United States Department of Labor
Employees' Compensation Appeals Board

L.W., Appellant	)	
and	)	**Docket No. 22-1116**
	)	**Issued: May 16, 2023**
U.S. POSTAL SERVICE, FAIRFIELD POST OFFICE, Fairfield, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On July 25, 2022 appellant filed a timely appeal from a February 2, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

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[1] Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of her oral argument request, appellant asserted that oral argument should be granted because she believes OWCP erred in terminating her benefits as she cannot work full time with restrictions. She also believes that there is some confusion over her back and hip injuries. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the February 2, 2022 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 OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective August 27, 2021, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary full-time limited-duty assignment.

FACTUAL HISTORY

On February 5, 2017 appellant, then a 47-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 4, 2017 she injured her left foot and lower back when her foot slipped off the foot rail as she was stepping out of her vehicle while in the performance of duty. OWCP accepted the claim for sprain of unspecified parts of lumbar spine and pelvis, aggravation of spondylolisthesis, lumbar region, and spondylosis without myelopathy or radiculopathy, lumbar region. It paid appellant intermittent wage-loss compensation on the supplemental rolls as of March 18, 2017 and on the periodic rolls as of October 12, 2017. On October 13, 2017 appellant underwent an OWCP-approved L4-5 discectomy, anterior and posterior lumbar interbody fusion L4-5 with hardware. She returned to part-time, limited-duty work on September 24, 2018. Appellant stopped work again on June 12, 2019. OWCP paid her wage-loss compensation on the supplemental rolls effective June 22, 2019, and on the periodic rolls commencing November 10, 2019.

In May 11 and July 1, 2020 reports, Dr. D. Michael Hembd, a Board-certified physiatrist, provided examination findings and noted results of diagnostic testing from 2017 through 2019. He provided an impression of chronic lower back pain status post L4-5 fusion for spondylolisthesis, improved, but persistent lower back pain secondary to L3-4, L5-S1 spondylosis and facet arthritis, right hip and radiating leg pain, secondary to labral tear, with no significant change following trochanteric bursa injection, and chronic pain. Dr. Hembd opined that appellant was temporary totally disabled.

In a May 21, 2020 report, Dr. Ron E. James, an orthopedic surgeon, noted the history of appellant's 2017 employment injury. He evaluated her right hip and opined that she had superior/acetabular labral tear with minimal right hip osteoarthritis. As appellant failed conservative care, including physical therapy, Dr. James recommended a right hip arthroscopy and labral repair. An authorization request for the surgery was attached.

On July 30, 2020 OWCP referred appellant, the medical record, a July 30, 2019 statement of accepted facts (SOAF), and a series of questions to Dr. John H. Welborn, an orthopedic surgeon, for a second opinion on the nature and extent of the accepted conditions, the appropriate treatment, and her work capacity.

In an August 24, 2020 report, Dr. Welborn noted his review of the SOAF, related the history of appellant's February 4, 2017 employment injury, and her subsequent medical treatment. He provided examination findings of her back, hip and pelvis and related assessments of lumbar spondylolisthesis, lumbar spinal fusion, left hip pain, sprain of left hip, and sprain of right hip. Dr. Welborn opined that appellant had permanent aggravation of lumbar spondylolisthesis due to lumbar fusion with objective findings of lumbar fusion and stiffness, labral tear on right hip magnetic resonance imaging (MRI) scan, and mild arthritis. In response to OWCP's questions, he advised that "more than likely [appellant's] right hip labral tear is not connected to factors of employment as described in the SOAF." Dr. Welborn noted that Dr. Arthur Auerbach, a Board-certified orthopedic surgeon and second opinion examiner, failed to mention any history of hip

pain in his June 29, 2018 report and the only mention of hip pain was on appellant's first visit to the emergency room on February 5, 2017 when she had left buttock tenderness in the distribution of the sciatic nerve. He also opined that her nonindustrial preexisting right hip arthritis was not related to her 2017 injury and that the requested labral tear surgery should be done on a nonindustrial basis. Dr. Welborn further opined that appellant's total disability ended on June 29, 2018 when she was noted to be able to work modified duty. He opined that she could work modified duty regarding her back with limitations of no lifting over 30 pounds, but due to preexisting hip arthritis, she should not lift over 10 pounds or stand over 1 hour at a time. Dr. Welborn additionally completed a work capacity evaluation (Form OWCP-5c) wherein he indicated that appellant's standing would be limited to four hours daily.

Based on Dr. Welborn's report, OWCP referred appellant to vocational rehabilitation services on September 2, 2020.

Dr. Hembd continued to provide progress reports regarding appellant's back and right hip conditions, noting radiating leg pain secondary to labral tear conditions. He continued to opine that she was totally disabled.

In an October 19, 2020 report, Dr. Hembd disagreed with Dr. Welborn's opinion that appellant's right labral tear of the hip was not causally related to the February 4, 2017 employment injury. He noted that she had undergone treatment for lumbar stenosis and lumbar spondylolisthesis and, despite a successful surgery on her lumbar spine, she continued to have right hip pain which had been identified as symptomatic labral tear with surgery recommended. Dr. Hembd indicated that a review of appellant's pain diagrams from July 2017 through the present showed that she has had back and hip pain the entire time. He further opined that she should continue her current work restrictions of no standing over 15 minutes and less than 4 hours per day.

On February 25, 2021 the employing establishment offered appellant a modified city carrier assignment of casing route up to two hours and delivering route up to six hours. The physical requirements of the position included standing intermittent (1-hour a time) for up to 4 hours; fine manipulation/simple grasping intermittent up to 8 hours; sitting intermittent up to 4 hours; driving intermittent 4 to 6 hours; lifting up to 10 pounds maximum up to 8 hours intermittent; and pushing/pulling up to 20 pounds up to 6 hours intermittent, not to exceed 20 pounds. The employing establishment advised that appellant was not to exceed her medical limitations furnished by her treating physician, but indicated that the job offer was based on the August 25, 2020 restrictions by the second opinion examiner. It noted that any items weighing more than 10 pounds would be handled by another coworker/carrier and assistance would be provided to push any containers to the vehicle in excess of 20 pounds. The employing establishment also explained that the assignment would be subject to revision based on changes in appellant's physical restrictions and the availability of work.

Appellant, on March 2, 2021, refused the position. She advised that the restrictions listed did not comply with the current restrictions from Dr. Hembd's office. An attached February 2, 2021 work status from a nurse practitioner indicated restrictions of no standing over 15 minutes and less than 4 hours per day; minimal (0-5 pound) lifting/carrying and pushing/pulling no more than 5 pounds. Appellant also advised that she was taking prescribed narcotic medicine for pain, and that she was currently attending vocational rehabilitation training.

Progress reports from Dr. Hembd continued to report on appellant's back and right hip conditions. OWCP also received a letter of medical necessity for opioid authorization, which it approved, and an undated statement from her indicating that her disagreement with the second opinion findings of Dr. Welborn.

On July 2, 2021 the employing establishment confirmed that the offered position remained available to appellant.

On July 23, 2021 OWCP notified appellant of its proposed termination of her wage-loss compensation in accordance with 20 C.F.R. § 10.500(a) based on her refusal of the February 25, 2021 temporary light-duty assignment. It advised that it had reviewed the work restrictions provided by Dr. Welborn and found that his opinion represented the weight of the medical evidence. OWCP further determined that the offered position was within appellant's restrictions and remained available. It informed her that any claimant who declined a temporary light-duty assignment deemed appropriate by OWCP was not entitled to compensation for total wage loss. OWCP noted that the actual earnings in the offered temporary light-duty assignment met or exceeded the wages of the position appellant had held when injured. It afforded her 30 days to accept the assignment and report to duty or demonstrate that her refusal was justified.

On July 26, 2021 OWCP received appellant's undated statement indicating that she remained in pain and was unable to work based on Dr. Hembd's restrictions, and that he continued to treat her for chronic back and hip pain. Appellant requested another second opinion examination due to her right hip and chronic back pain.

By decision dated August 27, 2021, OWCP terminated appellant's wage-loss compensation, effective that date, because she failed to accept the temporary light-duty assignment in accordance with 20 C.F.R. § 10.500(a). It found that, if she had accepted the position, she would have had no wage loss.[4]

On November 9, 2021 appellant requested reconsideration. She provided statements dated September 23, October 25 and November 9, 2021, work restriction forms dated January 19, February 2, August 30 and September 20, 2021 from a nurse practitioner, a September 20, 2021 laboratory test for opioids, and a January 21, 2022 request for an electromyography test.

Dr. Hembd continued to report on appellant's conditions. In a September 20, 2021 report, he provided impressions of chronic severe lower back pain status post L4-5 fusion for spondylolisthesis, improved, but persistent lower back pain secondary to L3-4 and L5-S1 spondylosis and facet arthritis, chronic severe right hip and radiating leg pain, secondary to labral tear. In a September 20, 2021 work status note, Dr. Hembd noted that appellant had reached maximum medical improvement and could lift/carry 15 to 50 pounds, could frequently bend/stoop and could push/pull 10 to 25 pounds. He also advised that she could not stand over 15 minutes and less than 4 hours per day. In an October 7, 2021 work status report, Dr. Hembd advised that appellant could not lift over 25 pounds. In a January 21, 2022 report, he noted new onset of upper extremity paresthesias. Dr. Hembd diagnosed spondylolisthesis, lumbar region, fusion of lumbar spine, myalgia, gluteal tendinitis, right hip, trochanteric bursitis, right hip, unilateral primary osteoarthritis, right hip, injury of unspecified nerves of neck, and chronic pain syndrome.

[4] The Board notes that the decision contains a typographic error as it referenced a March 31, 2021 temporary job offer, however, the date of the offer, as properly noted in the preliminary notice, was dated February 25, 2021.

By decision dated February 2, 2022, OWCP denied modification of its August 27, 2021 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[5]

OWCP regulations at 20 C.F.R. § 10.500(a) provide, in relevant part:

> "(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 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."[6]

When it is determined that, an employee is no longer totally disabled from work and is on the periodic rolls, OWCP's procedures provide that the claims examiner should evaluate whether the evidence of record establishes that light-duty work was available within his or her restrictions. The claims examiner should provide a pretermination or prereduction notice if appellant is being removed from the periodic rolls.[7] OWCP's procedures require that, if an employee declines an offered appropriate assignment, it shall issue "a notice of proposed termination or reduction of compensation for the duration of the temporary assignment, whether specified or indefinite, and provide the claimant with 30 days to respond."[8] The notice should advise the claimant of the requirements of section10.500, and identify the light-duty assignment by its name and/or date.[9]

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall

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[5] *C.G.*, Docket No. 21-0171 (issued November 29, 2021); *T.C.*, Docket No. 20-1163 (issued July 13, 2021); *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[6] 20 C.F.R. § 10.500(a).

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

[8] *Id.* at Chapter 2.814.9c(5).

[9] *Id.*

make an examination.[10] For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.[11] In situations where the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[12]

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation effective August 27, 2021, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary full-time limited-duty assignment.

OWCP referred appellant to Dr. Welborn for a second opinion examination. In his August 24, 2020 report, Dr. Welborn reviewed her history of the February 4, 2017 employment injury, accepted for sprain of unspecified parts of lumbar spine and pelvis, aggravation of spondylolisthesis, lumbar region, and spondylosis without myelopathy or radiculopathy, lumbar region and an October 13, 2017 lumbar discectomy and fusion at L4-5. He opined that appellant had permanent aggravation of lumbar spondylolisthesis due to lumbar fusion with objective findings of lumbar fusion and stiffness, labral tear on right hip MRI scan, and mild arthritis. Dr. Welborn opined that the labral tear and preexisting right hip arthritis were not related to her 2017 injury. He further opined that appellant could work modified duty regarding her back with limitations of no lifting over 30 pounds; however, due to preexisting hip arthritis, her limitations were no lifting over 10 pounds and no standing over 1 hour, up to 4 hours a day.

In an October 19, 2020 report, Dr. Hembd opined that appellant's right labral tear of the hip was causally related to the February 4, 2017 employment injury and set forth work restrictions of no standing over 15 minutes and less than 4 hours per day. OWCP terminated her wage-loss compensation effective August 27, 2021, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary full-time limited-duty assignment based on Dr. Welborn's restrictions.

OWCP's procedures specifically advise that the light-duty assignment must take into account the claimant's work-related condition(s), as well as any preexisting medical conditions and any conditions which have arisen since the compensable injury. A light-duty assignment that does not consider all such conditions will not be considered appropriate.[13] In this case, Dr. Wellborn opined that appellant's right hip condition was not work related, however, he properly provided work restrictions with and without the right hip condition considered. He opined that she could work modified duty regarding her back with limitations of no lifting over 30 pounds; however, due to preexisting hip arthritis, her limitations were no lifting over 10 pounds and no standing over 1 hour, up to 4 hours a day. Dr. Hembd opined, in his October 19, 2020 report, that appellant could not stand over 15 minutes and less than 4 hours per day. The modified city carrier

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[10] 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[11] *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

[12] *See D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

[13] *See supra* note 7 at Chapter 2.814.9c(2).

assignment included standing intermittent (1-hour a time) for up to 4 hours. Thus, a conflict in medical opinion exists between Dr. Welborn and Dr. Hembd as to the amount of standing appellant is able to perform. Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[14]

Consequently, the Board finds that OWCP failed to adequately develop the medical evidence prior to terminating appellant's wage-loss compensation under 20 C.F.R. § 10.500(a).[15] OWCP should have resolved the conflict in medical opinion regarding her work restrictions prior to terminating her wage-loss compensation under section 10.500(a).[16] Thus, it improperly terminated appellant's wage-loss compensation effective August 27, 2021.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation effective August 27, 2021, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary full-time limited-duty assignment.

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 16, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

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[14] 5 U.S.C. § 8123(a); *L.T.*, Docket No. 18-0797 (issued March 14, 2019).

[15] *L.T.*, Docket No. 22-0963 (issued November 14, 2022).

[16] *Id.*; *K.W.*, Docket No. 20-1591 (issued February 11, 2022).