United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 20-0107**
	)	**Issued: May 13, 2021**
U.S. POSTAL SERVICE, NORTHWESTERN STATION POST OFFICE, Detroit, MI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 14, 2019 appellant filed a timely appeal from October 1, 2019 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]

ISSUE

The issue is whether appellant has met her burden of proof to establish entitlement to wage-loss compensation during the period July 20 to August 26, 2019, causally related to her accepted January 22, 2019 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the October 1, 2019 decisions, 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.*

FACTUAL HISTORY

On January 22, 2019 appellant, then a 26-year-old full-time regular carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date, she slipped and fell on her right leg while in the performance of duty. She stopped work on January 22, 2019. OWCP accepted the claim for contusion of the lower back and pelvis and lumbar spine sprain. Appellant was paid wage-loss compensation on the supplemental rolls as of March 9, 2019.

In a report dated April 29, 2019, appellant's treating physician, Dr. Anna Trostinskaia, a Board-certified internist, noted that appellant would be able to return to work on May 6, 2019 with restrictions of working four hours per day, with two hours of walking, no lifting over 20 pounds, and no bending. She indicated that these restrictions would continue until June 7, 2019.

Appellant accepted a modified limited-duty assignment on May 2, 2019 for four hours of work per day. The offer listed the duties of the position as set up routes for one to two hours per day, and deliver mail for two hours per day. The physical requirements of the position provided no lifting over 20 pounds and no bending. The record reflects that appellant began the modified limited-duty assignment on May 6, 2019. She continued to receive intermittent wage-loss compensation on the supplemental rolls.

In a report dated June 7, 2019, Dr. Trostinskaia noted that appellant was able to return to work for five hours per day with restrictions of two hours of walking, no lifting over 20 pounds, and no bending. She indicated that these restrictions would continue until August 9, 2019.

On June 12, 2019 the employing establishment forwarded appellant a written modified limited-duty job offer for two hours of work per day carrying mail. The physical requirements of the position listed no bending, no lifting over 20 pounds, and walking limited to two hours per day. Appellant accepted the offer on June 13, 2019.

In a report dated June 20, 2019, Dr. Trostinskaia that appellant was able to work for five hours per day with two hours of walking, intermittent bending, and no lifting over 20 pounds. She indicated that these restrictions would continue until August 9, 2019.

A July 6, 2019 field nurse report indicated that appellant was medically released to work five hours per day, but that she was working two hours per day as the employing establishment did not have work available for five hours per day.

In a July 17, 2019 report, Dr. Owais Khadem Alsrouji, a neurologist, noted that he evaluated appellant for low back pain she had been having since her January 22, 2019 fall at work. He diagnosed numbness and tingling of right leg and chronic midline low back pain with right-sided sciatica. Dr. Alsrouji ordered a magnetic resonance imaging (MRI) scan of the lumbar spine with and without contrast and an electromyogram.

In a July 22, 2019 duty status report (Form CA-17), Dr. Trostinskaia, diagnosed acute midline thoracic back pain and opined that appellant was unable to work.

On August 1, 2019 OWCP requested that Dr. Trostinskaia provide a narrative report which addressed whether appellant's work restrictions were supported by objective medical examination

findings. It also requested that she provide updated work restrictions due to the accepted medical conditions.

On August 2, 2019 appellant filed a claim for compensation (Form CA-7) for disability for the period July 20 to August 2, 2019. In an accompanying time analysis form (Form CA-7a), appellant claimed eight hours of wage-loss compensation for LWOP each workday during this period, pursuant to Dr. Trostinskaia's July 22, 2019 report, except that she noted 2.35 hours of work on July 30, 2019 and "off day."

In an August 6, 2019 development letter, OWCP informed appellant that it had received her wage-loss compensation claim for the period July 20 to August 2, 2019. It determined that her claim was not payable in its entirety, but it authorized payment for 5.44 hours for July 20, 2019, and three hours per day for July 23, 24, 25, 26, 27, 29, and 31, and August 1 and 2, 2019. OWCP noted that appellant had worked in a limited-duty position within her restrictions until July 23, 2019, when she stopped work. It further noted that the evidence indicated that the light-/limited-duty position was available to her within her medical restrictions, and she was required to provide evidence to explain why she was unable to work the light-/limited-duty assignment. OWCP advised appellant of the type of evidence needed to establish her disability claim and afforded her 30 days to submit the necessary evidence.

An August 17, 2019 MRI scan of appellant's lumbar spine noted an impression of minimal annular fissure on the left L3-4 with minimal facet arthropathy at L5-S1.

In an August 22, 2019 report, Dr. Trostinskaia advised that appellant should be excused from work for the period July 23 to August 22, 2019. She diagnosed a back contusion.[3]

On August 23, 2019 appellant filed a claim for wage-loss compensation (Form CA-7) for 80 hours of LWOP for the period August 3 to 16, 2019. She indicated that she had not worked during this time period.

On August 26, 2019 appellant accepted a written modified limited-duty position for five hours of work per day. The duties of the position required one hour of casing mail and three and a half hours of carrying mail per day. The physical requirements of the position provided for: repetitive reaching, twisting, grasping, and holding up to five hours per day; lifting and carrying small bundles up to 20 pounds for three and a half hours per day; and standing and walking up to five hours per day.

The record reflects that appellant did not receive any intermittent wage-loss compensation between August 3 and 26, 2019. OWCP commenced payment of intermittent wage-loss compensation as of August 26, 2019.

In a development letter dated August 27, 2019, OWCP advised appellant that it had received her Form CA-7 claiming wage-loss compensation commencing August 3, 2019. It noted that the evidence of record indicated that she stopped work on August 3, 2019 and had not returned. OWCP also noted that appellant had been working her limited-duty job within her restrictions until

[3] Appellant also submitted Dr. Trotinskaia submitted an OWCP-5c dated August 22, 2019 indicating appellant's restrictions.

August 3, 2019. It indicated that the evidence on file indicated that a light-/limited-duty assignment was available within the medical restrictions provided by her physician. OWCP indicated that appellant's treating physician did not provide a well-rationalized opinion as to why she was no longer able to work a limited-duty position. Appellant was advised that she should provide a well-rationalized opinion, based upon objective examination findings, explaining why she could not work in any capacity, including in the light-/limited-duty assignment which was available within her restrictions.

Appellant submitted a September 3, 2019 claim for wage-loss compensation (Form CA-7) in which she claimed intermittent disability from August 17 to 30, 2019. In an accompanying time analysis form (Form CA-7a), appellant listed the hours she had worked as of August 26, 2019.

OWCP received a September 9, 2019 work excuse from Renesha Perdue, a medical assistant, for the period July 22 to August 22, 2019, based on a diagnosis of back contusion and back spasms.

In a September 24, 2019 report, Dr. Trostinskaia advised that appellant should have been excused from work for the period July 22 to August 22, 2019. She noted that appellant continued to have swelling in her lower back, sciatic pain, and back spasms, and that further diagnostic testing was required.

By decision dated October 1, 2019, OWCP denied appellant's wage-loss compensation claim for the period July 20 through August 2, 2019. It determined that payment of 5.44 hours wage-loss compensation was authorized for July 20, 2019 and that payment of wage-loss compensation for 3 hours per day was authorized for July 23, 24, 25, 26, 27, 29, and 31, and August 1 and 2, 2019. OWCP noted that appellant had been provided a limited-duty job offer for five hours of work per day, within her medical restrictions as provided by Dr. Trostinskaia, her treating physician. It further explained he had provided a work excuse with a diagnosis of back contusion, but had not explained why appellant was unable to work limited duty.

By separate decision of even date, OWCP denied appellant's wage-loss compensation claim for the period commencing August 3, 2019. It noted that she stopped work on August 3, 2019 and returned to work on August 26, 2019. OWCP found that the September 24, 2019 note from Dr. Trostinskaia indicated that appellant was unable to work from July 22 to August 22, 2019; however, she diagnosed back contusion, but failed to explain why appellant was unable to work within her restrictions. It again noted that appellant had been offered limited duty within her restrictions.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim by the preponderance of the evidence.[5] For each period of disability claimed the employee has the burden of proof to establish that he or she was disabled

[4] *Supra* note 1.

[5] *See B.F.*, Docket No. 19-0123 (issued May 13, 2019); *M.D.*, Docket No. 18-0474 (issued October 3, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

from work as a result of the accepted employment injury.[6] Whether a particular injury caused 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.[7]

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 to show that he or she cannot 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.[8]

OWCP's procedures require that offers of employment be made in writing, or if made orally be provided in writing within two business days.[9] Neither the Board nor OWCP can evaluate a light-duty position offer unless the position is in writing.[10]

ANALYSIS

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

OWCP's regulations at 20 C.F.R. § 10.500(a) specifically provides that an employee is not entitled to compensation for any wage loss claimed on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place, that light duty within those work restrictions was available, and that the employee was previously notified in writing that such light duty was available.[11]

The evidence of record establishes that as of June 7, 2019 Dr. Trostinskaia reported that appellant was able to return to work for five hours per day with restrictions on walking, lifting, and bending.

OWCP paid appellant intermittent wage-loss compensation until August 2, 2019 for three hours of wage loss per day, ostensibly under a finding that appellant had been offered a modified job offer within Dr. Trostinskaia's restrictions for five hours of work each day. However, the record fails to establish that appellant was presented with a written offer of employment, providing

[6] *Id.*

[7] *M.D., supra* note 4; *see Edward H. Horton,* 41 ECAB 301 (1989).

[8] *See D.W.*, 19-1584 (issued July 9, 2020); *K.P.*, Docket No. 19-1811 (issued May 12, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

[9] 20 C.F.R. § 10.505(a) (where the employer has specific alternative positions available the employer should advise the employee in writing); 20 C.F.R. § 10.507(c) (The employer must make any job offer in writing. However, the employer may make a job offer verbally as long as it provides the job offer to the employee in writing within two business days of the verbal job offer.); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a)(1) (June 2013).

[10] *Id.*

[11] *See also R.S.*, Docket No. 19-1605 (issued May 28, 2020).

her with a position that would allow her to work within her restrictions for five hours a day during the period July 20 to August 26, 2019.

On June 12, 2019 the employing establishment offered, and appellant accepted, a modified limited-duty offer for two hours of work per day. The record indicates that it was not until August 26, 2019 that the employing establishment offered and appellant accepted a written modified job offer for five hours of work per day.

OWCP did not pay appellant any wage-loss compensation from August 3 through 26, 2019. It continued to find that the employing establishment had made light work available for five hours a day, within appellant's restrictions. However, as previously noted, the record does not establish that work was offered to appellant for more than two hours a day until August 26, 2019.

The Board finds that these discrepancies in the evidence of record preclude it from making an informed decision on appellant's compensation claim.[12] While OWCP continued to find that work was available within appellant's medical restrictions during the claimed time periods for five hours a day, the current record does not contain a written job offer establishing that work was available for more than two hours a day during this period. Upon return of the case record, it shall make additional findings as to the number of hours per day that work was made available, by a written job offer, during the time period in question. Thereafter, OWCP shall determine whether appellant has established that she was unable to perform the duties of the offered position. Based upon these findings, it shall determine appellant's entitlement to additional wage-loss compensation from July 20 to August 26, 2019. 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.

[12] *See S.B.*, Docket No. 18-0147 (issued August 19, 2019).

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2019 decisions of the Office of Workers' Compensation Programs are set aside and remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: May 13, 2021
Washington, D.C.

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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