United States Department of Labor
Employees' Compensation Appeals Board

W.E., Appellant	)	
and	)	**Docket No. 09-1614**
	)	**Issued: April 8, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Waterford, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 10, 2009 appellant, through his attorney, filed a timely appeal from an August 12, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim for compensation and a February 27, 2009 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he was disabled beginning June 27, 2001 due to his employment injury; and (2) whether the Office properly denied his request for further review of the merits of his claim under 5 U.S.C. § 8128.

FACTUAL HISTORY[1]

On October 25, 1999 appellant, then a 45-year-old letter carrier, filed a claim for an injury to his lower back occurring on that date in the performance of duty. The Office accepted the claim for low back strain and a herniated nucleus pulposus at L5-S1. Appellant worked limited duty following his injury. The Office also accepted that he sustained a recurrence of disability on February 1, 2000 and paid him compensation for intermittent lost wages from that date until March 3, 2000.

On May 23, 2000 appellant resigned from the employing establishment. He provided as the reason for his resignation that he could not work for the postmaster, George Dennison. Appellant related that Mr. Dennison did not assist him with his work injury and that he experienced high blood pressure from stress.

By decision dated November 16, 2000, the Office terminated appellant's compensation benefits on the grounds that he abandoned suitable work under 5 U.S.C. § 8106(c). Following a preliminary review, in a decision dated April 10, 2001, a hearing representative reversed the November 16, 2000 decision. She found that the Office had not followed its procedures in terminating his compensation for abandoning suitable work.

On October 27, 2001 appellant accepted a limited-duty job offer from the employing establishment. In a letter dated October 31, 2001, Mr. Dennison alleged that appellant had harassed him after he resigned from work. On October 31, 2001 the employing establishment rescinded the October 22, 2001 job offer because of his harassment of the postmaster.

On December 14, 2001 the Office notified appellant of its proposed termination of his compensation effective November 3, 2001. It found that the employing establishment would have provided limited-duty employment if it had not withdrawn the offer of employment due to his misconduct.[2]

On November 22, 2002 appellant filed a claim for compensation from May 23, 2000 to October 18, 2002. On December 17, 2004 the Office paid him compensation in the amount of $32,595.38 for the period May 10, 2000 to June 27, 2001.

On September 26, 2006 appellant's attorney requested compensation from May 23, 2002 to the present. On October 2, 2006 the Office notified him that it had properly terminated appellant's compensation on December 14, 2001. By letter dated October 13, 2006, counsel informed the Office that the December 14, 2001 proposed termination of compensation was never finalized. On December 4, 2006 appellant described alleged wrongful actions taken towards him by Mr. Dennison.

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[1] In a letter dated December 5, 2000, appellant informed the Office that he resigned due to stress and not due to his work injury.

[2] In a December 21, 2001 response, appellant's attorney noted that he had accepted the offer of limited-duty employment and that the proposed termination under section 8106(c) was therefore improper. In a letter dated December 27, 2001, appellant asserted that he resigned due to the "abusive nature of Mr. Dennison concerning my disability."

By letter dated April 27, 2007, the employing establishment noted that appellant had resigned on May 23, 2000. It questioned why the Office had paid him compensation from May 10, 2000 to June 27, 2001 given his resignation. The employing establishment requested that the Office determine whether appellant had received an overpayment of compensation as he lost time from work due to his resignation rather than disability from employment.

By decision dated March 21, 2008, the Office denied appellant's claim for compensation after finding that the employing establishment withdrew his light-duty job for cause.

On April 18, 2008 appellant requested a review of the written record.[3] He asserted that he did not harass Mr. Dennison but rather was harassed by Mr. Dennison. Appellant maintained that he resigned while working limited duty because of Mr. Dennison's harassment. By decision dated August 12, 2008, the hearing representative affirmed the March 21, 2008 decision. He determined that the Office properly denied appellant's claim for compensation because he received an offer of light-duty work that was withdrawn for cause.

On December 8, 2008 appellant, through his attorney, requested reconsideration. He argued that there was no proof that appellant had harassed Mr. Dennison and further asserted that the employing establishment's withdrawal of the limited-duty position was not justified.

By decision dated February 27, 2009, the Office denied appellant's request for reconsideration after finding that the evidence submitted was insufficient to warrant reopening the case for further review of the merits under section 8128.

On appeal appellant's attorney asserts that the Office, in its March 21, 2008 decision, terminated his compensation because he abandoned suitable work. He argued that the Office did not establish that the offered position was medically and vocationally suitable. The attorney also contended that the Office acknowledged that appellant had established a recurrence of disability due to the withdrawal of his limited duty as it paid him compensation for disability from May 10, 2000 through June 27, 2001. He argued that appellant at a minimum is entitled to compensation from June 28, 2001 through March 21, 2008.

LEGAL PRECEDENT

Where an employee, who is disabled from the job he or she 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 has the burden to establish by the weight of the reliable, probative and substantial 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.[4]

[3] In a letter dated April 17, 2008, appellant's wife described mistreatment by Mr. Dennison.

[4] *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

Office regulations provide that 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.[5] This term also means an inability to work that takes place 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 or her established physical limitations.[6]

ANALYSIS

The Board finds that the Office did not properly adjudicate the issue presented. The Office accepted that appellant sustained low back strain and a herniated nucleus pulposus at L5-S1 due to an October 25, 1999 employment. Appellant worked in a limited-duty position until May 23, 2000, when he voluntarily resigned from employment. In order to establish entitlement to compensation, he must show that he sustained an employment-related recurrence of disability based on either the withdrawal of his light-duty assignment or because the medical evidence establishes that he was disabled from work due to his accepted injury.[7] At the time that appellant voluntarily resigned, his light-duty position remained available.[8] Consequently, he has not established a recurrence of disability based on the withdrawal of his limited-duty position.

The next issue to be determined is whether the medical evidence establishes that appellant was disabled from his limited-duty employment beginning June 27, 2001 due to his accepted October 25, 1999 employment injury.[9] The Office did not consider the medical evidence in adjudicating his claim for compensation. Instead, it determined that appellant was not entitled to compensation because the employing establishment withdrew a job offer for cause that it made after he voluntarily resigned from work. However, the fact that the employing establishment made and then withdrew a job offer to appellant after his voluntary resignation is not relevant in this case. Appellant did not return to work after his resignation and at the time of his resignation his light-duty position remained available. Consequently, he must provide medical evidence establishing that he was disabled due to a worsening of his accepted work-related conditions of low back strain and herniated disc.[10] The case will be remanded for the

[5] 20 C.F.R. § 10.5(x).

[6] *Id*.

[7] *Id.*; *see also J.R.*, 58 ECAB 124 (2006).

[8] A recurrence of disability includes the withdrawal of a light-duty assignment made to accommodate the work-related condition, for reasons other than misconduct or nonperformance. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997); *see also Steven A. Andersen*, 53 ECAB 367 (2002).

[9] The Board notes that the Office paid appellant compensation for disability from My 10, 2000 to June 27, 2001. It is not clear whether the Office considered the medical evidence in finding him entitled to compensation for disability.

[10] *See Cecelia M. Corley*, 56 ECAB 662 (2005); *Jackie D. West*, *supra* note 4.

Office to adjudicate whether the medical evidence establishes that appellant was disabled from employment due to his accepted work injury subsequent to his resignation.[11]

CONCLUSION

The Board finds that the case is not in posture for decision.[12]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 27, 2009 and August 12, 2008 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 8, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[11] In view of the Board's disposition of the merits, it will not address the arguments raised by appellant's attorney on appeal.

[12] In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for reconsideration under section 8128 is moot.