

relationship to his employment. OWCP accepted an aggravation of cervical spondylosis and degeneration of a cervical intervertebral disc. After a period of total disability, appellant returned to light-duty work in November 2005 for eight hours a day, five days a week.

On July 8, 2010 the employing establishment advised appellant that it was withdrawing his light-duty position under the National Reassessment Program (NRP). Appellant was offered a light-duty position for two hours per day, five days per week, which he accepted.

On August 4, 2010 appellant filed a claim for compensation, Form CA-7, alleging that partial disability from July 17 to 30, 2010.² He later filed additional CA-7 forms claiming partial disability after July 30, 2010 and indicated that he lost six hours a day under NRP action.

In an August 4, 2010 decision, OWCP advised appellant that his “recurrence of July 17, 2010 has been accepted;” however, it did not begin paying appellant disability compensation at that time.

Appellant submitted medical evidence in support of his claim for a recurrence of partial disability. In an October 19, 2010 report, Dr. Yasser Gouda, an attending Board-certified orthopedic surgeon, stated that appellant continued to have flare-ups of cervical pain which limited his functioning. In a December 6, 2010 report, he indicated that appellant continued to be partially disabled due to his work injury.

In decisions dated between October 2010 and May 2011, OWCP denied appellant’s claim for a recurrence of disability beginning July 17, 2010. The April 14, 2011 decision of an OWCP hearing representative discussed NRP and the directives of FECA Bulletin No. 09-05. The hearing representative listed the bulletin’s three criteria for paying compensation when there is no wage-earning compensation determination in an NRP case (including the existence of current medical evidence showing continuing work residuals) and the requirement that an OWCP claims examiner should request current medical evidence from both the U.S. Postal Service and the claimant if the medical evidence is insufficient.³ The hearing representative did not address whether the requirements of FECA Bulletin No. 09-05 had been carried out.

In a May 31, 2011 report, Dr. Randall N. Smith, an attending Board-certified orthopedic surgeon, discussed appellant’s medical history, including physical examination findings. He detailed appellant’s accepted work injury and stated:

“In my opinion it is a substantial contributing factor. His carrying the mail for that period of time has accelerated his disc degeneration leading to the present findings on the [magnetic resonance imaging] and his present complaints including neck pain and numbness in the arms. This does not allow him to return to carrying mail. The light duty is tolerated and fine. He should continue to do light duty and he can do that on a full-time basis.... The question arises again, whether his present condition is substantially as a result of his carrying mail for a

² On July 20, 2010 appellant also filed a notice of recurrence, Form CA-2a.

³ See *infra* note 7.

period of time. In my mind, it is and that carrying the mail has accelerated the degeneration in his discs leading to the present condition and thus not allowing him to return to the work force as a letter carrier.”

In September 6 and 29, 2011 decisions, OWCP denied appellant’s recurrence of disability claim without discussing FECA Bulletin No. 09-05.

Appellant submitted a March 6, 2012 report in which Dr. Smith reported his findings on examination and stated:

“In summary, [appellant] did sustain an injury on May 25, 2000 while performing his regular job which put him out of work, at least as a regular letter carrier. Whatever happened on that date did aggravate the underlying spondylosis and make it impossible for him to continue doing his job. In the particular period from July 10 through December 31, 2010 [appellant] could not perform his job as a regular letter carrier as a result of the aggravation of the cervical condition and that occurred on May 25, 2000. He had the spondylosis to a certain degree before that was cumulatively progressing as he performed his job and then the lifting of that date was enough to say the straw that broke the camel’s back that put him over the top, making it impossible for him to continue performing the job as a letter carrier.”

In a March 16, 2012 report, Dr. Robert A. Smith, a Board-certified orthopedic surgeon serving as an OWCP referral physician, stated that appellant still had evidence of degeneration of the cervical discs, which was an accepted condition and he recommended various work restrictions.

In a May 21, 2012 decision, OWCP affirmed its September 29, 2011 decision denying appellant’s recurrence of disability claim. It did not mention the requirements of FECA Bulletin No. 09-05.

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.⁴

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

⁴ 20 C.F.R. § 10.5(x).

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.⁵ 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.⁶

FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to NRP. Regarding claims for total disability when a loss of 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.)

“2. If the medical evidence is not sufficient, the CE should request current medical evidence from both the [employing establishment] and the claimant. As with the previous circumstances, the claimant should be requested to provide a narrative medical report that addresses the nature and extent of any employment-related residuals of the original injury.”⁷

ANALYSIS

Appellant filed a claim for recurrence of partial disability commencing July 17, 2010 and continuing.⁸ The record indicates that his limited-duty job was withdrawn effective July 8, 2010

⁵ *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *Maurissa Mack*, 50 ECAB 498 (1999).

⁷ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁸ OWCP accepted that appellant sustained aggravation of cervical spondylosis and degeneration of cervical intervertebral disc.

pursuant to NRP and that he accepted work for two hours a day.⁹ The Board notes that no wage-earning compensation determination has been made in the present case.

It is well established 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 notes that OWCP should consider whether the current medical evidence establishes that the claimant has continuing employment-related residuals after the withdrawal of the light-duty position. The bulletin describes specific standards that should be followed when, as in the present case, no wage-earning capacity determination has been made. If the medical evidence is not sufficient, OWCP should request additional evidence.

The Board finds that OWCP failed to apply the standards of FECA Bulletin No. 09-05, particularly with regard to the request for additional medical evidence from both the U.S. Postal Service and appellant. It did not adequately review the medical evidence from the physicians of record in light of the standards of the FECA Bulletin No. 09-05. For example, appellant submitted the May 31, 2011 and March 6, 2012 reports from Dr. Smith, an attending Board-certified orthopedic surgeon, who found that he continued to be partially disabled due to his work injury. OWCP did not discuss this evidence in the context of FECA Bulletin No. 09-05 or explain whether such evidence established partial disability after July 17, 2010 under the standards of the bulletin.

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 the case is not in posture for decision regarding whether appellant sustained a recurrence of partial disability beginning July 17, 2010 and continuing. The case must be remanded to OWCP for proper findings on this issue.

⁹ Appellant's hours were reduced from eight hours per day, five days per week to two hours per day, five days per week.

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2012 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: April 2, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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