United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 09-2130**
	)	**Issued: July 15, 2010**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, LOS ANGELES INTERNATIONAL AIRPORT, Los Angeles, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 19, 2009 appellant filed a timely appeal from a July 22, 2009 decision of the Office of Workers' Compensation Programs that denied his claim for disability compensation. 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 is whether the Office properly found that appellant is not entitled to disability compensation beginning September 11, 2008 and continuing. On appeal appellant contends that he was not offered a limited-duty position on September 12, 2008, as asserted by the employing establishment.

FACTUAL HISTORY

On August 28, 2003 appellant, then a 33-year-old transportation security screener, sustained employment-related right shoulder trapezius and lumbar strains and on January 23, 2004 a lumbosacral strain. He stopped work that day and returned to limited duty for brief periods in 2004. On March 13, 2005 appellant returned to a modified transportation security screener position.[1]

In March 2006, the Office referred appellant to Dr. William C. Boeck, Jr., Board-certified in orthopedic surgery, for a second opinion evaluation. By report dated April 10, 2006, Dr. Boeck noted his review of the medical record, the history of injury and appellant's complaint of low back pain radiating down to the left calf. He provided findings on physical examination and diagnosed lumbosacral strain and MRI scan evidence of lumbosacral degenerative disc disease. Dr. Boeck advised that appellant's work-related condition had resolved and that he could perform his usual job duties.

In a June 12, 2007 report, Dr. David M. Wall, an attending Board-certified orthopedic surgeon, advised that he disagreed with Dr. Boeck's opinion that appellant's work-related condition had resolved. He opined that appellant's job duties caused an aggravation of his symptoms and that he could not return to his date-of-injury position that required heavy, repetitive lifting. Dr. Boeck advised that appellant could work with restrictions of no lifting over 25 pounds, no repetitive stooping, bending or twisting and limited sitting, standing and walking. On August 6, 2007 appellant accepted a modified transportation security officer position.

In September 2007, the Office referred appellant to Dr. Joseph Pierce Conaty, a Board-certified orthopedic surgeon, for a second opinion evaluation.[2] In a September 25, 2007 report, Dr. Conaty noted his review of the statement of accepted facts and medical record, and the history of injury as provided by appellant. He stated that appellant indicated that pain was not a problem and that he wanted to return to his customary occupation without restrictions. Dr. Conaty provided findings on physical examination and diagnosed lumbosacral strain, resolved, and preexisting degenerative disc disease of the lumbosacral spine. He opined that there were no injury-related factors of disability based on the lack of objective findings and concluded that, if appellant returned to his date-of-injury job, it would eventually result in another episode of back pain. Dr. Conaty advised that maximum medical improvement had been reached and that appellant could work eight hours daily with permanent restrictions of four hours walking and standing; two hours twisting, bending and stooping; and pushing, pulling, lifting and squatting limited to four hours a day with a 25-pound weight restriction.

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[1] A July 2, 2004 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated degenerative disc disease at L5-S1 with disc protrusion. In September 2004, the Office referred appellant to Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 6, 2004 report, Dr. Bleecker diagnosed lumbosacral strain with degenerative disc disease at L5-S1 and advised that appellant could work eight hours daily with no twisting, bending or stooping and a 25-pound lifting restriction. On October 20, 2004 he further diagnosed degenerative arthritis of both hips.

[2] Appellant did not keep the initial appointment, scheduled for September 11, 2007, and the Office proposed to suspend his compensation. He attended a rescheduled appointment on September 24, 2007.

By report dated October 29, 2007, Dr. Wall noted that appellant tried to return to full duty and was having an increase in pain. He advised that he could not work full duty but could work with restrictions of no lifting over 25 pounds; no repetitive bending, twisting, kneeling or stooping; no prolonged standing and no overtime work for three months.

On November 15, 2007 the Office proposed to terminate appellant's compensation benefits on the grounds that the medical evidence, as characterized by Dr. Conaty's report, established that his accepted conditions had resolved. A lumbar spine MRI scan on November 16, 2007 demonstrated a disc protrusion at L5-S1 with no significant central stenosis or nerve root impingement. By decision dated December 27, 2007, the Office finalized the termination. In reports dated December 28, 2007 and January 9, 2008, Dr. Wall noted that appellant had not worked for two weeks and had complaints of back and leg pain. He provided the same restrictions and advised that appellant was disabled from work until February 4, 2008 and could not stoop, bend or twist, and could not sit or stand for prolonged periods.

On January 22, 2008 appellant requested reconsideration and submitted a December 7, 2007 report in which Dr. Wall provided examination findings and diagnosed lumbosacral sprain, not resolved; disc bulge with stenosis and bilateral leg pain, left more severe than right. Dr. Wall noted his disagreement with Dr. Conaty's September 25, 2007 report, stating that appellant should continue to work restricted duty. In a January 29, 2008 report, Dr. John B. Dorsey, an attending Board-certified orthopedic surgeon, noted his review of the statement of accepted facts, medical records, and history of injury and appellant's complaint of constant low back pain with stiffness and intermittent leg pain. He provided findings on physical examination including diminished lumbosacral spine range of motion. Dr. Dorsey diagnosed lumbar spine strain with disc herniation at L5-S1 superimposed upon preexisting degenerative disc disease and advised that the disc protrusion was a result of the January 23, 2004 lifting injury. He recommended continued care with Dr. Wall. In a March 20, 2008 report, Dr. Wall noted that appellant was not working and had to walk hunched over due to back and leg pain. Appellant's disability retirement was approved on August 26, 2008.

By decision dated September 5, 2008, the Office vacated the December 27, 2007 decision and accepted the expanded diagnosis of disc bulge at L5-S1. It found that appellant could work modified duty and advised that the case remained open for medical treatment. As instructed by the Office, appellant submitted a Form CA-7, claim for lost wages. In a September 12, 2008 letter, the employing establishment offered him a temporary modified position with restrictions of no prolonged standing, walking, stooping, bending and twisting and no lifting over 25 pounds. On September 15, 2008 the Office informed appellant that his claim for compensation could not be paid and advised him of the evidence needed to support his claim. By report dated September 24, 2008, Dr. Wall noted that appellant had retired and advised that he was disabled. In a September 29, 2008 letter, appellant stated that he stopped work on December 27, 2007 because he was informed that he could only work at his full-duty position. He attached an October 4, 2007 job offer that he accepted and was within the restrictions provided by Dr. Wall.

In an October 21, 2008 decision, the Office found that appellant had not established a recurrence of total disability beginning on December 27, 2007.[3] In an undated letter, Mary Young, workers' compensation coordinator at the employing establishment, advised that appellant was entitled to monetary compensation for the period December 27, 2007 through September 4, 2008 because he was not allowed to work limited duty during that period. She further stated, "upon receipt of the September 5, 2008 [decision], the Agency contacted [appellant] to offer him a limited[-]duty job. He informed the Agency that he had already been approved for disability retirement effective September 5, 2008." In a November 17, 2008 report, Dr. Wall advised that appellant could not work due to severe to moderate back pain. On December 23, 2008 appellant requested reconsideration, stating that the employing establishment did not let him work during the time his case was under appeal and did not offer him modified duties during that period. He continued to submit CA-7 forms, claims for compensation.

In reports dated May 20 and June 22, 2009, Dr. Wall advised that he had been treating appellant since January 26, 2004 and reported appellant's subjective complaint of constant right and left side low back pain radiating into the gluteal area and legs, worse on the left, aggravated with increased activity and repetitive movements. He provided examination findings and diagnosed low back and left leg pain and a central disc protrusion and advised that appellant was released to limited duty on February 4, 2008 with restrictions of eight-hour shifts; no prolonged sitting, standing or walking; no stooping, bending or twisting and no lifting over 25 pounds. Dr. Wall stated that these restrictions continued until September 24, 2008 when appellant became totally disabled. He advised that appellant's total disability would continue until June 22, 2009.

On May 30, 2009 appellant informed the Office that the employing establishment did not offer him a light-duty position on September 12, 2008. By decision dated July 22, 2009, the Office modified the October 21, 2008 decision to show that compensation be paid for the period December 27, 2007 to September 11, 2008. It found that Dr. Wall's opinion was not rationalized and that, because work appropriate to appellant's limitations was available beginning on September 12, 2008, he was not entitled to further monetary compensation.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[4] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5] The fact that the Office accepts a claim for a specified period of disability does not shift the burden of proof to the claimant to show that he or she is still disabled. The burden is on the Office to

[3] The Board notes that the Office misidentified Dr. Dorsey as a referee physician when he was an attending physician.

[4] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[5] *Id.*

demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.[6]

Under section 8116 of the Federal Employees' Compensation Act,[7] an injured employee must make an election between compensation for disability and retirement pay.[8] Office procedures provide that, when an election is required in a disability case, the Office must provide an Office Form CA-1102 to the employee.[9] This form provides information about the rate of compensation payable and the employee's right to elect the more advantageous benefit.[10]

ANALYSIS

By its September 5, 2008 decision, the Office vacated a December 27, 2007 decision that terminated appellant's compensation benefits and expanded the accepted conditions to include a disc bulge at L5-S1. While the Office vacated the termination by this decision, it did not reinstate appellant's compensation following the September 5, 2008 decision.[11] Appellant was entitled to compensation at that time and, since his retirement had become effective August 26, 2008, as required by Office procedures, the Office should have afforded him the opportunity to elect either workers' compensation or retirement benefits by forwarding to him an Office Form CA-1102.[12] This was not done. Although by the July 22, 2009 decision appellant was awarded compensation for the period December 27, 2007 to September 11, 2008, the Office improperly placed the burden of proof on him from the time of the September 5, 2008 decision. Since the Office had vacated the September 5, 2008 termination, the burden was again on the Office to terminate benefits, and the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment. The burden of proof on the Office includes the necessity of furnishing rationalized medical opinion evidence which is based on a proper factual and medical history,[13] and pretermination notice is required.[14]

CONCLUSION

The Board finds that the Office failed to forward Form CA-1102 election form to appellant following its September 8, 2008 decision in which its December 27, 2007 decision

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[6] *Elsie L. Price*, 54 ECAB 734 (2003).

[7] 5 U.S.C. §§ 8101-8193.

[8] *Id*. at § 8106; *R.H.*, 60 ECAB ____ (Docket No. 08-2025, issued July 20, 2009.

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Obtaining Elections Between OWCP and OPM Benefits*, Chapter 2.1000.5(b) (February 1995).

[10] *Id*.

[11] *See Teresa B. Russ*, 47 ECAB 444 (1996).

[12] *Supra* note 9.

[13] *T.P.*, 58 ECAB 524 (2007).

[14] *See Lan Thi Do*, 46 ECAB 366 (1994).

terminating appellant's compensation benefits was vacated. The Board further finds that the Office improperly placed the burden of proof on appellant to establish continuing disability after September 11, 2008.[15]

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2009 and October 21, 2008 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: July 15, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[15] Appellant asserted on appeal that the employing establishment did not provide him a job offer on September 12, 2008. The record, however, contains a temporary modified position job offer, mailed by the employing establishment to appellant on September 12, 2008. There is no evidence of record to show that the Office assessed the suitability of this offered position.