

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

D.C., Appellant)	
)	
and)	Docket No. 23-1141
)	Issued: August 2, 2024
U.S. POSTAL SERVICE, WT HARRIS POST)	
OFFICE, Charlotte, NC, Employer)	
)	

Appearances: *Case Submitted on the Record*
Daniel F. Read, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 5, 2023 appellant, through counsel, filed a timely appeal from an April 6, 2023 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.

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 has met her burden of proof to establish a recurrence of disability, causally related to her accepted December 21, 2018 employment injury.

FACTUAL HISTORY

On December 21, 2018 appellant, then a 37-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that same date she sustained a lower back strain from heavy lifting while in the performance of duty. On February 14, 2019 OWCP accepted the claim for strain of lower back muscle and lumbar radiculopathy.

Following her injury, appellant returned to full-time, limited-duty work as of January 28, 2021 and then decreased her working hours to four hours per day beginning February 4, 2021.

In a letter dated January 29, 2021, the employing establishment offered appellant a permanent, modified-duty rural carrier associate position, effective January 28, 2021. The position required four hours of intermittent work including answering telephones up to four hours per day, addressing customer complaints up to three hours per day, processing Express Mail up to one hour per day, and assisting with customer pick-ups up to four hours per day. The physical requirements of the position involved four hours of lifting 10 pounds intermittently, standing, sitting, simple grasping, and fine manipulation, and driving up to one hour per day. On February 9, 2021 appellant accepted the job offer.

In an April 22, 2021 work status report, Dr. David R. Wiercisiewski, a Board-certified physiatrist, reported that appellant could work for four hours a day, with restrictions of no driving, continuous sitting or standing, climbing, bending, squatting or kneeling, and lifting not to exceed 10 pounds. He further recommended a lumbar support chair, an adjustable sit-stand desk, cushioned foot support mat, an ergonomic foot stool, a flexible work schedule that allows her to work 40 hours in a two-week period, a flexible work schedule that allows her to request leave retrospectively, and periodic rest breaks.

In a June 28, 2021 report, Dr. Wiercisiewski reported that appellant was working four hours per day but complained of neck pain, low back pain, and significant pelvic floor pain. He noted chronic neck and low back pain related to mild-to-moderate degenerative changes in the cervical spine at C5-6 and C6-7 and mild disc protrusions to the left at L3-4 and L4-5. Dr. Wiercisiewski diagnosed degeneration of C5-6 intervertebral disc; degeneration of intervertebral disc at C6-7 level; myalgia of auxiliary muscles, head and neck; other intervertebral disc displacement of the lumbar region; and other chronic pain. He continued his previous work restrictions and requested she be able to work from home.

In a June 28, 2021 work status note and work capacity evaluation (Form OWCP-5c), Dr. Wiercisiewski discussed appellant's work restrictions, which included no continuous sitting or standing, squatting or kneeling, forceful pushing, pulling, gripping or twisting, and lifting restrictions not to exceed five pounds. He advised she should be allowed position changes as needed for comfort. Dr. Wiercisiewski noted that due to appellant's conditions, she should work from home for a total of four hours per day, five days per week.

In a July 2, 2021 e-mail, appellant notified her supervisor that she had a disability that entitled her to accommodations under the Americans with Disabilities Act and requested the following accommodations as recommended by her physician: a lumbar support chair, an adjustable sit-stand desk, cushioned foot support mat, an ergonomic foot stool, a flexible work schedule that allows her to work 40 hours in a two week period, a flexible work schedule that allows her to request leave retrospectively, and periodic rest breaks.

In a July 2, 2021 e-mail, appellant's supervisor responded explaining that no remote work was available for her position as a rural carrier assistant. Her supervisor reported that the employing establishment could accommodate light-duty for four hours per day, where appellant would be able to stand and walk as needed. She further informed appellant that she would order her an ergonomic chair with lumbar support and cushioned foot support mat to use while at work.

In work status notes dated July 29 through August 2, 2021, Dr. Wiercisiewski placed appellant off work.

On August 17, 2021 appellant filed a claim for compensation (Form CA-7) for disability from work for the period July 31 through August 13, 2021. She continued to file CA-7 forms for additional periods of disability thereafter.

Appellant stopped work completely on September 11, 2021.

Appellant submitted additional medical reports and work restrictions dated September 16 through October 7, 2021, from Dr. Wiercisiewski documenting treatment and placing her off work. He noted appellant's complaints of worsening neck and low back pain radiating into the arms and legs with associated numbness and tingling rendering her unable to work. Dr. Wiercisiewski noted review of imaging studies, which did not show any evidence of a severe neurocompressive lesion and a review of electrodiagnostic testing, which revealed normal findings. He reported that he could not explain the significant nature of her pain based on her imaging studies and other diagnostic testing completed.

In a November 15, 2021 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish a recurrence of disability. It advised her of the type of evidence needed to establish her recurrence claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In his November 18, 2021 report, Dr. Wiercisiewski explained that appellant could previously work for 4 hours a day, and no more than 40 hours every two weeks, with lifting restrictions not to exceed five pounds. However, he took appellant off work from July 29 through August 2, 2021 due to flare ups of low back pain.

By decision dated January 11, 2022, OWCP denied appellant's claim for a recurrence, finding that the medical evidence of record was insufficient to establish a worsening of her accepted December 21, 2018 employment injury such that she was disabled from work for the claimed period.

On January 12, 2022 OWCP expanded the acceptance of appellant's claim to include the additional conditions of cervical disc degeneration at C5-6, and cervical disc degeneration at C6-7.

In a January 14, 2022 report, Dr. Wiercisiewski reported that appellant was under his care for primary complaints of neck and low back pain. He noted that imaging studies revealed evidence of multilevel cervical degenerative disc disease, cervical spondylosis, and lumbar disc protrusions with radiculopathy. Dr. Wiercisiewski noted conservative management of appellant's conditions as she was deemed not to be a surgical candidate. He recommended ongoing physical therapy as well as participation in a multidisciplinary rehabilitation program, which includes physician oversight, psychological counseling, and physical therapy due to appellant's ongoing symptoms for greater than one year. Dr. Wiercisiewski explained that ongoing conservative treatment was necessary for the appellant to improve her symptoms and in order to return to work with the proper modifications.

On March 23, 2022 appellant, through counsel, requested reconsideration of the January 11, 2022 decision. Counsel argued that the January 11, 2022 decision failed to apply the guidance provided for a recurrence claim, only generally stating that the evidence failed to support a spontaneous change in the medical condition related to the accepted December 21, 2018 employment injury. He contended that appellant's work-related cervical disc herniations at C5-6 and C6-7 were just recently accepted on January 12, 2022, the day following the recurrence decision was issued. Counsel explained that the conditions were brought forth at the time of the initial injury but had not been approved and therefore, were not taken into consideration when establishing appellant's work restrictions. He explained that these injuries were factored in by appellant's physicians as the reason to place her off work.

Counsel further asserted that appellant established her claim for a recurrence as the employing establishment had failed to honor her work restrictions and therefore, effectively withdrew her modified offer. He explained that the Board had determined that a formal withdrawal of a job offer was not necessary in order to support a request for recurrence, which should be determined based on the factual events to determine if a valid job offer and modified duty had been accomplished. In support of his arguments, counsel referenced the July 2, 2021 e-mail appellant provided from her supervisor notifying her that an appropriate ergonomic chair and stool would be provided per her restrictions, which was never received, as noted in appellant's statement.

Appellant provided a statement describing her work status, injuries, and restrictions. She reported that the employing establishment repeatedly violated the light-duty work restrictions provided from her physician and that her supervisor assigned her a job outside of her restrictions involving a lot of bending, lifting/casing mail, and standing for long periods. Appellant alleged that she was required to work up to 6 hours a day, and even worked over 20 hours per week without compensation. She further asserted that she never received her ergonomic chair or stool in line with her accommodations and restrictions. As such, appellant's physician restricted her from returning to work as her restrictions were not being honored by the employing establishment and her conditions had worsened.

Following appellant's request for reconsideration, OWCP received medical reports and work status notes dated June 28, 2021 through April 14, 2022 from Dr. Wiercisiewski documenting treatment for appellant's conditions, ongoing work restrictions, and status of disability as a result of her employment injury.

In a March 3, 2022 report, Dr. Wiercisiewski continued to hold appellant off work to focus on her rehabilitation.

In a March 17, 2022 work capacity evaluation (Form OWCP-5c), Dr. Wiercisiewski reported that appellant was unable to return to work until April 14, 2022, pending further evaluation.

In an April 14, 2022 medical report, Dr. Wiercisiewski reported that appellant underwent an MRI of the cervical spine, which demonstrated small central disc herniation at C2-3 and degenerative changes at C5-6 and C6-7 where there was still some mild to moderate foraminal stenosis at C6-7. He noted appellant's complaints of neck pain without arm pain, worsening back pain and recommended additional medication management due to the longstanding chronic nature of her pain and the circumstances of her worker's compensation case. Dr. Wiercisiewski diagnosed chronic neck pain likely related to multilevel cervical degenerative disc disease and cervical spondylosis and chronic low back pain with intermittent leg pain consistent with lumbar disc protrusions with radiculopathy. He continued to hold appellant off work.

By decision dated June 21, 2022, OWCP denied modification of the January 11, 2022 decision.

In medical reports, work status notes, and form reports dated July 14 through September 28, 2022, Dr. Wiercisiewski continued to hold appellant off work and advised that she should continue physical therapy.

On September 6, 2022 OWCP received a July 6, 2022 report wherein Dr. Wiercisiewski opined that appellant's work, which was outside her restrictions, was clearly aggravating her condition and creating a barrier to her overall recovery. Dr. Wiercisiewski felt he had no choice other than taking appellant off work in September 2021 and asserted that work restrictions and accommodations should be followed to prevent further worsening of her condition.

On September 15, 2022 appellant, through counsel, requested reconsideration of the June 21, 2022 decision. Counsel asserted that the submission of Dr. Wiercisiewski's July 6, 2022 report established appellant's claim.

In medical reports dated December 9 and 12, 2022, Dr. Wiercisiewski reported that appellant had reached maximum medical improvement and opined that she was incapable of returning to work.

By decision dated April 6, 2023, OWCP denied modification of the June 21, 2022 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, which resulted from a previous injury of illness, without an intervening injury of new exposure to the work environment that

caused the illness.³ Recurrence of disability also means 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.⁴ Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.⁵

When an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establish that the recurrence is causally related to the original injury.⁶ This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the recurrent disability is causally related to the employment injury.⁷ The physician's opinion must be based on a complete and accurate factual and medical history and it must be supported by sound medical reasoning.⁸ Where no such rationale is present, the medical evidence is of diminished probative value.⁹

ANALYSIS

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

OWCP regulations provide that a recurrence may be established due to a material change/worsening of the accepted work-related conditions or due to withdrawal of a light-duty assignment. The record reflects that following appellant's December 21, 2018 employment injury, she underwent additional diagnostic testing and sought continued treatment for her back injury. Appellant was provided work restrictions from Dr. Wiercisiewski who restricted her from returning to work after she indicated that the employing establishment failed to comply with her light-duty job offer. Both the employing establishment and appellant have attested to a light-duty assignment following her accepted December 21, 2018 employment injury. However, the record is unclear as to the specific light-duty assignment provided and whether those employment duties were within appellant's prescribed work restrictions.

³ 20 C.F.R. § 10.5(x).

⁴ *Id.*

⁵ *G.L.*, Docket No. 16-1542 (issued August 25, 2017); *Theresa L. Andrews*, 55 ECAB 719, 722 (2004); *see also Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ 20 C.F.R. § 10.104(b); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 and 2.1500.6 (June 2013).

⁷ *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *S.S.*, 59 ECAB 315, 218-19 (2008).

⁸ *Id.*

⁹ *G.L.*, Docket No. 19-0898 (issued December 5, 2019); *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

As OWCP regulations allow for a claimant to establish a recurrence of disability under either scenario above, the evidence of record and arguments submitted must be fully developed so that it contains accurate information regarding appellant's claim to determine whether she sustained a recurrence of disability because of a material change/worsening of her accepted work-related condition or because of a change of withdrawal of her limited-duty assignment.¹⁰

OWCP shall obtain additional information from both the employing establishment and appellant to clarify appellant's employment position(s) including any light-duty assignments, work restrictions, and reasonable accommodations surrounding the availability of work within her ability.

Although it is appellant's burden to establish her claim, OWCP is not a disinterested arbiter, but rather, shares responsibility in the development of the evidence.¹¹ OWCP procedures provide that OWCP is responsible for requesting evidence from both the claimant and the employing establishment to resolve the relevant issues in the claim.¹² The procedures continue that the claims examiner should contact the claimant and employing establishment in writing to obtain evidence and should specifically request the information needed, tailored to the specifics of the individual case.¹³ In this instance, OWCP failed to properly develop appellant's claim for a recurrence of disability.

Accordingly, the Board finds that OWCP failed to resolve the issue pertaining to a recurrence of disability and therefore, the case will be set aside and remanded for further development.¹⁴ Following this and any other such further development as it deems necessary, OWCP shall issue an appropriate merit decision.¹⁵

CONCLUSION

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

¹⁰ *S.F.*, Docket No. 19-1735 (issued March 12, 2020); *J.B.*, Docket Nos. 18-1752, 19-0792 (issued May 6, 2019); *C.G.*, Docket No. 16-1503 (issued May 17, 2017).

¹¹ *See generally C.F.*, Docket No. 18-1607 (issued March 12, 2019); *K.S.*, Docket No. 18-0845 (issued October 26, 2018); *D.M.*, Docket No. 14-0460 (issued February 11, 2016).

¹² FECA Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4 (November 2023).

¹³ *Id.* at Chapter 2.800.5. *See also V.R.*, Docket No. 16-1167 (issued December 22, 2016).

¹⁴ *R.R.*, Docket No. 17-0871 (issued November 6, 2017); *T.H.*, Docket No. 14-326 (issued February 5, 2015).

¹⁵ *See generally B.N.*, Docket No. 17-0787 (issued July 6, 2018); *C.D.*, Docket No. 17-1074 (issued August 28, 2017).

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 2, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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