

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

C.W., Appellant)	
)	
and)	Docket Nos. 18-1764 & 19-0709
)	
U.S. POSTAL SERVICE, POST OFFICE, Memphis, NY, Employer)	Issued: August 27, 2020
)	

Appearances:
Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

On September 21, 2018 appellant, through counsel, filed a timely appeal from an April 10, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP) in relation to OWCP File No. xxxxxx169. The Clerk of the Appellate Boards assigned Docket No. 18-1764. On February 19, 2019, appellant, through counsel, filed a timely appeal from a September 11, 2018 decision in relation to OWCP File No. xxxxxx674. The Clerk of the Appellate Boards assigned Docket No. 19-0709.²

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 The Board notes that following the September 11, 2018 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.*

Appellant's claims have previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On October 5, 1998 appellant, then a 47-year-old part-time flexible distribution/window clerk, filed an occupational disease claim (Form CA-2) alleging post-traumatic stress disorder (PTSD), anxiety, and depression because a customer who had molested her and threatened to kill her as a child was a daily patron at the Memphis, New York, location of the employing establishment and she had to interact with him in her capacity as a window clerk. She noted that she first became aware of her claimed condition on January 3, 1995 and related it to her federal employment on May 22, 1998. On the reverse side of the claim form, the employing establishment noted that appellant stopped work and reported her condition to a supervisor on June 27, 1998. OWCP assigned that claim OWCP File No. xxxxxx169 and accepted PTSD as an employment-related condition.

On March 26, 1999 appellant accepted the employing establishment's offer of a position as a part-time flexible hub clerk at the Martville, New York Post Office as an accommodation to her employment restrictions put into place due to her accepted and continuing PTSD condition. While working at the Martville Post Office location she encountered an individual who bore a resemblance to and had the same last name of the man who had abused, assaulted, and threatened her as a child -- possibly that man's nephew. Following her encounters with this individual, appellant ceased employment on October 5, 2002.⁴

On June 9, 2010 appellant filed a notice of recurrence (Form CA-2a) of disability commencing October 5, 2002. By decision dated September 1, 2010, the recurrence claim was denied. Appellant was instructed that a new claim should be filed in an emotional condition claim, rather than a recurrence claim, for exposure to new factors other than the previously accepted employment factors.

By decision dated September 2, 2010, OWCP issued a retroactive loss of wage-earning capacity (LWEC) determination based on appellant's actual earnings as a part-time flexible hub clerk at the employing establishment. It found that she had worked in the position for over three years, commencing March 27, 1999, and that the employment fairly and reasonably represented her wage-earning capacity. OWCP found that appellant had 72 percent LWEC and paid her compensation for this loss for the period March 27, 1999 to October 4, 2002.⁵

On October 14, 2010 appellant filed a new occupational disease claim (Form CA-2) alleging an aggravation of her PTSD condition as a result of employment-related interactions with the possible nephew of the man who had abused her and threatened her as a child. That claim was

³ Docket No. 14-0693 (issued January 12, 2016); Docket No. 12-1854 (issued June 25, 2013); Docket No. 06-1155 (issued February 23, 2007); Docket No. 05-0581 (issued June 9, 2005).

⁴ Appellant reported to Dr. Teresa R. Miller, an attending physician Board-certified in psychiatry, that she encountered this individual in the workplace as early as September 2001. She indicated that, on multiple occasions prior to ceasing employment, she waited on this individual as a customer and handed him mail.

⁵ The record contains no evidence showing that appellant received wage-loss compensation after October 4, 2002.

assigned OWCP File No. xxxxxx674. By decision dated May 3, 2011, OWCP denied appellant's occupational disease claim in File No. xxxxxx674 finding that she had not met her burden of proof to establish a new injury in that she had not established a compensable employment factor. Appellant submitted additional requests for reconsideration under OWCP File No. xxxxxx674, but OWCP denied modification by merit decisions dated March 23, 2012 and August 16, 2013.

Appellant requested modification of the September 2, 2010 LWEC determination.⁶ By decision dated October 23, 2013, OWCP denied modification of the September 2, 2010 LWEC determination.

Appellant appealed to the Board on February 6, 2014. By decision dated January 12, 2016, the Board determined that OWCP had erroneously issued a retroactive LWEC determination on September 2, 2010 after appellant had submitted medical evidence supporting a change in her work-related condition and after she had filed a recurrence claim. The Board notes that, while the order portion of the January 12, 2016 decision indicates that the decision dated "October 23, 2013 is remanded," no remand instructions were given to OWCP regarding the September 2, 2010 LWEC determination. Given that the Board clearly determined that the September 2, 2010 LWEC determination was erroneous, this LWEC determination is no longer in place.

The Board's January 12, 2016 decision also set aside OWCP's August 16, 2013 decision and remanded the case to OWCP with instructions for further development of the evidence. The Board found that OWCP made no specific findings in its August 16, 2013 decision regarding the alleged employment factors, *i.e.*, appellant's interactions with the individual at the Martville Post Office, and failed to provide a reason why they would not be considered compensable employment factors.⁷ The Board directed OWCP, on remand, to make adequate findings of facts regarding this matter, to be followed by the issuance of a *de novo* decision.

By decision dated April 10, 2018, OWCP determined, in OWCP File No. xxxxxx169, that the formal September 2, 2010 LWEC determination should be considered modified to reflect that it was issued in error, in accordance with the determination of the Board in its January 12, 2016 decision. It also found that, pursuant to its procedures, appellant's filing of a claim for a recurrence of disability "was not possible" given that her prior claim had been accepted for an emotional condition. The Board indicated that, in emotional condition cases, a new claim should always be filed.

By decision dated September 11, 2018, OWCP denied appellant's occupational disease claim because she had not established any compensable employment factors. In a brief discussion in the analysis section of the decision, it indicated that she had not proven that the individual she

⁶ By order dated June 25, 2013, the Board directed OWCP to administratively combine appellant's claims under OWCP File Nos. xxxxxx674 and xxxxxx169. On August 16, 2013 OWCP administratively combined the files, designating OWCP File No. xxxxxx169 as the master file.

⁷ The Board noted that there was no discussion as to whether appellant's allegations were supported by the evidence of record or whether the allegations were outside the scope of coverage. The Board further noted that OWCP did not consider evidence from Dr. Miller, as well as other statements, which were relevant to the issue of whether appellant established a compensable employment factor.

encountered at the Martville Post Office was a nephew of the man who had previously sexually abused her or that she was “caused harm” by him.

The Board, having duly considered the matter, further concludes that this case is not in posture for decision.

Appellant filed two claims, one for a recurrence of disability and one for a new occupational disease, which included a claim for ongoing total disability caused by her PTSD, an accepted condition in OWCP File No. xxxxxx169.

Preliminarily, the Board finds that it was erroneous for OWCP to find in the context of the present case that, given that appellant’s claim has been accepted for an emotional condition, her filing of a claim for a recurrence of disability was improper.

A recurrence of disability can be established when an inability to work has been shown after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury, or new exposure to the work environment that caused the illness.⁸ The FECA procedure manual provides additional guidance as to when a notice of recurrence should be filed. OWCP’s procedures provide, in relevant part, that a recurrence of disability does not include a work stoppage caused by “[a] condition which results from a new injury, even if it involves the same area of the body previously injured, or by renewed exposure to the causative agent of a previously suffered occupational disease.”⁹ If a new work-related injury or exposure occurs, a Form CA-1 or CA-2 should be completed accordingly.¹⁰ The FECA procedure manual further provides:

“[I]n some occupational disease cases where the diagnosis remains the same but disability increases due to additional exposure to the same work factors, the claimant may submit Form CA-2a rather than filing a new claim. For instance, a claimant with carpal tunnel syndrome who has returned to work but whose repetitive work activities result in the need for surgery, is not required to file a new claim.

“Note, however, that in emotional stress and hearing loss cases, a new claim should always be filed.”¹¹

The Board has recognized PTSD as a compensable consequential injury under circumstances where a certain triggering event has been medically demonstrated to have caused a

⁸ 20 C.F.R. § 10.5(x).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3c(5) (June 2013).

¹⁰ *Id.*

¹¹ *Id.*

reawakening or exacerbation of existing PTSD systems.¹² OWCP has not adjudicated whether appellant has sustained a consequential injury through an exacerbation of her accepted PTSD.

The Board had held that in cases involving a diagnosis of PTSD, the provisions of Chapter 2.1500.3c(5) the procedure manual will not always be applicable.¹³ As the Board has recognized PTSD as a potential consequential injury, under circumstances where a certain triggering event has been medically demonstrated to have caused a “reawakening or exacerbation” of PTSD, it becomes necessary to remand the case for adjudication of whether appellant sustained a consequential injury due to the accepted PTSD condition, and whether such an injury caused disability on and after October 5, 2002.

The Board also finds that, in connection with the denial of appellant’s claim for a new occupational disease, OWCP erroneously found that there were no accepted employment factors. As previously noted, OWCP has accepted under OWCP File No. xxxxxx169 that appellant sustained PTSD because a customer who had molested her and threatened to kill her as a child was a daily patron at the Memphis, New York, location of the employing establishment and she had to interact with him in her capacity as a window clerk. Because appellant has implicated this previously accepted employment factor as part of her claim for a new occupational disease, it therefore is also an accepted employment factor of this new claim.

Moreover, the Board finds that OWCP has failed to make adequate findings of facts and statements of reasons in its decisions regarding appellant’s consolidated consequential injury, recurrence of disability, and new occupational disease claims. For example, OWCP did not adequately explain why appellant’s claimed exposures in 2001 and 2002 to the individual at the Martville Post Office would not constitute a “triggering event” or “reawakening or exacerbation” of her previously accepted PTSD, thereby causing a consequential injury, or why it would not be a compensable employment factor with respect her new occupational disease claim. Section 8124(a) of FECA provides that OWCP shall determine and make findings of fact and make an award for or against payment of compensation.¹⁴ Section 10.126 of Title 20 of the Code of Federal Regulations provides that a decision shall contain findings of fact and a statement of reasons. The Board has held that the reasoning behind OWCP’s evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹⁵

The Board will therefore set aside OWCP’s April 10 and September 11, 2018 decisions which form the basis of the present appeals, and remand the case to OWCP for further development.

¹² See *P.H.*, Docket No. 15-0482 (issued August 4, 2015).

¹³ See *B.I.*, Docket No. 18-0253 (issued August 2, 2018).

¹⁴ 5 U.S.C. § 8124(a).

¹⁵ *L.M.*, Docket No. 13-2017 (issued February 21, 2014); *D.E.*, Docket No. 13-1327 (issued January 8, 2014); *L.C.*, Docket No. 12-0978 (issued October 26, 2012); Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances* Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

On remand OWCP shall evaluate the factual and medical evidence to determine, in one merit decision whether: 1) appellant sustained, by October 5, 2002, a consequential injury resulting from her accepted employment-related PTSD condition; 2) appellant sustained a recurrence of disability of her accepted PTSD condition; and/or 3) appellant sustained a new occupational disease causally related to her accepted employment factor of exposures in 2001 and 2002 to an individual at work.

OWCP shall thereafter determine appellant's entitlement, if any, to wage-loss compensation. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision, with adequate findings of fact and a statement of reasons, consistent with this order of the Board. Accordingly,

IT IS HEREBY ORDERED THAT the September 11 and April 10, 2018 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: August 27, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board