

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

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| N.H., Appellant |) | |
| |) | |
| and |) | Docket No. 24-0659 |
| |) | Issued: September 19, 2024 |
| U.S. POSTAL SERVICE, SAN ANTONIO |) | |
| PROCESSING & DISTRIBUTION CENTER, |) | |
| San Antonio, TX, Employer |) | |
| |) | |

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 5, 2024 appellant, through counsel, filed a timely appeal from a May 6, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 May 6, 2024 decision, OWCP received additional evidence. 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.*

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's wage-loss compensation, effective January 16, 2024, based on her refusal of an offer of a temporary limited-duty assignment, pursuant to 20 C.F.R. § 10.500(a).

FACTUAL HISTORY

On November 30 2022 appellant, then a 58-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 29, 2022 she injured her left ankle and right elbow and hip and when she fell after her left foot caught on a wire in her postal vehicle while in the performance of duty. She stopped work on that date. OWCP accepted appellant's claim for left ankle sprain, contusion of the right hip, and abrasion of the right elbow. It paid her wage-loss compensation, effective January 14, 2023.

On January 20, 2023 Dr. Geoffrey Glebus, an osteopath and Board-certified orthopedic surgeon, requested authorization for right hip surgery. By decision dated March 2, 2023, OWCP denied authorization for the requested surgery. On March 7, 2023 Dr. Glebus performed a right hip open surgical excisional debridement and irrigation due to a Morel-Lavallee lesion and trochanteric bursitis.

In a June 29, 2023 note, Dr. Kyriakos Tsalamandris, a physician Board-certified in emergency medicine, related appellant's history of injury and diagnosed contusion right hip, sprain of the left ankle, abrasion of the right elbow, traumatic secondary and recurrent hemorrhage and seroma, and disorders of the right hip. He found that appellant was unable to drive a vehicle or sit for prolonged periods of time.

Dr. Thomas Martens, an osteopath and Board-certified internist, completed an August 2, 2023 duty status report (Form CA-17) and treatment note. He opined that appellant was totally disabled from work due to his contusion of the right hip, sprain of the left ankle, abrasion of the right elbow, traumatic secondary and recurrent hemorrhage and seroma, and disorders of the right hip joint.

In an August 18 2023 note, Dr. Glebus examined appellant following surgery and diagnosed right hip trochanteric bursitis and pain in the right hip.

On August 24, 2023 OWCP preferred appellant, along with a statement of accepted facts (SOAF), and the medical record, for a second opinion examination with Dr. Charles W. Kennedy, Jr., a Board-certified orthopedic surgeon, to determine her current diagnosis and her work capacity.

³ 5 U.S.C. § 8101 *et seq.*

Dr. Tsalamandris completed a supplemental report and a Form CA-17 on September 7, 2023 and found appellant totally disabled from work. He opined that appellant was currently incapacitated due to her work-related injury and was incapable of any work.

On September 12, 2023 appellant sought treatment from William Baxter, a physician assistant.

In his September 19, 2023 second opinion report, Dr. Kennedy noted his review of the SOAF and the medical record with regard to the November 29, 2022 employment injury. He reviewed diagnostic studies of the right hip which demonstrated a large hematoma around the greater tuberosity and a nondisplaced labrum tear. Dr. Kennedy opined that appellant's accepted conditions of left ankle sprain, contusion of the right hip, and abrasion of the right elbow had not resolved, and he recommended physical therapy. He further opined that appellant was not capable of returning to her date-of-injury position due to physical restrictions. Dr. Kennedy found that appellant could work four hours a day with sedentary activities including limited sitting, standing, walking, and lifting. He completed a work capacity evaluation (Form OWCP-5c) on September 19, 2023 noting that she was limited to working no more than four hours a day, sitting for two hours, walking for one hour, and standing for one hour. Dr. Kennedy limited lifting to 10 pounds and found that appellant could not squat or climb. He further recommended a desktop converter to allow her to change positions as needed.

Appellant continued to submit reports from Mr. Baxter dated September 26 and October 23, 2023. She also provided CA-17 forms with an illegible signature dated October 12 and November 1, 2023. OWCP also received notes from Robert Raposo, a physician assistant, dated October 12, 2023, and from Youmin Z. Hong, an acupuncturist.

On November 3, 2023 the employing establishment provided appellant with an offer of modified assignment (limited-duty) as a modified rural carrier. The duties were identified as casing for up to two hours and lobby assist for up to two hours. The physical requirements were identified as simple grasping for up to four hours, standing and walking for one hour each and sitting for two hours.

The employing establishment also explained that the assignment would be subject to revision based on changes to appellant's physical restrictions and the availability of work. If revision was necessary, appellant would be provided a revised written modified assignment.

Appellant refused to accept the November 7, 2023 modified job offer.

On November 8, 2023 Dr. Ricardo Alvarado, a physician specializing in pain management, examined appellant due to her right hip seroma due to traumatic injury on November 29, 2022. He diagnosed chronic pain syndrome and right thigh pain. Dr. Alvarado recommended physical therapy.

In a notice dated November 13, 2023, OWCP proposed to reduce appellant's wage-loss compensation. It advised her that it had reviewed the work restrictions provided by Dr. Kennedy and determined that the "temporary" position the employing establishment offered her on November 3, 2023 was within her restrictions. OWCP informed appellant of the provisions of 20 C.F.R. § 10.500(a) and advised her that her entitlement to wage-loss compensation would be

“reduced indefinitely” if she did not accept the offered “temporary” job or provide a written explanation with justification for her refusal within 30 days.

OWCP thereafter received physical therapy notes and a December 13, 2023 Form CA-17 with an illegible signature.

Dr. Alvarado reexamined appellant on November 28 and December 10, 2023 and performed a right gluteal tendon sheath injection.

In a December 6, 2023 report, Dr. Martens reviewed Dr. Kennedy’s findings and disagreed that appellant could return to four hours of sedentary work. He noted that she had attempted to return to work, but was unable to tolerate 30 minutes of sedentary work or the commute to work. Dr. Martens found that appellant was totally disabled pending completion of physical therapy and a functional capacity evaluation. He also evaluated her on December 13, 2023.

By decision dated January 16, 2024, OWCP reduced appellant’s wage-loss compensation, effective January 16, 2024, in accordance with 20 C.F.R. § 10.500(a). It noted that she had not accepted the November 3, 2023 “temporary” modified position which was within the work restrictions provided by Dr. Kennedy.

On January 11, 2024 appellant, through counsel, requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review. A hearing was held on April 3, 2024.

OWCP continued to receive medical evidence. On December 21, 2023 Dr. Alvarado reported that appellant had sustained a right hip seroma due to traumatic injury and related that she recently fell. He diagnosed chronic pain syndrome, gluteal tendinitis right hip, pain in right thigh, spinal stenosis lumbar region, and intervertebral disc disorders with radiculopathy lumbar region. Dr. Alvarado examined her on January 19 and February 15, 2024 and repeated his diagnoses. Appellant submitted December 15 through March 15, 2024 notes from Mr. Baxter and Mr. Raposo, physical therapy notes, and January 24 and February 21, 2024 CA-17 forms with illegible signatures. She resubmitted a January 10, 2023 report from Dr. Glebus, her March 7, 2023 surgical report, and December 23, 2022 diagnostic studies.

By decision dated May 6, 2024, OWCP’s hearing representative affirmed the January 16, 2024 decision.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁴

⁴ See *S.V.*, Docket No. 17-1268 (issued March 23, 2018); *I.J.*, 59 ECAB 408 (2008).

Section 10.500(a) of the Code of Federal Regulations provides:

“(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, 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 duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing establishment had offered, in accordance with OWCP procedures, a temporary light-duty assignment within the employee’s work restrictions. (The penalty provision of 5 U.S.C. § 8106(c)(2) will not be imposed on such assignments under this paragraph.)”⁵

OWCP’s procedures also provide that if the evidence establishes that injury-related residuals continue and result in work restrictions, that light duty within those work restrictions is available, and the employee was notified in writing that such light duty was available, then wage-loss benefits are not payable for the duration of light-duty availability, since such benefits are payable only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁶ The claims examiner must provide a pretermination notice if the claimant is being removed from the periodic rolls.⁷ When a temporary light-duty assignment either ends or is no longer available, the claimant is entitled to compensation and should be returned to the periodic rolls immediately as long as medical evidence supports any disabling residuals of the work-related condition.⁸

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to reduce appellant’s wage-loss compensation, effective January 16, 2024.

The evidence of record contains a written job offer, dated November 3, 2023, for a modified rural carrier position. The duties were identified as casing for up to two hours and lobby assist for up to two hours. The physical requirements were identified as simple grasping for up to four hours, standing and walking for one hour each and sitting for two hours. The November 3, 2023 job offer did not indicate that the modified position was temporary. OWCP,

⁵ 20 C.F.R. § 10.500(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1)(a) (June 2013).

⁷ *Id.* at Chapter 2.814.9c(1)(b).

⁸ *Id.* at Chapter 2.814.9c(1)(d).

however, subsequently issued a notice of proposed reduction of wage-loss compensation on November 13, 2023, noting that appellant had been offered a “temporary” light-duty assignment as a modified rural carrier on November 3, 2023.

Pursuant to 20 C.F.R. § 10.500(a), OWCP had the burden of proof to establish that the offered employment position was temporary in nature.⁹ As OWCP has not established that offered modified job was a temporary position, the Board finds that OWCP has not met its burden of proof to reduce appellant’s wage-loss compensation.¹⁰

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to reduce appellant’s wage-loss compensation, effective January 16, 2024.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2024 decision of the Office of Workers’ Compensation Programs is reversed.

Issued: September 19, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees’ Compensation Appeals Board

Janice B. Askin, Judge
Employees’ Compensation Appeals Board

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

⁹ See *M.B.*, Docket No. 24-0478 (issued June 5, 2024); *A.W.*, Docket No. 21-1287 (issued September 22, 2023); *C.W.*, Docket No. 18-1779 (issued May 6, 2019).

¹⁰ *Id.*