United States Department of Labor
Employees' Compensation Appeals Board

FRANK FLEMING, Appellant	)	
and	)	**Docket No. 03-2234**
	)	**Issued: April 28, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Riverside, CA, Employer	)	

Appearances:
Max Gest, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 7, 2003 appellant, through counsel, filed a timely appeal from the Office of Workers' Compensation Programs' decision dated June 20, 2003, which affirmed a previous denial of temporary total disability causally related to an accepted work-related injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether appellant was entitled to wage-loss compensation for the period May 18 through June 14, 2002 and beyond, due to his accepted November 21, 2001 employment injury. On appeal his counsel contends that he is entitled to disability compensation benefits for the period November 19, 2001 to the present with the only exception being the two half days he worked on May 8 and June 13, 2002.

FACTUAL HISTORY

On December 11, 2001 appellant, then a 54-year-old modified rehabilitation distribution clerk, filed an occupational disease claim alleging that on November 19, 2001 he suffered low

back pain and muscle spasms radiating down both legs as a result of his federal employment. On January 9, 2002 the Office accepted the claim for a lumbar sprain, however, it determined that the injury occurred over one single incident and thus, considered it a traumatic injury rather than an occupational disease.[1] The Office informed appellant that, if his injury resulted in any disability for work or the need for medical treatment, he was to claim compensation on Form CA-7. Appellant stopped work on the day of the incident and was authorized continuation of pay. He utilized sick leave following the expiration of his continuation of pay.[2]

In April 2002 the employing establishment faxed a request for limited duty for appellant to Dr. Henrique DaCosta, his attending physician, and limitations were given for his return to work. In a report dated May 7, 2002, Dr. DaCosta stated: "I received a fax showing that initially I put [appellant] off [work] for 30 days. However this modified duty that I just received a fax on I believe we could try to see if he can tolerate it." Appellant accepted the limited-duty clerk position and returned to work for five hours on May 8, 2002. He stopped work again that same day due to pain.

The employing establishment consulted Dr. DaCosta again and it created a second limited-duty position for appellant on June 12, 2002. He briefly returned to work on June 13, 2002 and claimed to have watched a training video for 1.5 hours and then had to leave due to back spasm and pain. Dr. DaCosta issued new restrictions in a June 14, 2002 report and stated:

> "I dictated a permanent and stationery report for [appellant] regarding his lower back condition and also his right carpal tunnel. Apparently with the modified job offered to him through the [employing establishment], it was not light enough to accommodate his condition…." What I suggest is to revise the last DMI [document of medical impairment] that was given to [appellant] and this form would include no bending, no driving, no kneeling, no pushing or pulling, no squatting, no twisting and intermittent change from sitting, standing and walking every 10 minutes to accommodate the need for his low back pain. Also he should have time to do some stretching exercises for his lower back. This could be accommodated in 30 minutes every 2 hours. For such an exercise he needs a special table for that. It would be physical therapy padded table for stretching exercises of the lower back…. "I believe that with all of these restrictions, [appellant] will be able to perform a modified duty."

On June 25, 2002 the employing establishment advised appellant that it could not accommodate his new restrictions because his physician required that a padded table be provided for him for stretching, thus, it could no longer offer him a limited-duty position. He retired on disability effective January 28, 2003.

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[1] The record contains evidence that appellant sustained at least one previous lumbar strain which occurred on November 22, 1991. He testified in an oral hearing that he sustained several work-related back injuries beginning in 1989. The record reflects that appellant also developed right carpal tunnel syndrome with a date of injury of April 1, 1990.

[2] The record does not reflect that appellant ever filed a CA-7 claim for disability related to the November 19, 2001 work injury or that wage-loss compensation was ever paid to him in that regard.

On May 17, 2002 appellant filed a Form CA-7, claim for compensation requesting wage-loss compensation for the period May 18 through June 14, 2002. By decision dated May 30, 2002, the Office denied appellant's claim for wage-loss compensation on the grounds that the evidence failed to support that he was not capable of performing the limited-duty position for that period. The Office found that the May 7, 2002 report of Dr. DaCosta did not support that he was incapable of performing the limited-duty position.

In a letter dated June 15, 2002, appellant requested an oral hearing. He submitted additional evidence to the Office, including a CA-7, claim for compensation for indefinite wage loss beginning June 7, 2002 and medical reports.

Appellant's counsel submitted a report dated June 7, 2002, in which Dr. DaCosta diagnosed low back pain, moderately severe and recurrent and determined the condition permanent. He provided work restrictions of no bending of the trunk, no prolonged sitting, no kneeling, squatting and twisting and no lifting beyond 10 pounds and stated: "[Appellant] is in no condition to resume his work routine prior to the injury of November 19, 2001." [His] counsel also submitted a DMI dated June 7, 2002 by Dr. DaCosta, which stated: "[Appellant] is permanently disabled regarding his lower back condition.

An oral hearing was held on January 30, 2003. Appellant, presented with his attorney, provided testimony and submitted additional evidence to the record. His counsel noted that he wished to expand the claimed period of wage loss as continuing forward from June 14, 2002.

By decision dated June 20, 2003, an Office hearing representative found that the medical opinion evidence of record did not support that appellant was temporarily or permanently totally disabled for the claimed period or beyond June 14, 2002 causally related to the accepted employment injury. The hearing representative found that appellant had not submitted sufficient medical evidence to establish how or why the conditions of the job were beyond his physical capabilities or how his disability had worsened, thereby preventing him from performing the limited-duty job. The Office hearing representative affirmed the May 30, 2002 decision.

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 of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty.[3] This burden includes the necessity of 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

[3] *See Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

employment injury and supports that conclusion with sound medical rationale.[4] Where no such rationale is present, medical evidence is of diminished probative value.[5]

ANALYSIS

In the instant case, appellant was released to light duty following the November 19, 2001 employment injury on May 7, 2002 by Dr. DaCosta, his attending physician, who indicated that he could work light duty if he could tolerate it. He only worked for two partial days on May 8 and June 13, 2002 due to alleged pain and spasms of the lower back. In a report dated June 14, 2002, Dr. DaCosta revised his restrictions and stated that, with regard to his lumbar condition, appellant should not engage in any bending, driving, kneeling, pushing, pulling, squatting or twisting and that he should make intermittent changes from sitting, standing and walking every 10 minutes to accommodate the need for his low back pain. Dr. DaCosta also indicated that the employing establishment should accommodate appellant with a special physical therapy padded table for periodic stretching exercises of the lower back for 30 minutes of every 2 hours at work. He concluded: "I believe that, with all of these restrictions, [appellant] will be able to perform a modified duty."

On June 25, 2002 the employing establishment determined that it could no longer offer appellant a limited-duty position because it was unable to provide him with the required padded table for periodic stretching during his workday. There remained no position at the employing establishment to which appellant could return within his medical restrictions. As no limited duty was available to appellant after June 25, 2002, the nature and extent of the limited-duty requirements changed so that he could no longer perform the limited-duty position.[6] Appellant retired on disability effective January 28, 2003.

The Office hearing representative's decision dated June 20, 2003 found that appellant had not submitted sufficient medical evidence to establish how or why the conditions of the job were beyond his physical capabilities or how his disability had worsened thereby preventing him from performing the limited-duty job. The Board addressed a similar argument in *Arthur L. Gunning* and, in finding a recurrence of total disability, stated:

> "The Office argues that appellant did not have a recurrence of disability because he did not have a decrease in his ability to work, but was terminated only because the employing establishment refused to allow him to continue to work under his work restrictions. This argument confuses the definition of disability, allowing the employing establishment to say appellant is unable to work because of work restrictions arising from his employment injury, yet also allowing the Office to say there is no recurrence of disability because there is no change in his work restrictions."[7]

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[4] *See Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[5] *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[6] *See Jackie B. Wilson*, 39 ECAB 915 (1988).

[7] 33 ECAB 1808, at 1817 (1982).

Appellant's employment injury disabled him from the position of modified rehabilitation distribution clerk he held at the time of this injury on November 19, 2001. He was able to return to work in a limited-duty clerk position for 5 hours on May 8, 2000 and 1.5 hours on June 13, 2002. The employing establishment determined based on an examination by appellant's physician on June 14, 2002 that it was unable to provide him with a padded table for periodic stretching during his work day as medically required. When the employing establishment essentially removed him from his limited-duty position on June 25, 2002, appellant sustained a recurrence of total disability.

This situation is addressed by the Office's procedure manual, which states that a recurrence of disability includes a work stoppage caused by "withdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury. This withdrawal must have occurred for reasons other than misconduct or nonperformance of job duties."[8] The employing establishment terminated appellant's limited-duty assignment due to his inability to perform his position due to residuals of his employment injury. Appellant has met his burden of proof in establishing a recurrence of disability for the period claimed from May 18 through June 13, 2002, in that he could not perform the duties of the limited-duty position. Dr. DaCosta indicated in his May 7, 2002 report, that appellant was only released to the limited-duty position if he could "tolerate it" and acknowledged in his June 14, 2002 report, that "apparently with the modified job offered to him through the [employing establishment] it was not light enough to accommodate his condition…." Furthermore, the employing establishment's action of refusing to accommodate appellant's restrictions created a recurrence of total disability beginning June 25, 2002.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that his November 19, 2001 employment injury caused total disability from work for the claimed period May 18 to June 14, 2002 and beyond.

[8] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Recurrences*, Chapter 2.1500.3b (January 1995).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 20, 2003 is reversed.

Issued: April 28, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member