

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

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W.R., Appellant	)	
	)	
and	)	<b>Docket No. 12-1818</b>
	)	<b>Issued: March 4, 2013</b>
U.S. POSTAL SERVICE, AIR MAIL CENTER,	)	
Atlanta, GA, Employer	)	
	)	

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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On September 7, 2012 appellant filed a timely appeal from a June 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 has met his burden of proof to establish a recurrence of disability on and after April 4, 2011.

**FACTUAL HISTORY**

On August 25, 2004 appellant, then a 55-year-old mail handler, filed a traumatic injury claim alleging that he injured his lower back when he reached over to unjam mail on a conveyer belt. On January 25, 2005 OWCP accepted his claim for lumbar strain. Initially appellant, returned to work regular duty, but due to an increase in pain, he was placed on modified duty.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

He was treated by Dr. William Ross, a Board-certified orthopedic surgeon, and later by Dr. Matthew M. Richardson, a physician Board-certified in pain medicine, sports medicine and physical medicine and rehabilitation. As appellant's physicians adjusted his work restrictions, the employing establishment accommodated these restrictions with limited-duty work assignments.

By letter dated March 31, 2011, the employing establishment advised appellant that his position had been evaluated under the National Reassessment Process (NRP) and that there was no work available for him within his current medical restrictions. Appellant filed a claim for total disability compensation commencing April 4, 2011.

By letter dated April 15, 2011, OWCP asked appellant for a current narrative medical report, which would include, *inter alia*, current clinical examination findings. It requested that the information be provided within 30 days. On the same date OWCP asked the employing establishment to provide all current medical evidence.

In a decision dated May 24, 2011, OWCP denied appellant's claim for a recurrence of disability on April 4, 2011. It indicated that she had not provided medical evidence to establish a recurrence of disability.

By letter dated June 1, 2011, appellant requested reconsideration.

In a May 25, 2011 report and an addendum of May 27, 2011, Dr. Richardson listed a firm diagnosis of lumbar spondylosis, lumbago and sprain/strain (lumbar region). He noted that appellant had not been seen by him since July 9, 2008.

By decision dated July 14, 2011, OWCP denied modification of its May 24, 2011 decision.

Appellant filed an appeal to the Board, and on June 12, 2012, the Board issued an Order Remanding Case. The Board directed OWCP to consider appellant's case in light of FECA Bulletin No. 09-05 and to follow its provisions.<sup>2</sup>

By decision dated June 26, 2012, OWCP again denied appellant's claim for recurrence of disability as the medical evidence failed to establish a causal relationship between his disability and any employment-related residuals.

### **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 or her 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).<sup>3</sup> Absent a formal wage-earning capacity determination and assuming the position was not withdrawn for

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<sup>2</sup> Docket No. 11-1935 (issued June 12, 2012).

<sup>3</sup> 20 C.F.R. § 10.5(x).

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.<sup>4</sup>

In addition to the generally applicable provisions in the preceding paragraph, OWCP has issued specific guidance for employees affected by NRP of the U.S. Postal Service. 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, FECA Bulletin No. 09-05 provides that payment for total wage loss should be made based on the Form CA-7 as long as the following described 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. In addition, the evidence in the file must support that light duty is no longer available. There must be no indication that a retroactive loss of wage-earning capacity determination should be made. Where a retroactive loss of wage-earning capacity is considered, OWCP's district Director must approve any such decision. In the event that OWCP's claims examiner finds that the evidence in the file is not sufficient to determine whether total wage-loss benefits should continue, current medical evidence should be requested from the claimant and the employing establishment.<sup>5</sup>

### ANALYSIS

Appellant filed a claim for recurrence of total disability and wage loss commencing April 4, 2011. The record established that his limited-duty job was withdrawn by his employing establishment through NRP. There has been no loss of wage-earning capacity rating issued in this case.

The Board remanded this case for OWCP to apply the guidelines set forth by the Director in FECA Bulletin No. 09-05. The Board notes that, on remand, OWCP did discuss this bulletin. However, the Board finds that OWCP did not properly consider its responsibility in this case. The Board notes that generally, a withdrawal of limited duty constitutes a recurrence of disability under OWCP regulations.<sup>6</sup> As there was no loss of wage-earning capacity in place, OWCP should consider whether the medical evidence established that appellant had continuing injury-related residuals at the time of the withdrawal. FECA Bulletin 09-05 requires OWCP to request current medical evidence from both appellant and the employing establishment, and OWCP did so by letters dated April 15, 2011. In response, appellant submitted a May 25, 2011 report by Dr. Richardson. OWCP determined that this report was insufficient to establish a current diagnosed condition that is causally related to the original injury. However, if the medical evidence was insufficient, OWCP should have requested additional evidence or referred appellant to an appropriate specialist to address residuals due to the accepted condition. OWCP has the burden of proof to show that injury-related residuals have ceased.<sup>7</sup> Entitlement to

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(4) (October 2009).

<sup>5</sup> FECA Bulletin No. 09-05 (issued August 18, 2009); *see also E.V.*, Docket No. 11-1652 (issued June 14, 2012).

<sup>6</sup> *See C.C.*, Docket No. 12-305 (issued November 14, 2012).

<sup>7</sup> *M.B.*, Docket No. 12-435 (issued July 3, 2012); *J.A.*, Docket No. 11-1592 (issued February 13, 2012); *see also Joseph Roman*, 55 ECAB 233 (2004).

wage-loss compensation would be established if the current evidence established that employment-related residuals continued, the light duty was no longer available and there was no indication that a retroactive loss of wage-earning capacity determination should be made.<sup>8</sup>

Accordingly, the Board will set aside OWCP's June 26, 2012 decision and remand the case to OWCP for further consideration. After such further development as may be necessary, OWCP shall issue an appropriate final decision on appellant's claim for wage-loss compensation beginning April 4, 2011.

### **CONCLUSION**

The Board finds that this case is not in posture for decision on whether appellant is entitled to wage-loss compensation beginning April 4, 2011, as the employing establishment withdrew his limited duty under NRP.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 26, 2012 is set aside and the case is remanded for further action.

Issued: March 4, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>8</sup> *E.V.*, *supra* note 5.