United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 25-0328**
	)	**Issued: May 7, 2025**
U.S. POSTAL SERVICE, LANCASTER PROCESSING AND DISTRIBUTION CENTER, Lancaster, PA, Employer	)	

Appearances:
Wayne Johnson, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 21, 2025 appellant, through counsel, filed a timely appeal from an August 26, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 26, 2024 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*.

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, for the period December 4, 2020 through September 14, 2021, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary light-duty assignment; and (2) whether appellant has met her burden of proof to establish that her refusal of the temporary light-duty assignment was justified.

FACTUAL HISTORY

On July 8, 2017, appellant, then a 49-year-old lead mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on May 13, 2017 she sustained injury when she transferred a heavy tray filled with mail from a mail sorting machine to her worktable while in the performance of duty. She indicated that, during the transfer, she pulled the tray toward herself when it bent in the middle, and that she felt a burning sensation from her mid-back to her chest.[4] OWCP accepted the claim for aggravation of spondylosis of the cervical and thoracic regions. It paid appellant wage-loss compensation for disability from work on the supplemental rolls, effective May 13, 2017, and on the periodic rolls, effective January 7, 2018.

In a November 6, 2017 report, Dr. Louis A. Marotti, a Board-certified neurosurgeon, reported that appellant presented with complaints of back pain from a work injury. He advised that she would benefit from cervical facet radiculopathy ablations and indicated that he held her off work.

In a January 4, 2018 duty status report (Form CA-17), Dr. Marotti listed clinical findings of back pain, joint pain, neck pain, and tingling/sensory change, and indicated that appellant was totally disabled.

On May 9, 2018, OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions for a second opinion examination with Dr. Stuart J. Gordon, a Board-certified orthopedic surgeon. It requested that Dr. Gordon evaluate appellant's injury-related residuals and ability to work.

On October 1, 2018, Dr. Marotti discussed the possibility of cervical surgery. He indicated that he held her off work.

On December 7, 2018, Dr. Marotti performed OWCP-authorized surgery at C4-5, C5-6, and C6-7, including discectomies/decompression of the spinal nerve and nerve canal, bilateral foraminotomies/decompression of the bilateral nerve roots, and placement of interbody cages and other materials for fusion.

In a December 13, 2018 report, Dr. Gordon discussed appellant's factual and medical history, noting that she was wearing a Philadelphia collar due to her recent cervical surgery. He reported findings of his December 13, 2018 physical examination, including findings of tenderness

[4] OWCP assigned the present claim OWCP File No. xxxxxx624. Under a separate claim, assigned OWCP File No. xxxxxx227, OWCP accepted that on January 13, 2017 appellant had sustained aggravation of cervical spondylosis without myelopathy or radiculopathy, sprain of ligaments of the cervical spine, and strain of muscle, fascia, and tendon of the lower back. OWCP administratively combined OWCP File No. xxxxxx227 and OWCP File No. xxxxxx624, with the latter file serving as the master file.

to palpation of the thoracic and lumbar spine without spasm, and bilateral negative straight leg tests. Appellant had intact reflexes and intact motor and sensory functions. Dr. Gordon diagnosed chronic cervical and lumbar strains from the January 13, 2017 injury, chronic aggravation of cervical and thoracolumbar strains from the May 13, 2017 injury with incomplete rehabilitation, and preexisting cervical, thoracic, and lumbar degenerative disease. He indicated that appellant's "condition is not resolved" and maintained that she warranted sedentary activity due to her recent surgery. In a December 13, 2018 work capacity evaluation (Form OWCP-5c), Dr. Gordon advised that appellant was unable to perform her usual job, but was able to work for eight hours per day with restrictions. He indicated that she could perform sedentary work with restrictions of pushing, pulling, and lifting up to 10 pounds for up to four hours per day. Appellant could not engage in twisting, bending, stooping, squatting, kneeling, or climbing.

In a February 13, 2020 report, Dr. Marotti advised that appellant was unable to return to work. He indicated that she was undergoing further workup and treatment for her pain.

On February 25, 2020, OWCP determined that there was a conflict in the medical opinion evidence between Dr. Marotti and Dr. Gordon regarding appellant's injury-related residuals and ability to work and indicated that appellant would be referred to an impartial medical examiner (IME) to resolve this conflict. On April 7, 2020, OWCP referred appellant, along with the medical record, a SOAF, and a series of questions for an impartial medical examination with Dr. John F. Perry, a Board-certified orthopedic surgeon. It requested that Dr. Perry evaluate appellant's injury-related residuals and ability to work.

In a June 11, 2020 report, Dr. Perry discussed appellant's factual and medical history, noting that her current main complaint was mid-back pain. He reported findings of his physical examination, including mild limitation of cervical spine motion. Dr. Perry indicated that there was no tenderness in the lumbar or cervical areas of the spine, gait was normal, and sitting root testing was negative. The neurological examination in the upper and lower extremities was within normal limits, and sensation in the upper and lower extremities was normal. Dr. Perry stated that the "motor examination was fine" and noted that reflexes were zero to trace, bilaterally. He diagnosed aggravation of spondylosis of the cervical and thoracic regions, and opined that there currently was no objective evidence of a work-related musculoskeletal condition on the basis of objective criteria. Dr. Perry indicated that appellant "only has postoperative cervical spine changes." He opined that she could return to light-duty work on a full-time basis with restrictions of occasionally exerting up to 20 pounds of force and frequently exerting up to 10 pounds of force. Dr. Perry advised that walking, standing, sitting, and working at a production rate should be tolerable. In a June 11, 2020 Form OWCP-5c, he indicated that appellant could perform sedentary and light work, and advised that she could only perform minimal ladder climbing.

On June 22, 2020, OWCP requested that Dr. Perry provide a supplemental report clarifying his June 11, 2020 report, noting that there was a discrepancy between his June 11, 2020 narrative report and his June 11, 2020 Form OWCP-5c regarding work restrictions.

In a July 23, 2020 report, Dr. Marotti indicated that appellant could not lift more than 15 pounds.

In a supplemental report dated July 15, 2020, Dr. Perry advised that appellant could return to work lifting 20 pounds on occasion and 10 pounds frequently. He indicated that walking, standing, sitting, and working at a production rate should be tolerable, and noted that there were

no other restrictions. Dr. Perry stated that appellant was "able to climb, crawl, bend, stand, reach, twist, *etc.*, without restrictions" and advised that a corrected Form OWCP-5c was attached. In an attached July 22, 2020 Form OWCP-5c, he noted that she could work for eight hours per day with restrictions, and that she could perform light work. Dr. Perry did not indicate any specific work restrictions on the form.

On August 11, 2020, OWCP requested further clarification from Dr. Perry, the IME. It requested that he explain the discrepancy between his July 15, 2020 supplemental opinion and his July 22, 2020 Form OWCP-5c regarding appellant's work restrictions.

In an updated Form OWCP-5c dated June 11, 2020, Dr. Perry advised that appellant could perform sedentary or light work for eight hours per day. He further advised that she could push, pull, and lift up to 20 pounds for eight hours per day, and that she could engage in a minimal amount of ladder climbing.

On September 2, 2020, OWCP offered appellant a temporary position as a modified clerk. The position involved such duties as answering customer service requests on the telephone for up to eight hours per day, intermittently sorting small parcels for up to four hours per day, engaging in computer work/red book maintenance for up to four hours per day, and addressing undeliverable bulk business mail for up to four hours per day. The physical requirements of the position included intermittently sitting, standing, and walking per comfort for eight hours per day, simple grasping for eight hours per day, and intermittently pushing, pulling, and lifting up to 10 pounds for four hours per day. The position did not require climbing, twisting, bending, or stooping. The wages of the offered position were $1,002.73 per week.

On September 7, 2020, appellant refused the offered position, indicating that Dr. Marotti had placed her under a "no work" order.

On October 1, 2020, the employing establishment confirmed that the temporary modified clerk position remained available to appellant.

In an October 1, 2020 notice, OWCP informed appellant that, pursuant to 20 C.F.R. § 10.500(a), it proposed to terminate her wage-loss compensation benefits based on the determination that she could work in the temporary modified clerk position offered by the employing establishment on September 2, 2020. It advised her that the wages of the temporary modified clerk position were greater than the current wages of her date-of-injury position. OWCP informed appellant that the opinion of Dr. Perry, the IME, demonstrated that she could perform the duties of the offered position. OWCP afforded her 30 days to accept the offered position.

By decision dated December 4, 2020, OWCP terminated appellant's wage-loss compensation, effective that same date, pursuant to 20 C.F.R. § 10.500(a). It determined that the special weight of the medical opinion evidence regarding her ability to perform the offered temporary modified clerk position rested with the opinion of Dr. Perry, the IME.

On January 4, 2021, appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on April 7, 2021.

In a January 25, 2021 note, Dr. Marotti indicated that appellant could not return to work.

In a May 3, 2021 statement, appellant described the treatment she received for her employment injury and argued that she should not be required to return to work until her attending physicians determine that she had sufficiently healed.

By decision dated June 2, 2021, OWCP's hearing representative affirmed the December 4, 2020 termination decision.

In a June 24, 2021 note, Dr. Marotti advised that appellant could return to work on June 28, 2021 with restrictions of no lifting more than five pounds, no working more than four hours per day, and no working more than two days per week.

On December 30, 2021, appellant, through counsel, requested reconsideration of the June 2, 2021 decision.

By decision dated March 30, 2022, OWCP denied modification of the June 2, 2021 decision in part, finding that appellant's wage-loss compensation was properly terminated, effective December 4, 2020, pursuant to 20 C.F.R. § 10.500(a). OWCP also vacated the decision in part, finding that the medical evidence established that appellant was totally disabled from work due to her injury-related medical condition, effective September 15, 2021.

OWCP subsequently paid appellant wage-loss compensation for total disability from work, commencing September 15, 2021.

In March 31 and December 5, 2022 and January 16, 2023 notes, Dr. Marotti opined that appellant remained disabled from work.

On March 30, 2023 appellant, through counsel, requested reconsideration of the March 30, 2022 decision.

By decision dated June 26, 2023, OWCP denied modification.

In July 13 and August 24, 2023, and February 26, 2024 reports, Dr. Marotti continued to opine that appellant remained totally disabled from work.

On June 26, 2024 appellant, through counsel, requested reconsideration of the June 26, 2023 decision. No additional evidence was received.

By decision dated August 26, 2024, OWCP denied modification of its June 26, 2023 decision.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[5] OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[6]

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 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.[7]

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.[8] 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.[9] 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.[10]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[11] For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.[12] In situations where the case is properly referred to an

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[5] *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).

[6] *A.D.*, Docket No. 18-0497 (issued July 25, 2018). 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. *See* 20 C.F.R. § 10.5(f).

[7] 20 C.F.R. § 10.500(a).

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

[9] *Id*.

[10] *Id*. at Chapter 2.814.9c(1)(a).

[11] 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[12] *P.R.*, Docket No. 18-0022 (issued April 9, 2018); *see also Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 30 ECAB 1010 (1980).

impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation for the period December 4, 2020 through September 14, 2021, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary light-duty assignment.

On September 2, 2020, the employing establishment offered appellant a temporary light-duty assignment on a full-time basis as a modified clerk. The physical requirements of the position included intermittently sitting, standing, and walking per comfort for eight hours per day, simple grasping for eight hours per day, and intermittently pushing, pulling, and lifting up to 10 pounds for four hours per day. Appellant did not accept the position and, in a December 4, 2020 decision, OWCP terminated her wage-loss compensation effective the same date pursuant to 20 C.F.R. § 10.500(a).

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Marotti, an attending physician, and Dr. Gordon, an OWCP referral physician, regarding appellant's ability to work. In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Perry for an impartial medical examination and an opinion on the matter.[14]

In a June 11, 2020 narrative report, Dr. Perry opined that appellant could return to light-duty work on a full-time basis with restrictions of occasionally exerting up to 20 pounds of force and frequently exerting up to 10 pounds of force. He advised that walking, standing, sitting, and working at a production rate should be tolerable. In a supplemental narrative report dated July 22, 2020, Dr. Perry advised that appellant could return to work lifting 20 pounds on occasion and 10 pounds frequently. He again indicated that walking, standing, sitting, and working at a production rate should be tolerable, and noted that there were no other restrictions. Dr. Perry also noted that appellant was "able to climb, crawl, bend, stand, reach, twist, *etc.*, without restrictions." In a corrected Form OWCP-5c, dated June 11, 2020, he opined that appellant could perform sedentary or light work for eight hours per day. Dr. Perry further advised that her only work restrictions were pushing, pulling, and lifting no more than 20 pounds for eight hours per day, and engaging in a minimal amount of ladder climbing.

The physical requirements of the offered temporary modified clerk position were within the medical restrictions as provided by Dr. Perry. The special weight of the medical opinion evidence regarding appellant's ability to work as a temporary modified clerk rests with the opinion of Dr. Perry in his role as IME.[15] Appellant did not accept a temporary light-duty assignment offered by the employing establishment, which was within her medical restrictions and her vocational ability.

[13] *See D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, *id*.

[14] *See supra* notes 11 and 12.

[15] *See supra* note 13.

The Board thus finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation for the period December 4, 2020 through September 14, 2021, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary light-duty assignment.[16]

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of benefits, clearly warranted on the basis of the evidence at the time of the decision, the burden for reinstating compensation benefits shifts to appellant.[17]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish that her refusal of the temporary light-duty assignment was justified.

Following the December 4, 2020 termination decision, appellant submitted evidence wherein Dr. Marotti opined that appellant thereafter remained disabled from work. However, she has not submitted any rationalized medical evidence establishing that she was unable to perform the duties of the temporary light-duty assignment from the time it was offered by the employing establishment in September 2020 through the time her wage-loss compensation was reinstated in September 2021.[18]

Accordingly, the Board finds that appellant has not met her burden of proof to establish that her refusal of the temporary light-duty assignment was justified.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate wage-loss compensation for the period December 4, 2020 through September 14, 2021, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary light-duty assignment. The Board further finds that appellant has not met her burden of proof to establish that her refusal of the temporary light-duty assignment was justified.

[16] *See D.D.*, Docket No. 23-0173 (issued December 13, 2023).

[17] *See K.J.*, Docket No. 17-1971 (issued March 5, 2018); *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

[18] *See T.F.*, Docket No. 11-0763 (issued November 7, 2011); *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value if it contains an opinion on a medical matter which is unsupported by medical rationale).

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 2025
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board