

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

_____)	
J.V., Appellant)	
)	
and)	Docket Nos. 14-624 &
)	14-1088
DEPARTMENT OF AGRICULTURE, ANIMAL)	Issued: August 8, 2014
& PLANT HEALTH INSPECTION SERVICE,)	
Fort Pierce, FL, Employer)	
_____)	

Appearances:
Ronald Webster, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 28, 2014 appellant, through his attorney, filed a timely appeal from a November 26, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). This appeal was docketed as No. 14-624. On April 10, 2014 appellant filed a timely appeal of a February 6, 2014 OWCP merit decision, docketed as No. 14-1088. 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 has established any employment-related disability during the period December 21, 2012 to January 11, 2013.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 13, 2012 appellant, then a 60-year-old plant protection technician, filed a traumatic injury claim (Form CA-1) alleging that on February 29, 2012 he sustained injuries in a motor vehicle accident. The claim form states that he “swerved to avoid animal and ran into canal.” In a March 1, 2012 letter, the employing establishment advised that, as of June 24, 2011, appellant had been working under a one-year limited appointment. Appellant was limited to 180 days of work from June 24, 2011 to June 23, 2012 and, when injured, he had already worked 178 days, with his last scheduled day as March 2, 2012. He would then be in a nonpay status until June 23, 2012, when he would either be rehired under the same one-year appointment, rehired under a new appointment or terminated.

On April 17, 2012 OWCP accepted the claim for lumbosacral spondylosis without myelopathy, lumbar spondylosis with myelopathy, herniated discs at C4-5, L4-5 and L5-S1, cervical and lumbar sprains. The record indicates that appellant received compensation from April 16 to October 20, 2012.

In a work capacity evaluation (Form OWCP-5c) dated September 17, 2012, Dr. Daniel Husted, a Board-certified orthopedic surgeon, advised that appellant could work with a 30-pound lifting restriction. By letter dated October 1, 2012, the employing establishment offered appellant a 60-day job as a plant protection technician commencing October 22, 2012. It stated that the job was set up to accommodate his 30-pound lifting restriction. Appellant accepted the position and worked from October 22 to December 20, 2012.

On January 8, 2013 appellant filed a claim for compensation (Form CA-7) from December 21 to 28, 2012. On February 1, 2013 he filed a Form CA-7 for the period December 31, 2012 to January 11, 2013.

In a report dated January 30, 2013, Dr. Husted stated that appellant sustained work injuries on February 29, 2012 with an aggravation sustained at work on October 24, 2012.² He agreed to allow appellant to work a 60-day, relatively light job with no lifting over 30 pounds and allowing him to stretch every 45 minutes. On November 5, 2012 appellant had worsened symptoms and needed a functional capacity evaluation and an epidural injection. He stated that a magnetic resonance imaging (MRI) scan revealed a compression fracture and appellant should not be involved in prolonged sitting, standing or bending. Dr. Husted stated that appellant “certainly continues to be affected by this original diagnosis” and should be treated for those conditions in the future and the October 24, 2012 incident was the type of incident that aggravates an orthopedic condition.

In a report dated February 22, 2013, Dr. Husted provided results on examination and stated that appellant was status post February 29, 2012 work injury. He noted an MRI scan showed an L1 inferior endplate fracture, which was new and constituted a new injury.

By decision dated March 20, 2013, OWCP denied appellant’s claim for compensation from December 21 to 28, 2012. It found that he worked in a temporary position when injured,

² Claim File No. xxxxxx766.

was brought back for a 60-day temporary position and was not terminated due to injury but expiration of the temporary job.

Appellant requested a hearing before an OWCP hearing representative on April 9, 2013.

In a report dated April 10, 2013, Dr. Husted provided results on examination. He noted that appellant continued to have residual low back pain, that was a combination of both the compression fracture and stenosis and resulting in partial disability.

By decision dated May 3, 2013, OWCP denied the claim for compensation from December 31, 2012 to January 11, 2013. It again found appellant's work stoppage was not the result of the employment injury but termination of a temporary job.

On May 21, 2012 appellant requested a hearing on this decision.

A hearing was held on August 13, 2013. Counsel argued that appellant was provided a light-duty job that was withdrawn and he was entitled to compensation.

In a letter dated September 13, 2013, the employing establishment stated that appellant had been on a term appointment that expired on June 24, 2011. Appellant was then on a temporary one-year appointment, limited to 180 workdays, that would have ended regardless of a work injury. The employing establishment stated the 60-day job was also a temporary job that ended due to expiration of its term.

By decision dated November 26, 2013, an OWCP hearing representative affirmed the March 20, 2013. He found that appellant's work stoppage was due to the termination of a temporary appointment rather than a medical disability.

A hearing was held on October 30, 2013 with respect to the May 3, 2013 decision.

By decision dated February 6, 2014, an OWCP hearing representative affirmed the May 3, 2013 decision. She found that appellant did not submit sufficient medical evidence to establish that he sustained any employment-related disability.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ The term disability is

³ 5 U.S.C. §§ 8101-8193.

⁴ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁵

A claimant that has returned to a light-duty position may establish a recurrence of an employment-related disability by showing 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.⁶ The Board has recognized that for a permanent employee the withdrawal of a light-duty job may establish a change in the nature and extent of the light-duty requirements.⁷ 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.⁸

ANALYSIS

The record reflects that appellant was originally hired on a term appointment that expired on June 24, 2011. Appellant was rehired on a one-year, limited appointment not to exceed 180 workdays. This appointment would expire on June 23, 2012. At the time of injury on February 29, 2012, appellant was a temporary employee on a limited one-year contract. As of October 22, 2012, he worked for 60 days on a temporary light-duty position. The position expired and appellant filed claims for compensation commencing December 21, 2012.

There are circumstances where a permanent employee may establish a recurrence of disability when a light-duty job is withdrawn and no longer available. When the employing establishment has no modified job within the employment-related medical restrictions, then the permanent employee may establish an employment-related disability. The present case involves a temporary employee returning to a temporary light-duty position. As the Board noted in *M.S.*,⁹ when a temporary employee's appointment expires, this does not itself establish a recurrence of disability. Appellant was a temporary employee when injured and returned to a temporary light-duty position. The expiration of the temporary light-duty job, due to the terms of the appointment, does not itself establish any employment-related disability.¹⁰

⁵ 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

⁶ *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁷ *Jackie B. Wilson*, 39 ECAB 915 (1988).

⁸ *Maurissa Mack* 50 ECAB 498 (1999).

⁹ Docket No. 11-1184 (issued December 12, 2011). In this case the employee was a temporary employee who sustained an employment injury, returned to a light-duty position that expired at the end of the term appointment. The Board found this did not constitute a withdrawal of light duty establishing a recurrence of disability.

¹⁰ *See also Steven A. Anderson*, 53 ECAB 367 (2002); *Shelly A. Paolinetti*, 52 ECAB 391 (2001).

The issue is whether appellant submitted sufficient medical evidence to establish disability for the claimed period causally related to the February 29, 2012 injury. In this regard, the record contains reports from Dr. Husted regarding continuing treatment. Dr. Husted did not specifically discuss the claimed period of disability of December 21, 2012 through January 11, 2013. In addition, he noted that appellant sustained a new work injury on October 24, 2012 and reported a compression fracture. This claim is not before the Board on the current appeal. Dr. Husted refers generally to partial disability in his April 10, 2013 report due to compression fracture and stenosis. Neither of those conditions has been accepted pursuant to the current claim. As noted, a medical report must be based on a complete background and the opinion supported by sound medical reasoning.

On appeal, appellant argues that the evidence shows that he had two serious accidents, “both of which were limiting and both of which require the same orthopedic treatment.” He argues that there was no basis for the denial of compensation following the end of his temporary 60-day position, which was not the date-of-injury position. The Board finds that appellant did not establish disability commencing December 21, 2012 causally related to the February 29, 2012 employment injury. The termination of appellant’s temporary employment does not itself establish entitlement to compensation and the medical evidence of record is not sufficient to establish causal relationship between any disability beginning December 21, 2012 and the February 29, 2012 employment injuries.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established an employment-related disability during the period December 21, 2012 to January 11, 2013.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 6, 2014 and November 26, 2013 are affirmed.

Issued: August 8, 2014
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