

claimed compensation for intermittent periods during 2000, for which the Office paid compensation.

On July 21, 2000 appellant accepted an offer of limited duty as a modified full-time letter carrier using a push cart for mail delivery, with restrictions against lifting more than 10 pounds and any twisting. By decision dated March 5, 2001, the Office found that his actual earnings fairly and reasonably represented his wage-earning capacity, resulting in no loss of wage-earning capacity.

Thereafter appellant periodically filed claims for compensation for absences from work for pain and stiffness in his lower back or for physical therapy and chiropractic adjustments. The Office paid appropriate compensation for these periods. On November 20, 2002 one of appellant's attending chiropractors prescribed deep tissue massage, and appellant began undergoing physical therapy on January 13, 2003. On November 29, 2002 the Office advised appellant that all claims for compensation must be submitted through the employing establishment. On January 10, 2003 appellant filed a claim for compensation for January 3 and 4, 2003 for pain and stiffness in his low back. On February 2, 2003 appellant filed a claim for compensation for January 29 and 31, 2003 (3.75 hours each day) for physical therapy and chiropractic adjustments. The Office paid compensation for both these claims. On February 28, 2003 a physical therapist stated that appellant had completed a six-week physical therapy prescription.

On March 4, 2003 appellant filed a claim for compensation for February 4, 11 and 14, 2003, for 3.00 to 3.25 hours each day for pain and stiffness due to therapy and adjustments. On March 19, 2003 appellant filed a claim for compensation for about 3 hours each on February 27 and 28, 2003 for physical therapy and adjustments, for 8 hours each for March 3, 7 and 8, 2003 for pain and stiffness in his low back, and for partial days on March 17 and 18 and a full day on March 19, 2003 for the reason that there was no work for him and he was sent home. On March 20, 2003 the employing establishment reported that from March 17 to 19, 2003 appellant refused to do his job assignment he had done for the past nine months, and provided no reasons or new medical evidence. The Office paid appellant compensation for the 42.35 hours of leave without pay he used from February 27 to March 19, 2003.

In a March 28, 2003 report, Dr. Kyla Tremper, appellant's attending chiropractor, stated that appellant had a permanent low back injury resulting in permanent restrictions of no lifting over 10 pounds, no twisting, and limited pushing/pulling and bending/stooping. Dr. Tremper stated that appellant continued to experience flare ups/ exacerbations of his low back, and that he related that he was given the walk-in truck requested, but not the swivel seat with lumbar support. Dr. Tremper stated: "Without this swivel seat, [appellant] must twist to sit down or stand up. Twisting is definitely causing these exacerbations of his low back condition. It is vital for [appellant] to have a swivel seat to prevent him from twisting." In an April 1, 2003 report, Dr. Tremper stated that appellant had a recurrent L5 spondylolisthesis with a disc bulge, that the extent of his arthritic changes was not preexisting, that his repetitive job duties and his employment injury had caused these arthritic changes leading to his current chronic pain, and that a walk-in truck with a swivel seat and lumbar support would minimize his exacerbations. Dr. Tremper also stated that, without chiropractic care and with appellant's current working conditions, his condition would deteriorate rapidly and he would not continue to be able to work, and that the

treatment goals of his chiropractic care were a decrease in pain and muscle spasms, and the ability to continue working.

On April 3, 2003 appellant filed a claim for compensation for 76.23 hours from March 17 to April 1, 2003, for the reason that limited duty was not available. On April 8, 2003 the employing establishment reported that it had work for appellant within his restrictions, but he was refusing to do his job assignment and had not provided a reason or medical information of why he could not do his assignment. On April 10, 2003 appellant filed a claim for compensation for about 3 hours each day for February 19 and 21, 2003 for therapy and adjustments for the pain and stiffness in his low back. On April 22, 2003 the Office advised appellant that it could not process his claim for compensation for February 19 and 21, 2003 because the employing establishment had not completed and certified his claim forms.

On April 22, 2003 appellant filed a claim for compensation for eight hours each scheduled workday from March 20 through April 20, 2003¹ for the reason that no limited duty was available. On April 29, 2003 the employing establishment again stated that it had work for appellant within his restrictions, but he was refusing to do his job assignment and had not provided a reason or medical information of why he could not do his assignment. On May 2, 2003 the Office paid appellant compensation for the 59 hours he claimed from March 20 to April 1, 2003. On May 6, 2003 the Office advised appellant that his claim for compensation for the period March 20 to April 20, 2003 could not be processed because his claim forms were not completed and certified by the employing establishment. Appellant filed claims for compensation for the period April 22 to May 19, 2003, for the reason that no limited duty was available. The employing establishment certified these claims as accurate.

In a May 28, 2003 report, Dr. Richard Sidell, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation, stated that his musculoskeletal examination of appellant was normal, that magnetic resonance imaging scan done on April 23, 2003 showed no indication of a sUBLuxation at L5, and that appellant's current medical status was that he "has chronic low-level back pain due to preexisting spondylosis and facet joint arthropathy. He has been bothered by this from at least 1992 and his work injury of January 11, 1999 in no way contributed to this diagnosis." Dr. Sidell concluded that appellant had no residuals of the January 11, 1999 injury, that he did "not require any work restrictions either due to the work injury or any other nonwork-related condition," and that he needed no treatment except a home-directed exercise program for back conditioning. In a July 10, 2003 report, Dr. Tremper stated that appellant had improved since he was provided a truck with a swivel seat but that his limited-duty restrictions should continue.

On July 14, 2003 the Office proposed termination of appellant's compensation including medical benefits for the reason that Dr. Sidell's report showed he had no residuals of his employment injury. On July 18, 2003 the Office paid appellant compensation for temporary total disability for April 22 to May 19, 2003.

On August 1, 2003 appellant again filed a claim for compensation for the period February 4 to April 21, 2003. This time the employing establishment completed its side of the

¹ Appellant worked 4.55 hours on March 25, 2003 and claimed only 3.45 hours of compensation for that day.

claim form, stating that appellant was not entitled to compensation, as there was work within his restrictions which he refused to do. Appellant's claim form listing the specific dates claimed indicated that he was claiming about 3 hours each on February 4, 11, 14, 19 and 21 2003 for physical therapy, and 8 hours each scheduled workday from April 2 to 21, 2003 for the reason that no limited duty was available. The employing establishment indicated that appellant's statement was not accurate, as there was work available within his restrictions that he refused to do.

By decision dated September 23, 2003, the Office terminated appellant's compensation, including medical benefits, on the grounds that the weight of the medical evidence established that his employment injury had resolved. On October 3, 2003 the Office paid appellant compensation for temporary total disability from August 20 to September 12, 2003. On December 8, 2003 appellant took disability retirement from the employing establishment.

By decision dated June 17, 2004, the Office found that appellant was not entitled to the 135.10 hours of compensation he claimed between February 4 and April 21, 2003 on the grounds that the employing establishment had not certified his claim forms and that the medical evidence did not support total disability for the period claimed.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.² The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.³ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further treatment.⁴

ANALYSIS -- ISSUE 1

The Office based its termination of appellant's compensation for disability and medical care on the May 28, 2003 report of Dr. Sidell, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation. In this report Dr. Sidell concluded that appellant's chronic low back pain was due to his preexisting spondylosis and facet joint arthropathy, that his January 11, 1999 employment injury did not contribute to this condition, that he had no residuals of his January 11, 1999 employment injury, and that he did not require any work restrictions or medical treatment.

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

⁴ *Furman G. Peake*, 41 ECAB 361 (1990).

Appellant's attending chiropractor, Dr. Tremper, reached opposite conclusions on each point addressed by Dr. Sidell. In March 28 and April 1, 2003 reports, Dr. Tremper concluded that appellant's arthritic changes were not preexisting but rather were caused by his employment injury and his repetitive job duties, that he had sustained a permanent low back injury requiring permanent work restrictions, and that he required continued chiropractic treatment to allow him to continue working.

The Board finds that there is a conflict of medical opinion between Drs. Sidell and Tremper. As there is an unresolved conflict of medical opinion, the Office did not meet its burden of proof to terminate appellant's compensation.⁵

CONCLUSION -- ISSUE 1

The Office did not meet its burden of proof to terminate appellant's compensation due to an unresolved conflict of medical opinion.

LEGAL PRECEDENT -- ISSUE 2

The Board has interpreted section 8103 of the Federal Employees' Compensation Act,⁶ which authorizes medical services to injured employees and allows payment of expenses incidental to securing medical services, as authorizing payment for loss of wages incurred while obtaining medical services. An employee is entitled to disability compensation for any loss of wages incurred during the time he or she receives authorized medical treatment and for loss of wages for time spent incidental to such treatment.⁷

Appellant has the burden of proving by the preponderance of the reliable, probative, and substantial evidence that he or she is disabled for work as a result of an employment injury or condition. This burden includes the necessity of submitting medical opinion evidence, based on a proper factual and medical background, establishing such disability and its relationship to employment.⁸ If an employer does not make limited duty available to an employee who is not capable of working his or her regular duty due to an employment injury, that employee is totally disabled for the job he or she held at the time that he or she was injured.⁹

⁵ *Nathaniel Davis*, 50 ECAB 378 (1999).

⁶ 5 U.S.C. § 8103.

⁷ *Lawrence A. Wilson*, 51 ECAB 684 (2000); *Antonio Mestres*, 48 ECAB 139 (1996); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.5(c) (October 1990).

⁸ *David H. Goss*, 32 ECAB 24 (1980).

⁹ *Jackie B. Wilson*, 39 ECAB 915 (1988). The exception is when the Office finds the employee capable of performing other work in the open labor market and does a loss of wage-earning capacity determination.

ANALYSIS -- ISSUE 2

On each of the first four days for which the Office denied compensation in its June 17, 2004 decision -- February 4, 11, 14, 19 and 21, 2003 -- appellant underwent physical therapy prescribed by his attending chiropractor. Although the case record does not contain an explicit Office authorization of the physical therapy, it was prescribed by an authorized physician to treat the accepted employment injury. The Board finds, therefore, that as there is no medical evidence that this treatment was not for the effects of the accepted injury, the Office is required to pay for the physical therapy¹⁰ and for the loss of wages incurred during the time appellant received this treatment and for loss of wages for time spent incidental to such treatment. Appellant claimed compensation for lost wages for about three hours for each physical therapy session, which does not seem unreasonable and is consistent with the periods of lost wages the Office paid for prior physical therapy sessions.

Appellant has not established that he was totally disabled from April 2 to 21, 2003. He claimed that the employing establishment did not make limited duty available to him during this period,¹¹ but the employing establishment denied this, stating that limited duty within appellant's restrictions was available but that appellant refused to perform the duties he had been performing. As appellant did not submit any corroborating evidence that limited duty was not available, he has not met his burden of proving total disability through the employing establishment's withdrawal of limited duty.

Appellant has also not established through submission of medical evidence that he was totally disabled and unable to perform his limited-duty position from April 2 to 21, 2003. Dr. Tremper stated in March 28 and April 1, 2003 reports that a swivel seat in appellant's postal truck would minimize exacerbations, but did not state that appellant was presently disabled for the limited duty he was performing. Fear of future injury is not a basis for payment of compensation.¹²

CONCLUSION -- ISSUE 2

Appellant is entitled to compensation claimed for loss of wages on February 4, 11, 14, 19 and 21, 2003 when he underwent medical treatment, but is not entitled to compensation for total disability from April 2 to 21, 2003.

¹⁰ *Jacqueline Dickerson*, 37 ECAB 785 (1986).

¹¹ Appellant did not allege that the employing establishment changed his limited-duty assignment such that it exceeded his work tolerance limitations.

¹² *Calvin E. King*, 51 ECAB 394 (2000).

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2003 decision of the Office of Workers' Compensation Programs is reversed. The Office's June 17, 2004 decision is affirmed with regard to the period April 2 to 21, 2003, and reversed and remanded for payment with regard to the period February 4 to 21, 2003.

Issued: January 6, 2005
Washington, DC

David S. Gerson
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Willie T.C. Thomas
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