

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

S.D., Appellant)	
)	
and)	Docket No. 20-1273
)	Issued: June 3, 2021
U.S. POSTAL SERVICE, SALISBURY POST)	
OFFICE, SALISBURY, NC, Employer)	
)	

Appearances:
Erik B. Blowers, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 16, 2020 appellant, through counsel, filed a timely appeal from a May 15, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 May 15, 2020 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability commencing July 15, 2018, causally related to her accepted February 10, 2017 employment injury.

FACTUAL HISTORY

On February 10, 2017 appellant, then a 35-year-old rural carrier associate (RCA), filed a traumatic injury claim (Form CA-1) alleging that on February 10, 2017 she hit her head on the “front glass” and her right knee when her privately owned vehicle was rear-ended while in the performance of duty. She stopped work on February 11, 2017 and returned to part-time, modified-duty for four hours per day on March 20, 2017. OWCP accepted appellant’s claim for right knee contusion and scalp contusion and subsequently expanded the acceptance of her claim to include right knee meniscus tear. It paid appellant wage-loss compensation on the supplemental rolls for partial disability beginning April 1, 2017.

On July 12, 2017 appellant underwent right knee arthroscopic and partial medial meniscectomy surgery and stopped work. OWCP paid wage-loss compensation on the supplemental rolls until she returned to full-time, limited-duty on August 11, 2017. On April 3, 2018 appellant returned to full-duty work.⁴

In a July 20, 2018 urgent care report, Peter Nkyesiga, a physician assistant, noted that appellant sustained injuries to her right knee and neck after a February 10, 2017 employment injury. He indicated that appellant had returned to full duty three weeks prior and was complaining of neck and right shoulder pain, as well as headaches originating from the neck pain. Mr. Nkyesiga reported cervical spine examination findings of mild tenderness on palpation and good range of motion and strength. He diagnosed posterior neck pain.

In an August 6, 2018 duty status report (Form CA-17), Dr. Tuan Huynh, a family medicine specialist, noted the February 10, 2017 date of injury and a diagnosis of neck pain. The provider indicated that appellant could not work regular duty, but could work modified duty with restrictions of walking and driving a vehicle up to six hours, sitting and reaching above the shoulder up to five hours, bending and stooping up to four hours, standing up to three hours, climbing up to two hours, and kneeling, pulling, and pushing up to one hour.

Appellant stopped work on July 15, 2018. On August 9, 2018 she filed a notice of recurrence (Form CA-2a) claiming disability from work beginning on July 15, 2018, causally related to her accepted February 10, 2017 employment injury. Appellant indicated that her physician had given her more restrictions due to her cervical issues. She described her medical condition as “headaches almost daily, cervical pain, and shoulder pain.”

In a development letter dated September 4, 2018, OWCP informed appellant that the evidence of record was insufficient to establish that she was unable to work full duty beginning August 6, 2018. It advised her of the definition of a recurrence of disability and of the type of

⁴ In an April 2, 2018 examination report and Form CA-17, Dr. Harrison A. Latimer, a Board-certified orthopedic surgeon, noted normal right knee examination findings and indicated that appellant could return to regular work.

factual and medical evidence required to establish her recurrence of disability claim. OWCP afforded appellant 30 days to provide the requested evidence.

OWCP received a November 13, 2017 report by Dr. Latimer who noted appellant's complaints of right knee pain. He indicated that appellant was tolerating work for eight-hour days. Dr. Latimer reviewed appellant's history and provided examination findings. He diagnosed status post right knee arthroscopy. Dr. Latimer completed CA-17 forms dated November 13, 2017, January 2, and April 2, 2018 and checked a box marked "Yes" indicating that appellant was able to return to full duty.

In an October 9, 2018 decision, OWCP denied appellant's claim for a recurrence of disability commencing July 15, 2018, finding that the medical evidence of record was insufficient to establish that she was disabled due to a material change or worsening of her February 10, 2017 employment injuries.

Appellant subsequently filed claims for compensation CA-7 forms on November 1 and 13, 2018, claiming that she was in a leave without pay status for the period October 16 through November 10, 2018.

In a November 13, 2018 letter, appellant, through counsel, alleged that although OWCP had denied appellant's recurrence claim, it was still obligated to process and pay CA-7 forms for disability related to appellant's original injury. He requested that OWCP process his disability claims for the period October 16 through November 10, 2018.

In a July 30, 2018 report, Dr. Huynh indicated that appellant was seen in his office for complaints of neck pain as a result of an automobile collision. He described the February 10, 2017 automobile accident and reported that appellant had initially injured her neck, shoulder, and knee, but primarily focused on treating and repairing her injured knee. Upon physical examination of appellant's cervical spine, Dr. Huynh observed restricted range of motion of her cervical spine and moderate pain. He diagnosed cervical spine sprain and right shoulder sprain. Dr. Huynh opined that appellant's neck and right shoulder sprains were a direct result of the February 10, 2017 motor vehicle collision. He reported that appellant was finding it increasingly difficult to do her job of lifting packages, delivering mail, and driving her mail truck.

On November 19, 2018 appellant, through counsel, requested reconsideration.

On November 27, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions to Dr. Seth Jaffe, an osteopath who specializes in orthopedic surgery, for a second opinion evaluation, regarding the status of her February 10, 2017 employment injury and her ability to work. In a December 14, 2018 report, Dr. Jaffe described the February 10, 2017 employment injury and noted that appellant's claim was accepted for scalp contusion and right knee medial meniscus tear. He noted that appellant had returned to full-duty work on April 3, 2018 and had additional restrictions placed on her by a different physician on July 15, 2018. Upon examination of appellant's cervical spine, Dr. Jaffe observed tenderness to palpation and mild limitation on range of motion with right trapezium spasm. Examination of appellant's right knee revealed no swelling or tenderness and normal valgus stress, varus stress, and McMurray's tests. Dr. Jaffe diagnosed right knee medial meniscus tear and neck strain. He reported that appellant's right knee and scalp contusions and right knee

medial meniscus tear had resolved. Dr. Jaffe reported that appellant had no additional conditions related to the February 10, 2017 employment injury and that she could return to normal work duties.

By decision dated January 2, 2019, OWCP denied modification of the October 9, 2018 decision. It found that the weight of the medical evidence rested with the December 14, 2018 report of Dr. Jaffe, a second opinion examiner.

In a January 24, 2019 letter, appellant, through counsel, requested that the acceptance of appellant's claim be expanded to include cervical sprain as causally related to the original February 10, 2017 employment injury.

On February 20, 2019 appellant, through counsel, requested reconsideration. Counsel noted that appellant's recurrence claim alleged headaches and daily cervical and right shoulder sprain, but Dr. Jaffe failed to address these symptoms.

In an April 25, 2019 letter, appellant, through counsel, requested an update on the request to expand the acceptance of her claim to include a cervical strain and sprain.

By decision dated May 21, 2019, OWCP denied modification of the January 2, 2019 decision.

On June 11, 2019 appellant, through counsel, requested reconsideration. Counsel indicated that he was submitting new medical evidence to demonstrate that appellant was unable to work full duty due to her cervical condition, which she sustained as a result of the February 10, 2017 employment incident.

In a June 10, 2019 statement and completed questionnaire, appellant reported that she had experienced neck pain since the February 10, 2017 motor vehicle accident. She listed the dates that she received medical care and noted that she had now been diagnosed with disc bulges from the motor vehicle accident.

Appellant submitted a May 9, 2019 cervical spine magnetic resonance imaging (MRI) scan report, which showed mild disc bulges at C4-5, C5-6, and C6-7.

OWCP also received a June 3, 2019 report by Dr. Dawn Quashie, a Board-certified family medicine physician. Dr. Quashie described the February 10, 2017 employment incident and indicated that she had reviewed appellant's medical history. She noted that appellant had complained of continued cervical and shoulder pain since the accident and that a recent cervical spine MRI scan report had revealed disc bulges at C4-5, C5-6, and C6-7. Dr. Quashie opined that appellant's diagnosed cervical disc bulges were consistent with the type of motor vehicle accident that occurred on February 10, 2017. She described the mechanism of injury for a disc bulge and explained that the migration of a disc could take months or longer to manifest. Dr. Quashie diagnosed cervical disc disorder at C4-5, C5-6, and C6-7 with radiculopathy.

By decision dated September 4, 2019, OWCP denied modification of the May 21, 2019 decision.

In a separate decision dated September 4, 2019, OWCP expanded the acceptance of appellant's claim to include cervical spine sprain.

On October 9, 2019 appellant, through counsel, requested reconsideration. Counsel alleged that appellant was partially disabled and that the employing establishment was unable to accommodate her new work restrictions due to her cervical injury.

Appellant submitted a September 25, 2019 letter from Dr. Riyaz Jinnah, a Board-certified orthopedic surgeon, who noted that he would address the concerns in the September 4, 2019 OWCP decision. Dr. Jinnah indicated that he had reviewed appellant's medical history and agreed with Dr. Quashie's medical opinion that appellant suffered from diagnosed disc bulges at C4-5, C5-6, and C6-7 due to the February 10, 2017 motor vehicle accident. He also explained that it was reasonable for Dr. Latimer and Dr. Jaffe to opine that appellant's orthopedic conditions had resolved because it was common for cervical symptoms involved with disc bulges to wane for short durations or to develop later. Dr. Jinnah provided a detailed discussion of intervertebral discs and bulging discs and how bulging discs develop. He reported that disc injuries, such as disc bulges, follow a progression as the "nucleus pulposus places pressure on the annulus fibrous, slowly making its way through successive layers." Dr. Jinnah indicated that direct physical injury, such as a rear-end collision in which the head is tossed forward is a common cause. He explained that when appellant was rear-ended and tossed forward, she endured a "severe compressive load on her cervical spine. Once injured and weakened, the discs would have slowly migrated, resulting in the delay of presence on [appellant's] diagnostic testing and intermittent symptoms, and now displaying disc bulges whose origin began on the date of impact, February 10, 2017." Dr. Jinnah concluded that appellant's disc bulges at C4-5, C5-6, and C6-7 were directly related to the February 10, 2017 employment injury.

Dr. Jinnah further indicated that beginning October 2018, appellant's symptoms required a "reasonable accommodation" from her full duties. He noted that, as an RCA, appellant was required to lift substantial loads and engage in repetitious turning, bending, reaching, and placing stress on her spinal column. Dr. Jinnah reported that appellant had remained off work because the employing establishment would not accommodate her medical restrictions. He noted that appellant continued to need medical accommodations from work.

On October 25, 2019 OWCP referred appellant, along with an updated SOAF,⁵ a copy of the case record, and a series of questions to Dr. Joseph Estwanik, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Estwanik was asked to address whether appellant had residuals of her accepted right knee meniscus tear and cervical sprain injuries and whether she could perform the duties of the position described in the SOAF. In a December 16, 2019 report, Dr. Estwanik noted that he had reviewed the SOAF and that appellant had stopped work entirely more than one year prior. He described that appellant complained of lower back pain, neck pain, right shoulder pain, right knee pain, headache, sleeping problems, neck stiffness, and tingling and numbness in her arms and hands since the February 10, 2017 motor vehicle accident. Dr. Estwanik noted that appellant denied current problems with her right knee. He discussed appellant's medical records and noted that an August 9, 2018 computerized tomography scan of the head had confirmed a brain tumor meningioma on appellant's right frontal lobe. Upon examination of

⁵ The October 25, 2019 SOAF noted that appellant's claim was accepted for scalp contusion, right knee contusion, right knee meniscus tear, and cervical sprain. It also described appellant's job duties as an RCA.

appellant's cervical spine, Dr. Estwanik observed normal range of motion and negative Spurling sign. He also reported tenderness over the right trapezius when sitting. Examination of appellant's bilateral knees revealed no instability or patellofemoral crepitation. McMurry and Lachman signs were negative.

Dr. Estwanik reported that appellant had no objective findings related to her right knee meniscal tear. He noted that there were no positive physical examination findings and that appellant had no complaints regarding her right knee. Dr. Estwanik also opined that there were no objective findings of a cervical strain, "other than some residual periscapular levator scapula and rhomboid tendinitis." He also reported that he could not confirm that the cervical disc bulges noted in the May 19, 2019 MRI scan resulted from the February 10, 2017 motor vehicle accident because they appeared two years later. Dr. Estwanik concluded that appellant was capable of working as a full-time RCA and completed a work capacity evaluation form (Form OWCP-5c) indicating that she could return to full duty.

In a January 7, 2020 decision, OWCP denied modification of the September 4, 2019 decision.

OWCP subsequently received a September 25, 2019 Form CA-17 by an unknown provider with an illegible signature who indicated that appellant could work with restrictions.

On January 17, 2020 appellant returned to full-duty work.

On February 19, 2020 appellant, through counsel, requested reconsideration. He indicated that he was submitting a new medical report by Dr. Jinnah that addressed the concerns in the January 7, 2020 OWCP decision.

Appellant submitted a January 15, 2020 report by Dr. Jinnah. He confirmed that he had actually examined appellant on the date of the September 25, 2019 report and indicated that his medical opinion was based on a comprehensive history and physical examination. Dr. Jinnah also reported that appellant's brain tumor had no impact on her symptomology. He affirmed his opinion from the September 25, 2019 report that the February 10, 2017 employment incident was the direct and proximate cause of appellant's diagnosed medical conditions that resulted in her work restrictions beginning October 2018.

By decision dated May 15, 2020, OWCP denied modification of the January 7, 2020 decision.

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 that had resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.⁶ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations and which is necessary because

⁶ 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

of a work-related injury or illness is withdrawn or altered so that the assignment exceeds the employee's physical limitations.⁷

OWCP procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. The change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. OWCP does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁸

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that for each period of disability claimed, the disabling condition is causally related to employment injury and supports that conclusion with medical reasoning.⁹ Where no such rationale is present, the medical evidence is of diminished probative value.¹⁰

ANALYSIS

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

In November 2018 OWCP referred appellant to Dr. Jaffe for a second opinion examination regarding the status of her February 10, 2017 employment injury and her ability to work. Dr. Jaffe noted that appellant had returned to full-duty work on April 3, 2018 until her physician placed her on work restrictions on July 15, 2018. He conducted an examination and reported that appellant's accepted right knee and scalp conditions had resolved. Dr. Jaffe opined that appellant could return to her normal work duties. OWCP subsequently expanded acceptance of her claim to include cervical spine sprain. It then referred appellant to Dr. Estwanik for another second opinion evaluation to address whether appellant had residuals of her accepted right knee meniscus tear and cervical sprain injuries and whether she could perform the duties of the position described in the SOAF. In a December 16, 2019 report, he reviewed appellant's history and noted cervical spine examination findings of normal range of motion and tenderness over the right trapezius when sitting. Dr. Estwanik opined that appellant no longer had objective findings related to her right knee meniscal tear or cervical spine strain. He concluded that appellant was capable of returning to her normal duties.

The Board finds that OWCP failed to properly develop appellant's recurrence of disability claim. While OWCP referred appellant to Drs. Jaffe and Estwanik for second opinion evaluations regarding the status of her February 10, 2017 employment injuries, neither physician addressed

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013). *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

⁹ *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

¹⁰ *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

whether appellant sustained a recurrence of disability on July 15, 2018 due to a material change or worsening of her February 10, 2017 employment injuries.¹¹ When OWCP referred the case for second opinion evaluations, it should have inquired as to whether appellant's employment-related conditions had worsened, such that she was unable to work full duty beginning July 15, 2018 due to her accepted injury.¹²

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹³ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁴ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁵

As noted above, proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter.¹⁶ On remand, OWCP shall request a supplemental report from Dr. Estwanik addressing specifically whether appellant's employment-related conditions had materially changed or worsened such that she was disabled from work commencing July 15, 2018 due to her accepted injury. Following any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹¹ See *D.M.*, Docket No. 19-1181 (issued December 2, 2019).

¹² See *P.R.*, Docket No. 19-1313 (issued August 11, 2020); see also *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

¹³ *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

¹⁴ *Id.*; see also *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁵ *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

¹⁶ *Supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: June 3, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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