

**United States Department of Labor
Employees' Compensation Appeals Board**

M.S., Appellant)
and) Docket No. 11-1184
U.S. POSTAL SERVICE, POST OFFICE,) Issued: December 12, 2011
Albuquerque, NM, Employer)
)

Appearances: Case Submitted on the Record
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On April 11, 2011 appellant, through his representative, filed a timely appeal from a November 17, 2010 merit decision of the Office of Workers' Compensation Programs' (OWCP) hearing representative which denied his recurrence of disability claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 established that he sustained a recurrence of disability beginning March 13, 2010.

FACTUAL HISTORY

On September 30, 2009 appellant, then a 36-year-old mail carrier, filed a traumatic injury claim alleging that on September 26, 2009 he injured his low back when he stepped into a small

¹ 5 U.S.C. § 8101 *et seq.*

hole along his route. OWCP accepted his claim for lumbar strain. Appellant stopped work and returned to limited duty as a modified transitional carrier on November 4, 2009.

Appellant filed various claims for disability compensation beginning March 13, 2010.²

In a March 27, 2010 time analysis form, the employing establishment noted that appellant's employment was terminated on March 8, 2010 and attached a personnel action form, which indicated that appellant's term appointment ended on March 8, 2010.

In an April 3, 2010 letter, appellant stated that he was under restrictions for a September 29, 2009 work-related injury and that his employing establishment terminated his employment and refused to pay compensation. He also noted that the original job posting for his position did not mention that it was a temporary appointment.

In an April 12, 2010 report, Dr. Carlos J. Esparza, Board-certified in physical medicine and rehabilitation, stated that he performed a posterior lumbar facet joint injection block on appellant and that his response to the diagnostic and therapeutic injection indicated facet joint syndrome in the lumbar spine.

In letters dated April 15 and May 11, 2010, OWCP advised appellant that additional medical evidence was needed to establish that he was disabled beginning March 13, 2010 as a result of his accepted back condition.

In a letter dated April 20, 2010, the employing establishment controverted appellant's request for disability compensation on the grounds that his employment was terminated on March 8, 2010 due to the expiration of his noncareer appointment. It explained that he was provided a modified job duty to accommodate his medical restrictions until his appointment ended on March 8, 2010.

In an April 23, 2010 report, Dr. Esparza stated that appellant underwent a facet injection on April 12, 2010 but did not experience any significant changes in his symptoms. He diagnosed neural foraminal stenosis and facet syndrome and noted that on March 18, 2010 appellant was restricted to light duty with three to five hours standing, three to five hours sitting and three to five hours driving with occasional bending, squatting, climbing and twisting.

In a May 3, 2010 report, Dr. Esparza noted that appellant underwent a facet injection on April 12, 2010 but continued to complain of some pains across the lower back and occasionally all the way down the right leg. Upon examination, he observed good range of motion in the back with no significant spasms and negative straight leg raise test with no motor or sensory deficits. Dr. Esparza diagnosed chronic low back pain with radiculopathy.

In a May 11, 2010 attending physician's report, Dr. Esparza stated that appellant sustained a disc herniation and lumbar spondylosis when he stepped into a hole covered with

² On March 23, 2010 appellant also filed a claim for disability compensation for the period November 10, 2009 to March 13, 2010. As OWCP has not issued a decision regarding this claim, this issue is not before the Board.

grass and twisted his back. He noted that appellant was partially disabled beginning December 15, 2009 until the present and authorized to return to work on April 23, 2010.³

In a decision dated June 7, 2010, OWCP denied appellant's disability compensation claim finding insufficient medical evidence establishing that he was totally disabled for work from March 13 to May 21, 2010. It pointed out that he was terminated from his job on March 8, 2010 and that the record did not support that he was off work due to a medical disability.

In a June 14, 2010 report, Dr. Esparza stated that appellant continued to complain of back and leg pain. Upon examination, he observed that appellant had some spasms in the ilio-lumborum area, good muscle strength and no neurologic changes. Appellant's straight leg raise test was moderately positive bilaterally.

In a June 19, 2010 letter, a human resource specialist from the employing establishment stated that appellant's noncareer temporary appointment ended on March 8, 2010 and that he was no longer an employee of the U.S. Postal Service.

On June 22, 2010 appellant, through his representative, requested a telephone hearing.

In a letter dated August 23, 2010, the employing establishment informed OWCP that appellant's noncareer temporary appointment ended on March 8, 2010 and that he continued to submit disability compensation claim forms even though he was no longer an employee. It pointed out that a transition noncareer position was a temporary position that could be terminated at any time and attached a copy of his Notification of Personnel Action reflecting the noncareer termination.

In a September 7, 2010 progress note, a physician's assistant examined appellant for back and bilateral knee pain. Upon examination, the physician's assistant did not observe any gross abnormalities in appellant's back nor loss of muscle. Appellant had a mildly positive straight leg raise on the right side and was diagnosed with spinal stenosis of the lumbar region.

On September 20, 2010 a telephone hearing was held and appellant's representative was present. Appellant explained that he returned to work after his September 26, 2009 injury and that he was a term employee. He stated that the employing establishment made several attempts prior to March 8, 2010 to remove him from his job due to his work-related injury. Appellant also noted that the employing establishment did not give a reason why they did not renew his contract when his term appointment ended, but he believed it was a result of his work-related injury. Tina Segarra, a letter carrier and union steward, testified that much of what he stated was true. She also agreed with the hearing representative that the employing establishment did not need to give a reason to deny renewal of a temporary appointment contract. Anna Sedillo, appellant's wife, testified that she went with him on every single physician's visit and pointed out that his back pain had increased to the point that he needed surgery.

³ On May 24, 2010 appellant filed a recurrence claim alleging that on March 8, 2010 he sustained a recurrence of the September 26, 2009 injury. As OWCP has not issued a decision regarding this claim, this issue is not before the Board at this time.

In a letter dated October 14, 2010, OWCP stated that its June 7, 2010 denial decision applied to all of appellant's claims for disability compensation subsequent to his termination on March 8, 2010. It explained that his claims for disability compensation were invalid because he was not in leave without pay status subsequent to March 8, 2010.

In an October 21, 2010 progress note, a physician's assistant examined appellant for complaints of back and neck pain. The physician's assistant noted that appellant injured himself at work and had not worked since March 2010. The examination revealed limited range of motion in his back due to pain with no focal motor weakness, atrophy and edema. Appellant's straight leg raise test was negative bilaterally and his sensory examination was normal. He was diagnosed with spinal stenosis of the lumbar region, degeneration of lumbar or lumbosacral intervertebral disc, degenerative disc disease and a herniated disc.

By decision dated November 17, 2010, an OWCP hearing representative affirmed the June 7, 2010 denial decision finding that the record did not establish that he was disabled within the meaning of FECA. He noted that appellant's employment contract ended on March 8, 2010 and that when temporary employment is terminated there is no entitlement to compensation. OWCP determined that appellant did not sustain a recurrence of disability on March 8, 2010 and was not entitled to compensation beginning March 13, 2010.

LEGAL PRECEDENT

OWCP 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.⁴ 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.⁵

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.⁶

⁴ 20 C.F.R. § 10.5(x).

⁵ *Id.*

⁶ *Richard A. Neidert*, 57 ECAB 474 (2006); *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

ANALYSIS

On September 26, 2009 appellant sustained a back sprain in the performance of duty. He stopped work and returned to light duty on November 4, 2009. Appellant failed various compensation claims for disability compensation beginning March 13, 2010. OWCP denied his claim finding that he was not entitled to disability compensation during that period since his term appointment ended on March 8, 2010. The Board finds that appellant did not establish that he sustained a recurrence of disability beginning March 13, 2010.

The record reflects that appellant was a transitional employee whose term expired on March 8, 2010. In a letter dated April 20, 2010 and various time analysis forms, the employing establishment stated that appellant's employment was terminated on March 8, 2010 due to the expiration of his noncareer appointment. The Board has held that, when a claimant stops work for reasons unrelated to the accepted employment injury, there is not disability within the meaning of FECA.⁷ A recurrence of disability also does not include work stoppage caused by the termination of a temporary employment.⁸ In this case, both the employing establishment and appellant stated that he was a temporary employee and that his term appointment terminated on March 8, 2010. The Board finds that the evidence does not establish that he was off work due to a medical disability.

The medical evidence of record also fails to establish that appellant was disabled as a result of his September 29, 2009 employment injury. Appellant submitted various medical reports from Dr. Esparza who noted that appellant was partially disabled beginning December 15, 2009 until the present. Dr. Esparza's report is of limited probative value. The accepted condition in this case is lumbar strain. Dr. Esparza, however, provided diagnoses of multiple other lumbar conditions in his reports. On April 12, 2010 he noted that he had performed a posterior lumbar facet joint injection and that appellant had indications of facet joint syndrome. On April 23, 2010 Dr. Esparza diagnosed neural foraminal stenosis and facet syndrome. In a report dated May 3, 2010, he diagnosed low back pain with radiculopathy and on May 11, 2010 he diagnosed disc herniated and lumbar spondylosis. Dr. Esparza, however, never provided an opinion regarding the cause of these diagnosed conditions. He also never provided a medical explanation as to why appellant was disabled during the time period in question nor did he explain how his inability to work was causally related to the original injury.⁹

⁷ *Hubert A. Jones*, 57 ECAB 467 (2006); *John W. Normand*, 39 ECAB 1378 (1988).

⁸ D.M., Docket No. 11-194 (issued October 5, 2011); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2)(a) (May 1997). The Board has also noted that an employee generally will not be considered to have experienced a compensable recurrence of disability as defined in 20 C.F.R. § 10.5(x) merely because his or her employer has eliminated the employee's light-duty position in a reduction-in-force or some other form of downsizing. See 20 C.F.R. § 10.509.

⁹ S.S., 59 ECAB 315 (2008); *Elizabeth H. Kramm*, 57 ECAB 117 (2008).

The other medical evidence of record included reports by a physician's assistant. These reports are also insufficient to establish appellant's claim as physicians' assistants are not considered "physicians" under FECA.¹⁰

On appeal, appellant contends that OWCP's decision was contrary to fact and law. The record, however, demonstrates that he was a transitional employee whose appointment ended on March 8, 2010. The record substantiates that appellant stopped work because his term appointment expired, not because of his accepted injury. Appellant must establish that he was disabled from work as a result of his September 26, 2009 injury, he failed to meet this burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability on or after March 13, 2010.

¹⁰ Section 8102(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 12, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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