

the-road container closed and hit the top of her right shoulder. She sought medical attention that day and resumed modified duty.

Appellant received notice that her appointment would expire on December 30, 2011. According to a notification of personnel action, however, she was separated from employment effective December 31, 2011 for unsatisfactory attendance.

On her last day of work, appellant was seen by Dr. William B. Huey, Jr., a specialist in occupational medicine, who noted the history of injury, her complaints and his findings on examination. Dr. Huey found that she could perform modified duty. He made the same finding on January 5, 12 and 27, 2012. Dr. Jesse E. Seidman, a Board-certified orthopedic surgeon, found appellant capable of modified duty on February 9 and April 23, 2012.

OWCP accepted appellant's claim for right shoulder contusion. It later accepted right shoulder rotator cuff impingement syndrome. OWCP authorized arthroscopic rotator cuff repair, which was performed on July 25, 2012.

On January 31, 2013 appellant claimed compensation for disability beginning December 14, 2011. The employing establishment again indicated that she was separated effective December 31, 2011 for unsatisfactory attendance.

OWCP advised appellant that the period December 14, 2011 through January 28, 2012 could not be paid because it represented the initial 45 days falling under continuation of pay. Further, the period after January 29, 2012 was not payable because she was separated effective December 31, 2011 as a term casual employee for unsatisfactory attendance.

Appellant's attorney responded that appellant was not separated for unsatisfactory attendance; her appointment simply expired. Prior to the expiration, appellant was working limited duty due to her work injury. The attorney contended that there was no evidence that she had recovered the ability to earn wages as a mail handler. He argued that the expiration of her appointment amounted to a withdrawal of limited duty and that compensation for loss of wage-earning capacity is based on loss of the capacity to earn, not on actual wages lost. The attorney added that, as the withdrawal did not occur for cause, OWCP could accept a recurrence and begin the payment of benefits if the evidence establishes continuing injury-related disability for regular duty.

OWCP explained that appellant was entitled to compensation as a result of her authorized surgery on July 25 through September 14, 2012, when she was released to restricted duty. The period January 1 to July 24, 2012 and the period beginning September 14, 2012, however, required further development. OWCP asked appellant to provide medical evidence to establish her disability for work during the two periods.

The manager of distribution operations clarified that appellant was hired as a noncareer casual mail handler with a temporary appointment that was scheduled to end on December 30 2011. Appellant was hired to work the holiday season mailing on an as-needed basis with no set days or work hours. "Generally, after the holiday mailing season has come to an end, employees of this nature are terminated at the end of their appointment and because services are no longer required."

In a decision dated August 28, 2013, OWCP denied appellant's disability claim. It found that the period December 15 to 30, 2011 was considered a period of continuation of pay, which the employing establishment would pay. Documentation showed that appellant returned to work on December 17, 2011 and that her temporary appointment expired on December 30, 2011. OWCP advised that the employing establishment was responsible for her entitlement to continuation of pay on December 15 and 16, 2011, but that there was no entitlement to compensation beyond December 17, 2011. "The evidence of record at this time fails to support your claimed entitlement to compensation/disability during the period you claimed, again because you were hired as a noncareer casual mail handler from [November 19 to December 30, 2011]."

On appeal, appellant's attorney cites the case of *Debbie A. Titus*,² for the proposition that compensation for loss of wage-earning capacity is based on loss of the capacity to earn and not on actual wages lost. He noted no evidence that appellant had recovered her ability to earn wages as a mail handler and that the employing establishment withdrew her limited duty. The attorney concedes that appellant is not entitled to wage-loss compensation during the period that she was provided limited duty, but she was unable to perform the full duties of the position she occupied on her date of injury as a result of her work-related injury. "Thus, even though [appellant's] temporary assignment period ended, her wage-earning capacity remains diminished by her work-related injury." Appellant's attorney's cited OWCP's FECA procedure manual on withdrawals of light duty with no previous loss of wage-earning capacity determination. He argued that appellant is entitled to compensation for as long as she has lost the ability to earn the wages she was earning on the date of her injury.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her duty.³ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁴

A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence,⁵ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁶

² Docket No. 05-360 (issued June 3, 2005).

³ 5 U.S.C. § 8102(a).

⁴ 20 C.F.R. § 10.5(f).

⁵ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁶ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

When a claimant stops working at his or her employing establishment for reasons unrelated to his or her accepted injury, he or she has no disability within the meaning of FECA.⁷

ANALYSIS

Appellant sustained a traumatic injury in the performance of duty on December 14, 2011. She returned to limited duty on December 17, 2011 and continued to work limited duty until her temporary appointment ended on December 30, 2011, as scheduled. The question raised by appellant's claim for wage-loss compensation is what caused her incapacity after December 30, 2011 to earn the wages she was receiving at the time of injury.

Clearly, that incapacity was caused by the termination of appellant's temporary appointment. Whether or not she was injured, her temporary appointment was scheduled to end. It cannot be stated that appellant's work stoppage on December 31, 2011 was the result of her employment injury. Dr. Huey, the specialist in occupational medicine, examined her on her last day of work and found that she was still capable of performing modified duty. He made the same finding through January 2012. Dr. Seidman, the orthopedic surgeon, saw appellant thereafter. In February and April 2012, he found, as Dr. Huey did, that she remained capable of modified duty.

OWCP's FECA procedure manual likens the circumstances of appellant's work stoppage to those caused by a true reduction-in-force, where employees performing full duty as well as those performing limited duty are affected or to those caused by the closure of a base or other facility or by the cessation of special funding for a particular position or project.⁸ Such work stoppages arise independent of any employment injury.⁹ If a claimant was a temporary employee at the time of injury, the mere termination of the temporary appointment does not raise an issue of disability because it does not satisfy the definition, which requires incapacity because of an employment injury. Here, appellant's incapacity to earn the same wages after December 30, 2011 arose from an independent cause, namely, the administratively scheduled termination of her temporary appointment.

As the evidence fails to establish that appellant's December 14, 2011 employment injury was an operative factor in causing her incapacity to earn the same wages beginning December 31, 2011, the Board finds that she has not met her burden of proof. The Board will therefore affirm OWCP's August 28, 2013 decision on the issue of disability beginning December 31, 2011.

⁷ *M.S.*, Docket No. 08-1194 (issued October 22, 2008) (voluntary retirement).

⁸ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(1)-(2) (May 1997). Appellant's claim is not one of recurrence *per se*, but the principle remains that certain work stoppages do not represent a compensable disability, regardless of any prior period of disability.

⁹ *See also supra* note 7; *Joe H. Davis*, Docket No. 04-1030 (issued February 2, 2005) (cases involving claims of disability following voluntary retirement).

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.

There remains a question whether appellant is entitled to compensation for disability beginning July 25, 2012. OWCP advised that she was entitled to compensation as a result of her authorized surgery on July 25 through September 14, 2012, when she was released to restricted duty. In its August 28, 2013 decision, however, it did not directly address the issue. The Board will therefore set aside OWCP's August 28, 2013 decision on the issue of compensation beginning July 25, 2012 and will remand the case for an appropriate final decision.¹⁰

It is true, as appellant's attorney argues, that appellant was unable, as a result of her work-related injury, to perform the full duties of the position she occupied on her date of injury. That is not the definition of disability. The record demonstrates that appellant performed limited duty, with no apparent wage loss, from December 17, 2011 through the remainder of her temporary appointment. During this time, her employment injury did not cause an incapacity to earn the wages she was receiving at the time of injury. Immediately, after December 30, 2011, appellant's incapacity to earn those wages appeared to have nothing to do with her employment injury and everything to do with the expiration of her appointment.

The attorney points to procedures for withdrawals of limited duty with no loss of wage-earning determination, but there was no withdrawal of limited duty in this case. Appellant's temporary appointment expired on December 30, 2011 as scheduled.

The case of *Debbie A. Titus* does not advance appellant's claim. The claimant worked a temporary appointment as a casual clerk and sustained an injury in the performance of duty, but she later began another temporary assignment working limited duty. OWCP determined that her actual earnings in that position fairly and reasonably represented her wage-earning capacity. When her current employment terminated because of the expiration of her casual appointment, the claimant filed a recurrence of disability claim. Under such circumstances, the issue was whether the loss of wage-earning capacity determination should be modified. As there was no evidence of a material change in the nature and extent of her injury-related condition and no evidence that the determination was, in fact, erroneous, the claimant did not meet her burden of proof. The Board held that the expiration of her temporary appointment was no basis for modifying the loss of wage-earning capacity determination.

Titus thus supports that the expiration of a temporary appointment does not establish compensable disability or an injury-related loss of wage-earning capacity.

CONCLUSION

The Board finds that appellant has not met her burden to establish that her December 14, 2011 employment injury caused disability beginning December 31, 2011. The case is not in posture for decision on whether she is entitled to compensation for disability beginning July 25,

¹⁰ See 20 C.F.R. § 10.126 (a decision shall contain findings of fact and a statement of reasons).

2012, when she underwent authorized right shoulder surgery. Further, development of that issue is warranted.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed as to disability beginning December 31, 2011 but is set aside as to disability beginning July 25, 2012. The case is remanded for further action.

Issued: June 23, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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