

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

D.V., Appellant)
and) Docket No. 11-1977
U.S. POSTAL SERVICE, POST OFFICE,) Issued: May 3, 2012
Catano, Puerto Rico, Employer)

)

Appearances:

Elaine Rodriguez, 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 September 8, 2011 appellant, through his attorney, filed an appeal of a merit decision of the Office of Workers' Compensation Programs (OWCP) dated March 29, 2011 denying his claimed disability. 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 August 17, 2010.

FACTUAL HISTORY

On October 3, 2006 appellant, then a 51-year-old letter carrier, filed an occupational disease claim alleging that his bilateral carpal tunnel condition was related to factors of his federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome. Appellant

¹ 5 U.S.C §§ 8101-8193.

stopped work on September 28, 2006 and returned to work full duty on November 27, 2006. His duties were subsequently modified due to his accepted condition. As of February 15, 2007, Dr. Priscilla Mieses-Llavat, a treating physiatrist, advised that appellant could not perform his usual work and provided restrictions based on his bilateral carpal tunnel syndrome. He submitted numerous duty status reports noting appellant's work restriction due to his accepted condition. On August 18, 2010 appellant accepted an August 18, 2010 offer of modified assignment which provided for only one-hour casing mail.

On September 10, 2010 appellant filed a claim for intermittent wage loss for the period August 17 to September 3, 2010. He also filed a claim for intermittent wage loss for the period September 4 to October 19, 2010. On each of the claim forms, the employing establishment noted that an offer of modified assignment was prepared based on a June 16, 2010 duty status report (Form CA-17) which indicated that appellant could only do simple grasping one hour a day in an eight-hour day.²

In a September 23, 2010 letter, OWCP requested additional information before it could act on appellant's claim for intermittent wage loss for the period commencing August 17, 2010. It noted that he had resumed full duty on November 27, 2006 and, asked for a signed statement from a knowledgeable supervisor addressing whether he had worked limited duty and submit evidence that he could not perform light or limited duty. OWCP also requested medical reports documenting the progress of his accepted condition from the date he first returned to work to the date of the claimed recurrence, including any periods of total and partial disability with restrictions. Appellant was accorded 30 days to provide additional information.

In a September 29, 2010 telephone call to OWCP, appellant noted that the employing establishment had put him under the natural reassessment program. In a September 29, 2010 letter, he stated his claim for intermittent wage loss was based on the fact that the employing establishment no longer had limited-duty work for him. On August 17, 2010 appellant's limited-duty work was withdrawn and he was instructed to go home after only one hour of work.

By decision dated November 8, 2010, OWCP denied the claim for a recurrence of disability. It found that appellant did not provide sufficient evidence that he did not return to full duty and the medical evidence did not establish that he had any physical residuals from his accepted work-related condition.

On November 19, 2010 appellant disagreed with OWCP's decision and requested an oral hearing before an OWCP hearing representative, which was scheduled for February 17, 2011. This request was later changed to one for review of the written record.

In a February 14, 2011 report, Dr. Mieses-Llavat indicated that appellant had been under her care since February 23, 2007. Appellant came with a history of bilateral carpal tunnel syndrome for which he had left carpal tunnel release in June 2006. He reported that he worked light duty in 2006 and was placed in limited duty at the beginning of 2007. Dr. Mieses-Llavat

² This duty status report is from Dr. Mieses-Llavat, appellant's treating physiatrist, and contains restrictions attributable to carpal tunnel syndrome. The June 16, 2010 report actually limits simple grasping to one-half hour daily.

indicated that recent physical examination showed bilateral “APB” atrophy with decreased range of motion of wrists secondary to pain and there were positive Tinel’s and Phalen’s signs for both hands. Appellant’s hand grip was noted as 4/5. Dr. Mieses-Llavat opined that appellant’s bilateral carpal tunnel syndrome was a recurrence. She recommended, among other things, that he work full duty with simple grasping for one hour and has the cart for the rest. A copy of a duty status report dated February 11, 2011 was provided along with restrictions. Also provided were copies of a February 3, 2011 limited-duty assignment, which appellant accepted.

By decision dated March 29, 2011, OWCP’s hearing representative affirmed the November 8, 2010 decision finding that appellant was working full duty as of 2006 and any light duty accommodation the employing establishment may have made prior to the filing of the current claim for lost wages had not been shown to be related to his accepted work-related carpal tunnel syndrome.

LEGAL PRECEDENT

OWCP’s regulations define the term 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 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.³

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.⁴ 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.⁵

³ 20 C.F.R. § 10.5(x).

⁴ *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ *Maurissa Mack*, 50 ECAB 498 (1999).

FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to the National Reassessment Process (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 six 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 [National Reassessment Program] cases without approval from the District Director.)”⁶

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.

ANALYSIS

Appellant filed a claim for disability for the intermittent period August 17 to October 19, 2010. While there is no record of an official limited-duty offer after his return to full-time full-duty work on November 27, 2006, the record supports, based on the CA-17 forms on file, that he began working limited duty in February 2007 for several years due to his accepted work-related condition of bilateral carpal tunnel syndrome. Appellant stated that his light-duty job was withdrawn in 2010 pursuant to the reassessment program which appears to be the NRP process. The guidelines for evaluating a claim for total disability under these circumstances are noted above in FECA Bulletin No. 09-05.⁷

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.⁸

⁶ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁷ See also J.A., Docket No. 11-1592 (issued February 13, 2012).

⁸ It would be OWCP’s burden of proof to show that employment-related residuals had ceased. See *Joseph Roman*, 55 ECAB 233 (2004).

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. Mieses-Llavat in light of the withdrawal of the light-duty position. As noted, Dr. Mieses-Llavat submitted numerous reports indicating that appellant was unable to perform his regular duties and setting forth his work restrictions. Accordingly, the case will be remanded to OWCP for further development and 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 the case must be remanded to OWCP for proper findings on the issue presented.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further actions 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