

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

M.M., Appellant	)	
	)	
and	)	<b>Docket No. 21-0590</b>
	)	<b>Issued: December 2, 2021</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>CHEYENNE VA MEDICAL CENTER,</b>	)	
<b>Cheyenne, WY, Employer</b>	)	
	)	

*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 7, 2021 appellant filed a timely appeal from a February 17, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met her burden of proof to establish a recurrence of total disability commencing June 26, 2020, causally related to her November 1, 2019 employment injury.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the February 17, 2021 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.*

## **FACTUAL HISTORY**

On November 4, 2019 appellant, then a 58-year-old administrative officer, filed a traumatic injury claim (Form CA-1) alleging that on November 1, 2019 she slipped walking from the parking lot and fell injuring her left hand, knee, and jerking her neck while in the performance of duty. She stopped work on November 1, 2019. OWCP accepted appellant's claim for aggravation of cervical disc herniation. It paid her wage-loss compensation on the supplemental rolls beginning January 31, 2020 and on the periodic rolls beginning June 7, 2020.

On April 7, 2020 appellant's attending physician, Dr. Jason Caswell, a surgeon, opined that she was totally disabled as a result of her accepted November 1, 2019 employment injury due to debilitating pain, loss of mobility, and decreased sensation in her left arm. He noted that she was unable to turn her neck without increased pain such that she could not perform light-duty.

On June 15, 2020, an employing establishment physician, Dr. Kirby Duvall, a Board-certified family practitioner, completed a work capacity evaluation (Form OWCP-5c) and advised that appellant could return to work eight hours a day with restrictions on lifting and pushing more than five pounds.

On June 25, 2020 appellant accepted an eight-hour restricted-duty work assignment lifting, carrying, pushing, and pulling up to five pounds intermittently. She noted that her acceptance was pending further medical review.

On June 29, 2020 Dr. Duvall completed an additional OWCP-5c and indicated that appellant was unable to work because of pain and numbness with movement. He noted that she could not work, had a "failed return to work," and that her neurosurgeon had opined that she was totally disabled until after surgery.

In a series of July 1, 2020 notes, Dr. Donn M. Turner, a neurosurgeon, advised that appellant could return to work four hours a day lifting no more than 5 pounds frequently and 10 pounds infrequently. He further advised that she could not perform any repetitive motion with her upper extremities including no overhead reaching, and no reaching above the shoulders. Dr. Turner reported that appellant had difficulty working on a computer for eight hours a day due to weakness in her arms. He also noted that she did not believe that she could perform part-time work.

On July 7, 2020 the employing establishment informed appellant that she was allowed to move about the office and stretch in an effort to try to keep from becoming uncomfortable due to staring at a screen for eight hours.

In a July 10, 2020 report, Dr. Turner attributed appellant's current cervical disc herniations to the accepted aggravation of her preexisting cervical condition. He opined that she had exhausted all conservative measures. Dr. Turner noted that appellant had difficulties working even in a sedentary capacity due to her accepted condition.

On July 13, 2020 appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation for the period June 26 through July 4, 2020.

In a July 22, 2020 letter, OWCP noted that appellant had been provided with a light-duty job offer, which comported with the restrictions provided by Dr. Duvall on June 15, 2020. It found that this position was appropriate in accordance with 20 C.F.R. § 10.500(a). OWCP directed appellant to accept the assignment and report to duty. It afforded her 30 days to provide a written explanation of her reasons for failing to accept the assignment.

On August 10, 2020 Dr. Duvall noted that appellant was reporting headaches. He diagnosed spinal stenosis and cervical disc disorder. Dr. Duvall noted that appellant was unable to work due to worsening neck pain and headaches. He indicated that she was instructed by her neurosurgeon not to work until she was evaluated by an OWCP second opinion physician.

On July 16, 2020 the employing establishment offered appellant a light-duty assignment working four hours per day utilizing a computer to enter documentation into the employing establishment system. Appellant returned to four hours of sedentary work on July 20, 2020. She stopped work again on August 10, 2020.

In a September 11, 2020 note, Dr. Caswell found that appellant's accepted condition had deteriorated. He noted that her cervical radiculopathy had increased with greater muscle weakness and that he feared permanent damage would result without surgery. Dr. Caswell also found that appellant's neuropathic pain had increased. He additionally diagnosed adjustment disorder with mixed anxiety and depressed mood and anxiety.

By decision dated September 18, 2020, OWCP denied appellant's claimed total disability commencing June 26, 2020. It found that there was insufficient medical evidence to establish a change in the nature and extent of her injury-related condition such that she became totally disabled on or after June 26, 2020.

In a letter dated September 22, 2020, OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for a second opinion evaluation with Dr. Lloyd W. Mobley, a Board-certified neurosurgeon.

On September 21, 2020 Dr. Duvall noted that appellant had been taken off work by her neurosurgeon in order to avoid worsening her accepted condition. He agreed with this approach.

In a September 16, 2020 report, Dr. Turner listed appellant's symptoms of intermittent numbness and tingling involving the ulnar two fingers of both hands. He related that she tried to work for eight hours a day, and was then bedridden due to neck pain. On examination Dr. Turner found that appellant had loss of range of motion in her neck of 50 percent. He reported normal motor strength testing, normal sensory examination, and symmetric reflexes.

On October 16, 2020 appellant requested a telephonic hearing from a representative of OWCP's Branch of Hearings and Review.

In an October 15, 2020 report, Dr. Mobley described appellant's history of injury, medical treatment, and accepted conditions. He related that she attempted to return to work on June 25, 2020, but was bedridden the next day due to pain. Dr. Mobley also noted that appellant attempted to work four hours a day, but could not tolerate sitting, lying, or standing to use her computer. He diagnosed cervical radiculopathy due to spondylosis due to aggravation of appellant's preexisting cervical disc herniation caused by her accepted employment injury and recommended surgery.

Dr. Mobley found that appellant could return to work eight hours per day within the restrictions of the June 25, 2020 light-duty position, which included lifting, carrying, pushing, and pulling up to five pounds intermittently. He also completed an OWCP-5c and further found that she could work 8 hours per day with frequent breaks of 10 minutes every 2 hours. Dr. Mobley provided work restrictions of sitting and standing for four hours each, walking for two hours, reaching, reaching above the shoulder, twisting, bending, stooping, climbing, and lifting up to five pounds for one hour each, and pushing and pulling up to 10 pounds for four hours each.

Appellant returned to full-time light-duty work on December 3, 2020. On December 23, 2020 Dr. Turner found that appellant was totally disabled from December 9, 2020 through February 15, 2021 in preparation for her approved spine surgery. He also noted that she was experiencing increased bilateral arm and shoulder muscle spasms and bilateral hand numbness such that she could not perform her light-duty work.

On December 31, 2019 appellant underwent C3-4 and C4-5 anterior microdiscectomies and disc arthroplasties.

Appellant testified before an OWCP hearing representative on January 14, 2021. She asserted that when she returned to work on June 25, 2020 she worked an eight-hour shift on the computer resulting in burning pain in her neck down to her right hand. Appellant contended that working on a computer was her biggest problem causing headaches, severe stiffness, and soreness.

In a report dated January 21, 2021, Dr. Turner diagnosed a bulging disc with osteophyte formation and spinal stenosis at C3-4 and C4-5 above a preexisting anterior cervical fusion. He attributed appellant's neck pain and headaches to these conditions. Dr. Turner noted that she had reported that working on the computer caused her a great deal of discomfort with tightness and pain in her neck and shoulders resulting in numbness in her fingers and hands. He attributed these symptoms to appellant's accepted diagnosed conditions.

By decision dated February 17, 2021, OWCP's hearing representative affirmed the September 16, 2020 decision finding that appellant had not established a recurrence of total disability commencing June 26, 2020.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *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).

<sup>5</sup> 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

employment injury.<sup>6</sup> Whether a particular injury causes 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.<sup>7</sup>

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. 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.<sup>8</sup> If the claim for recurrence of disability for work is based on modification of the claimant's duties or physical requirements of the job, the claimant should be asked to describe such changes. If the evidence establishes that the limited-duty position has changed such that it no longer accommodates the claimant's work restrictions, OWCP should accept the recurrence.<sup>9</sup>

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.<sup>10</sup>

An employee who claims a recurrence of disability resulting from an accepted employment injury has the burden of proof to establish that the disability is related to the accepted injury. This burden requires furnishing 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 sound medical reasoning.<sup>11</sup>

If an appellant is receiving wage-loss compensation on the periodic rolls and makes a brief attempt to return to work, the claim for compensation after the return to work should not be characterized as a claim for recurrence of total disability. Characterizing the claim as a claim for recurrence of disability inappropriately places the burden of proof on appellant. A short-lived

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<sup>6</sup> *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

<sup>7</sup> *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>8</sup> 20 C.F.R. § 10.5(x); *see D.T.*, Docket No. 19-1064 (issued February 20, 2020).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6.a(3) (June 2013); *J.T.*, Docket No. 15-1133 (issued December 21, 2015).

<sup>10</sup> *See C.B.*, Docket No. 19-0464 (issued May 22, 2020); *R.N.*, Docket No. 19-1685 (issued February 26, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>11</sup> *Id.*

return to work does not shift the burden of proof regarding employment-related disability. The burden of proof remains with OWCP.<sup>12</sup>

### ANALYSIS

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

OWCP accepted appellant's claim for aggravation of cervical disc herniation due to a November 1, 2019 employment injury. The record reflects that appellant was on the periodic rolls when she initially returned to light-duty work for eight hours a day on June 25, 2020 and stopped work on June 26, 2020. OWCP characterized her claim for compensation on or after June 25, 2020 as a claim for recurrence of total disability due to her employment injury. The Board finds, however, that OWCP inappropriately placed the burden of proof for continuing compensation on appellant, indicating that she had the burden of proof to show that she was totally disabled from light-duty work. OWCP then found that she did not meet this burden of proof and did not pay her compensation after June 26, 2020.

Since OWCP retained the burden of proof, it should have provided appellant with notice that it intended to terminate her compensation and provided her an opportunity to submit evidence supporting continuing employment-related disability before stopping periodic roll compensation payments.<sup>13</sup> In this case, there is no indication that OWCP followed its procedures and issued a pretermination notice.

On return of the case record, after any further development as deemed necessary, OWCP shall issue a notice of proposed termination of compensation benefits, to be followed by a *de novo* decision as to whether OWCP met its burden of proof to terminate appellant's compensation benefits.

### CONCLUSION

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

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<sup>12</sup> *P.S.*, Docket No. 20-0714 (issued May 24, 2021); *P.T.*, Docket No. 12-1325 (issued January 18, 2013); *see Janice F. Migut*, 50 ECAB 166 (1998) (the Board found that, although appellant returned to work for two days, the burden remained on OWCP to justify termination of benefits); *see also Cheryl A. Weaver*, 51 ECAB 308 (2000) (claimant returned to work for one day); *Carl C. Graci*, 50 ECAB 557 (1999) (claimant returned to work for one day).

<sup>13</sup> *See P.S., id.*; *Donna R. Schlenkrich*, Docket No. 06-411 (issued April 12, 2006); *Winton A. Miller*, 52 ECAB 405 (2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 17, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: December 2, 2021  
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