

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

T.P., Appellant)	
)	
and)	Docket No. 23-1200
)	Issued: February 27, 2024
U.S. POSTAL SERVICE, POST OFFICE,)	
Princeton, WV, Employer)	
)	

Appearances:
Capp Taylor, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

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

On September 26, 2023 appellant, through her representative, filed a timely appeal from a September 8, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 23-1200.²

On September 25, 2013 appellant, then a 36-year-old sales, service, and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her neck when she lifted a heavy package while in the performance of duty. OWCP initially accepted the claim for disorder of bursae and tendons in the right rotator cuff and sprain of back, thoracic

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 an 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 The Board notes that, following the September 8, 2023 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.*

region. It subsequently expanded the acceptance of the claim to include neck sprain and cervical disc disorder at C5-6 with radiculopathy.

On November 1, 2019 appellant accepted a part-time modified-duty assignment as a limited-duty clerk. The position involved intermittent window clerk and lobby assistant duties for up to four hours, and indicated that the physical requirements included walking, standing, and sitting on an intermittent basis for zero to four hours. OWCP paid appellant wage-loss compensation for partial disability on the supplemental rolls, effective November 1, 2019.

On October 25, 2021 appellant filed a claim for compensation (Form CA-7) for disability from work, commencing October 9, 2021. OWCP converted her claim for compensation to claim for recurrence of disability.

By decision dated December 20, 2021, OWCP denied appellant's claim for a recurrence of disability commencing October 9, 2021, finding that the medical evidence of record was insufficient to establish that she was unable to perform the November 1, 2019 modified position due to the accepted September 25, 2013 employment injury during the claimed period.

On January 19, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated February 24, 2022, OWCP's hearing representative vacated OWCP's December 20, 2021 decision and remanded the case for further development.

Appellant subsequently submitted additional medical evidence. In a December 5, 2022 follow up note, Dr. Christopher R. Brown, a Board-certified orthopedic surgeon, indicated that her recent computerized tomography scan was consistent with nonunion at C5-6. In a separate narrative report of even date, he indicated that appellant was limited to job duties that required very little or seldom use of either upper extremity for reaching, lifting, pushing, or carrying and no lifting greater than 10 pounds due to the condition of her neck and shoulders.

By decision dated December 8, 2022, OWCP denied appellant's claim for a recurrence of disability, commencing October 9, 2021, based on the opinion of Dr. Mark Rowley, a Board-certified orthopedic surgeon, serving as OWCP's second opinion physician.³

On January 29, 2023 appellant, through her representative, requested reconsideration of OWCP's December 8, 2022 decision and submitted additional medical evidence.

In an April 12, 2023 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), confirmed the nonunion at C5-6 and agreed that posterior cervical fusion with foraminotomies at C5-6 was a reasonable treatment option consistent with the standard of orthopedic care.

³ By decision dated December 14, 2022, OWCP granted appellant a schedule award for 25 percent permanent impairment of the right upper extremity. The award ran for 68.64 weeks from December 3, 2022 to March 27, 2024.

By decision dated April 20, 2023, OWCP denied modification of its December 8, 2022 decision.

On April 21, 2023 OWCP authorized the recommended posterior cervical fusion surgery.

On June 17, 2023 appellant, through her representative, requested reconsideration of OWCP's April 20, 2023 decision.

OWCP also received a July 7, 2023 report of a magnetic resonance imaging (MRI) scan of the cervical spine and July 27, 2023 hospital records which indicated that appellant underwent posterior cervical fusion at C5-6 and foraminotomies bilaterally at C6 by Dr. Brown.

By decision dated September 8, 2023, OWCP denied modification of its April 20, 2023 decision.

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

Following OWCP's April 20, 2023 decision OWCP received additional medical evidence. In the case of *William A. Couch*,⁴ the Board held that, when adjudicating a claim, OWCP is obligated to consider 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, the Board notes that the December 5, 2022 and July 27, 2023 reports by Dr. Brown, the April 12, 2023 report of Dr. Harris, and the July 7, 2023 MRI scan were not considered and addressed by OWCP in its September 8, 2023 decision.⁵

It is crucial that OWCP consider and address all evidence received prior to the issuance of its final decision, as Board 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 consider and address the above-noted evidence in its September 8, 2023 decision.⁷ On remand, OWCP shall review all of the evidence submitted on reconsideration. Following this, and other such further development as deemed necessary, it shall issue a *de novo* decision. Accordingly,

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

⁵ *See C.D.*, Docket No. 20-0168 (issued March 5, 2020).

⁶ *See C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch*, *supra* note 4.

⁷ *See Order Remanding Case L.G.*, Docket No. 23-0637 (issued September 15, 2023).

IT IS HEREBY ORDERED THAT the September 8, 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 27, 2024
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