

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

H.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hampden, ME, Employer**

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**Docket No. 11-1593
Issued: May 3, 2012**

Appearances:
Robyn G. March, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 27, 2011 appellant, through her attorney, filed a timely appeal from the December 30, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her 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 met her burden of proof to establish that she sustained a recurrence of total disability on or after February 10, 2010 due to her work injury.

FACTUAL HISTORY

In February 23, 2000, OWCP accepted that appellant, then a 46-year-old distribution clerk, sustained a lumbar strain due to the repetitive duties of her job overtime, including the

¹ 5 U.S.C. §§ 8101-8193.

lifting and carrying of mail trays.² On her occupational claim form, appellant had indicated that she first became aware of her back injury on February 5, 2010.³ She began working in a light-duty position with work restrictions including no bending, no prolonged walking and no lifting more than five pounds. OWCP paid compensation for periods of disability.⁴

In a June 23, 2009 report, Dr. Elizabeth Weiss, an attending Board-certified internist, stated that appellant had struggled with chronic low back pain and radiating pain in her right leg which limited her to working six hours per day at the employing establishment.⁵ She noted that appellant's injury occurred in February 2000 and indicated that her treatment included steroid injections and physical therapy.

In several duty status reports dated between July 2009 and February 2010, Dr. Weiss noted appellant's February 2000 work injury and indicated that she could only work six hours per day and was restricted from lifting more than 15 pounds and engaging in bending. Appellant could sit and stand on an intermittent basis.⁶ On January 12, 2010 Dr. Weiss responded to an employing establishment request for more information about appellant's condition and checked a box indicating that the residuals of her February 2000 work injury had not resolved.

On February 10, 2010 the employing establishment advised appellant that her job was being terminated under the National Reassessment Process (NRP) and that no work was available for her within her work restrictions.

On February 10, 2010 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of total disability on February 10, 2010 because the employing establishment withdrew her light-duty assignment.

In a March 17, 2010 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim. Appellant resubmitted the findings of October 13, 2009 MRI scan testing of her lumbar spine.

In an April 26, 2010 decision, OWCP denied appellant's claim that she sustained a recurrence of total disability on or after February 10, 2010 due to her work injury. It noted that she claimed that she sustained a recurrence of total disability on February 10, 2010 due to the

² Appellant's regular work required her to continuously lift up to 25 pounds and intermittently lift up to 70 pounds. OWCP had previously accepted that she sustained a work-related back strain on January 16, 1999.

³ A number of documents list appellant's work injury as occurring on February 5, 2000, but it is clear from the record that her injury was sustained overtime and became apparent in early February 2000.

⁴ Appellant stopped work on August 20, 2008 and filed a claim alleging that she sustained a recurrence of total disability on that date due to her accepted work injury. In a January 7, 2009 decision, OWCP denied her claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a work-related recurrence of total disability. Appellant returned to light-duty work at the employing establishment for six hours per day with restrictions, including no lifting more than 15 pounds and no bending.

⁵ The report was also signed by Miki MacDonald, an attending nurse practitioner.

⁶ The findings of October 13, 2009 magnetic resonance imaging (MRI) scan testing of appellant's lumbar spine showed minimal focal degenerative disc disease at L5-S1 which appeared to be stable.

withdrawal of her light-duty job under the NRP. OWCP found that the submitted factual and medical evidence did not establish that the claimed recurrence was caused by the accepted work injury because “there was no updated medical evidence to support any ongoing restrictions ... due to your accepted injury.”

Appellant requested a telephone hearing with an OWCP hearing representative.⁷ During the October 13, 2010 hearing, appellant’s counsel discussed appellant’s work-related back injury in 2000 and her return to work in a light-duty position. She stated that the employing establishment withdrew appellant’s job assignment as of February 10, 2010 under the NRP and posited that, given appellant’s continuing work-related residuals, she was entitled to OWCP benefits due to the withdrawal of work. She referenced OWCP’s regulations under 20 C.F.R. § 10.5(x) and Board precedent.⁸

In a November 15, 2010 letter, Dr. Weiss indicated that appellant had been a patient for the last eight years and had struggled with a lumbar strain from an injury incurred at work in February 2000, which was caused by engaging in repetitive lifting and carrying of mail trays.⁹ She noted that appellant’s medical condition and physical limitations had persisted over the past 10 years with continued low back pain radiating down her right leg. Dr. Weiss stated that, due to the original workplace injury which occurred in February 2000, appellant had not been able to improve to her preinjury level of activity and had not been able to return to her regular work at the employing establishment. She noted that the lumbar strain in 2000 had left appellant with a weakened lower back which, despite attempts at rehabilitation, had not improved enough for her to do any type of physical labor or work more than six hours a day. Whenever, appellant attempted to increase her hours or physical activity, she ended up having more back pain and being debilitated.

In a December 30, 2010 decision, an OWCP hearing representative affirmed OWCP’s April 26, 2010 decision. OWCP noted that appellant’s light-duty job had been withdrawn under the NRP and discussed the medical evidence she submitted in support of her claim. It stated:

“The [Board] has held that, when a claimant stops work for reasons unrelated to her accepted employment injury, she has no disability within the meaning of [FECA]. While the dismissal acted effectively as a withdrawal of light-duty status, it cannot form the basis for a disability compensation claim because the dismissal had nothing to do with the claimant’s ability to perform the light-duty requirements of the job assignment. As the withdrawal of the position was premised on the agency’s general withdrawal regarding [NRP], the loss of the claimant’s position does not constitute a recurrence of disability. Currently, the record lacks any medical evidence establishing that the claimant could not

⁷ Prior to the hearing, appellant submitted a May 3, 2010 report in which Dr. Weiss stated that she could only work six hours per day with restrictions, including no lifting more than 15 pounds.

⁸ Counsel expanded on this argument in memoranda dated October 13 and November 15, 2010.

⁹ The report was also signed by Ms. MacDonald.

perform in the job at the time that the agency withdrew work and has there been [sic] any evidence establishing a change or modification of the restrictive[-]duty assignment.”

LEGAL PRECEDENT

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. 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.¹⁰

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 of record establishes that he or she 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 show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.¹¹ To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.¹²

FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to the NRP. Regarding claims for total disability when a loss of wage-earning capacity (LWEC) 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 [claims examiner] (CE) has set aside the LWEC rating as discussed above), payment for total wage loss should be made based on the [Form] CA-7 as long as the following criteria are met --

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

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

¹⁰ 20 C.F.R. § 10.5(x).

¹¹ *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹² *Maurissa Mack*, 50 ECAB 498 (1999).

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.)”¹³

FECA Bulletin No. 09-05 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.¹⁴

ANALYSIS

Appellant filed a claim for recurrence of total disability commencing February 10, 2010. The record indicates that her light-duty job was withdrawn pursuant to the NRP program. The guidelines for evaluating a claim for total disability under these circumstances are noted above in FECA Bulletin 09-05,¹⁵ but in this case OWCP failed to discuss FECA Bulletin No. 09-05 or properly consider the evidence presented in light of the guidelines contained in the bulletin. OWCP’s hearing representative stated that, while there was a withdrawal of the position under the NRP, the loss of the light-duty position does not constitute a recurrence of disability.

It is well established, as noted above, that a withdrawal of a light-duty position is considered a recurrence of disability under OWCP regulations. The guidance from FECA Bulletin No. 09-05 indicates that OWCP should consider whether the current medical evidence established that appellant had continuing employment-related residuals at the time of the withdrawal of the light-duty position. If the medical evidence is not sufficient, OWCP should request additional evidence.¹⁶

In this case, OWCP failed to properly follow the guidelines in FECA Bulletin No. 09-05. It did not properly review the medical evidence from Dr. Weiss, an attending Board-certified internist, in light of the withdrawal of the light-duty position. Accordingly, the case will be remanded to OWCP for further consideration. After such further development as OWCP deems necessary, it should issue an appropriate decision with proper findings on the issue presented.

CONCLUSION

The Board finds that the case must be remanded to OWCP for proper findings on the issue presented.

¹³ FECA Bulletin No. 09-05 (issued August 18, 2009).

¹⁴ *Id.*

¹⁵ The bulletin refers to a Form CA-7, claim for compensation, but the Form CA-2a, claim for a recurrence of disability, also represents a claim for total disability.

¹⁶ It would be OWCP’s burden of proof to show that employment-related residuals had ceased. *See J.A.*, Docket No.11-1592 (issued February 13, 2012).

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2010 merit decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: May 3, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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