

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

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**K.S., Appellant**

**and**

**U.S. POSTAL SERVICE, CONNELLSVILLE  
POST OFFICE, Connellsville, PA, Employer**

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**Docket No. 23-0878  
Issued: March 25, 2024**

*Appearances:*

*Douglas Sughrue, Esq., for the appellant<sup>1</sup>*

*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 June 1, 2023 appellant filed a timely appeal from a March 1, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the March 1, 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.*

## **ISSUE**

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective March 1, 2023, pursuant to 20 C.F.R. § 10.500(a).

## **FACTUAL HISTORY**

On April 5, 2016 appellant, then a 37-year-old rural sales/services/distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on March 17, 2016 she sprained her right ankle when she tripped and fell over a pallet while in the performance of duty. She stopped work on April 5, 2016. On May 19, 2016 OWCP accepted appellant's claim for sprain of deltoid ligament of right ankle, and spontaneous rupture of flexor tendons, right ankle and foot. It subsequently expanded the acceptance of the claim to include causalgia of right lower limb, other acquired deformities of right foot, complex regional pain syndrome (CRPS) 1 of right lower limb, and strain of other muscles and tendons of the lower leg posterior muscle group. OWCP paid appellant wage-loss compensation on the supplemental rolls as of May 28, 2016 and on the periodic rolls as of October 11, 2020.

Appellant underwent a May 27, 2016 OWCP-authorized debridement and repair of posterior tibial tendon tear and deltoid tear, right ankle and a June 13, 2017 Evans osteotomy, posterior tibial tendon debridement and tendon transfer.

On December 12, 2019 OWCP forwarded appellant's medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. Mitchell E. Antin, an osteopath specializing in orthopedic surgery, for a second opinion examination regarding the nature and extent of appellant's condition and disability. In a January 2, 2020 report, Dr. Antin indicated that the accepted medical conditions of spontaneous rupture flexor tendons, right ankle and foot, sprain of deltoid ligament, right ankle, and acquired deformities of right foot had resolved and, while appellant continued with unresolved pain that may represent causalgia or CRPS 1 of the right lower limb, clinically it did not meet the full criteria for causalgia or CRPS. He advised that there did not appear to be any aggravation of a preexisting condition, but the medical evidence of record supported additional diagnoses of anxiety, depression and chronic pain as related to the accepted March 17, 2016 work injury. Dr. Antin opined that appellant did not require further medical treatment and was capable of light-duty work with permanent restrictions. In a January 2, 2020 work capacity evaluation (Form OWCP-5c), he opined that appellant could work full-time light duty, with permanent restrictions; however, he did specify appellant's restrictions.

On January 24, 2020 OWCP requested that appellant's treating physician Dr. Stephen F. Conti, a Board-certified orthopedic foot and ankle surgeon, comment on Dr. Antin's opinion. In reports dated February 3 and March 17, 2020, Dr. Conti reviewed Dr. Antin's report and provided comments. He opined that appellant's current condition was related to her ongoing CRPS. Dr. Conti opined that appellant was unable to stand and ambulate for any period of time, she was unable to stand on the right heel and toe, and her acquired flatfoot deformities had not resolved. He noted that while she may not appear to meet the full criteria for CRPS, Dr. Zongfu Chen, a specialist in pain medicine, who was treating appellant for CRPS, had diagnosed the condition. Dr. Conti opined that appellant's restrictions were unchanged and that she could only perform sedentary work with no more than five miles driving each day, and that she must wear her brace or a tall boot. He also opined that appellant should strongly consider any additional aggressive

treatment that may help resolve the CRPS. In a February 3, 2020 note, Dr. Conti indicated that appellant could return to sedentary work with no driving more than five miles per day.

In a May 21, 2020 report, Dr. Conti provided a detailed history of appellant's work injury and her medical care. He explained that from March 2019 to March 2020, she developed progressive claw toe deformities, an expected complication of both her original contractures as well as the progression of CRPS. Dr. Conti indicated that appellant's condition was permanent, and she needed ongoing care from Dr. Chen for her CRPS.

On June 18, 2020 OWCP declared a conflict in medical opinion between Dr. Antin and Dr. Conti as to how appellant's CRPS should be treated, whether maximum medical improvement (MMI) has been reached, and what type of work appellant could perform on a full-time basis and restrictions, if any. It referred appellant, along with a December 11, 2019 SOAF, to Dr. Nasimullah Rehmatullah, a Board-certified orthopedic surgeon, to serve as an impartial medical examiner (IME) to resolve the conflict.

In a July 20, 2020 report, Dr. Rehmatullah noted his review of the medical record, including the SOAF. He noted that appellant was able to walk with assistance without a boot, the toes of her right foot curled up with weight bearing and she could not walk on heel to toe on right foot. Dr. Rehmatullah reported 1-inch right calf atrophy, mild mottling and discoloration right lower leg and foot, with right foot mildly cooler than left foot, with okay vascular status. Claw toe deformities of all toes were noted with mild prominence of hallux. Dr. Rehmatullah opined that the accepted medical conditions had resolved in part, with continuing residuals of unresolved pain that may represent causalgia or CRPS of the right lower limb. He indicated that ketamine infusion treatment was medically necessary and causally related to the March 17, 2016 injury and an AFO brace was necessary for support and stability of the right foot and ankle and to unload the right lower extremity to reduce pain. Dr. Rehmatullah opined that appellant had not reached MMI with regard to pain control and she would need a functional capacity evaluation to properly document her physical capabilities. He opined that, currently, she was capable of a sit-down job with the ability to stand and walk at will no more than 15 minutes at a time, with total standing and walking of 1 hour for 8 hours of work with two 30-minute breaks. In a July 20, 2020 Form OWCP-5c, Dr. Rehmatullah opined that appellant could work an 8-hour sedentary position with indefinite restrictions of sitting for 6 hours, walking and standing for 1 hour, operation of motor vehicle at work for 5 minutes twice a day, no squatting, kneeling, climbing, and two breaks at 30 minutes each per day.

In a September 2, letter, OWCP requested that Dr. Rehmatullah specify appellant's limitations when operating a motor vehicle going to and from work.

In a September 14, 2020 OWCP-5c form, Dr. Rehmatullah clarified that "if driving distance to and from work is more than [five] minutes, she is unable to work." He explained that motion of right foot and ankle in driving more than five minutes would result in increased right foot and ankle pain and impair her ability to continue to work. Dr. Rehmatullah reiterated the restrictions provided in the July 20, 2020 Form OWCP-5c.

On December 28, 2020 OWCP requested that the employing establishment, to the extent possible, prepare a written job offer consistent with Dr. Rehmatullah's work restrictions outlined in his July 20, 2020 medical report and September 14, 2020 OWCP-5c form.

On January 21, 2021 OWCP referred appellant to vocational rehabilitation services to determine the least expensive transportation alternative to and from work due to her driving restrictions. As of September 22, 2021, transportation through a rideshare service was authorized.

On September 28, 2021 the employing establishment provided appellant a written temporary job offer as a sales service associate (SSA) beginning October 4, 2021. The duties of the modified assignment were retail sales/window services for six hours; staging rolling cart for one hour; sorting post office box for one hour; and dispatch clerk for two hours. The physical requirements of the position included standing/walking for one hour in 15-minute intervals; sitting up to six hours, no squatting/kneeling/climbing and breaks twice a day for 30 minutes each.<sup>4</sup> The job offer noted that appellant would not operate a motor vehicle at work and transportation to and from work would be provided through OWCP's vocational/rehabilitation services. The employing establishment also noted that a stool would be provided for the window work and morning distribution.

Appellant declined the position on October 1, 2021 noting that she was unable to perform the duties listed.

In reports dated October 28, 2021 and February 3, 2022, Dr. Conti noted that appellant's physical examination revealed right calf atrophy and right ankle equinus contracture but was otherwise unchanged from previous visits. He assessed healed right posterior tibial tendon tear and CRPS. Dr. Conti indicated that appellant's work restrictions remained unchanged at sedentary duty with no driving more than five miles per day. He also recommended continued treatment with her CRPS doctors, including ketamine treatments, wearing her AFO brace or tall fixed walking boot as needed for pain, and to resume physical therapy. In his February 3, 2022 report, Dr. Conti related that appellant was not medically able to perform the duties outlined in the modified job offer as she was limited to sedentary duty and could not drive more than five miles per day.

On December 1, 2022 OWCP scheduled appellant for another second opinion examination with Dr. Antin. In a January 9, 2023 report, Dr. Antin reviewed an updated SOAF, the medical record, and reported examination findings. He indicated that the accepted diagnoses had been confirmed and, while appellant had shown improvement with the management of pain and improvement in strength and range of motion, the work-related conditions had not reached maximum medical improvement. Dr. Antin opined that appellant should continue physical therapy and resumption of treatment for depression. However, pain management may be discontinued as the ketamine infusions were off label, unproven and risked addiction. Dr. Antin opined that appellant could not perform her date-of-injury position and work restrictions/limitations were medically warranted. He reviewed the September 28, 2021 offer of modified assignment (limited duty) and opined that appellant was capable of returning to work in that limited-duty capacity. In a January 9, 2023 OWCP-5c form, Dr. Antin opined that appellant could work full time in a sedentary position with permanent restrictions of one to two hours of walking

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<sup>4</sup> Sedentary work requires occasional walking, standing, and lifting to 10 pounds. Occasionally, performing an activity means that the activity is performed up to one-third of the time during the workday, or up to 2.64 hours of an 8-hour workday or 1.32 hours of a 4-hour workday as in this case. See *S.H.*, Docket No. 17-0990 (issued June 12, 2018); see also *E.S.*, Docket No. 21-1172 (issued July 14, 2023); *P.S.*, Docket No. 18-1789, n.20 (issued April 11, 2019); *J.M.*, Docket No. 17-0397 (issued April 3, 2018).

and standing, no squatting, kneeling, climbing or operating motor vehicle at work, and one hour of operating a motor vehicle to and from work. Also, appellant must be allowed to use rigid/fixed angle walker for right ankle.

On January 18, 2023 the employing establishment related that the September 28, 2021 job offer remained available.

On January 23, 2023 OWCP issued appellant a notice of proposed termination of her wage-loss compensation in accordance with 20 C.F.R. § 10.500(a) based on her refusal of the September 28, 2021 temporary light-duty assignment. It advised that Dr. Antin's current work restrictions were permanent in nature and, although she was a permanent employee at the time of injury, its procedures stated that a temporary light-duty assignment may be provided to an employee when there are permanent restrictions, and the employing establishment was unable to provide permanent employment to accommodate those restrictions. OWCP further determined that the September 28, 2021 offered position was within appellant's restrictions as provided by Dr. Antin and remained available. It informed her that any 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 actual earnings in the offered temporary light-duty assignment met or exceeded the wages of the position appellant had held when injured. It afforded her 30 days to accept the assignment and report to duty or demonstrate that her refusal was justified.

In a February 17, 2023 statement, appellant responded, contending that the September 28, 2021 job offer was not within her restrictions. She indicated that performing the offered job duties would cause further injury and halt any further progress of healing and pain management. Appellant advised that she had been attending school online at home to obtain a degree that would enable her to work in a sedentary capacity from home.

Appellant thereafter submitted a November 16, 2022 report from Dr. Chen regarding medical treatment of appellant's neuropathy and CRPS of right lower extremity. Dr. Chen noted appellant's persistent CRPS pain in the right foot between ketamine injections, and that appellant related decreased sensation on the plantar surface of her right foot over the past few months. He did not address appellant's disability status.

OWCP also received copies of notes from physical therapists dated January 3 through 27, 2023, which noted diagnoses and treatment.

By decision dated March 1, 2023, OWCP terminated appellant's wage-loss compensation, effective that date, pursuant to 20 C.F.R. § 10.500(a).

### **LEGAL PRECEDENT**

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>5</sup> OWCP may not terminate compensation without

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<sup>5</sup> *L.L.*, Docket No. 18-1426 (issued April 5, 2019); *C.C.*, Docket No. 17-1158 (issued November 20, 2018); *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541 (1986).

establishing that the disability ceased or that it was no longer related to the employment.<sup>6</sup> In general, the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.<sup>7</sup>

Section 10.500(a) of OWCP's regulations provides that 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 claim for wage-loss compensation (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.<sup>8</sup>

When a claimant is on the periodic rolls, OWCP's procedures similarly provide that, if the evidence establishes that injury-related residuals continue and result in work restrictions, light duty within those work restrictions is available, that the employee was notified in writing that such light duty was available, then wage-loss benefits are not payable for the duration of light-duty availability.<sup>9</sup> OWCP's procedures explain that this is because such benefits are payable 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.<sup>10</sup> When a claimant is on the periodic rolls, a pretermination notice must be issued if the claims examiner is removing the claimant from the periodic rolls and ceasing his/her wage-loss compensation payments.<sup>11</sup>

### ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective March 1, 2023, pursuant to 20 C.F.R. § 10.500(a).

On September 28, 2021 the employing establishment provided appellant with a written offer for a temporary modified assignment as an SSA beginning October 4, 2021. As of January 18, 2023, it indicated that the temporary job offer remained available to appellant.<sup>12</sup> The job offer required standing/walking for 1 hour in 15-minute intervals; sitting up to 6 hours, no squatting/kneeling/climbing and breaks twice per day for 30 minutes each. The temporary job

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<sup>6</sup> A.D., Docket No. 18-0497 (issued July 25, 2018).

<sup>7</sup> See 20 C.F.R. § 10.5(f).

<sup>8</sup> *Id.* at § 10.500(a); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9a (June 2013).

<sup>9</sup> *Id.* at Chapter 2.814.9c(1)(a) (June 2013).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at Chapter 2.814.9c(1)(b).

<sup>12</sup> Appellant rejected the job offer on February 17, 2023.

offer specifically noted that there would be no operation of a car at work and that transportation to and from work would be provided through OWCP's vocational/rehabilitation services.

OWCP referred appellant to Dr. Antin for an updated opinion regarding appellant's work capacity. In his January 9, 2023 report and January 9, 2023 Form OWCP-5c, Dr. Antin opined that appellant could perform sedentary work with permanent restrictions of one to two hours of walking and standing, no squatting, kneeling, climbing or operating motor vehicle at work, and one hour of operating a motor vehicle to and from work with ability to use rigid/fixed angle walker for right ankle. The physical requirements of the offered temporary light-duty position were within Dr. Antin's January 9, 2023 medical restrictions and the job offer remained work available.

Appellant declined the job offer and submitted a February 3, 2022 report, wherein Dr. Conti related that she could not perform the duties of the SSA position as she was limited to sedentary work and could not drive more than five miles per day. However, the job offer specifically noted that appellant would not operate a motor vehicle at work and transportation to and from work would be provided through OWCP's vocational/rehabilitation services.

Appellant also submitted a November 16, 2022 report from Dr. Chen regarding the medical treatment of her neuropathy and CRPS of right lower extremity. However, Dr. Chen did not address appellant's ability to work the offered position. As he did not address the relevant issue of disability, this evidence is of no probative value.<sup>13</sup>

OWCP also received several reports from physical therapists, dated January 3 through 27, 2023. The Board, however, has held that the report of a physical therapist does not constitute probative medical evidence as physical therapists are not considered physicians as defined under FECA.<sup>14</sup> Therefore, this evidence is of no probative value on appellant's ability to work the offered position.

The Board thus finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective March 1, 2023, pursuant to 20 C.F.R. § 10.500(a).<sup>15</sup>

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective March 1, 2023, pursuant to 20 C.F.R. § 10.500(a).

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<sup>13</sup> See *D.S.*, Docket No. 21-0996 (issued July 14, 2023); *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).

<sup>14</sup> Section 8101(2) of FECA defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a (January 2013). *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (a physical therapist is not considered a physician as defined under FECA); see *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physical therapist will be considered medical evidence if countersigned by a qualified physician.

<sup>15</sup> *D.S.*, *id.*; *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 March 1, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 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