

)	
MIKLE W. WILLIAMS, Appellant)	
)	
and)	Docket No. 04-91
)	Issued: February 9, 2004
U.S. POSTAL SERVICE, POST OFFICE,)	
Dallas, TX, Employer)	
)	

Case Submitted on the Record

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

On September 24, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated September 5, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether appellant is entitled to compensation for wage loss after July 31, 1996.

This is the third appeal to the Board. In the first appeal,¹ the Board issued a January 27, 1998 decision which found that appellant did not establish that he sustained a lumbar

¹ Docket No. 97-1100 (issued January 27, 1998). Appellant developed a right heel spur and right plantar faciitis condition in September 1993. He underwent surgery on April 14, 1994 and returned to limited duty, subject to limitations on walking, standing and twisting the right knee. On July 14, 1995 appellant received a schedule award

strain, chondromalacia or a sclerotic lesion of the right knee or osteophytes of the right and left knees causally related to his federal employment. The Board found that the medical evidence submitted by him was insufficient to establish his claim. The Board also found that appellant did not establish that he sustained a recurrence of total disability on or after May 20, 1996 causally related to his September 22, 1993 injury. The Board noted that the medical evidence submitted was insufficient to establish a change in the nature or extent of his injury-related condition.

In a December 17, 1998 letter, appellant requested reconsideration and submitted additional medical evidence in support of his request. In a July 19, 1999 decision, the Office found that the medical evidence supported the causal relationship of his low back and bilateral knee conditions to his accepted right foot injury and accepted those conditions for payment of medical expenses. The Office also accepted that appellant was totally disabled for the period June 6 to July 31, 1996 and accepted his recurrence of disability claim for this period. The Office found, however, that he was able to return to modified work as of August 1, 1996 and that the modified job that he had been performing was available at the University Hills station as of that date. Therefore, the Office denied wage-loss compensation after July 31, 1996.

By letter dated October 14, 1999, appellant requested reconsideration and submitted additional medical evidence in support of his request. In a January 5, 2000 decision, the Office denied modification of its July 19, 1999 decision.

In the second appeal to the Board, appellant acknowledged that he was not disabled for his limited-duty position after July 31, 1996, but contended that the employing establishment did not have any light-duty work available as of August 1, 1996. In a May 29, 2002 decision,² the Board found that the evidence of record was not clear as to the availability of light duty to appellant as of August 1, 1996. The Board set aside the Office's January 5, 2000 decision and remanded the case to the Office for further development of the evidence with regard to this issue³ and for the issuance of a *de novo* decision on appellant's entitlement to wage-loss compensation as of August 1, 1996. The facts and background of the case, as set forth in the Board's prior decision, are incorporated herein by reference.

Following remand, on March 24 and June 20, 2003, the Office attempted to obtain additional information from the employing establishment in accordance with the Board's decision. In a response dated June 25, 2003, the employing establishment stated that it was in the process of gathering the information requested. However, no information was ever received from the employing establishment.

On July 1, 2003 appellant submitted a copy of an Equal Employment Opportunity (EEO) Commission decision dated September 26, 2001, in which the EEO addressed the issue of the

for 19 percent impairment of his right foot. The period of the award ran from October 25, 1994 to July 24, 1995.

² Docket No. 00-1001 (issued May 29, 2002).

³ In particular, the Board instructed the Office to request clarification as to appellant's work status and the availability of light duty and further instructed the Office to clarify whether appellant was instructed to return to regular-duty work at the Highland Hills station or to light duty at the University Hills station.

availability of light-duty work to appellant after July 31, 1996. The EEO found, in pertinent part:

“Respondent [employing establishment] did breach its nondiscrimination obligation toward [c]omplainant [appellant] by ignoring its responsibilities under the OFO decision and by not entering into an informal interactive process by which [r]espondent could discover [c]omplainant’s abilities and [c]omplainant could discover available vacant positions for which he could have requested reassignment. Until [r]espondent meets its obligations to enter into that process with [c]omplainant it will continue to be in breach of its obligations imposed upon it by Congress in 1992. Furthermore, [r]espondent did not raise the defense of “[u]ndue [h]ardship” in these proceedings. Furthermore, [r]espondent’s refusal to put [c]omplainant to work when, in July 1996, he was released by his physician to return to the modified position that [r]espondent had created for [c]omplainant when he was first injured; in addition there was work available for [c]omplainant at that time.⁴ Furthermore, [r]espondent’s denial of work to [c]omplainant and the placing him on enforced leave led to [c]omplainant’s ultimately having to take disability retirement. Such actions constitute a removal of [c]omplainant.”

By way of remedy, the EEO required, among other things, that the employing establishment enter into an informal interactive process with appellant to see if a vacancy for which he could have qualified became vacant from the time appellant was denied light duty to the time the employing establishment enters into the process with appellant, noting that the position must be within a reasonable commuting area surrounding appellant’s duty station at the time of his injury. The employing establishment was further directed to determine the amount of back pay, with interest, from the time that appellant was denied work on the basis of full-time employment to the time that the employing establishment completes the interactive process with appellant and searches for an appropriate position, noting that the employing establishment could offset for any disability retirement payments or other work in which appellant has been engaged during the interim period. As interim relief, the employing establishment was directed to retroactively restore appellant to his modified limited-duty position at the Highland Hills station or another appropriate, acceptable station.

In a decision dated September 5, 2003, the Office found that the EEO decision submitted by appellant established that the employing establishment had erred in not providing suitable employment for appellant beginning August 1, 1996. Therefore, the Office approved appellant’s claim for compensation for wage loss beginning August 1, 1996. The Office further found, however, that as the EEO ordered, that appellant receive retroactive salary from the employing establishment beginning August 1, 1996, compensation benefits for wage loss could not be paid at that time. Therefore, the Office declined to pay appellant compensation benefits beginning August 1, 1996.

⁴ See note signed by Donald Brent, station Manager, wherein the station manager stated: Work was available for appellant within his restrictions on his return to work date of July 31, 1996 at the University Station. ROI at page 14.

LEGAL PRECEDENT

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 establishes that the employee can perform the light-duty position, the employee had the burden to establish by the weight of the reliable and probative evidence a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁵

ANALYSIS

In its decision dated September 5, 2003, the Office found that appellant had submitted sufficient evidence to establish entitlement to wage-loss compensation beginning August 1, 1996. Therefore, the only issue before the Board is whether the Office properly declined to pay appellant wage-loss compensation benefits beginning August 1, 1996, on the grounds that the employing establishment had been ordered to pay appellant retroactive wages for the same period. Section 8116 of the Act⁶ sets forth limitations on right to receive compensation and provides:

“(a) While an employee is receiving compensation under this subchapter or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay or remuneration of any type from the United States, except --

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of title 5, United States Code.”

The Office properly found that, if appellant was receiving retroactive pay for the period August 1, 1996 under the EEO decision, he would not also be entitled to receive wage-loss compensation for the same period. However, there is no evidence of record that the employing establishment has fulfilled its obligations under the EEO decision, nor evidence that appellant has been paid any of the back wages he is owed. On remand, the Office should determine

⁵ *Shelly A. Paolinetti*, 52 ECAB 391 (2001).

⁶ 5 U.S.C. § 8116.

whether appellant has in fact been paid back wages pursuant to the EEO order and, after examining all of the relevant evidence, issue a *de novo* decision on appellant's entitlement to wage-loss compensation benefits for the period beginning August 1, 1996.

CONCLUSION

The Board finds that the case is not in posture for decision. Further development of the evidence is necessary.

ORDER

IT IS HEREBY ORDERED THAT the decision dated September 5, 2003 be affirmed in part and set aside in part and the case remanded for further development consistent with this decision.

Issued: February 9, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member