United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 22-1379**
	)	**Issued: May 19, 2023**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Kansas City, MO, Employer	)	

Appearances:
Steven E. Brown, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On September 20, 2022 appellant, through counsel, filed a timely appeal from an April 28, 2022 merit decision and June 21, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider 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.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a recurrence of disability commencing October 11, 2016, causally related to her accepted employment conditions; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

This case has previously been before the Board on different issues. The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 16, 2010 appellant, then a 47-year-old computer assistant, filed a traumatic injury claim (Form CA-1) alleging that on February 9, 2010 she injured her lower back, hip/leg socket, and pelvis area when an elevator she was riding in suddenly dropped while in the performance of duty. She stopped work on February 19, 2010. OWCP accepted the claim for lumbar radiculitis. It paid appellant wage-loss compensation on the supplemental rolls, effective April 1 through June 4, 2010.

By decisions dated August 28 and December 12, 2014, OWCP expanded the acceptance of appellant's claim to include compression fractures at T12 and L3, respectively.

On March 16, 2015 appellant filed a Form CA-2a claiming that she sustained a recurrence of disability on February 13, 2013, causally related to her accepted February 9, 2010 employment injury.

By decision dated May 28, 2015, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish disability from work due to the accepted February 13, 2013 employment injury.

On September 11, 2015 appellant, through counsel, requested reconsideration.

By decision dated November 19, 2015, OWCP denied modification of the May 28, 2015 recurrence decision.

On November 1, 2016 appellant, through counsel, requested reconsideration of the November 19, 2015 decision. In support of her request for reconsideration, appellant submitted an October 11, 2016 functional capacity evaluation (FCE) report by Amanda Huenefeldt, a licensed/registered occupational therapist, who found that appellant was unable to perform sedentary work, eight hours per day.

Appellant also submitted an October 19, 2016 report, wherein Dr. John C. Verstraete, her attending infectious disease medicine specialist, referenced objective changes in appellant's condition due to her accepted T12 and L3 vertebra compression fractures. Dr. Verstraete noted that she had increased debilitating symptoms resulting from the consequential employment injuries. He indicated that while he agreed with OWCP that appellant could work prior to her accepted T12 and L3 vertebra compression fractures, he found that she could no longer work.

Dr. Verstraete noted that his opinion regarding appellant's work capacity was supported by a June 30, 2014 report of Dr. William O. Hopkins, a Board-certified orthopedic surgeon serving as a second opinion physician. He indicated that he ordered an FCE, which was performed on October 11, 2016, to determine how the progressive deterioration of appellant's employment conditions had changed his opinion on her work capacity. Dr. Verstraete related that the October 11, 2016 FCE was reliable and valid. He reported that the FCE revealed that appellant was not capable of performing sedentary work for an eight-hour workday. Appellant's ability to sit and stand more than five minutes was severely limited by her employment injuries. Dr. Verstraete compared the October 11, 2016 FCE with the July 1, 2010 FCE and found that it was clear that the former FCE indicated that appellant's ability to perform work tasks had diminished as she could not work eight hours per day with frequent posture changes as indicated by the latter FCE. He concluded that her employment injury was progressive in nature and resulted in her progressive neurological deterioration with progressive and continuing pain, and inability to work eight hours per day. In an accompanying work capacity evaluation (Form OWCP-5c) of even date, Dr. Verstraete reiterated appellant's work capacity. He also listed her permanent restrictions based on the October 11, 2016 FCE.

By decision dated March 31, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5. U.S.C. § 8128(a).

On May 9, 2017 appellant, through counsel, appealed the March 31, 2017 decision to the Board. By decision dated November 13, 2017, the Board set aside the March 31, 2017 decision.[3] The Board found that OWCP failed to follow its procedures as it failed to discuss the evidence submitted by appellant on reconsideration. The Board also found that Ms. Huenefeldt's October 11, 2016 FCE report and Dr. Verstraete's October 19, 2016 report constituted pertinent and relevant new medical evidence regarding whether appellant sustained a recurrence of disability commencing February 13, 2013. The Board remanded the case to OWCP for an appropriate merit review.

On remand, by decision dated May 16, 2018, OWCP denied modification of its recurrence decision, finding that Ms. Huenefeldt's October 11, 2016 FCE report and Dr. Verstraete's October 19, 2016 report were insufficient to establish that appellant sustained a recurrence of disability commencing February 13, 2013, causally related to her accepted February 9, 2010 employment injury.

OWCP subsequently received a November 29, 2018 report, wherein Dr. Verstraete advised that his opinion remained unchanged. Dr. Verstraete explained that appellant took oxycodone pain medication several times a day. He noted that this was a very strong pain medication that had side effects including dizziness, drowsiness, nausea, vomiting, constipation, and headache. Dr. Verstraete further noted that appellant had to lay down frequently throughout the day. He related that activity exacerbated the nerve pain and caused her to spend days in bed. Appellant was also extremely unbalanced even without taking the pain medication. Dr. Verstraete indicated that it would be difficult and dangerous for her to drive back and forth

[3] Docket No. 17-1183 (issued November 13, 2017).

while taking the medication. He related that no company would hire someone that would not be a dependable, reliable employee, or someone taking pain medication on a daily basis.

On February 11, 2022 appellant filed a notice of recurrence (Form CA-2a) claiming that she sustained a recurrence of disability commencing October 11, 2016, causally related to her February 9, 2010 employment injury. In support thereof, appellant resubmitted Ms. Huenefeldt's October 11, 2016 FCE and Dr. Verstraete's October 19, 2016 and November 29, 2018 reports.

OWCP, by development letter dated February 18, 2022, informed appellant of the deficiencies in her recurrence claim. It advised her of the type of evidence necessary to establish her claim and provided appellant a questionnaire for her completion. OWCP afforded appellant 30 days to provide the requested evidence. No response was received.

By decision dated April 28, 2022, OWCP denied appellant's recurrence claim, finding that there was insufficient medical evidence to establish that she was disabled from work commencing October 11, 2016, causally related to her accepted employment injury.

On May 31, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated June 21, 2022, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing, finding that it was not made within 30 days of the April 28, 2022 decision and, therefore, was untimely filed. It further exercised its discretion and determined that the issue in this case could equally well be addressed by a request for reconsideration before OWCP, along with the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5] Under FECA, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[6] For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.[7] Whether a particular injury causes an employee to become

[4] *Supra* note 2.

[5] *See D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

[7] *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

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.[8]

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 injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[9] The term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[10]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the limited-duty requirements.[11]

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 the disabling condition is causally related to the employment injury and supports that conclusion with medical reasoning.[12] Where no such rationale is present, the medical evidence is of diminished probative value.[13]

ANALYSIS -- ISSUE 1

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

Appellant submitted reports dated October 19, 2016 and November 29, 2018 from Dr. Verstraete who found that appellant was totally disabled from work due to her accepted employment conditions which had progressively worsened with continuing pain. Dr. Verstraete

[8] *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[9] 20 C.F.R. § 10.5(x); *see D.T.*, Docket No. 19-1064 (issued February 20, 2020); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[10] *Id*.

[11] *C.B.*, Docket No. 19-0464 (issued May 22, 2020); *see R.N.*, Docket No. 19-1685 (issued February 26, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

[12] *Id*.

[13] *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

explained that a comparison of the October 11, 2016 FCE and July 1, 2010 FCE indicated that appellant was no longer able to perform her work tasks, eight hours per day, due to her employment conditions. He further explained that she took pain medication several times a day and experienced side effects that included dizziness, drowsiness, nausea, vomiting, constipation, and headache. Dr. Verstraete noted that taking pain medication made it difficult and dangerous for appellant to drive. He also explained that she had to lay down frequently throughout the day and she spent days in bed because activity exacerbated her nerve pain.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[14] While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[15] The Board finds that, while Dr. Verstraete's October 19, 2016 and November 29, 2018 reports are not sufficiently rationalized, they raise an uncontroverted inference between appellant's inability to work commencing October 11, 2016 and the accepted employment conditions. Further development of appellant's claim is therefore required.[16]

The case shall, therefore, be remanded to OWCP for further development of the medical evidence. On remand, OWCP shall refer appellant to a physician in the appropriate field of medicine, along with the case record, and a statement of accepted facts, for an examination and a rationalized medical opinion as to whether the accepted employment conditions caused a recurrence of disability beginning October 11, 2016.[17] If the second opinion physician disagrees with Dr. Verstraete, he or she must provide rationale explaining why the accepted employment conditions were insufficient to have caused the claimed recurrence of disability. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.[18]

[14] *See C.F.*, Docket No. 20-1572 (issued November 10, 2021); *Vanessa Young*, 56 ECAB 575 (2004).

[15] *Id*.

[16] *See H.M.*, Docket No. 22-0097 (issued October 11, 2022); *D.V.*, Docket No. 21-0383 (issued October 4, 2021).

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *see also K.B.*, Docket No. 20-1001 (issued June 23, 2021).

[18] In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2022 decision of the Office of Workers' Compensation Programs is set aside. The June 21, 2022 decision is set aside as moot. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 19, 2023
Washington, DC

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

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

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