

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

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J.Z., Appellant)	
)	
and)	Docket No. 13-890
)	Issued: August 12, 2013
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF PRISONS, Florence, CO, Employer)	
_____)	

<i>Appearances:</i> Alan J. Shapiro, Esq., for the appellant Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 5, 2013 appellant, through counsel, timely appealed the January 31, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied wage-loss compensation.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.³

ISSUE

The issue is whether appellant sustained a recurrence of disability on February 7, 2012 causally related to his April 20, 2007 employment injury.

¹ OWCP also issued a December 4, 2012 decision which affirmed the denial of appellant's claim for a schedule award. Counsel did not request Board review of the December 4, 2012 schedule award decision.

² 5 U.S.C. § 8101 *et seq.*

³ The record includes evidence received after the January 31, 2013 decision. As this evidence was not part of the record when OWCP issued its final decision, the Board is precluded from considering it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On April 20, 2007 appellant, then a 43-year-old maintenance worker supervisor, sustained a neck and back injury in the performance of duty. He was stripping wooden forms from concrete and felt a pop when he went to pull a form upward. OWCP accepted appellant's claim for neck sprain, thoracic sprain and left upper back muscle spasm. On January 28, 2009 appellant underwent an anterior cervical discectomy and fusion (C5-6).⁴ OWCP authorized the January 2009 surgery and paid appropriate wage-loss compensation. On March 23, 2009 appellant returned to work as a modified maintenance supervisor.⁵ Effective April 21, 2009, he was released to resume his regular duties without restrictions.⁶

In May 2010, OWCP formally expanded appellant's claim to include additional accepted conditions of aggravation of left foraminal stenosis (C5-6), cervical disc displacement (C6-7) and cervical radiculitis.

As a maintenance worker supervisor, appellant supervised and trained inmate workers in various phases associated with the construction, repair, maintenance and renovation of buildings and related structures, grounds, fixtures and utilities. He was also responsible for maintaining security of the institution. Appellant's specific correctional responsibilities included custody and supervision of inmates, responding to emergencies and institution disturbances, participating in fog and escape patrols and assuming correctional officer posts when necessary. He was required to shakedown inmates and conduct visual searches in their work or living area for contraband. Appellant was expected to be prepared and trained to use physical control in situations where necessary, such as fights among inmates, assaults on staff and riots or escape attempts. His position was designated a law enforcement position and, when necessary, he was authorized to carry firearms and exercise appropriate force to establish and/or maintain control over individuals. Appellant's duties required frequent direct contact with individuals in detention.

In a report dated November 8, 2011, Dr. Robert D. McCurry, a Board-certified family practitioner, advised appellant not to return to the Federal Correctional Complex institutional grounds or work around inmates due to his job-related injury.⁷ He reported various complaints and limitations with respect to appellant's neck, shoulder, upper back and upper extremities. Dr. McCurry highlighted appellant's various correctional responsibilities and noted that when appellant responded to emergency situations, he was unable to resume his full responsibilities due to his work-related injury. He explained that if appellant were to be hit, punched or struck in the head, he could suffer extreme pain and serious permanent injury because his strength and mobility were no longer as effective as they once were.

⁴ Dr. Gary Ghiselli, a Board-certified orthopedic surgeon, performed the January 28, 2009 procedure.

⁵ Appellant's restrictions at the time included no overhead work, no responding to body alarm (emergency situations) and no lifting greater than 25 pounds.

⁶ Between June 2009 and February 2011, OWCP paid appropriate wage-loss compensation (26.5 hours) for appellant's attendance at various medical appointments.

⁷ FCC, Florence, CO consists of three main facilities: a medium security Federal Correctional Institution (FCI); a high security U.S. Penitentiary (USP); and an Administrative Maximum (ADMAX) USP, with a minimum security satellite prison camp. Appellant was regularly assigned to the medium security FCI.

Appellant stopped work and filed a claim for compensation (Form CA-7) for the period November 9 to 19, 2011. OWCP paid wage-loss compensation (52 hours) for the claimed period.

In December 2011, Dr. Ghiselli, appellant's surgeon, and Dr. McCurry agreed that pending further evaluation, appellant could temporarily return to work as a full-time maintenance supervisor at the minimum camp.⁸ Effective January 13, 2012, appellant returned to work on restricted duty.⁹

On February 2, 2012 Dr. Ghiselli conducted an annual follow-up examination which included a cervical magnetic resonance imaging (MRI) scan. In a February 7, 2012 report, he noted that appellant was status post C5-6 anterior cervical discectomy and fusion performed in January 2009. Dr. Ghiselli currently complained of neck pain and intermittent numbness into both upper extremities in an ulnar-type distribution. Appellant's current symptoms had increased over the past six months. Dr. Ghiselli noted that appellant experienced pain with any overhead activity, especially with any pushing or pulling. He stated that the February 2, 2012 MRI scan showed a solid fusion at the C5-6 level. Dr. Ghiselli also noted slight degeneration at C4-5 and mild left foraminal narrowing at C6-7. On physical examination, he reported a mildly positive Tinel's sign in both elbows. Upper extremity motor strength muscle testing was 5/5, bilaterally. As to whether appellant was able to return to work at a correctional facility, Dr. Ghiselli stated that, due to the high risk of injury, he would not recommend appellant's returning to full duty in a correctional facility. He explained that appellant's compromised cervical spine would certainly increase the chance of injury. Dr. Ghiselli further noted his concurrence with Dr. McCurry's recommendations.

Appellant stopped work on February 7, 2012. He used sick/annual leave through March 29, 2012, and then filed a claim for wage-loss compensation (Form CA-7) beginning March 30, 2012. The employing establishment subsequently withdrew appellant's light-duty assignment in view of Dr. Ghiselli's February 7, 2012 report.

In a February 27, 2012 report (Form CA-16), Dr. McCurry diagnosed cervical spinal stenosis and cervical degenerative disc disease. He indicated that appellant was on permanent restricted duty as of November 8, 2011. In an April 10, 2012 Form CA-16, Dr. McCurry diagnosed cervical disc disease and noted that appellant was totally disabled as of February 14, 2012.

On June 5, 2012 Dr. Ghiselli treated appellant for ongoing neck problems related to his April 20, 2007 employment injury. His diagnoses included degenerative disc disease,

⁸ Apart from noting that appellant should be assigned to the minimum security camp, neither physician identified any specific physical limitations. Appellant reportedly advised his physicians that working the camp alongside nonviolent inmates was preferable to working at USP because he could use the camp inmates to perform 100 percent of the maintenance work unlike at USP.

⁹ On January 25, 2012, the employing establishment advised OWCP *via* telephone that appellant had returned to work. The CA-110 notes indicate a return to "restricted duty," but do not otherwise describe appellant's particular assigned duties as of January 13, 2012. In subsequent correspondence dated April 3, 2012, the employing establishment indicated that appellant returned to work in a modified capacity on December 29, 2011. However, the particular duties and/or modifications were not described.

displacement of cervical disc, ulnar nerve lesion and bilateral contracture of palmar fascia (Dupuytren's contracture). Dr. Ghiselli stated that he strongly believed it would be best that appellant not be placed into a correctional facility due to his neck degeneration and his previous fusion.

In a decision dated July 18, 2012, OWCP denied appellant's claim for wage-loss compensation beginning March 30, 2012. It found that it was insufficient to establish total disability as his physicians premised their opinions on fear of possible future injury.

Appellant requested a hearing which was held on November 14, 2012.

On July 17, 2012 Dr. Kenneth A. Pettine, a Board-certified orthopedic surgeon, examined appellant. Dr. Pettine noted that appellant had a fusion at C5-6 following an April 2007 work-related injury and had since developed adjacent level herniations at C4-5 and C6-7. On physical examination, appellant had 50 percent loss of cervical motion and pain to palpation in the paraspinal/suboccipital area. Dr. Pettine also reported a positive Spurling's compression test and associated radiculopathy in appellant's arms. He recommended artificial disc replacements at C4-5 and C6-7. Dr. Pettine noted that it was not safe for appellant to be in a correctional facility environment.

In a November 8, 2012 report, Dr. Pettine noted that he could not explain appellant's inability to work from March to July 14, 2012 because he did not treat him until July 17, 2012. He reiterated that it was difficult for appellant to continue working as a correctional officer due to the increased pain, especially with any lifting. There was concern that appellant could exacerbate his symptoms if there were to be an incident with an inmate.

By decision dated January 31, 2013, the hearing representative found that, while the employing establishment withdrew appellant's light-duty assignment, he did not establish disability from performing his regular duties as a maintenance worker supervisor. Concern over possible future injury was not an appropriate basis for awarding wage-loss compensation. Consequently, appellant failed to establish a recurrence of disability beginning February 7, 2012, and was not entitled to compensation commencing March 30, 2012.

LEGAL PRECEDENT

A recurrence of disability includes an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn -- except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or other downsizing or where a loss of wage-earning capacity determination is in place.¹⁰ Absent a formal wage-earning capacity determination and assuming the light-duty position was not withdrawn for cause or because of downsizing, the employee would be entitled to compensation based upon a showing of continuing injury-related disability for regular duty.¹¹

¹⁰ 20 C.F.R. §§ 10.5(x) and 10.509; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013).

¹¹ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1500.6a(4).

ANALYSIS

Prior to appellant's February 7, 2012 work stoppage, the employing establishment accommodated his restrictions in accordance with the December 2011 advice of Dr. McCurry and Dr. Ghiselli. He was assigned to restricted duty. Appellant stopped work on February 7, 2012 based on the advice of his physician. The employing establishment subsequently withdrew appellant's assignment. Given that the light-duty position has been withdrawn, appellant could be entitled to compensation based upon a showing that he is disabled for work.¹²

In a February 7, 2012 report, Dr. Ghiselli advised appellant against returning to full duty in a correctional facility. He explained that appellant's compromised cervical spine would increase the chance of injury. Dr. Ghiselli's June 5, 2012 report similarly advised against returning to work in a correctional facility. Medical limitations based solely on the fear of a possible future injury are insufficient to support payment of continuing compensation.¹³ The Board has held that the possibility of future injury does not constitute a basis for the payment of compensation.¹⁴

Dr. McCurry generally advised against working on institutional grounds or around inmates. In a November 8, 2011 report, he explained that if appellant were to be hit, punched or struck in the head, he could suffer extreme pain and serious permanent injury. Dr. McCurry's February 27, 2012 CA-16 noted that appellant was on permanent restricted duty as of November 8, 2011, but he did not otherwise describe appellant's physical limitations. In an April 10, 2012 Form CA-16, Dr. McCurry noted that appellant was totally disabled as of February 14, 2012; but the physician did not explain his finding of total disability. As noted, limitations based solely on the fear of a possible future injury are insufficient.¹⁵

Dr. Pettine's July 17 and November 8, 2012 reports are similarly deficient for purposes of establishing appellant's disability for work on or after February 7, 2012. He stated generally that it was not safe for appellant to be in a correctional facility environment. Dr. Pettine subsequently stated that he was not in a position to address appellant's work limitations prior to his July 17, 2012 examination. He commented that it was difficult for appellant to continue work as a correctional officer due to the increased pain, especially with any lifting. Dr. Pettine also noted concern that appellant could exacerbate his symptoms if there were to be an incident with an inmate.

The Board notes that Dr. Pettine did not provide a history of injury other than to note that appellant had a work-related injury in April 2007. Dr. Pettine did not set forth appellant's employment duties as he incorrectly identified appellant as a "correctional officer" rather than a maintenance worker supervisor. He did not adequately address disability for work other than

¹² *Id.*

¹³ 20 C.F.R. § 10.501(a)(3).

¹⁴ See *Calvin E. King*, 51 ECAB 394 (2000); *Carlos A. Marrero*, 50 ECAB 117 (1998); *William A. Kandel*, 43 ECAB 1011 (1992).

¹⁵ *Id.*

noting that appellant could exacerbate his symptoms if there were to be a future incident with an inmate.

The reports from Drs. Ghiselli, McCurry and Pettine are insufficient to establish appellant's claimed recurrence of disability beginning February 7, 2012. Consequently, OWCP properly denied wage-loss compensation commencing March 30, 2012.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision.¹⁶

CONCLUSION

Appellant failed to establish a recurrence of disability beginning February 7, 2012.

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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

¹⁶ See 5 U.S.C. § 8128(a); 20 C.F.R. §§ 10.605, 10.607.