United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	**Docket No. 10-1213**
	)	**Issued: November 23, 2010**
U.S. POSTAL SERVICE, BALDWIN POST OFFICE, Baldwin, NY, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 30, 2010 appellant filed a timely appeal from a January 13, 2010 merit decision of the Office of Workers' Compensation Programs finding that he did not establish a recurrence 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 sustained a recurrence of disability on July 27, 2009 causally related to his July 8, 2009 employment injury.

FACTUAL HISTORY

On July 8, 2009 appellant, then a 44-year-old carrier, filed a claim alleging that on July 1, 2009 he sustained an injury to his lower back in the performance of duty. The Office accepted the claim for lumbar sprain. Appellant stopped work on July 1, 2009 and returned to work on July 23, 2009.

In a duty status report dated July 20, 2009, a physician found that appellant could return to his regular employment beginning July 23, 2009.

On July 29, 2009 Dr. Alfred F. Faust, a Board-certified orthopedic surgeon, diagnosed a sprain due to appellant's employment injury and found that he was unable to return to work. On August 28 and 31, 2009 he diagnosed lumbar radiculopathy and a herniated nucleus pulposus of the lumbar spine.[1]

On September 28, 2009 appellant filed a notice of recurrence of disability on July 27, 2009 causally related to his work injury. On the reverse side of the form, the employing establishment indicated that appellant was able to return to full duty on July 23, 2009 but was terminated on that date for "failure to follow instructions."

On November 20, 2009 the Office referred appellant to Dr. Michael J. Katz, a Board-certified orthopedic surgeon, for a second opinion examination. On December 4, 2009 Dr. Katz diagnosed lumbosacral strain with radiculitis due to the work injury on July 1, 2009 and the recurrence of disability on July 27, 2009. He found that appellant had symptoms caused by an extruded disc at L3-4 and required a surgical evaluation in two months. Dr. Katz opined that appellant was unable to perform his usual employment but could work six hours per day "with very limited seated work with limited stooping, limited bending, no squatting and no lifting of greater than 15 pounds."

By decision dated January 13, 2010, the Office found that appellant had established a recurrence of a medical condition but had not established a recurrence of disability on July 27, 2009 causally related to his accepted employment injury. It determined that Dr. Katz' opinion established that he required further medical care. The Office found, however, that appellant had not shown that he sustained a recurrence of disability because the employing establishment terminated him on July 23, 2009 for cause.

On appeal appellant argued that Dr. Faust, his attending physician, found he was disabled from work. He noted that he is challenging the termination and is also unable to work in another position due to his employment injury.

LEGAL PRECEDENT

When an appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician, who on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports this conclusion with sound medical reasoning.[2]

[1] In duty status reports dated July 29 and August 31, 2009, Dr. Faust found that appellant was totally disabled. He continued to submit progress reports.

[2] *Ricky S. Storms*, 52 ECAB 349 (2001); *Helen Holt*, 50 ECAB 279 (1999).

Section 10.5(x) of the Office's regulations provide in pertinent part:

> "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."[3]

Section 10.5(x) of the Office's regulations specifically provide that the withdrawal of a light-duty assignment for reasons of misconduct or nonperformance of job duties does not constitute a recurrence of disability.[4]

ANALYSIS

The Office accepted that appellant sustained a lumbar sprain due to a July 1, 2009 employment injury. Appellant stopped work on the date of injury and returned to work on July 23, 2009. The employing establishment terminated appellant on July 23, 2009 for cause. On September 28, 2009 appellant alleged that he sustained a recurrence of disability on July 27, 2009 causally related to his July 1, 2009 employment injury.

The Office found that appellant did not establish a recurrence of disability as he was terminated for cause. It did not evaluate the medical evidence. The Board notes that termination for cause does not itself give rise to a compensable disability.[5] Appellant would, however, be entitled to wage-loss compensation if he was unable to earn the wages he was receiving at the time of the alleged recurrence of disability due to his employment injury.[6] In similar cases where employment has been terminated for misconduct and disability is subsequently claimed, the Board has noted that the term "disability" means the "incapacity because of injury to earn the wage which the employee was receiving at the time of such injury."[7] Disability benefits are payable regardless of whether the termination of employment was for cause if the medical evidence establishes that appellant was unable to perform his assigned duties due to his injury-related condition.[8] The Office did not evaluate the medical evidence to determine whether he was medically able to perform the duties of his position at the time of his alleged recurrence of disability. The case, therefore, is remanded to the Office to adjudicate whether appellant was disabled from employment beginning July 27, 2009 due to his work injury. Following such further development as is deemed necessary, it should issue an appropriate decision.

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[3] 20 C.F.R. § 10.5(x).

[4] *Id*.

[5] *Id.*; *see also John W. Normand*, 39 ECAB 1378 (1988).

[6] *See Janice J. Green*, 49 ECAB 307 (1998).

[7] *See John W. Normand*, *supra* note 5.

[8] *See Regina C. Burke*, 43 ECAB 399 (1992) (the Board noted that the Office had erroneously relied upon the case of *Clentino Laspina*, 13 ECAB 201 (1961) as support for the proposition of law that an employee dismissed for misconduct is no longer entitled to monetary compensation regardless of whether accepted employment-related conditions continue to cause a loss of wage-earning capacity).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 23, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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