

FACTUAL HISTORY

On February 23, 2001 appellant, then a 39-year-old city carrier, filed an occupational disease claim, alleging that employment duties caused degenerative arthritis in the left wrist. The claim was adjudicated by OWCP under File No. xxxxxx829. In a claim adjudicated by OWCP under File No. xxxxxx076, on September 10, 2002, appellant filed a second occupational disease claim, asserting that he sustained employment-related left ulnar neuropathy. OWCP initially denied both claims.

On February 19, 2004 OWCP accepted that appellant sustained left ulnar neuropathy under the xxxxxx076 claim, and on January 11, 2005, that he sustained employment-related arthritis of the left wrist under the xxxxxx829 claim.² On June 29, 2007 Dr. Paul D. Fournier, Board-certified in family and occupational medicine, provided permanent restrictions of six hours lifting, carrying 15 pounds; one to eight hours sitting, simple grasping, and fine manipulation; two to eight hours standing; two to six hours walking; one to two hours kneeling, bending, stooping, pulling, pushing; one to three hours twisting; one to four hours reaching above the shoulder; and two to six hours driving.

On February 5, 2009 adjudicated under file number xxxxxx453, OWCP accepted that appellant sustained lateral epicondylitis on the right and a right radial nerve lesion. The three claims were combined by OWCP on February 5, 2009. On April 3, 2009 Dr. Kerry G. Perloff, a Board-certified orthopedic surgeon, provided restrictions of six hours of driving; four hours of lifting, simple grasping, fine manipulation, and reaching above the shoulder; three hours of twisting; and two hours of kneeling, bending and stooping with a weight restriction of 15 pounds continuously and 35 pounds intermittently. There was no restriction on sitting, standing or walking. On July 3, 2009 appellant accepted a full-time modified assignment.³ In a July 13, 2010 report, Dr. Donna M. Baldwin, an osteopath, indicated that appellant had an additional restriction of no repetitive motion with the left arm.

Appellant accepted modified assignments on April 22 and July 16, 2010 that limited his working hours.⁴ On April 26, 2010 he filed a recurrence claim, stating that he was restricted from using his left arm. The employing establishment noted that, as of April 22, 2010, appellant began working four hours daily under the National Reassessment Process (NRP). He filed claims for wage-loss compensation, for the dates April 24 to July 30, 2010. On the claim form, an employment establishment supervisor noted that appellant was working a partial day under

² OWCP also accepted the left wrist fusion appellant underwent on February 25, 2003. By decision dated August 25, 2006, appellant was granted a schedule award for a 14 percent impairment of the left upper extremity, and on January 25, 2008 a schedule award for an additional 27 percent left upper extremity impairment, for a total impairment of 41 percent.

³ The duties were described as case and carry route for four hours, drive for six hours, work CFS mail on other routes for four hours, with physical restrictions of 15 pounds lifting of four hours, simple grasping of four hours, fine manipulation of four hours and reaching above the shoulder for four hours.

⁴ The assignment described the duties as casing route 1132 for two hours daily and delivering route 1132 for two hours daily, with standing, walking, bending and twisting for two hours daily and two hours of intermittent reaching above the shoulder.

the NRP. Time analysis and leave summary forms indicated that appellant began working less than eight hours daily on April 24, 2010. Appellant retired effective August 6, 2010.

By decision dated September 16, 2010, OWCP denied appellant's recurrence claim on the grounds that the medical evidence did not establish that he continued to have residuals of the accepted conditions. On October 8, 2010 appellant requested a hearing and submitted a July 27, 2010 report in which Dr. Christopher B. Ryan, a Board-certified physiatrist, noted the accepted conditions. Dr. Ryan stated that he had reviewed x-rays that demonstrated fairly significant arthritis of the right elbow. He advised that appellant's condition had not changed and that he had residuals of the accepted conditions, including arthritis and ulnar neuropathy. In an August 27, 2010 statement, appellant indicated that he was restricted to working two hours a day under the NRP and described his work duties, stating that he cased mail using his right hand only. At the hearing, held telephonically on February 10, 2011, he testified that, under the NRP, his hours were initially cut to four hours daily and then to two. Appellant described his left upper extremity condition and stated that he had given up all sports due to his work injuries. Dr. Ryan testified that appellant's upper extremity condition was permanent. He advised that, due to the fusion on the left, appellant had altered forearm anatomy with nerve damage and described appellant's postsurgery limitations, specifically indicating that appellant had limited wrist motion due to the fusion and problems with his elbow due to nerve damage

By decision dated May 2, 2011, an OWCP hearing representative affirmed the September 16, 2010 decision, finding the medical evidence insufficient to establish that appellant's employment-related conditions worsened such that he was precluded from his modified duties. The hearing representative found the fact that appellant's work hours were reduced under the NRP was not sufficient to establish entitlement to compensation.

LEGAL PRECEDENT

OWCP'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."⁵ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employees' 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.⁶ If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.⁷

⁵ 20 C.F.R. § 10.5(x).

⁶ See *id.*; see also *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (March 2011). See also *Donald T. Pippin*, 54 ECAB 631 (2003).

When 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.⁸ OWCP procedures provide that a recurrence of disability can be caused by a withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.⁹

FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to the NRP. Regarding claims for total disability when a wage-earning capacity decision has not been issued, the Bulletin provides:

“1. If the claimant has been on light duty due to an injury[-]related condition without an LWEC [loss of wage-earning capacity] rating (or the CE [claims examiner] has set aside the LWEC rating as discussed above), payment for total wage loss should be made based on the CA-7 as long as the following criteria are met:

“The current medical evidence in the file (within the last 6 months) establishes that the injury[-]related residuals continue;

“The evidence of file supports that light duty is no longer available; and

“There is no indication that a retroactive LWEC determination should be made. (Note -- Retroactive LWEC determinations should not be made in these NRP cases without approval from the District Director.)”¹⁰ The Bulletin also states that if the medical evidence is not sufficient, the claims examiner should request current medical evidence from the employing establishment and the claimant.”¹¹

The Board has held that a claimant established an employment-related recurrence of disability when a modified position made specifically to accommodate an accepted condition was withdrawn as part of the NRP and there was no indication that the modified work was withdrawn due to misconduct or nonperformance of job duties.¹²

⁸ *J.F.*, 58 ECAB 124 (2006); *Carl C. Graci*, 50 ECAB 557 (1999); *Mary G. Allen*, 50 ECAB 103 (1998); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

⁹ *See* Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1500.3.b(1)(c).

¹⁰ FECA Bulletin No. 09-05 (issued August 18, 2009).

¹¹ *Id.*

¹² *A.N.*, Docket No. 11-394 (issued October 26, 2011); *K.S.*, Docket No. 08-2105 (issued February 11, 2009).

ANALYSIS

The accepted conditions in this case are left ulnar neuropathy, arthritis of the left wrist, and right lateral epicondylitis and right radial nerve lesion. Appellant claimed disability compensation beginning April 24, 2010 when his working hours in the modified position were reduced under the NRP. The record contains time analysis forms signed by employing establishment officials and leave summary forms that indicate that, beginning on April 24, 2010, appellant's work hours were reduced because insufficient work was available within his restrictions.

In this case, OWCP failed to properly follow the guidelines in FECA Bulletin No. 09-05. In light of the withdrawal of appellant's light-duty position, it did not properly review the medical evidence. In a July 27, 2010 report, Dr. Ryan, an attending physiatrist, noted the accepted conditions. He stated that he had reviewed x-rays that demonstrated fairly significant arthritis of the right elbow. Dr. Ryan advised that appellant's condition had not changed and that he had residuals of the accepted conditions, including arthritis and ulnar neuropathy. He also testified at the hearing where he stated that appellant's upper extremity condition was permanent and advised that, due to the fusion on the left, appellant had altered forearm anatomy with nerve damage. Dr. Ryan described appellant's postsurgery limitations, noting that he had limited wrist motion due to the fusion and problems with his elbow due to nerve damage.

As noted above, OWCP procedures provide that a recurrence of disability can be caused by a withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.¹³ The guidance from FECA Bulletin No. 09-05 indicates that it should consider whether the current medical evidence established that appellant had continuing employment-related residuals at the time of the withdrawal of the modified position.

The May 2, 2011 decision denying appellant's claim for compensation does not refer to FECA Bulletin No. 09-05 or attempt to follow its provisions. If no LWEC is in place, as in this case, OWCP is to evaluate the medical evidence to determine if the current evidence establishes that the employment-related residuals continue and, if the medical evidence is not sufficient, the claims examiner should request current medical evidence from both the claimant and the employing establishment. Entitlement to wage-loss compensation would be established if the current evidence established that employment-related residuals continued, the light duty was no longer available, and there was no indication that a retroactive LWEC determination should be made.¹⁴

The case must, therefore, be remanded to OWCP for a proper decision in accord with the proper standard for review in accordance with FECA Bulletin No. 09-05. After such development as OWCP deems necessary, it should issue an appropriate decision.

¹³ *Supra* note 10.

¹⁴ *R.K.*, Docket No. 11-1048 (issued January 25, 2012).

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: June 6, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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