

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

M.E., Appellant)	
)	
and)	Docket No. 11-1416
)	Issued: May 17, 2012
U.S. POSTAL SERVICE, POST OFFICE, Hartford, CT, Employer)	
)	

Appearances: *Case Submitted on the Record*
William E. Shanahan, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 24, 2011 appellant, through her attorney, filed a timely appeal from a March 25, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim for a recurrence. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established a recurrence of total disability commencing January 20, 2010 causally related to a January 22, 2002 employment injury.

On appeal appellant's counsel contends that appellant sustained a recurrence of disability as her light-duty position was withdrawn due to the National Reassessment Process (NRP).

FACTUAL HISTORY

On January 22, 2002 appellant, then a 46-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her back while slipping on an icy sidewalk in

¹ 5 U.S.C. § 8101 *et seq.*

the performance of duty that same day. She did not fall but strained her back while catching her balance due to the slip. The employing establishment noted that appellant was already working light duty for a nonemployment-related motor vehicle accident which had resulted in back injuries.

In a January 22, 2002 report, Bert Centura, a physician's assistant, diagnosed cervical strain and thoracic strain, indicating that appellant fell at work that same day.

In a February 12, 2002 report, Dr. Peter T. Naiman, a Board-certified orthopedic surgeon, indicated that a magnetic resonance imaging (MRI) scan of the lumbar spine revealed an annular tear at L4-5 lateral portion without foraminal narrowing. Mechanical signs of lumbar dysfunction decreased with decreased spasm and tenderness and her neurological and vascular status was intact. Dr. Naiman released her to light duty with restrictions.

By decision dated March 19, 2002, OWCP accepted appellant's claim for cervical strain and thoracic strain.

OWCP referred appellant to Dr. Balazs Somogyi, a Board-certified orthopedic surgeon, for a second opinion examination. In a July 15, 2002 report, Dr. Somogyi reviewed appellant's medical history, a statement of accepted facts and performed a physical examination. He diagnosed cervical sprain/strain, chronic cervical syndrome, thoracolumbar sprain/strain and chronic thoracic and lumbar syndromes. Dr. Somogyi opined that appellant was totally disabled and had not achieved maximum medical improvement. In addendums dated July 22 and 29, 2002, he opined that appellant's condition was related to the January 22, 2002 employment injury.

In an October 3, 2002 report, Dr. Naiman indicated that mechanical signs of cervical and lumbar dysfunction persisted with paraspinal muscle spasm, tenderness and restrictions in range of motion of mild degree. He advised a light-duty work status with intermittent sitting and standing, lifting in the 5- to 10-pound range on an intermittent basis, ground-level work, no repetitive lifting or stair climbing.

Appellant submitted an April 15, 2003 MRI scan of the cervical spine which revealed cervical vertebra body hypointensities within the bone marrow which appeared to have slightly progressed since a December 1, 2001 examination.

In a July 10, 2006 report, Dr. John Shine, a Board-certified orthopedic surgeon, diagnosed cervical spondylosis no myelopathy, cervical, lumbar and thoracic sprain/strain and tenosynovitis shoulder. On May 30, 2008 he restricted appellant from lifting more than 10 pounds and reaching over shoulder level.

On November 30, 2009 appellant requested a change in physician as Dr. Shine had retired from his practice. On December 1, 2009 OWCP authorized a change of treating physician to Dr. Jeffrey Sumner, a Board-certified orthopedic surgeon. In a January 12, 2010 treatment note, Dr. Sumner diagnosed cervical spondylosis no myelopathy and recommended that she continue with the lifting limits and the overhead restrictions.

The employing establishment notified appellant on January 20, 2010 that it determined that there was no work available for her based on a comprehensive review of its operational

needs within the local commuting area and her medical restrictions. It indicated that appellant would be placed into an administrative leave status until February 4, 2010.

On January 25, 2010 appellant filed a notice of recurrence (Form CA-2a) commencing January 20, 2010. She indicated that the employing establishment had withdrawn her limited-duty assignment due to the NRP.

Appellant submitted the January 12, 2010 report by Dr. Sumner who diagnosed cervical spondylosis no myelopathy. Dr. Sumner indicated that appellant had been stable at her work setting for some time and recommended that she continue with the lifting limits and overhead restrictions of her light-duty position.

By decision dated May 12, 2010, OWCP denied appellant's claim for a recurrence of disability commencing January 20, 2010 on the grounds that the evidence was not sufficient to establish that she was disabled due to her employment-related injury or that she continued to suffer residuals from her employment-related conditions.

In a July 9, 2010 letter, the employing establishment notified appellant that there was no work available for her and that she retained her restoration rights for her compensable injury in the event that her medical restrictions improved and she was able to perform additional duties.

On August 18, 2010 appellant, through her attorney, requested reconsideration and reiterated that the employing establishment withdrew her limited-duty assignment due to the NRP.

By decision dated August 31, 2010, OWCP denied appellant's request for reconsideration on the basis that she did not submit relevant and pertinent new evidence not previously considered by OWCP, did not show that OWCP erroneously applied or interpreted a point of law nor advanced a point of law not previously considered by OWCP.

On October 6, 2010 appellant, through her attorney, requested reconsideration and submitted a September 23, 2010 report from Dr. Sumner who opined that appellant's spondylosis condition was an aggravation of a preexisting condition causally related to her employment-related injury of 2002. She also submitted an October 25, 2010 work capacity evaluation by Dr. Sumner who diagnosed cervical and thoracic strains and aggravated cervical spondylosis no myelopathy. He opined that appellant was unable to work and placed permanent restrictions on reaching above the shoulder, twisting and pushing, pulling and lifting more than 20 pounds.

By decision dated November 18, 2010, OWCP denied modification of its May 12, 2010 decision on the basis that the medical evidence submitted failed to establish that appellant continued to suffer from disabling residuals of her accepted employment injury. On November 29, 2010 it issued an amended decision which included the correction of a typographical error. The basis for the denial remained the same.

On December 20, 2010 appellant, through her attorney, requested reconsideration contending that OWCP did not address the issue of withdrawal of her light-duty work due to the NRP. Appellant also submitted a December 10, 2010 report by Dr. Sumner who provided a brief medical history and opined that appellant's condition limited her ability to work and constituted a permanent aggravation of a preexisting condition.

By decision dated March 25, 2011, OWCP denied modification of the November 29, 2010 decision which denied appellant's claim on the basis that the medical evidence submitted was insufficient to establish that she sustained a recurrence of disability commencing on January 20, 2010, causally related to the accepted employment injury and that her ongoing medical conditions and disability for work were not employment related. It noted that appellant was performing a limited-duty position under her medical restrictions when, on January 20, 2010, her limited-duty position was withdrawn as a result of the NRP.

LEGAL PRECEDENT

Recurrence of disability, as defined in OWCP's regulations, means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.²

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.³ To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.⁴

FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to the NRP. Regarding claims for total disability when a wage-earning capacity decision has not been issued, the Bulletin provides:

“1. If the claimant has been on light duty due to an injury[-]related condition without an LWEC [loss of wage-earning capacity] rating (or the

² 20 C.F.R. § 10.5(x).

³ See *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁴ See *Maurissa Mack*, 50 ECAB 498 (1999).

CE [claims examiner] has set aside the LWEC rating as discussed above), payment for total wage loss should be made based on the [Form] CA-7 as long as the following criteria are met --

The current medical evidence in the file (within the last 6 months) establishes that the injury[-]related residuals continue;

The evidence of file supports that light duty is no longer available; and

There is no indication that a retroactive LWEC determination should be made. (Note -- Retroactive LWEC determinations should not be made in these NRP cases without approval from the [d]istrict [d]irector.)”⁵

FECA Bulletin No. 09-05 also states that, if the medical evidence is not sufficient, the claims examiner should request current medical evidence from the employing establishment and the claimant.⁶

ANALYSIS

Appellant filed a notice of recurrence on January 25, 2010. The record establishes that her light-duty job was withdrawn pursuant to the NRP program. The guidelines for evaluating a claim for total disability under these circumstances are described in FECA Bulletin No. 09-05.⁷ In this case, OWCP failed to discuss FECA Bulletin No. 09-05 or properly consider the evidence presented in light of the guidelines contained in the bulletin. OWCP found no recurrence of disability, although it acknowledged that appellant’s limited-duty position was withdrawn on January 20, 2010 as a result of the NRP.

It is well established that a withdrawal of a light-duty position is considered a recurrence of disability under OWCP regulations. The guidance from FECA Bulletin No. 09-05 indicates that OWCP should consider whether the current medical evidence established that appellant had continuing employment-related residuals at the time of the withdrawal of the light-duty position. If the medical evidence is not sufficient, OWCP should request additional evidence.⁸

In this case, OWCP failed to properly follow the guidelines in FECA Bulletin No. 09-05. It did not properly review the medical evidence from Dr. Sumner, appellant’s treating physician, a Board-certified orthopedic surgeon, in light of the withdrawal of the light-duty position.⁹

⁵ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁶ *Id.*

⁷ The Bulletin refers to a Form CA-7, claim for compensation, but the Form CA-2a, claim for a recurrence of disability, also represents a claim for total disability.

⁸ It would be OWCP’s burden of proof to show that employment-related residuals had ceased. *See Joseph Roman*, 55 ECAB 233 (2004); *H.S.*, Docket No. 11-1593 (issued May 3, 2012); *J.A.*, Docket No. 11-1592 (issued February 13, 2012).

⁹ *H.S.*, *supra* note 8.

Accordingly, the case will be remanded to OWCP for further consideration. After such further development as OWCP deems necessary, it should issue a *de novo* decision with proper findings on the issue presented.

CONCLUSION

The Board finds the case must be remanded to OWCP for proper findings on the issue presented.

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further actions consistent with this decision of the Board.

Issued: May 17, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board