United States Department of Labor
Employees' Compensation Appeals Board

T.C., Appellant	)	
and	)	**Docket No. 11-1880**
	)	**Issued: September 25, 2012**
U.S. POSTAL SERVICE, POST OFFICE, West Hartford, CT, Employer	)	

Appearances:
Anita M. Varunes, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 15, 2011 appellant, through his attorney, appealed the March 15, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his recurrence claim. Pursuant to the Federal Employees' Compensation Act[1] (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 a recurrence of disability beginning November 9, 2009, causally related to his January 10, 2000 employment injury.

FACTUAL HISTORY

On February 23, 2000 appellant, then a 42-year-old part-time regular (PTR) mail handler filed an occupational disease claim (Form CA-2) for a lower back injury that reportedly occurred

[1] 5 U.S.C. §§ 8101-8193 (2006).

on or about January 10, 2000.[2] On June 22, 2000 OWCP accepted the claim for lumbar strain.[3] Following his January 10, 2000 employment injury, appellant worked limited-duty repairing mail. OWCP later expanded the claim to include permanent aggravation of (lumbar) degenerative disc disease (DDD) as an accepted condition. The decision to expand the claim was based on the November 3, 2003 report of Dr. David C. Bomar, a Board-certified orthopedic surgeon and OWCP referral physician, who diagnosed chronic lumbosacral strain and lumbar spine DDD. Although appellant's DDD preexisted the January 10, 2000 employment injury, Dr. Bomar explained that repeated heavy lifting on the job permanently aggravated appellant's lumbar DDD and also caused the lumbosacral strain. He further indicated that appellant was unable to perform his regular duties, but was able to work full-time, limited duty with permanent restrictions of occasional bending/stooping and occasional lifting up to 20 pounds.

On April 13, 2004 the employing establishment offered appellant a position as a modified PTR mail handler, working four hours a day, six days a week.[4] OWCP reviewed the job description and found it consistent with his medical restrictions. Appellant accepted the position on April 27, 2004. Approximately, three years later, the employing establishment extended a revised rehabilitation job offer, which he accepted on March 12, 2007.[5]

On November 9, 2009 the employing establishment advised appellant that there was no limited-duty work available within their operational needs. Pursuant to the National Reassessment Process, the employer immediately placed him on administrative leave pending final resolution of the issue. On February 18, 2010 the employing establishment issued a final decision regarding the lack of limited-duty work. The decision was effective February 22, 2010.

Appellant subsequently filed a notice of recurrence (Form CA-2a), claiming that he had stopped working on November 9, 2009 because his employer withdrew his limited-duty assignment.[6]

On March 26, 2010 OWCP advised appellant to submit a report from his physician addressing whether appellant remained disabled from performing his regular duties and if so,

[2] As a PTR mail handler, appellant worked four hours per day, six days a week.

[3] Although the claim was accepted for lumbar strain, an April 5, 2000 lumbar magnetic resonance imaging scan revealed multilevel degenerative changes, most prevalent at L4-5 and L5-S1. There was also a small tear in the annulus to the right side in proximity to the L4 nerve root.

[4] Appellant was physically capable of working an eight-hour day, however, the employer offered only part-time work consistent with appellant's date-of-injury status as a PTR employee.

[5] Appellant continued to work four hours a day, six days per week. As a modified mail handler he was primarily responsible for repairing damaged mail. The physical requirements of the position were as follows: (1) lifting up to 20 pounds, one hour, intermittently; (2) standing/walking, two to four hours, intermittently; (3) sitting, four hours, intermittently; (4) bending/stooping, one to three times per day, intermittently; and (5) reaching above shoulder, zero to two hours, intermittently.

[6] Although appellant stopped work as of November 9, 2009, there is a discrepancy as to when his pay stopped. On his CA-2a form, he indicated that his pay stopped on February 22, 2010. However, the employing establishment indicated that appellant's pay stopped as of February 13, 2010.

whether the current disability was causally related to the January 10, 2000 employment injury. A large number of reports were submitted by appellant.

In a March 15, 2011 decision, the hearing representative found that there was insufficient evidence of a causal relationship between appellant's lumbar disc tear and his accepted employment injury of January 10, 2000. The hearing representative also found that he had not established a "material worsening" of the accepted condition or that he was unable to work due to the accepted condition as of November 2009. Consequently, the hearing representative affirmed the April 30, 2010 decision denying appellant's claimed recurrence of disability.

LEGAL PRECEDENT

A recurrence of disability includes an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his 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 (RIF).[7] Absent a formal wage-earning capacity determination and assuming the position was not withdrawn for cause or because of a RIF, the employee would be entitled to compensation based upon a showing of continuing injury-related disability for regular duty.[8]

In addition to the generally applicable provisions in the preceding paragraph, OWCP has issued specific guidance for employees affected by NRP of the postal service. FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to NRP. Regarding claims for total disability when a wage-earning capacity decision has not been issued, the FECA Bulletin No. 09-05 provides that if the claimant has been on light duty due to an injury-related condition without an loss of wage-earning capacity (LWEC) rating (or the claims examiner 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. First, the current medical evidence within the file establishes that injury-related residual conditions continue. There must be sufficient medical evidence in the record within the last six months to make this determination. The evidence in the file must support that light duty is no longer available. There must be no indication that a retroactive LWEC determination should be made. Where a retroactive LWEC is considered, OWCP district director must approve the decision to perform one. In the event the claims examiner finds that the evidence in file is not sufficient to determine whether total wage-loss benefits should continue, current medical evidence should be requested from the claimant and the employer.[9]

ANALYSIS

OWCP accepted conditions of lumbar strain and later included permanent aggravation of lumbar DDD stemming from a low back injury that occurred on or about January 10, 2000.

[7] 20 C.F.R. § 10.5(x).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(4) (October 2009).

[9] FECA Bulletin No. 09-05 (issued August 18, 2009).

Dr. Bomar, OWCP referral physician indicated that appellant was unable to perform his regular duties, but was able to work in a full-time capacity with permanent restrictions. The employing establishment offered appellant a limited-duty position of a modified PTR handler. Appellant accepted the position, however, was later notified that there was no further limited-duty work available.

Generally, a withdrawal of limited-duty constitutes a recurrence of disability under OWCP regulations. In the instant case, there is no LWEC in place. As such, OWCP, according to the guidelines outlined in FECA Bulletin No. 09-05 must consider whether the current medical evidence establishes that the injury-related residuals continue (within the last six months); that evidence in the file supports a certain number of hours of light duty are no longer available; and that there is no indication that a retroactive LWEC should be made. If such medical evidence does not exist or insufficient, it should request current medical evidence from both the postal service and claimant.

The March 15, 2011 OWCP decision denying appellant's claim for compensation did not refer to FECA Bulletin No. 09-05 or attempt to follow its dictates. As such, the Board will set aside OWCP's March 15, 2011 decision and the case will be remanded for a proper decision in accordance with the procedures and guidance offered in FECA Bulletin No. 09-05. After such development OWCP finds necessary, it shall issue an appropriate decision.

CONCLUSION

The Board finds that OWCP failed to follow the procedures it has adopted for adjudicating claims under the postal service NRP and that the order dated November 15, 2011 must be set aside and the case remanded.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for adjudication in accordance with the terms of this order.

Issued: September 25, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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