

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, SHERMAN OAKS
STATION, Sherman Oaks, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 06-1427
Issued: January 9, 2007**

Appearances:
Anthony M. Amoscato, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2006 appellant, through his attorney, filed a timely appeal from the May 8, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the denial of his claim for wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this decision.

ISSUE

The issue is whether appellant established that he sustained a recurrence of disability on January 18, 2003 causally related to his September 18, 2003 employment injury.

FACTUAL HISTORY

This is the second appeal before the Board. In a December 6, 2005 decision, the Board reversed an April 28, 2005 Office decision which found appellant at fault in creating a \$22,467.56 overpayment of benefits for the period May 24, 2004 to January 22, 2005.¹ The

¹ Docket No. 05-1309 (issued December 6, 2005).

Board found that the record was devoid of evidence that compensation was paid for the period in question except for checks returned by appellant.² The Board found that the Office failed to establish that an overpayment of compensation occurred. The facts and the circumstances are set out in the prior decision and are hereby incorporated by reference.

On March 11, 2005 the employing establishment offered appellant a modified job as a manager of customer services working four hours per day,³ which appellant accepted. The record contains evidence from a May 10, 2005 investigative memorandum. The investigator detailed various occasions when appellant was observed performing activities outside the restrictions set by his treating physician.

On May 19, 2005 the employing established issued a proposed letter of warning in lieu of suspension and a notice of proposed removal. The basis for the removal was the investigative report documenting that appellant had performed activities inconsistent with his restrictions. The employing establishment issued the proposed warning regarding appellant's failure to timely report an overpayment of compensation to the Office.

On June 20, 2005 appellant filed a claim for compensation (Form CA-7) for the period June 17, 2005 based on removal from his position. The employing establishment noted that appellant received paid leave for eight hours for June 17, 2005. In a letter dated June 20, 2005, appellant informed the Office that the employing establishment issued a letter of removal effective June 17, 2005. He stated that as of May 31, 2005 the physical restrictions imposed by his treating physician had not changed. In view of his removal from the employing establishment, appellant requested that the Office continue his wage-loss compensation.

On July 5, 2005 the Office received the June 16, 2005 letter of decision which terminated appellant's employment effective June 17, 2005.

The Office received copies of physical therapy prescriptions dated May 1 and July 5, 2005 from Dr. Narinder S. Grewal, a treating Board-certified anesthesiologist. On July 5, 2005 Dr. Grewal prescribed neck and upper back physical therapy including massage, ultrasound, electrical stimulation twice a week for six weeks.

On July 13, 2005 the employing establishment verified that the modified position would have remained available for appellant had he not been terminated for cause.

In a decision dated July 13, 2005, the Office denied appellant's claim for wage-loss compensation on and after June 17, 2005. Compensation was denied due to his termination from his managerial position for cause unrelated to his work-related injury of September 18, 2003.

² On September 18, 2003 appellant, a 45-year-old customer service manager, filed a traumatic injury claim alleging that he injured his back and neck on that date when he was rear ended at a traffic stop. He stopped work on September 18, 2003 and returned to work five hours per day on May 24, 2004. The Office accepted the claim for cervical and lumbar strains.

³ Appellant did not sustain a wage loss from accepting this offer as the employing establishment paid him for eight hours.

Subsequent to the July 13, 2005 decision, appellant submitted evidence including a July 11, 2005 report from Dr. Grewal who noted that appellant was seen for severe neck pain complaints. Dr. Grewal diagnosed cervical degenerative disc disease/facet tenderness and recommended a magnetic resonance imaging scan be performed. On August 31, 2005 he diagnosed cervical spine degenerative disc disease/facet disease, bilateral cervical facet disease, cervicogenic headache and neck pain and cervical stenosis, spondylosis. Dr. Grewal recommended that appellant undergo radiofrequency treatment of the cervical facets. Dr. William Caton, III, a treating Board-certified neurologist, diagnosed post-traumatic neck pain and prescribed head halter traction in progress notes. In reports dated July 14 and September 22, 2005, he noted loss of range of motion and pain with range of motion. Dr. Caton diagnosed left C4 radiculopathy post-traumatic cervical radiculopathy and post-traumatic neck pain. He recommended continuing physical therapy and a home head halter traction. Dr. Caton stated that appellant "shall continue to work four hours a day." In a July 14, 2005 report, he reviewed reports from Dr. Parviz Galdjie, who opined appellant reached a plateau in September 2004. Dr. Caton concluded "it appears [appellant] is steadily worsening."

On July 18, 2005 appellant requested an oral hearing, which was held on January 23, 2006 at which he was represented and testified.

The Office referred appellant for examination by G.B. Ha'eri, a second opinion Board-certified orthopedic surgeon. In a report dated August 12, 2005, he found that appellant had no disability as a result of his accepted cervical and lumbar strain. Dr. Ha'eri concluded that any disability was due to appellant's nonemployment-related degenerative disease of the lower cervical spine. He also stated that appellant was capable of performing the position of customer service manager with restrictions on lifting and pushing/pulling, which were due to his nonemployment-related degenerative condition.

In a November 18, 2005 report, Dr. Caton indicated that he had reviewed Dr. Ha'eri's report and noted his disagreement with the diagnosis and clinical findings.

On January 23, 2006 the Office received a settlement agreement and general release between appellant and the employing establishment regarding his termination. Appellant agreed to submit an application for disability retirement to the Office of Personnel Management (OPM). The employing establishment agreed that it would state that appellant's conduct was satisfactory and that he had successfully performed all the critical elements of his position. Both parties agreed that, if OPM denied appellant's application for disability retirement, or at the expiration of one year with no final determination by OPM, the employing establishment could reinstate the June 16, 2005 removal letter. The employing establishment agreed to rescind the removal letter, but reserved the right of reinstatement.

In a January 24, 2006 report, Russell Lee, a physical therapist, stated that he had reviewed a videotape and opined that appellant did not violate the restrictions set by Dr. Galdjie.

In a February 14, 2006 supplemental report, Dr. Ha'eri concluded that appellant's multilevel disc degeneration and spondylosis were not employment related as "[t]his type of condition does not take three months following a whiplash injury of the neck to appear on

imaging studies.” He stated this type of condition usually presented itself over years and was “partly based on genetics.”

In an April 24, 2006 report, Dr. Grewal diagnosed left cervical radiculopathy, cervical facet syndrome and degenerative disc disease. He stated that appellant was in severe pain and requested authorization for him to undergo a cervical epidural injection.

In a decision dated May 8, 2006, an Office hearing representative affirmed the July 13, 2005 decision denying appellant’s claim for wage-loss compensation on and after June 17, 2005.

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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁴ This term also means an inability to work 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 (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 established physical limitations.⁵

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position, or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements.⁶

ANALYSIS

Appellant accepted a March 11, 2005 part-time modified job offer. The employing establishment provided part-time work in accordance with Dr. Galdjie’s restrictions. Appellant was terminated for cause effective June 17, 2005. This was subsequently reduced by the employing establishment based upon a settlement agreement. Appellant agreed to file for disability retirement and not to seek reemployment with the employing establishment. The employing establishment retained the right to reinstate the termination for cause under specific circumstances.

The employing establishment dismissed appellant for cause effective June 17, 2005. The stated reasons for terminating employment were because of appellant performing activities

⁴ 20 C.F.R. § 10.5(x).

⁵ *Id.*

⁶ *Barry C. Peterson*, 52 ECAB 120, 125 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

outside the physical restrictions imposed by his physician. Section 10.5(x) specifically provides that the withdrawal of a light-duty assignment for reasons of misconduct or nonperformance of job duties does not constitute a recurrence of disability.⁷ While the employing establishment effectively withdrew appellant's light-duty assignment, under the circumstances of this case it does not establish a recurrence of disability.

Appellant may also establish a recurrence of disability by demonstrating a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements.⁸ With respect to the latter means of establishing a recurrence of disability, appellant has not alleged nor does the record support that there was a change in the nature and extent of the light-duty job requirements prior to appellant's June 17, 2005 dismissal for cause.

The remaining question is whether appellant demonstrated a change in the nature and extent of his employment-related condition. Appellant had been performing part-time, modified-duty work through June 17, 2005. The record contains various reports and progress notes by Drs. Caton, Grewal and Galdjie and an Office referral opinion by Dr. Ha'eri. None of the reports by Drs. Grewal or Galdjie address the issue of whether appellant was disabled from performing his modified position as of June 17, 2005. Their reports noted appellant's health status generally with no opinion as to his work capability. Dr. Grewal provided reports on the epidurals given appellant. The only treating physician who addresses the issue of appellant's ability to work is Dr. Caton. On July 14, 2005 Dr. Caton indicated that appellant should continue working four hours per day. The record is devoid of any medical evidence supported by medical rationale supporting that appellant was unable to perform the duties of the modified position for the claimed period of total disability. In a June 20, 2005 letter, appellant stated that as of May 31, 2005 the physical restrictions imposed by his treating physician, which included working four hours per day, had not changed. He stated that he was requesting wage-loss compensation from the Office as the employing establishment had terminated him for cause. The record contains no evidence that appellant was disabled from performing his modified job. Appellant failed to satisfy his burden of proof in demonstrating a change in the nature and extent of his employment-related condition. Accordingly, the Office properly denied his claim for wage-loss compensation beginning June 17, 2005.

CONCLUSION

The Board also finds that appellant failed to establish that his claimed recurrence of disability on or after June 17, 2005 was due to his September 18, 2003 employment injury.

⁷ 20 C.F.R. § 10.5(x).

⁸ *Barry C. Peterson, supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 8, 2006 is affirmed.

Issued: January 9, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board