

FACTUAL HISTORY

On October 19, 2009 appellant, then a 38-year-old transportation security screener, filed a traumatic injury claim alleging that on October 7, 2009 he experienced a sharp pain in his low back after lifting a bag and carrying it to a table. OWCP accepted the claim for lumbar strain.

On November 13, 2009 appellant filed a claim for compensation for disability (Form CA-7) from December 6, 2009 to January 2, 2010. On January 31, 2010 he filed a claim for compensation from January 3 to February 13, 2010. OWCP did not receive the forms from the employing establishment until February 22, 2010.

In a February 11, 2010 progress report, Dr. Tetsuto Numata, an attending Board-certified orthopedic surgeon, noted that appellant was injured at work on October 7, 2009. He related that appellant intended to go to Thailand as his “case has not been accepted, he is not getting paid, he cannot work and he is running out of cash. [Appellant] has no one else who can help him.” Dr. Numata diagnosed lumbar sprain and opined that appellant had “improved to the point he does have work capacity, which he did not have well previously due to [the] intensity of pain and his inability to stand and walk enough to do work.” He advised that appellant could perform modified sedentary duty sitting, walking and standing as needed.

On March 5, 2010 OWCP paid appellant compensation for total disability from December 6, 2009 to January 2, 2010.

On March 23, 2010 Dr. Numata advised that appellant could work modified sedentary duty. He submitted a work restriction evaluation of the same date listing work restrictions.

On April 8, 2010 Jamie Jacintho, with the employing establishment, e-mailed appellant noting that she had advised him that his claim was accepted in January 2010 and that he should have received compensation. She indicated that the employing establishment required medical documentation to support disability after January 2, 2010.

In an April 13, 2010 response, appellant informed Ms. Jacintho that Dr. Numata had kept him off work from October 2009 to February 2010. He related that OWCP had not paid him any compensation for disability or medical expenses. Appellant stated that he had no income from December 2009 to February 2010 and relocated to an area with a lower cost of living. He maintained that he had informed his supervisor of the situation and submitted leave requests for the time off.

On April 19, 2010 Dr. Numata advised the employing establishment that he had released appellant for sedentary duty effective February 12, 2010.

On April 25, 2010 appellant e-mailed Ms. Jacintho to inquire if she had heard anything about his OWCP claim. In an April 28, 2010 response, Ms. Jacintho related that she remembered speaking to him about his “financial situation and the possibility of moving” but that he had not confirmed that he was going. She noted that appellant’ physician released him for limited duty and therefore he was absent without leave.

On June 10, 2010 OWCP paid appellant compensation from January 3 to February 11, 2010.

On June 17, 2010 Dr. Numata advised appellant's attorney that he moved to Thailand after he did not receive any compensation from OWCP. He stated that if no sedentary work was available it was appropriate for appellant to stay off work.

OWCP held a telephone conference with appellant and Ms. Jacintho on August 19, 2010.² Appellant questioned when he would receive compensation and the claims examiner noted that he had been released to light duty on February 12, 2010. His attorney asserted that the employing establishment had not issued a written job offer and he was entitled to compensation. Ms. Jacintho related that appellant had left without providing a forwarding address and was orally informed that he had a job.

On September 15, 2010 the employing establishment offered appellant a modified position.³ Appellant accepted the position on September 17, 2010 and advised that he would be back on October 4, 2010. On October 20, 2010 he filed a claim for compensation from February 11 to September 25, 2010.⁴

In an October 21, 2010 report, Dr. Numata informed the employing establishment that appellant had the capacity for modified sedentary duty on February 11, 2010 but that the work note "did not state he must return to work at all cost." He opined that if the employing establishment could not provide work within the recommended restrictions, appellant would have had to stay off work.

By decision dated December 14, 2010, OWCP denied appellant's claim for disability compensation from February 12 to September 25, 2010. It determined that the evidence did not establish that he was totally disabled from work and that there was no evidence that the employing establishment could not have accommodated his work restrictions.

On December 20, 2010 appellant, through his attorney, requested a telephone hearing that was held on April 13, 2010. Counsel argued that he received compensation when he moved to Thailand and was not offered a job with the employing establishment. Appellant confirmed that he had not received a letter offering limited-duty employment. He related that he had no source of income so he took a loan from his Thrift Savings Plan and sold his belongings to relocate to Thailand to recover from his injury. Appellant had told his supervisor of his plan. His attorney

² In a July 28, 2010 e-mail message, appellant informed Ms. Jacintho that he could not "survive on Maui from my savings so I relocated to a cheaper environment." He related that he submitted leave slips to his supervisor. In a July 30, 2010 telephone call, Ms. Jacintho related that she told appellant that the medical evidence indicated that he could work but he said that he could not and was staying in Thailand.

³ The record also contains an August 20, 2010 job offer; however, the employing establishment made a subsequent job offer on September 15, 2010.

⁴ On October 20, 2010 Ms. Jacintho submitted an employing establishment form describing the responsibilities of injured workers, including notifying it of a physician's release of an injured worker for limited duty.

argued that it was the duty of the employer to determine if work was available and OWCP's duty to evaluate whether the job offer is suitable.

By letter dated May 6, 2011, Ms. Jacintho asserted that appellant did not notify anyone that he was going to Thailand and or provide any contact information.⁵ She maintained that she had advised him orally and in writing that limited-duty employment was available.

In a decision dated June 28, 2011, the hearing representative affirmed the December 14, 2010 decision.

LEGAL PRECEDENT

A claimant has the burden of establishing the essential elements of his claim, including that the medical condition for which compensation is claimed is causally related to the claimed employment injury.⁶ For wage-loss benefits, the claimant must submit medical evidence showing that the condition claimed is disabling.⁷ The evidence submitted must be reliable, probative and substantial.⁸

As used in FECA,⁹ the term disability means incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.¹⁰ The general test in determining loss of wage-earning capacity is whether the employment-related impairment prevents the employee from engaging in the kind of work he was doing when he was injured.¹¹ If an employing establishment's actions prevent an employee from working due to a work-related condition, that employee is disabled within the meaning of FECA.¹²

OWCP regulations provide that, where an attending physician notifies the employer in writing that the employee can return to restricted duty, the employer must advise the employee in writing of any available positions which accommodate his restrictions.¹³ The offer must include a description of the duties of the position, the physical requirements of those duties and the date

⁵ In an internal memorandum dated May 5, 2011, a manager with the employing establishment related that appellant told him that he was going to Honolulu and that he had no memory of him requesting leave from his supervisor.

⁶ 20 C.F.R. § 10.115(e) (2007); *see Tammy L. Medley*, 55 ECAB 182 (2003).

⁷ *Id.* at § 10.115(f).

⁸ *Id.* at § 10.115.

⁹ *Supra* note 1; *id.* at § 10.5(f).

¹⁰ *Paul E. Thams*, 56 ECAB 503 (2005).

¹¹ *See Frazier V. Nichols*, 37 ECAB 528 (1996).

¹² *See Claude E. Pilgreen*, 33 ECAB 566 (1982).

¹³ 20 C.F.R. § 10.507(b).

by which the employee is either to return to work or notify the employer of his decision to accept or refuse the job offer.¹⁴ When the employer sends a copy of the offer to the employee, it must simultaneously send a copy of the offer to OWCP.¹⁵

If an employee can resume regular federal employment, he must do so.¹⁶ However, if he cannot return to the job held at the time of injury, but has recovered enough to perform some type of work, the employee must seek work.¹⁷ Where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions.¹⁸ If there are no specific positions available, the employer should notify the employee of accommodations it can make to accommodate his injury.¹⁹

OWCP regulations at 20 C.F.R. § 10.515 further provide:

“(b) If an employee cannot return to the job held at the time of injury due to partial disability from the effects of the work-related injury, but has recovered enough to perform some type of work, he or she must seek work. In the alternative, the employee must accept suitable work offered to him or her. This work may be with the original employer or through job placement efforts made by or on behalf of OWCP.

“(c) If the employer has advised an employee in writing that, specific alternative positions exist within the agency, the employee shall provide the description and physical requirements of such alternative positions to the attending physician and ask whether and when he or she will be able to perform such duties.

“(d) If the employer has advised an employee that it is willing to accommodate his or her work limitations, the employee shall so advise the attending physician and ask him or her to specify the limitations imposed by the injury. The employee is responsible for advising the employer immediately of these limitations.”

ANALYSIS

OWCP accepted that appellant sustained lumbar strain due to an October 7, 2009 employment injury. On February 11, 2010 Dr. Numata found that appellant could return to

¹⁴ *Id.*

¹⁵ *Id.* at § 10.507(d).

¹⁶ *Id.* at § 10.515(a).

¹⁷ *Id.* at § 10.515(b).

¹⁸ *Id.* at § 10.505(a). A similar written requirement is imposed with respect to offers of suitable work. *See id.* at § 10.506(c) and (d).

¹⁹ *Id.* at § 10.505(b).

modified, sedentary employment, if available. He noted that appellant intended to relocate to Thailand as he had not received compensation for disability and had difficulty meeting expenses. Appellant relocated to Thailand subsequent to Dr. Numata's February 11, 2010 report. On February 22, 2010 the employing establishment submitted his November 13, 2009 and January 31, 2010 claims requesting compensation for disability from December 6, 2009 to February 13, 2010. On March 5, 2010 OWCP paid appellant compensation for total disability from December 6, 2009 to January 2, 2010 and on June 10, 2010 it paid him compensation for disability from January 3 to February 11, 2010.

On March 23, 2010 Dr. Numata submitted a work restriction evaluation identifying appellant's work restrictions. In a report dated April 19, 2010, he advised the employing establishment that appellant could perform sedentary duty beginning February 12, 2010.

Appellant filed a claim for compensation from February 12 to September 25, 2010. OWCP denied his claim as the evidence did not establish that he was disabled from employment after February 11, 2010. It determined that there was no evidence that the employing establishment was unable to accommodate appellant's work restrictions.

The Board finds that appellant has established that he was disabled from February 12 to September 25, 2010 causally related to his October 7, 2009 employment injury. While his attending physician released him to return to modified sedentary duty, the employing establishment did not offer him a limited-duty position in writing as required by the implementing regulations.²⁰ Ms. Jacintho noted that the employing establishment did not have a forwarding address and that she had informed appellant orally and in writing that limited-duty work was available. The record, however, contains no evidence that the employing establishment ever advised him in writing that it could accommodate his restrictions or provided a written job offer to his last known address. Once notified by his physician that appellant was able to return to light-duty work with restrictions, the employing establishment was obligated to provide him with a written offer. To be valid, the job offer must describe the duties of the position, the physical requirements of those duties and the date by which he was to return to work or provide notification of his decision to accept or refuse the job offer.²¹ The employing establishment did not submit any written job offer in compliance with the regulations until September 15, 2010. Accordingly, neither appellant nor his physician were put on notice of any specific alternative positions existing prior to that time. As there is no indication that the employing establishment provided him with a written limited-duty job offer in accordance with the applicable regulations, OWCP erred in finding that he had not established entitlement to disability compensation.

²⁰ *Id.* at § 10.507.

²¹ See *S.J.*, Docket No. 06-2135 (issued August 21, 2007); *Harold S. McGough*, 36 ECAB 332 (1984); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (December 1993).

CONCLUSION

The Board finds that appellant is entitled to compensation for disability from February 12 to September 25, 2010 causally related to his October 7, 2009 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 7, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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