.

In a November 5, 2020 duty status report (Form CA-17), Dr. Razavi diagnosed status post right thumb arthroplasty, and found that appellant could return to work on November 5, 2020 with no use of the right upper extremity.

On November 6, 2020 the employing establishment provided appellant with a written, temporary, light-duty assignment as a modified rural carrier. This position required her to work eight hours a day with no use of the right hand. The duties included: answering the telephone, making copies, shredding papers, red book maintenance, RFS returns/STC verification and filing CBU keys. The physical requirements included simple grasping with the left hand. Appellant refused the position as it had not been approved by OWCP. She further noted that she could answer the telephone, but could not write to take notes or to maintain the red book.

On November 9, 2020 OWCP issued appellant a notice of proposed termination. It informed her that she had been provided with a "temporary light-duty assignment as a modified rural carrier" on November 6, 2020. OWCP noted that it had been advised that she had refused to accept or report to the job assignment provided. It indicated that it had reviewed the "temporary light-duty assignment" and determined that it comported with the work restrictions provided by Dr. Razavi on November 5, 2020. OWCP also informed appellant of the provisions of 20 C.F.R. § 10.500(a) and further advised that her entitlement to wage-loss compensation would be terminated under this provision if she did not accept the offered temporary assignment or provide a written explanation with justification for her refusal within 30 days. It noted that the actual earnings "in the assignment would meet or exceed the current wages of the job held when injured. Therefore, you would not be entitled to ongoing wage-loss compensation."

By decision dated December 29, 2020, OWCP terminated appellant's wage-loss compensation, effective January 3, 2021, pursuant to 20 C.F.R. § 10.500(a).

On January 5 and 7, February 17 and 24, and April 15, 2021 Dr. Joseph McGinley, an osteopath, completed a series of notes and form reports indicating that appellant was totally disabled. On January 5, 2021 he described the accepted September 15, 2019 employment injury and the July 8, 2020 surgery. Dr. McGinley recounted that appellant believed that the surgery was a failure with loss of function in the right thumb and increased pain and twisting of the fingers of the right hand with decreased motion. On physical examination he found that adduction of the right thumb was severely limited and that all fingers in the right hand demonstrated limited flexion.

In January 7 and February 24, 2021 notes, Dr. Randall W. Culp, a Board-certified orthopedic (hand) surgeon, found that appellant continued to experience pain in the right thumb

and numbness and tingling in the median nerve and superficial radial nerve distributions. He recommended additional surgery.

On April 8, 2021 OWCP referred the case record and a statement of accepted facts (SOAF) to Dr. Robert Y. Pick, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA) to determine whether additional surgery recommended by Dr. Culp was medically necessary and employment related.

In an April 13, 2021 report, Dr. Pick, noted appellant's history of injury and accepted conditions. He reviewed her medical history and opined that ongoing conditions of the right thumb and wrist were not related to the September 16, 2019 employment injury and that, therefore, any additional surgery would not be related to the employment injury.

On May 7, 2021 appellant, through counsel, requested reconsideration of the December 29, 2020 termination decision. In support thereof, counsel provided a March 30, 2021 report from Dr. McGinley, finding that appellant was totally disabled due to bilateral hand pain, right thumb pain, and decreased range of motion of the right hand and thumb. Dr. McGinley found that any use of her hand, wrist, and/or fingers would have exceeded her capabilities and restrictions causing more damage.

By decision dated May 19, 2021, OWCP denied modification of the December 29, 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.⁴

OWCP regulations at 20 C.F.R. § 10.500(a) provides 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

⁴ *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."⁵

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.⁶ 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.⁷

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)."⁸

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's entitlement to wage-loss compensation, effective January 3, 2021, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary light-duty assignment.

On November 6, 2020 the employing establishment provided appellant with a written offer for a temporary light-duty assignment as a modified rural carrier. The physical requirements of the offered temporary light-duty assignment were within appellant's medical restrictions provided by Dr. Razavi. In his November 5, 2020 report, Dr. Razavi found that appellant could return to work on November 5, 2020, following her July 8, 2020 thumb surgery, with no use of her right upper extremity. The November 6, 2020 job offer indicated that the modified rural carrier position required her to work eight hours a day with no use of the right hand. The duties included: answering the telephone, making copies, shredding papers, red book maintenance, RFS returns/STC verification and filing CBU keys. The physical requirements also included simple grasping with the left hand. The Board thus finds that appellant had temporary, light-duty work available within her work restrictions.

Following the November 6, 2020 job offer, appellant's treating physician, Dr. Culp, found that appellant continued to experience pain in the right thumb and numbness and tingling in the median nerve and superficial radial nerve distributions. He recommended additional surgery.

On April 8, 2021 OWCP referred the case record and a SOAF to Dr. Pick, a DMA, to determine whether additional surgery recommended by Dr. Culp was medically necessary and

⁵ 20 C.F.R. § 10.500(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9(c)(1) (June 2013).

⁷ *Id.*

⁸ *Id.* at Chapter 2.814.9(c)(8).

employment related. In an April 13, 2021 report, Dr. Pick noted appellant's history of injury and accepted conditions. He reviewed her medical history and opined that ongoing conditions of the right thumb and wrist were not related to the September 16, 2019 employment injury and that, therefore, any additional surgery would not be related to the employment injury. Dr. Pick's report is detailed, well rationalized, and based on a proper factual background, and thus his opinion represents the weight of the medical evidence with regard to the need for further surgery. As such, the Board finds that the offered light-duty job was within appellant's restrictions.⁹

Following the December 29, 2020 decision, appellant provided additional form reports and treatment notes from Dr. McGinley dated January 5 through April 15, 2021 finding that she was totally disabled. On March 30, 2021 Dr. McGinley found that any use of her right hand, wrist, and/or fingers would have exceeded her capabilities and restrictions causing more damage. These reports are of no probative value, however, because he did not provide any medical rationale or explanation to support his opinion regarding appellant's ability to work in the November 6, 2020 modified position which excluded any use of the right hand.¹⁰

In reports dated January 7 and February 24, 2021, Dr. Culp did not address appellant's ability to work. As he did not address the relevant issue of disability, this evidence is of no probative value.¹¹

In light of the foregoing, the Board finds that OWCP met its burden of proof to terminate her wage-loss compensation, effective January 3, 2021, pursuant to 20 C.F.R. § 10.500(a).¹²

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's entitlement to wage-loss compensation, effective January 3, 2021, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary light-duty assignment.

⁹ *S.W.*, Docket No. 22-0154 (issued August 23, 2022).

¹⁰ *Id.*; *C.T.*, Docket No. 21-0543 (issued August 22, 2022); *F.S.*, Docket No. 18-0098 (issued August 13, 2018); *P.W.*, Docket No. 17-0514 (issued June 9, 2017).

¹¹ *C.P.*, Docket No. 19-1072 (issued November 7, 2019); *P.C.*, Docket No. 18-1719 (issued June 19, 2019); *M.K.*, Docket No. 18-0907 (issued February 7, 2019).

¹² *D.T.*, Docket No. 19-0579 (issued October 22, 2019); *E.G.*, Docket No. 18-0710 (issued February 12, 2019); *R.W.*, Docket No. 16-1053 (issued December 6, 2016); *see J.R.*, Docket No. 13-0720 (issued October 21, 2013); *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 14, 2023
Washington, DC

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

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

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