

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

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B.P., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
AUDIE L. MURPHY VA HOSPITAL,)
San Antonio, TX, Employer)

Docket No. 23-1048
Issued: February 28, 2024

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

JANICE B. ASKIN, Judge

JAMES D. MCGINLEY, Alternate Judge

On August 2, 2023 appellant filed a timely appeal from a May 10, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 23-1048.¹

On June 15, 2021 appellant, then a 29-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on March 11, 2021 she sustained injury to her lower back while providing care to patients in the intensive care unit while in the performance of duty. OWCP accepted her claim for sprain of ligaments of the lumbar spine, strain of muscle, fascia and tendon of the lower back, and intervertebral disc disorders of the lumbar region with myelopathy. Appellant returned to full-duty work on August 13, 2021 until September 15, 2021 when she began working reduced hours with restrictions.

¹ The Board notes that, following the May 10, 2023 decision, appellant submitted additional evidence to OWCP and to the Board. 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.*

Appellant stopped work on February 22, 2023. On February 27, 2023 she filed a notice of recurrence (Form CA-2a) claiming a recurrence of disability commencing February 22, 2023 due to her accepted March 11, 2021 employment injury. Appellant explained that she was unable to perform all of her work-related duties because of a physical therapy session during the week of February 9, 2023, which aggravated her work-related back injury, causing pain to radiate into her lower extremities.²

In support of her claim for a recurrence, appellant submitted a February 22, 2023 report from Dr. Robert C. Lowry, a physician specializing physiatry, neurology, and surgery, who documented her diagnosed lumbar conditions. He related appellant's first day of physical therapy involved active rehabilitation. Dr. Lowry opined that appellant experienced a significant flare-up of her low back pain due to her initial day of physical therapy as she was "being too aggressive and [had not] been in any sort of exercise program prior to this." He held appellant off work for two days.

In a March 9, 2023 development letter, OWCP informed appellant of the deficiencies in her recurrence claim. It advised her of the type of evidence necessary to establish her claim and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested additional information from the employing establishment, including comments from a knowledgeable supervisor. It afforded both parties 30 days to respond.

Appellant subsequently submitted additional medical evidence, including March 15 and 29, 2023 reports and an accompanying duty status report (Form CA-17), wherein Dr. Lowry documented treatment for her injury and provided work restrictions limiting her to modified-duty work.

By decision dated May 10, 2023, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish a recurrence of disability commencing February 22, 2023 causally related to her March 11, 2021 employment injury. The only medical evidence that it noted as received was a March 15, 2023 report of Dr. Lowry and an accompanying Form CA-17.

The Board, having duly considered this matter, finds that the case is not in posture for decision.

In the case of *William A. Couch*,³ the Board held that, when adjudicating a claim, OWCP is obligated to consider and address all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

While OWCP is not required to list every piece of evidence submitted to the record, the record is clear that Dr. Lowry's February 22 and March 29, 2023 reports providing work

² In a February 9, 2023 report, an attending physical therapist reported the findings of an initial OWCP-authorized physical therapy session.

³ 41 ECAB 548 (1990); see *Order Remanding Case, J.R.*, Docket No. 21-1421 (issued April 20, 2022); see also *R.D.*, Docket No. 17-1818 (issued April 3, 2018).

restrictions were not reviewed by OWCP in its May 10, 2023 decision.⁴ As it did not consider and address these medical reports, it failed to follow its own procedures.⁵

It is crucial that OWCP considers and addresses all evidence received prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.⁶ The Board finds that this case is not in posture for decision as OWCP did not review the above-noted evidence in its May 10, 2023 decision.⁷

On remand, OWCP shall review all evidence of record. Following any further development as deemed necessary, it shall issue a *de novo* decision. Accordingly,

IT IS HEREBY ORDERED THAT the May 10, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: February 28, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

⁴ See *Order Remanding Case, J.N.*, Docket No. 21-0086 (issued May 17, 2021); *Order Remanding Case, C.D.*, Docket No. 20-0168 (issued March 5, 2020).

⁵ *E.P.*, Docket No. 20-0655 (issued March 17, 2021).

⁶ See *Order Remanding Case, C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); see also *William A. Couch*, *supra* note 3.

⁷ See *V.C.*, Docket No. 16-0694 (issued August 19, 2016).