

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

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V.H., Appellant)	
)	
and)	Docket No. 23-0425
)	Issued: February 23, 2024
U.S. POSTAL SERVICE, VENTURA POST)	
OFFICE, Ventura, CA, Employer)	
_____)	

Appearances:
Sally F. LaMacchia, Esq., for the appellant¹
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 February 3, 2023 appellant, through counsel, filed a timely appeal from an August 10, 2022 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 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 10, 2022 decision, appellant submitted additional evidence to OWCP. 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, commencing October 22, 2015, causally related to her accepted March 13, 2013 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 14, 2013 appellant, then a 54-year-old dispatch/window clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2013 she sustained an injury when she fell to the floor, landing on her right shoulder, while in the performance of duty. She did not stop work. OWCP accepted appellant's claim for right shoulder contusion, right shoulder/upper arm sprain, lumbar sprain, neck sprain, and concussion without loss of consciousness. Appellant subsequently stopped work for intermittent periods, commencing November 6, 2013, and OWCP paid her wage-loss compensation on the supplemental rolls, commencing that date.

On January 28, 2014 appellant began working in a modified-duty position, in the passport office, which required sitting for eight hours per day, engaging in simple grasping for eight hours, and standing/walking as necessary for minimal periods. The physical duties of the position were based on work restrictions provided on January 22, 2014 by Dr. Hrair Darakjian, a Board-certified orthopedic surgeon, who indicated that appellant was restricted from lifting more than 10 pounds, performing overhead work, and engaging in prolonged neck flexion.

In an October 21, 2015 report, Dr. Daniel A. Capen, an attending Board-certified orthopedic surgeon, noted that on physical examination appellant exhibited a markedly positive head compression sign, positive Spurling's maneuver to the right, and pain on right scapular retraction. He diagnosed cervical sprain/strain syndrome, right shoulder impingement with shoulder spurs and rotator cuff tendinopathy, spinal sprain/strain syndrome, knee contusion, and likely disc herniation syndrome.

A November 10, 2015 Notification of Personnel Action Form (SF-50) indicated that appellant retired from the employing establishment on disability retirement, effective October 22, 2015.

In a January 21, 2016 report of termination of disability and/or payment (Form CA-3), appellant's supervisor noted, "Please see attached job offer -- [eight] hours of work was available." Attached was the job offer for the modified-duty position at a passport office, which appellant began working on January 28, 2014.

Appellant submitted progress reports dated February 3 through October 19, 2016, wherein Dr. Capen recommended that appellant undergo right shoulder surgery, including subacromial

⁴ Docket No. 20-0875 (issued August 13, 2021).

decompression with acromioclavicular decompression, and possible right rotator cuff repair. In his February 3, 2016 report, he opined that she remained disabled from work.

On September 22, 2016 OWCP referred appellant to Dr. Steven W. Pearson, a Board-certified orthopedic surgeon, for a second opinion on whether she had any disability from work causally related to her accepted March 13, 2013 employment injury. In a November 9, 2016 report, Dr. Pearson diagnosed severe spondylosis with degenerative disc disease, cystic bony changes, and facet arthrosis at C3-6, as well as right shoulder impingement, possible right rotator cuff tear, right acromioclavicular joint arthropathy, and lumbar strain with disc disease. He opined that these conditions were “medically connected” to the accepted March 13, 2013 employment injury and that appellant needed right shoulder surgery due to the effects of that injury. In an accompanying November 15, 2016 OWCP-5c form, he restricted appellant from sitting more than six hours per day, walking/standing more than four hours, lifting more than 20 pounds, or pushing/pulling more than 30 pounds.

In a December 13, 2016 supplemental report, Dr. Pearson clarified that appellant’s cervical and lumbar spine conditions were directly caused by the March 13, 2013 employment injury, and that her right shoulder conditions were also directly caused by that employment injury.

By decision dated January 18, 2017, OWCP expanded the acceptance of appellant’s claim to include right shoulder impingement syndrome and cervical disc disorder with radiculopathy, mid-cervical region.

Appellant submitted additional progress reports from Dr. Capen dated January 11, 2017 through March 7, 2018; a February 28, 2017 magnetic resonance imaging (MRI) scan of the lumbar spine; March 20, 2017 and March 30, 2018 MRI scans of the cervical spine; and April 17, 2018 MRI scans of both knees. On April 5, 2017 Dr. Capen provided the additional diagnosis of right shoulder impingement with acromioclavicular arthropathy. On March 7, 2018 he provided the additional diagnoses of knee internal derangement, likely degenerative arthritis, lumbago, cervical discopathy, and irritability with lumbago-like symptomatology.

On April 13, 2018 appellant filed a claim for compensation (Form CA-7) for disability from work for the period October 22, 2015 through April 14, 2018.

Appellant submitted a May 2, 2018 progress report from Dr. Capen who indicated, under the heading “disability status,” that she “is permanent and stationary.”

In a May 15, 2018 letter, OWCP requested that the employing establishment confirm whether full-time work under Dr. Pearson’s restrictions remained available had she not retired on October 22, 2015. On May 16, 2018 the employing establishment provided a job description for the modified-duty position working eight hours per day in the passport office which appellant began working on January 28, 2014. The position required sitting and engaging in simple grasping for eight hours per day, as well as minimal standing and walking, as necessary.

In a May 17, 2018 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of her recurrence of disability claim. It afforded her 30 days to respond.

In a May 25, 2018 letter, counsel argued that appellant sustained a recurrence of disability on October 22, 2015 because there was no clear, written evidence in the case record that work was available to her which accommodated her work restrictions.

By decision June 19, 2018, OWCP denied appellant's recurrence claim, finding that she had not submitted sufficient medical evidence to establish a recurrence of disability commencing October 22, 2015 causally related to her accepted March 13, 2013 employment injury. It also noted, "[i]n addition, your employing agency notified this office that full-time modified work was available and would have continued to be available had [appellant] not elected disability retirement."

On June 19, 2019, appellant, through counsel, requested reconsideration of the June 19, 2018 decision. She submitted an Office of Personnel Management (OPM) form for agency certification of reassignment and accommodation efforts (Standard Form (SF) 3112D), signed by an employing establishment official on July 27, 2015. In the portion of the form requesting information about whether a reasonable effort for accommodation had been made, the official checked a box indicating, "Yes, describe below accommodation efforts made, attach supporting documentation, and provide narrative analysis of any unsuccessful accommodation efforts." The official added the notation, "If any confusion, please see supervisor's statement (SF 3112B)." In the portion of form requesting information about the results of the agency's reassignment efforts, the official checked a box indicating, "Reassignment is not possible. There are no vacant positions at this agency, at the same grade or pay level and tenure within the same commuting area for which the employee meets minimum qualifications standards."

Appellant also submitted a June 19, 2019 statement and progress reports from Dr. Capen dated June 13, 2018 through August 7, 2019. In his June 13, 2018 report, Dr. Capen indicated that she remained disabled from work.

By decision dated September 17, 2019, OWCP denied modification of its June 19, 2018 decision. It found that appellant had not established that the employing establishment did not have work available to her on October 22, 2015, which was within the restrictions necessitated by her accepted March 13, 2013 employment injury.

Appellant appealed to the Board. By decision dated August 13, 2021,⁵ the Board set aside OWCP's September 17, 2019 decision, finding that the evidence of record was ambiguous with respect to whether the employing establishment had work available to appellant on October 22, 2015, which was within the work restrictions necessitated by her accepted March 13, 2013 employment injury. The Board remanded the case to OWCP for further development of her recurrence of disability claim to include evaluation of whether the employing establishment had work available as of October 22, 2015, which was within appellant's restrictions, followed by a *de novo* decision.

On September 30, 2021 OWCP requested that the employing establishment indicate whether full-time work was available to appellant on or about October 22, 2015, which was in

⁵ *Id.*

accordance with the February 19, 2014 work restrictions of Dr. Darakjian. It afforded the employing establishment 30 days to respond.

In response to the request for information, an employing establishment official submitted a December 17, 2021 memorandum in which she confirmed that full-time modified work was in fact available to appellant on or about October 22, 2015 in accordance with the February 19, 2014 medical restrictions of Dr. Darakjian.

In February 17 and March 23, 2022 letters, OWCP requested additional information regarding the availability of suitable work for appellant on or about October 22, 2015. No response was received.

By *de novo* decision dated August 10, 2022, OWCP again denied appellant's recurrence claim, finding that the factual evidence was insufficient to establish that work was not available within appellant's restrictions necessitated by the accepted March 13, 2013 employment injury and that the medical evidence of record was insufficient to establish a work-related recurrence of disability commencing October 22, 2015.

LEGAL PRECEDENT

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, which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.⁶ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations.⁷ A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.⁸

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁹

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a

⁶ 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁷ *Id.*

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.¹⁰ Where no such rationale is present, the medical evidence is of diminished probative value.¹¹

ANALYSIS

The Board finds that this case is not in posture for decision.

In a November 9, 2016 report, Dr. Pearson, OWCP's referral physician, diagnosed severe spondylosis with degenerative disc disease, cystic bony changes, and facet arthrosis at C3-6, as well as right shoulder impingement, possible right rotator cuff tear, right acromioclavicular joint arthropathy, and lumbar strain with disc disease. He opined that these conditions were "medically connected" to the accepted March 13, 2013 employment injury and that appellant needed right shoulder surgery due to the effects of that injury. In a November 15, 2016 Form OWCP-5c, Dr. Pearson provided increased restrictions, including sitting no more than six hours per day, walking/standing no more than four hours, lifting no more than 20 pounds, or pushing/pulling no more than 30 pounds. In a December 13, 2016 supplemental report, he clarified that appellant's cervical and lumbar spine conditions were directly caused by the March 13, 2013 employment injury and that her right shoulder conditions were also directly caused by that employment injury. However, while Dr. Pearson supported a worsening of appellant's conditions, he did not specify whether that worsening caused appellant to be disabled from work as of October 22, 2015.

The Board has held that, while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹² Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹³ Once OWCP starts to procure a medical opinion, it must do a complete job in securing from its referral physician an opinion which adequately addresses the relevant issues.¹⁴

The case must therefore be remanded for clarification from Dr. Pearson as to whether appellant's work-related condition had worsened such that she was disabled from work as of October 22, 2015. If Dr. Pearson is unavailable or unwilling to clarify his prior opinion, OWCP shall refer appellant to a new second opinion physician in the appropriate field of medicine for the

¹⁰ *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

¹¹ *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

¹² *See D.V.*, Docket No. 17-1590 (issued December 12, 2018); *Russell F. Polhemus*, 32 ECAB 1066 (1981).

¹³ *See A.K.*, Docket No. 18-0462 (issued June 19, 2018); *Robert F. Hart*, 36 ECAB 186 (1984).

¹⁴ *T.B.*, Docket No. 20-0182 (issued April 23, 2021); *L.V.*, Docket No. 17-1260 (issued August 1, 2018); *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983).

purpose of obtaining a rationalized medical opinion on the recurrence issue.¹⁵ After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 23, 2024
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

¹⁵ *J.H.*, Docket No. 19-1476 (issued March 23, 2021); *R.O.*, Docket No. 19-0885 (issued November 4, 2019); *Talmadge Miller*, 47 ECAB 673 (1996).