United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket No. 17-1988**
	)	**Issued: January 28, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Appellant, pro se
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 September 25, 2017 appellant filed a timely appeal from two August 23, 2017 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish disability for two hours on May 4, 2017 and two hours on May 5, 2017, causally related to her accepted November 14, 2002 employment injury; and (2) whether appellant has met her burden of proof to

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the August 23, 2017 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 evidence for the first time on appeal. *Id.*

establish a recurrence of disability for the period January 16 through March 14, 2017, causally related to her accepted November 14, 2002 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On January 19, 2003 appellant, then a 32-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, while in the performance of duty, she sat down on a wooden bench in the women's locker room and fell onto the floor. By decision dated April 14, 2003 OWCP accepted her claim for the condition of low back (lumbosacral) sprain/strain. By decision dated January 11, 2005, it expanded the acceptance of appellant's claim to include the additional condition of herniated disc at L5-S1.

Following her employment injury, appellant was working full time with a 20-pound lifting restriction until her work hours were reduced to six hours per day with a 10-pound lifting restriction on or around April 24, 2009, based upon a duty status report (Form CA-17) which was completed by a physician with an illegible signature. She continued light-duty employment until August 2010 when the employing establishment was no longer able to accommodate her restrictions. Appellant filed claims for compensation (Form CA-7) and OWCP paid her wage-loss compensation on the periodic rolls for total disability.[4]

OWCP referred appellant to vocational rehabilitation on February 4, 2011, based upon the medical findings of Dr. Scott Massien, a Board-certified internist and treating physician, who noted that her lumbosacral sprain and strain had resolved, but that her L5-S1 disc herniation continued to produce pain. Dr. Massien noted his review of the job description for a mail handler and determined that she could not perform those employment duties. He assigned restrictions limiting appellant's work to 2.5 hours per day for 5 days per week with various restrictions on her physical functioning. In a report dated July 11, 2011, Dr. Massien noted that she could work for six hours per day with various restrictions on her physical functioning which were determined by a work capacity evaluation.

By decision dated March 20, 2013, OWCP reduced appellant's wage-loss compensation as she failed to complete vocational rehabilitation. On March 28, 2013 appellant requested an oral hearing. By decision dated June 11, 2013, a hearing representative reversed the March 20, 2013 decision, finding that OWCP had improperly reduced appellant's compensation without issuing the requisite prereduction notice pursuant to 5 U.S.C. § 8113(b). Benefits were reinstated at the previous level retroactive to March 20, 2013. A loss of wage-earning capacity (LWEC)

[3] Docket No. 03-1880 (issued November 17, 2003); Docket No. 10-0968 (issued February 1, 2011); and Docket No. 14-0584 (issued July 29, 2014).

[4] By decision dated February 1, 2011, the Board found that appellant had not met her burden of proof to establish a recurrence of disability beginning May 5, 2009 causally related to her accepted employment injury. *Id*.

determination was thereafter issued by OWCP on July 19, 2013 and was affirmed by the Board in its decision dated July 29, 2014.[5]

On October 15, 2015 appellant accepted a limited-duty job offer as a mail handler (modified) working for two hours a day, five days per week. She continued to work in that position until January 16, 2017 when her work assignment was amended to two hours a day, four days per week.

In a January 12, 2017 treatment note, Dr. Tim Nice, a Board-certified orthopedic surgeon, noted that he saw appellant on December 29, 2016. He indicated that she could not return to work for the period January 13 through February 13, 2017.

Appellant thereafter submitted several claims for compensation (Form CA-7) following her change in duty status.

In an August 11, 2016 Form CA-17, Dr. Nice indicated that appellant could perform modified duty for two hours a day, four days a week. In a May 4, 2017 Form CA-17, he again indicated that appellant could resume her limited-duty employment for two hours a day, four days per week.

In a letter dated May 5, 2017, D.J., an employing establishment human resources specialist, provided additional information and copies of previously submitted evidence. She also included a May 4, 2017 e-mail from the employing establishment which indicated that they were not aware of any work stoppage due to no work available. Furthermore, the employing establishment advised that there was no change in appellant's restrictions and that her October 15, 2015 job offer remained in effect.

In a May 4, 2017 treatment note, Dr. Nice explained that he had not seen appellant for a year. He advised that she continued to take her medicine and lived with pain in her back. Dr. Nice noted that appellant worked two hours a day standing "and even that bothers her." He examined her and reported a negative straight leg raise on the left and a negative straight leg raise on the right. Dr. Nice determined that the straight leg raise went to 90 degrees and did not create back pain, but appellant had some pain behind her knee. He found that she had a good muscle strength examination of both lower extremities which were symmetric. Dr. Nice found that appellant denied any paresthesias in her right leg. He also indicated that she has had disc issues at L5 in the past and that she was given a sedentary work status when she had her functional capacity examination. Dr. Nice noted that appellant had not seen a neurologist or neurosurgeon. He advised that she had electrical studies which showed a very mild chronic L5-S1 radiculopathy, mostly on the right side. Dr. Nice also indicated that appellant was also claiming to have pain in the left leg, but there were "absolutely no neurologic findings in the left leg." He continued her on her present work restrictions.

[5] On June 18, 2013 OWCP provided prereduction notice of its intent to reduce appellant's wage-loss compensation based upon the constructed position of doctor's office clerk. By decision dated July 19, 2013, it finalized the proposed reduction of her wage-loss compensation benefits. A hearing representative, by decision dated March 14, 2014, affirmed the LWEC determination. On February 27, 2014 appellant requested a modification of her LWEC determination. By decision dated April 21, 2014, OWCP denied her request for modification.

On May 14, 2017 appellant filed a claim for compensation (Form CA-7) requesting intermittent disability during the period April 29 to May 12, 2017. On a time analysis form, dated May 16, 2017, she noted that April 29 and 30, 2017 were her days off, and indicated "no work available." Appellant also noted eight hours for May 1, 2017 as her off day. For May 4, 2017, she noted eight hours for a physician visit as she saw Dr. Nice for back pain. For May 5, 2017, appellant noted eight hours for back pain. She claimed a total of 76 hours of compensation.

In a May 25, 2017 memorandum of telephone call, OWCP determined that appellant's job offer required that she work two hours a day, four days a week. It was noted in the memorandum that time was taken off due to medical appointments on May 4 and 6, 2017. OWCP explained to appellant that she attended her medical appointments during the day and that she was scheduled to work at night. It further explained to appellant that she could not take time off for medical appointments and claim temporary total disability as they were two different issues. OWCP also addressed her complaint of loss of work due to pain. It instructed that, if appellant was disabled from work, that was in essence a recurrence that must be established with substantive medical evidence.

In a letter dated June 6, 2017, appellant provided a note from Dr. Nice. Dr. Nice explained that she could return to work on May 9, 2017 following his May 4, 2017 examination. In a note to OWCP appellant noted that, due to drowsiness, she could not drive and "rest the night away due to my injury on job."

In a June 23, 2017 memorandum of phone call, OWCP verified that appellant worked two hours and was in six hours of leave without pay status on March 23, 2017. In a separate memorandum of the same date, OWCP's claims examiner indicated that the physician's note for May 4 to 9, 2017 "did not include much."

On June 26, 2017 OWCP manually adjusted appellant's underpayment, providing compensation for six hours on March 23, 2017.[6]

In a June 12, 2017 treatment note, Dr. Nice indicated that he saw appellant three months ago and opined that she was able to work two hours a day and she wanted to continue working the two hours a day. He noted that she was experiencing numbness in her left foot, which was something new. Dr. Nice advised that appellant's reflexes, though decreased bilaterally were symmetric in the Achilles and the patella reflexes. He found that the muscle strength was negative and the straight leg raise maneuver was negative bilaterally. Dr. Nice opined that he could not account for what appellant was claiming to have, but he explained that a magnetic resonance imaging (MRI) scan from 2014 showed the degenerative disc at L5 with a four millimeter bulge mostly on the right. He explained that now her symptoms were on the left and right. Dr. Nice indicated that it was possible that "this has gotten worse." He advised that appellant was going to

[6] In a June 27, 2017 note, appellant indicated that she had still not been paid for lost wages of 34 hours. She listed the dates as: 4 hours from March 4 to 17, 2017; 4 hours from March 18 to 31, 2017; and 4 hours from April 29 to May 12, 2017, and explained that she was not paid for her off day of Monday of 2 hours each; 4 hours for the period May 13 to 26, 2017; and 6 hours for wage loss not paid on March 23, 2017, appellant noted that it was her error as she had skipped the date on the Form CA-7; and 12 hours for being out sick from May 4 to 5, 2017, appellant filled in physician appointment not paid.

have a neurologic consultation and they might have to repeat electrical studies and the MRI scan to her back. Dr. Nice indicated that she could continue working.

In a letter dated June 30, 2017, OWCP noted that they had received appellant's Form CA-7 claiming compensation for the period April 29 through May 12, 2017. It paid compensation for May 1 through 5, 2017 and May 8 through 12, 2017, for a total of 60 hours in the amount of $1,153.88. OWCP noted that development had also been undertaken to determine entitlement to compensation for an additional two hours on both May 1 and 8, 2017 as these were days off, but four hours were subsequently paid. It therefore noted that for the period April 29 through May 12, 2017, as claimed on the May 14, 2017 Form CA-7, there remained only four hours under consideration. These hours related two hours for her examination with Dr. Nice on May 4, 2017 and absence due to back pain on May 9, 2017. OWCP denied payment for these four hours due to lack of medical documentation to support recurrent disability.

In a July 27, 2017 report, Dr. Nice noted that there was some debate regarding appellant's work status on May 4 and 5, 2017. He explained that she was seen in his office for her usual appointment for her back symptoms on May 4, 2017. Dr. Nice indicated that appellant was having a bad day and he refilled her medication. He explained that she was also off on May 5, 2017 because of the ongoing symptoms in her left leg. Dr. Nice noted that appellant did not return to work until May 6, 2017, which would probably be appropriate based on the symptoms she was having on May 4, 2017. He explained that she was working two hours a day, four days a week. Dr. Nice advised that appellant continued to take anti-inflammatories and occasional pain medicine, as well as therapy modalities and seemed to be tolerating this work schedule. He opined that there was no overall change in her work status or symptomatology with a negative neurologic examination. Dr. Nice noted that appellant was actually doing better than she was when he saw her in May 2017. He also completed a duty status report of the same date.

In an August 14, 2017 letter, appellant indicated that she had not been paid for May 4 and 5, 2017. She indicated that she was off sick for a medical appointment due to severe and ongoing leg (nerve) pain with numbness and tingling on the left leg. Appellant explained that she was prescribed medication and rest and was awaiting electromyography testing and had been referred to a neurologist on July 14, 2017. She noted that she experienced constant back pain and she could not drive because her medication made her sleepy.

On August 15, 2017 OWCP received a copy of appellant's May 18, 2017 modified position. The two hours that appellant was scheduled to work on her scheduled workdays were listed as 19:00 to 21:00 (7:00 p.m. to 9:00 p.m.)

By decision dated August 23, 2017, OWCP denied appellant's claim for an additional four hours of compensation for the period May 4 to 5, 2015 (two hours of wage loss each day), finding that the evidence of record was insufficient to establish that she was disabled from work as a result of her accepted conditions.

By separate decision also dated August 23, 2017, OWCP denied appellant's recurrence of disability claim for the period January 16 through March 14, 2017 as she failed to establish that she was disabled due to a material change or worsening of her accepted conditions.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[7] has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[8] For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.[9] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.[10]

Under FECA the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[11] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[12] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, the claimant is entitled to compensation for any loss of wages.[13]

A claimant who has returned to work following an accepted injury or illness may need to undergo examination or treatment and such employee may be paid compensation for wage loss while obtaining medical services and for a reasonable time spent traveling to and from the medical provider's location.[14] A claimant may be paid compensation for wage loss while obtaining medical services and for a reasonable time spent traveling to and from the medical provider's location.[15] As a rule, no more than four hours of compensation or continuation of pay should be allowed for routine medical appointments. Longer periods of time may be allowed when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain the medical care.[16]

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[7] *Supra* note 1.

[8] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel A. Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

[9] *See Amelia S. Jefferson, id.; see also David H. Goss*, 32 ECAB 24 (1980).

[10] *See Edward H. Horton*, 41 ECAB 301 (1989).

[11] *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

[12] *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

[13] *E.B.*, Docket No. 17-1160 (issued December 19, 2018); *Merle J. Marceau*, 53 ECAB 197 (2001).

[14] *C.Y.*, Docket No. 17-0605 (issued January 11, 2018); *Daniel Hollars*, 51 ECAB 355 (2000); *Jeffrey R. Davis*, 35 ECAB 950 (1984).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.19 (February 2013).

[16] *Id*. at Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.8 (November 1998)

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish disability for two hours on May 4, 2017 and two hours on May 5, 2017, causally related to her accepted November 14, 2002 employment injury.

In support of her claim for compensation, appellant submitted medical reports of Dr. Nice. In a May 4, 2017 treatment note, Dr. Nice examined her and provided findings. He noted that appellant was also claiming to have pain in the left leg, but there were "absolutely no neurologic findings in the left leg." Dr. Nice continued her work restrictions and did not offer an opinion that she was unable to perform her two hours of work that day, which as listed in her job offer, was from 7 p.m. to 9 p.m. He also provided a separate May 4, 2017 duty status report (Form CA-17) and indicated that appellant could resume her limited duties of two hours a day, four days per week. In another report dated May 4, 2017, Dr. Nice explained that appellant was seen in his office that day for an appointment and she could return to work on May 9, 2017. However, he did not offer a reason for the time off from work. These medical reports do not establish that appellant was disabled from her light-duty employment position, as her restrictions remained unchanged and Dr. Nice did not provide a medical opinion supporting her loss of two hours of employment. Furthermore, the medical appointment was scheduled and occurred during nonwork hours. Therefore appellant has not met her burden of proof to establish that she incurred a loss of wages to obtain this treatment.[17]

In a July 27, 2017 report, Dr. Nice noted that there was some debate on appellant's work status on May 4 and 5, 2017. He explained that she was seen in his office for her usual appointment for her back symptoms on May 4, 2017. Dr. Nice indicated that appellant was having a bad day and he refilled her medication. He explained that she was also off on May 5, 2017 because of the ongoing symptoms in her left leg. Dr. Nice noted that appellant did not return to work until May 6, 2017, which would probably be appropriate based on the symptoms she was having on May 4, 2017. He opined that there was no overall change in her work status or symptomatology with a negative neurologic examination. Dr. Nice noted that appellant was actually doing better on that date than she was when he saw her in May 2017. This medical report also fails to support appellant's claim for compensation. Dr. Nice did not provide a rationalized medical opinion explaining why appellant could not work for two hours on May 4, 2017 or two hours on May 5, 2017.

As appellant has not submitted rationalized medical evidence establishing disability from work for the periods claimed, she has not met her burden of proof to establish her claim.

LEGAL PRECEDENT -- ISSUE 2

Section 10.5(x) of OWCP's Code of Federal Regulations provides that a recurrence of disability means an inability to work after an employee has returned to work, caused by a

[17] *Id*.

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.[18]

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 establishes that the employee can perform the light-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative and substantive evidence, a recurrence of total disability, and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements.[19]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.[20] This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.[21] The physician's opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[22]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability for the period January 16 through March 14, 2017, causally related to her accepted November 14, 2002 employment injury.

Appellant has not alleged a change in the nature and extent of her light-duty job requirements. She must therefore provide medical evidence establishing that she was disabled due to a worsening of her accepted work-related conditions.[23]

In support of her claim, appellant presented a January 12, 2017 note from Dr. Nice. Dr. Nice indicated that he saw her on December 29, 2016 and that she could not return to work for the period January 13 through February 13, 2017. However, this report does not contain a diagnosis or an opinion as to why appellant was disabled for the period January 13 through February 13, 2017 and unable to work.[24] Dr. Nice did not provide clear physical findings

[18] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[19] *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[20] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[21] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[22] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[23] *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[24] Medical evidence which does not offer any opinion regarding causal relationship is of no probative value. *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

supporting appellant's disability for work during the period in question and did not provide any rationale explaining how or why appellant was disabled due to a worsening of her accepted work-related conditions.[25] Therefore this report is insufficient to establish her claim.

In a progress note dated May 4, 2017, Dr. Nice saw appellant for complaints of back pain. He examined her and continued her on her present work status. Likewise, Dr. Nice's return to work note of May 4, 2017 advised that appellant could return to work on May 9, 2017 while his June 12, 2017 progress note provided findings and indicated that she continue working two hours per day. Dr. Nice provided a July 27, 2017 progress note, which advised that on May 4, 2017 appellant was having a bad day and took some time off work through May 6, 2017. He indicated that she was doing better than she was in May 2017. However, these reports are insufficient to establish appellant's claim as they do not address any period of disability claimed from January 16 through March 14, 2017 and they lack any medical rationale supporting disability.[26]

No other medical reports specifically address how appellant's disability on the aforenoted dates was caused or aggravated by her accepted conditions.

The Board thus finds that the evidence of record is insufficient to establish that there was a change in the nature or extent of appellant's injury-related condition, or a change in the light-duty requirements, that would prohibit her from performing the light-duty position for the period January 16 through March 14, 2017, causally related to her accepted employment injuries. Thus, appellant has not met her burden of proof.

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 appellant has not met her burden of proof to establish disability for two hours on May 4, 2017 and two hours on May 5, 2017, causally related to her accepted November 14, 2002 employment injury. The Board also finds that she has not met her burden of proof to establish a recurrence of disability for the period January 16 through March 14, 2017, causally related to her accepted November 14, 2002 employment injury.

[25] *See J.M.*, Docket No. 16-0306 (issued May 5, 2016).

[26] *Supra* note 24.

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 28, 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