United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
	)	**Docket No. 18-0147**
and	)	**Issued: August 19, 2019**
	)	
U.S. POSTAL SERVICE, MANAGER DAYTON PROCESSING & DISTRIBUTION FACILITY, Dayton, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 26, 2017 appellant, through counsel, filed a timely appeal from a September 26, 2017 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.

[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.*

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of partial disability for the periods May 16 through October 23, 2015 and September 16, 2016 and continuing, causally related to her accepted August 28, 2010 employment injury.

FACTUAL HISTORY

OWCP accepted that on August 28, 2010 appellant, then a 58-year-old automation clerk, sustained left shoulder strain, left shoulder impingement, aggravation of left acromioclavicular joint arthropathy, and left rotator cuff tear as a result of pushing an all-purpose container (APC) that became stuck on a floor brace at work. It authorized left shoulder arthroscopic surgeries performed on July 5, 2011 and February 17, 2012. The surgeries were performed by Dr. Paul A. Nitz, an attending orthopedic surgeon. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing July 5, 2011.

In a September 18, 2013 work capacity evaluation (Form OWCP-5c), Dr. Nitz noted that appellant could work eight hours a day with reaching up to two hours, pushing up to 25 pounds, pulling and lifting up to 15 pounds, climbing for one hour, and no reaching above the shoulder, repetitive movements of the shoulder, and operating automated equipment or machinery (no sweeping machines).

On January 23, 2014 appellant returned to temporary, full-time modified-duty work as a sales solution team member at the employing establishment based on the restrictions set forth by Dr. Nitz's work capacity evaluation (Form OWCP-5c). The job offer noted the scheduled work hours as 8:00 a.m. to 4:30 p.m., with Saturdays and Sundays as the scheduled days off. The temporary assignment was for one year.

OWCP, by letter dated May 14, 2014, informed appellant that her wage-loss compensation would be reduced based upon her actual earnings as a sales solution team member, effective January 23, 2014. It noted that, although she returned to work at a saved pay rate, she continued to lose night differential and Sunday premium pay.[3]

In a May 11, 2015 duty status report (Form CA-17), Dr. Nitz opined that appellant could return to modified-duty work for four hours per day with restrictions.

On May 19, 2015 OWCP again offered, and appellant accepted, a part-time, modified-duty assignment as a sales solution team member based on further work restrictions set forth in Dr. Nitz's subsequent duty status report (Form CA-17) dated May 11, 2015. The modified assignment job offer listed the scheduled work hours as 8:00 a.m. to 12:00 p.m., with Saturdays and Sundays as the scheduled days off.

[3] The Board notes that OWCP's letter dated May 14, 2014 did not contain appeal rights following the reduction of her wage-loss compensation benefits.

Appellant subsequently filed several claims for compensation (Form CA-7) for leave without pay (LWOP) from May 16 through October 30, 2015 and compensation for loss of night differential and Sunday premium pay from October 3 through 30, 2015.

By letter dated October 6, 2015, OWCP requested that the employing establishment clarify whether it had provided appellant with a full-time position as it noted that a part-time position was offered despite there being no medical evidence to indicate that she was unable to perform a full-time restricted position.

An August 31, 2015 letter from Dr. Nitz was received. He noted appellant's limited ability to reach with her shoulders secondary to range of motion restrictions from arthritis and strength challenges associated with her rotator cuff disease. Dr. Nitz further noted appellant's desire to work, but that she related that an eight-hour workday left her in far worse pain and subsequent marked difficulties with the use of her extremities. Appellant also related that if she worked four hours a day, then she was able to provide better care for herself and perform more independently during the remainder of her workweek and at home. Dr. Nitz, therefore, recommended that appellant continue her four-hour a day work schedule with her present work restrictions. He also recommended that she continue her current weight restrictions.

In response to OWCP's October 6, 2015 letter, the employing establishment, in an October 28, 2015 letter, controverted appellant's claim for compensation beginning May 20, 2015. It noted that its accompanying May 19, 2015 job offer indicated that she had accepted a full-time sales solution team member position.[4] The employing establishment also noted that following its receipt of Dr. Nitz's May 11, 2015 Form CA-17 report, appellant began working four hours a day on May 29, 2015 and continued to do so until it conducted an investigation to determine why she only worked four hours a day when she had voluntarily accepted a full-time position. It related that on October 22, 2015 appellant's supervisor informed her that she was supposed to work eight hours a day. On October 26, 2015 appellant returned to work eight hours a day. The employing establishment controverted her claim because it had provided her with an eight-hour position within the restrictions set forth in Dr. Nitz's September 18, 2013 Form OWCP-5c dated September 18, 2013 and she failed to work in such capacity with no medical rationale from a treating physician explaining why she was unable to work full time.

On April 8, 2016 OWCP requested that the employing establishment clarify whether appellant was still working in her sales representative position on a full-time basis and whether the position was temporary or permanent. On April 11, 2016 the employing establishment responded that she was still working in the modified position and that the position was temporary. It related that appellant would continue to work in the position until her retirement or restrictions changed.

Appellant submitted an August 8, 2016 narrative report from Dr. Nitz who examined appellant and provided an impression of left complete rotator cuff tear or rupture of the left shoulder, not specified as traumatic, and left shoulder pain.

[4] The enclosed job offer was a copy of the previously submitted May 19, 2015 job offer for modified duty as a sales solution team member, which listed the scheduled work hours as 8:00 a.m. to 12:00 p.m.

On August 8, 2016 OWCP received a Form CA-17 duty status report from Dr. Nitz in which he indicated that appellant could work eight hours a day with new permanent restrictions.

On September 13, 2016 the employing establishment offered, and appellant accepted, another modified sales solution team member position. Appellant's scheduled hours were 8:00 a.m. to 9:00 a.m., five days a week.

On October 18 and 19, 2016 appellant notified OWCP that she was working only one hour a day because the employing establishment did not have enough work available within her restrictions. OWCP responded that it had no way of knowing if her hours were changed because her physician had changed them or if the employing establishment was unable to provide her with more work. In response, appellant advised that she would have a human resources employee confirm her contention.

In an October 25, 2016 letter, the employing establishment again challenged appellant's claim for compensation, contending that the medical evidence indicated that she could work eight hours a day with permanent restrictions. It noted that Dr. Nitz had provided new work restrictions in his August 8, 2016 Form CA-17 report, which differed from the work restrictions in his September 18, 2013 Form CA-17 report, but appellant had not provided rationalized medical evidence to support the constant changes in work restrictions. The employing establishment also noted its previous challenge to her work stoppage on May 16, 2015 due to the restrictions set forth in Dr. Nitz's May 11, 2015 Form CA-17. It maintained that suitable full-time work was still available to her.

OWCP, in an October 25, 2016 letter, to appellant noted that there was no detailed medical rationale on file to indicate she was only able to work one hour a day. OWCP requested that appellant submit detailed medical rationale to support her recently filed claim for compensation by November 18, 2016.

Appellant continued to file Form CA-7 claims requesting compensation for loss of night differential and Sunday premium pay through October 28, 2016.

On November 8, 2016 appellant reiterated her contention that the employing establishment reduced her eight-hour workday to a one-hour workday. She claimed that she did not know why this happened as her work restrictions had not changed.

By development letter dated November 15, 2016, OWCP notified appellant of the deficiencies of her claims for compensation and requested that she submit additional medical evidence. It afforded her 30 days to provide the requested evidence.

On December 12, 2016 appellant filed a notice of recurrence (Form CA-2a) claiming disability beginning in May 2015 due to her accepted August 28, 2010 employment injuries. She reported that after the original injury she returned to limited-duty work on January 23, 2014. Appellant contended that she currently had daily pain and achiness in both shoulders and her right wrist and fingers due to an increased workload in the sales retention office. She noted an increased workload and contended that it aggravated her original 2015 left shoulder and right wrist injuries. On the reverse side of the claim form, the employing establishment reiterated that appellant had accepted a full-time position with permanent restrictions on January 23, 2014 and May 19, 2015.

It noted that she only worked one hour on September 16, 2016 and stopped work on December 9, 2016.

The employing establishment, by letter dated December 12, 2016, further controverted appellant's recurrence claim. It denied her contention that she had an increased workload. Again the employing establishment noted that she stopped work on September 16, 2016 after working only one hour on that day. It also noted appellant's permanent work restrictions related to her shoulder, effective September 13, 2013. The employing establishment contended that she had failed to submit medical evidence from her treating physician indicating that her condition had worsened to the point that she could not perform the duties she accepted on January 23, 2014 and May 19, 2015 in the sale retention center with her permanent restrictions. Appellant last worked on December 9, 2016 due to a nonwork-related surgery. The employing establishment concluded that she failed to meet her burden of proof to establish an employment-related recurrence of disability.

Appellant filed additional Form CA-7 claims requesting compensation for LWOP and loss of night differential and Sunday premium pay.

By decision dated January 3, 2017, OWCP denied appellant's claims for compensation for partial disability for the periods May 16 through October 23, 2015 and September 16, 2016 and continuing. It found that the medical evidence of record was insufficient to establish that she was disabled from work due to a worsening of her accepted work-related conditions. OWCP further found that appellant had accepted the employing establishment's May 19, 2015 job offer for a full-time modified sales solution team member position prior to the filing of her claims for compensation.

On January 12, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative regarding the January 3, 2017 decision.

In a visit note and Form CA-17 report dated May 11, 2017, Dr. Nitz examined appellant and provided an impression of left unspecified sprain of the left shoulder joint, initial encounter, left impingement syndrome of left shoulder, and left rotator cuff capsule sprain, initial encounter. In his May 11, 2017 Form CA-17 report, Dr. Nitz indicated that appellant could work eight hours a day with permanent restrictions.

During the telephonic hearing, held on July 12, 2017, appellant again maintained that the employing establishment had changed her full-time modified work assignment by reducing her work hours. She claimed that her work hours were reduced because the employing establishment believed that her physician had changed her work restrictions when he responded to its questionnaire regarding her ability to perform certain tasks.

By decision dated September 26, 2017, an OWCP hearing representative affirmed the January 3, 2017 decision. He found that, Dr. Nitz's reports failed to provide a rationalized medical opinion to establish a change in the nature and extent of appellant's accepted work-related conditions that resulted in a recurrence of partial disability from May 16 through October 23, 2015 and beginning September 16, 2016. The hearing representative further found that appellant did not establish that the employing establishment had withdrawn her full-time modified-duty position

during the claimed periods of disability. He noted that she had accepted the employing establishment's May 19, 2015 job offer for a full-time modified sales solution team member position prior to the filing of her claims for compensation.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without an intervening cause or a new exposure to the work environment that caused the illness. It can also mean 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.[5]

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish, by the weight of the reliable, probative, and substantial evidence, a recurrence of total disability and an inability to perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[6] To establish a change in the nature and extent of the injury-related condition, there must be a probative medical opinion, based on a complete and accurate factual and medical history as well as supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[7] In the absence of rationale, the medical evidence is of diminished probative value.[8] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, it must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[9]

ANALYSIS

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

Appellant accepted the employing establishment's May 19, 2015 job offer for a part-time, modified sales solution team member position for four hours per day. The Board notes that OWCP requested clarification from the employing establishment as to whether it had provided appellant

[5] *J.F.*, 58 ECAB 124 (2006). A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties, or other downsizing. 20 C.F.R. § 10.5(x). *See also Richard A. Neidert*, 57 ECAB 474 (2006).

[6] *A.M.*, Docket No. 09-1895 (issued April 23, 2010); *Terry R. Hedman*, 38 ECAB 222 (1986).

[7] *Mary A. Ceglia*, 55 ECAB 626, 629 (2004).

[8] *Id.*; *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[9] *Ricky S. Storms*, 52 ECAB 349 (2001).

with a full-time position as the record indicated that a part-time position had been offered to her on May 19, 2015 and there was no medical evidence indicating that she was unable to perform her full-time modified position. The Board notes that OWCP requested clarification from the employing establishment as to whether it had provided appellant with a full-time position as the record indicated that a part-time position had been offered to her on May 19, 2015 and there was no medical evidence indicating that she was unable to perform her full-time modified position. Appellant contended that on September 13, 2016 the employing establishment reduced her position to one hour a day, 8:00 a.m. to 9:00 a.m., five days a week, which she accepted on the same date. Appellant contended that the employing establishment did not have enough work available within her restrictions. The employing establishment, however, maintained that appellant reduced her work hours even though suitable full-time work was still available to her.

In response, the employing establishment maintained that it had made full-time employment available to appellant since May 2015 and that such employment was still available. However, it only resubmitted a copy of the May 19, 2015 job offer for four hours of work, Monday through Friday. The employing establishment did not provide evidence that full-time employment remained available to appellant.

The Board finds that there are discrepancies in the evidence of record which preclude it from making an informed decision on appellant's recurrence claim.

Therefore, the case must be returned to OWCP for further development as to the status of appellant's employment at the time of her alleged recurrence.[10] Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[10] *See T.M.*, Docket No. 17-1552 (issued July 10, 2018).

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: August 19, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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