United States Department of Labor
Employees' Compensation Appeals Board

N.S., Appellant	)	
and	)	**Docket No. 10-1766**
	)	**Issued: May 25, 2011**
U.S. POSTAL SERVICE, BAY STATION POST OFFICE, Brooklyn, NY, Employer	)	

Appearances:
Greg Dixon, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 22, 2010 appellant, through his representative, filed a timely appeal from an April 28, 2010 merit decision of the Office of Workers' Compensation Programs denying his recurrence claim. Pursuant to the Federal Employees' Compensation Act[1] 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 December 1, 2009, causally related to his accepted June 13, 1989 employment injury.

On appeal, appellant's representative contends that the employing establishment's withdrawal of appellant's modified position on December 1, 2009 resulted in a recurrence of disability.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 14, 1989 appellant, then a 46-year-old carrier, filed a traumatic injury claim alleging that he injured his lower back and left small finger on June 13, 1989 when he was run over by someone pushing a steel cart while he was sorting parcels. The Office accepted the claim for lumbosacral sprain and tendinitis/contusion over left little finger and placed him on the periodic rolls for temporary total disability effective January 31, 1991. Appellant returned to a light-duty job working four hours a day on January 12, 1992, which was increased to eight hours a day on March 11, 1992. The Office accepted a recurrence of disability on October 2, 2004 and by letter dated November 1, 2004 placed him on the periodic rolls for temporary total disability.[2]

On August 26, 2005 appellant accepted a modified job working four hours a day from the employing establishment. The hours of the job were 7:30 a.m. to 11:30 a.m. Monday through Friday with Saturday and Sunday as his days off. The employing establishment indicated that the work hours were contingent on work being available. Duties of the position included: approximately two hours of casing mail; approximately one and a half hours of express mail delivery within walking distance and accountable and certified mail; and approximately one-half hour of strapping out. Appellant's actual return to work was on September 19, 2005.[3]

On December 1, 2009 the employing establishment presented appellant with a new modified job offer which replaced the modified job he had been performing since September 19, 2005. The hours of the new position were 12:50 p.m. to 4:50 p.m. Monday, Tuesday, Thursday and Friday and 9:00 a.m. to 11:00 a.m. on Saturday with Sunday and Wednesday as his days off. Duties of the position included: one to four hours of lobby customer assistance; one to four hours of assisting customers with all-purpose container (APC); and up to one hour of street delivery of express mail. The physical requirements of the position were up to 10 pounds of intermittent lifting one to four hours a day; one to four hours of walking; one to two hours of sitting; and up to two hours of standing and walking. Appellant rejected this new job offer from the employing establishment. As appellant refused to sign the December 1, 2009 new job offer, the employing establishment placed him in off-duty status and sent him home. The employing establishment contended the only difference between the December 1, 2009 modified job and the one appellant had been performing was the reporting time.

On December 4, 2009 appellant filed a claim for wage-loss compensation eight hours a day for the period December 2 to 4, 2009.

By letter dated December 23, 2009, the Office advised appellant that before payment could be issued for December 2 to 4, 2009, medical and factual evidence regarding his work stoppage should be submitted.

[2] The recurrence was due to the employing establishment's withdrawal of appellant's light-duty job as it was unable to provide work within his restrictions.

[3] The effective date of the job was September 3, 2005, but due to nonjob-related medical conditions appellant actually returned to work on September 19, 2005. The employing establishment requested the Office to modify appellant's wage-loss compensation payment to four hours a day.

In a January 28, 2010 memorandum to file, the Office informed the employing establishment that the December 1, 2009 job offer was not suitable as the medicals limited appellant up to two hours of walking and the walking requirement in the job offer was one to four hours. The employing establishment amended the job offer. The Office notified appellant on January 28, 2010 that it had reviewed the job offer and found it to be suitable. It further notified him that he had 30 days to either accept the job offer or to demonstrate that it was not suitable. Failure to do either would result in termination of wage-loss compensation and denial of any schedule awards, pursuant to 5 U.S.C. § 8106(c)(2).

On January 28, 2010 the employing establishment presented appellant with a new modified job offer. The hours of the position were 12:50 p.m. to 4:50 p.m. Monday, Tuesday, Thursday and Friday and 9:00 am to 11:00 a.m. on Saturday with Sunday and Wednesday as his days off. Duties of the position included: one to four hours of lobby customer assistance; one to four hours of assisting customers with APC; and up to one hour of street delivery of express mail. The physical requirements of the position were up to 10 pounds of intermittent lifting one to four hours a day; up to two hours of intermittent walking; up to two hours of intermittent sitting; and up to two hours of intermittent standing.

On February 8, 2010 the Office received a January 20, 2010 claim for a recurrence of disability from appellant for the period beginning December 1, 2009. On the back of the form, the employing establishment noted appellant was instructed not to return to work because he had refused an offer of modified work. It noted that the Office found the job suitable on January 28, 2010.

In a February 16, 2010, Dr. David M. Rizzo, a treating osteopath, stated that appellant was being treated for high blood pressure, diabetes and lower back pain. He indicated that appellant has been disabled from working since December 1, 2009.

On February 17, 2010 appellant submitted a January 20, 2010 letter advising the Office, *inter alia*, that he did not immediately sign the job offer because his blood pressure was elevated and he was not feeling well, that he was not given an opportunity to fully read and comprehend the job offer and that as a result his supervisor relieved him of his identification badge and directed him to leave. Additionally, he noted that the offer did not conform to his doctor's restrictions and recommendations.

By letter dated March 5, 2010, the Office advised that appellant's reasons for refusing the offer of suitable work were not valid and provided him an additional 15 days to accept the position, which was still available, or his entitlement to wage-loss compensation or a schedule award would be terminated.

On March 5, 2010 the Office received a February 25, 2010 letter from appellant advising that he had accepted the January 28, 2010 modified job offer from the employing establishment and noted that restrictions on temperature extremes and street work needed to be included in the physical restrictions of the offered job. Appellant attached a copy of the signed acceptance of the offer dated February 25, 2010.

The Office on March 5, 2010 also received a May 13, 2009 duty status report (Form CA-17) and February 12, 2010 disability note from Dr. Raghava R. Polavarapu, a treating Board-certified orthopedic surgeon, and a February 27, 2010 report from Dr. Rizzo.[4] Dr. Polavarapu provided work restrictions for appellant in a May 13, 2009 Form CA-17. He stated that appellant was capable of working four hours a day with restrictions, which were up to four hours of intermittent lifting up to 5 pounds; up to two hours of intermittent sitting; up to two hours of intermittent walking; up to two hours of intermittent standing; up to two hours of intermittent pushing/pulling 5 to 30 pounds; up to four hours of APC work; up to two hours of reaching above the shoulder; no exposure to temperature below 32 degrees Fahrenheit or above 90 degrees Fahrenheit; up to three hours of driving a vehicle; up to four hours of fine manipulation and simple grasping; and no kneeling, bending/stooping or twisting. In a subsequent report dated February 12, 2010, Dr. Polavarapu diagnosed herniated lumbar disc and lumbar radiculopathy and that appellant has been treated for low back pain since December 4, 2009. He stated that appellant has been totally disabled by his low back pain since December 4, 2009. Once appellant was medically fit, Dr. Polavarapu stated that appellant would return to his modified job.

Appellant submitted a February 27, 2010 report in which Dr. Rizzo advised the Office that he has been treated for low back pain, diabetes and high blood pressure since December 1, 2009. Dr. Rizzo stated that appellant was unable to begin work in the afternoons as it would raise his blood sugar and pressure and that he preferred appellant to have two consecutive days off (preferably Saturday and Sunday) due to medical reasons.

By letter dated March 9, 2010 and received by the Office on March 15, 2010, appellant replied that he had accepted and signed the job offer on February 25, 2010, added that he had been ill since December 1, 2009 and that the only objections to the offer were the extreme temperature range, the "street work," and starting times for his shift.

In a March 17, 2010 letter, the Office informed appellant of the evidence required for his light-duty recurrence claim and was given 30 days to provide the requested information.

In an April 6, 2010 letter, the Office noted the additional restrictions mentioned by appellant and informed him that it would verify their relationship to his accepted injuries. It informed appellant that there would be a referral for a second opinion evaluation and he would be notified at a later date regarding the details of the evaluation.

Appellant raised the same objections to the job offer in his March 30, 2010 response to the Office. He also reiterated that he became ill beginning December 1, 2009.

On April 9, 2010 the Office received a March 26, 2009 report from Dr. Polavarapu and a March 25, 2010 report from Dr. Rizzo. Dr. Polavarapu diagnosed lumbosacral sprain, lumbar radiculopathy and lumbar herniated disc and that appellant was currently totally disabled. He reported that appellant injured his back at work on June 13, 1989 and that on December 1, 2009 he developed dizziness while exiting a bus which caused him to twist his left foot and caused severe low back pain. A physical examination revealed paraspinal tenderness, 40 degrees

[4] There appears to be a typographical error with respect to the physician's name as in the signature block it is spelled "Russo" and not "Rizzo."

flexion, 5 degrees extension, 50 degrees left straight leg testing and 40 degrees right straight leg testing.

Dr. Rizzo reported on March 25, 2010 that he had treated appellant since December 1, 2009 for lower back pain, elevated blood pressure, anxiety and uncontrolled diabetes. Diagnoses included lumbar sprain, diabetes, mixed hyperlipidia and hypertension. Dr. Rizzo indicated that appellant has been out of work since December 1, 2009 with a return to work contingent on a specialist consultation and/or improvement in appellant's clinical status.

By decision dated April 28, 2010, the Office denied appellant's December 1, 2009 recurrence claim on the grounds that the medical evidence failed to establish that any disability was due to his accepted employment injuries.

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.[5]

The Office's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6] 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.[7]

ANALYSIS

The Office accepted appellant's claim for lumbosacral sprain and tendinitis/contusion over left little finger and provided him a light-duty job. Appellant filed a claim for a recurrence of disability beginning December 1, 2009 due to the withdrawal of limited-duty job he had been performing since September 19, 2005. On December 1, 2009 the employing establishment

[5] *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

[6] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). *See also Phillip L. Barnes*, 55 ECAB 426 (2004).

[7] *Id*. *See A.M.*, Docket No. 09-1895 (issued April 23, 2010); *K.S.*, Docket No. 08-2105 (issued February 11, 2009); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

presented him with a new modified job, which he rejected. Appellant does not allege a change in the nature or extent of his injury-related condition. In the April 28, 2010 decision, the Office denied his claim on the grounds that the medical evidence was insufficient to establish employment-related disability beginning December 1, 2009 and did not address whether the employing establishment offer of a new job on December 1, 2009 constituted a withdrawal of his limited-duty job he had been performing since September 19, 2005. Thus, the question presented is whether the employing establishment withdrew appellant's job on December 1, 2009.

The record supports that appellant was working in a limited-duty job since September 19, 2005 and on December 1, 2009, the employing establishment presented appellant with a new limited-duty job offer within his restrictions. When appellant refused to sign the job offer on December 1, 2009, the employing establishment advised him to stop working and sent him home. Appellant then filed a claim for a recurrence of disability due to the withdrawal of his light-duty job effective December 1, 2009. The December 1, 2009 job offer by the employing establishment was not found suitable by the Office because it did not comply with all of appellant's physical restrictions. The employing establishment presented appellant with a new modified job on January 28, 2010 which the Office found suitable and was accepted by him. Based on the Office's determination that the December 1, 2009 job offer was not suitable, the Board finds the Office improperly denied appellant's claim for recurrence. Appellant's disability beginning December 1, 2009 was due to the withdrawal of his light-duty job on that day. The employing establishment's offer of a modified job on January 28, 2010, which the Office found suitable, supports appellant's contention that his work stoppage beginning December 1, 2009 was due to a withdrawal of his light-duty job. The record is unclear as to whether appellant's disability following the January 28, 2010 modified job offer was employment related. Appellant indicated that he had accepted this job offer, but had not returned to work as his physician had not determined that he was medically able to return to work. Moreover, it appears from evidence in the record that the Office determined a second opinion evaluation was required to determine the extent of appellant's restrictions and whether the additional restrictions noted by him were causally related to his accepted employment injury. On remand, the Office should undertake additional development of appellant's claim and ascertain whether the additional restrictions noted by him were due to his accepted employment injuries. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision on this issue.

CONCLUSION

The Board finds that the Office improperly denied appellant's claim for recurrence of disability beginning December 1, 2009 due to removal of his light-duty job assignment.

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further development consistent with the above decision.

Issued: May 25, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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