United States Department of Labor
Employees' Compensation Appeals Board

C.W., Appellant	)	
and	)	**Docket No. 09-1466**
	)	**Issued: March 24, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Los Angeles, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 26, 2009 appellant filed a timely appeal from the March 13, 2009 merit decision of the Office of Workers' Compensation Programs denying his claim for intermittent periods of disability. 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 appellant met his burden of proof to establish that he sustained work-related disability for intermittent periods between March 8 and November 2, 2005.

FACTUAL HISTORY

The Office accepted that on June 30, 2000 appellant, then a 42-year-old letter carrier, sustained a lumbar strain while lifting a mail tray out of a hamper at work. Appellant later filed a claim alleging that on January 13, 2003 he sustained a recurrence of disability due to his June 30, 2000 work injury. The Office determined that appellant was claiming a new injury and

accepted that he sustained a lumbar strain on January 13, 2003. Appellant performed limited-duty work for the employing establishment following both injuries.[1]

On March 27, 2006 appellant filed a Form CA-7 claiming wage-loss compensation for intermittent disability from March 8 to November 2, 2005.[2] On the form, an agency representative stated that appellant was not sent home, that work was available to him and that he went home "per his own request." Attached CA-7a forms listed intermittent hours of leave without pay from August 16 to November 2, 2005.

On April 5, 2006 the Office requested that appellant submit additional factual and medical evidence in support of his claim. Appellant submitted an April 27, 2006 letter stating that management was aware that he had limited-duty restrictions but did not provide any work within his restrictions so that he could work an eight-hour day until March 16, 2006. He claimed that about six months prior, the station manager told him that he could deliver Express Mail and work on passports and the Address Management System (AMS). Appellant noted, however, that he needed training for both passports and AMS, and he also needed an earlier starting time in order to deliver Express Mail. He indicated that at no time prior to March 16, 2006 did the employing establishment change his starting time so that he could deliver Express Mail.[3]

In a March 21, 2005 note, Dr. Lieu Rupp, an attending Board-certified family practitioner, stated that appellant should be allowed to work at the station sorting mail for three weeks with no driving or getting in and out of his truck. In an April 12, 2005 report, he indicated that appellant could lift up to 25 pounds on a continuous basis and lift up to 35 pounds on an intermittent basis, but he could not engage in bending, stooping or twisting. In notes dated June 19, September 9 and October 21, 2005, Dr. Bradley Baum, an attending Board-certified orthopedic surgeon, stated that appellant could not engage in repetitive upper trunk twisting or lift, push or pull more than 15 pounds. In a June 17, 2005 report, he indicated that appellant could stand for eight hours, lift up to 25 pounds on a continuous basis, and lift up to 35 pounds on an intermittent basis. In a September 9, 2005 report, Dr. Baum noted that appellant could stand for six hours, lift up to 15 pounds on a continuous basis, and lift up to 30 pounds on an intermittent basis.[4]

In a July 19, 2005 report, Dr. Rupp stated that appellant had been treated conservatively for occasional flare-ups which were related to his original injury in July 2000. Appellant continued to do his job which required repetitive movements with getting in and out of the mail truck and turning to the right side picking up mail all day long. Dr. Rupp noted that an April 30, 2004 magnetic resonance imaging (MRI) scan study of appellant's back showed discogenic

[1] Appellant's limited-duty work involved casing mail and required intermittent standing for up to eight hours per day.

[2] Appellant indicated days that he took leave without pay for part of the day and typically included the notation, "no work within medical restrictions."

[3] Appellant submitted an itemized list of the dates that he used sick leave to seek medical care for his work injury.

[4] In a December 16, 2005 report, Dr. Baum stated that appellant could stand for eight hours, lift up to 25 pounds on a continuous basis, and lift up to 15 pounds on an intermittent basis.

disease with disc protrusion in the lumbar region. He noted that in May 2005, due to pain limitations, appellant was given a modified work duty which required working in the office sorting letters, placing them in trays and putting these trays in hampers. Dr. Rupp stated, "[Appellant] is doing well with this work and the back pain has been much less. In my opinion, he has discogenic disease in the back demonstrated on the MRI [scan] which caused muscle spasms from nerve irritation."

In a May 15, 2006 decision, the Office denied appellant's claim for intermittent wage-loss compensation from August 16 to November 2, 2005. It found that he failed to establish that appropriate limited duty was not available to him and had not submitted medical evidence which showed that he sustained disability during the period.

In a May 22, 2006 e-mail, an agency compensation specialist asked Ray Woltman, appellant's supervisor, to submit a statement indicating whether work within appellant's work restrictions was available to him on the dates of claimed disability. In a May 23, 2006 letter, Mr. Woltman stated that during the period in question there are no notations on appellant's Forms 3971 regarding whether or not work was offered or available. He noted that as of March 2006 appellant was working under a job offer and acceptance. Mr. Woltman indicated that appellant was waiting for training in AMS and passport acceptance and processing. In an e-mail response dated May 24, 2006, he stated that "during the period in question, there were days when no work was available" for appellant, but he noted that there were no records with precise information for that period.

In a June 16, 2006 decision, the Office denied appellant's claim for intermittent wage-loss compensation during the period March 8 to August 15, 2005. It indicated that appellant had not shown that appropriate work was not available during the period in question. On August 16, 2006 the Office issued a decision accepting appellant's claim for the additional conditions of displacement of a lumbar disc without myelopathy and lumbar radiculitis. It authorized lumbar disc surgery which was performed on October 10, 2006. Appellant received compensation for time lost from work through August 28, 2007.

Appellant requested a hearing before an Office hearing representative the Office's May 15 and June 16, 2006 decisions. At the November 29, 2007 hearing, Kevin McMillan, appellant's representative, asserted that the employing establishment did not provide appropriate work for appellant. Appellant testified that his deteriorating back condition made it impossible for him to perform his work duties. He was asked to stand and case mail, a task which exceeded his physician's restriction on standing. Appellant indicated that since the only job the employing establishment offered him was casing mail, he would punch out and go home early. He claimed that he was not offered an appropriate limited-duty job until March 16, 2006.

In a January 29, 2008 decision, the Office hearing representative affirmed the Office's May 15 and June 16, 2006 decisions.

In an undated statement received by the Office on January 20, 2009, appellant argued that the Office hearing representative ignored work restrictions shown on CA-7 forms and decided that he could stand and case mail for up to eight hours per day. He indicated that the reports of record plainly stated that there should be no twisting and bending on a repetitive basis and he

asserted that casing mail required those actions. Appellant argued that the employing establishment did not show that appropriate work was available.

In a July 12, 2006 letter, Dr. Rupp stated that he had been appellant's primary care doctor since July 11, 2000 for his low back condition. He noted that over the years appellant continued to have the same low back problems on and off as his work required bending, lifting and getting in and out of his truck. Further work-up showed discogenic disease of appellant's lumbar spine with disc herniation and spinal stenosis which caused persistent pain interfering with his work. Numerous additional medical reports were submitted, but they were already considered or did not address disability for the period March 8 to November 2, 2005.

In a March 13, 2009 decision, the Office affirmed its January 29, 2008 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 limited-duty position or the medical evidence of record establishes that he can perform the limited-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. 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 limited-duty job requirements.[5] Office procedure provides that a recurrence of disability may be caused by withdrawal of a limited-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.[6]

ANALYSIS

The Office accepted that on June 30, 2000 appellant sustained a work-related lumbar strain and that on January 13, 2003 he sustained a work-related lumbar strain, displacement of a lumbar disc without myelopathy and lumbar radiculitis. Appellant performed limited-duty work for the employing establishment following both injuries.[7] In March 2006 he filed a claim alleging wage-loss compensation for intermittent disability during the period March 8 to November 2, 2005.

The Board finds that appellant did not meet his burden of proof to establish that he sustained intermittent disability as alleged during the period March 8 to November 2, 2005. Appellant contended that the employing establishment did not offer him appropriate limited-duty work during this period. As noted, a recurrence of disability can be caused by withdrawal of a limited-duty assignment made specifically to accommodate an employee if the withdrawal is not

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

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(c) (January 1995).

[7] Appellant's limited-duty work involved casing mail and required intermittent standing for up to eight hours per day.

due to misconduct or nonperformance of job duties. However, appellant has not submitted sufficient evidence to establish that limited-duty work was not available on the specific dates he claimed disability. Employing establishment officials indicated that appellant was not sent home, that appropriate work was available to him and that he periodically went home "per his own request" during the period in question.[8]

Appellant did not submit sufficient medical evidence to show that he sustained work-related disability from March 8 and November 2, 2005. In a March 21, 2005 note, Dr. Rupp, an attending Board-certified family practitioner, stated that appellant should be allowed to work at the station sorting mail for three weeks with no driving or getting in and out of his truck. He did not provide any prohibition that appellant could not perform the standing required by casing mail. In an April 12, 2005 report, Dr. Rupp indicated that appellant could lift up to 25 pounds on a continuous basis and lift up to 35 pounds on an intermittent basis, but he could not engage in bending, stooping or twisting. In notes dated June 19, September 9 and October 21, 2005, Dr. Baum, an attending Board-certified orthopedic surgeon, stated that appellant could not engage in repetitive upper trunk twisting or lift, push or pull more than 15 pounds. There is no evidence of record that appellant's limited-duty requirements exceeded these restrictions.[9] In a June 17, 2005 report, Dr. Baum indicated that appellant could stand for eight hours, lift up to 25 pounds on a continuous basis, and lift up to 35 pounds on an intermittent basis. In a September 9, 2005 report, he noted that appellant could only stand for six hours, but he did not provide any findings on examination or diagnostic testing showing a change in appellant's condition which would explain why he changed appellant's standing restriction at this point. Appellant has not submitted any rationalized medical evidence showing that he sustained work-related disability between March 8 and November 2, 2005 as alleged and the Office properly denied his claim.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained work-related disability for intermittent periods between March 8 and November 2, 2005.

[8] Although Mr. Woltman, appellant's supervisor, indicated in an e-mail dated May 24, 2006 that "during the period in question, there were days when no work was available" for appellant, he did not provide any further details and acknowledged that there were no records with precise information for that period.

[9] In a July 19, 2005 report, Dr. Rupp noted that in May 2005 appellant was given modified work duty which required working in the office sorting letters, placing them in trays and putting these trays in hampers. He stated, "He is doing well with this work and the back pain has been much less."

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 24, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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