United States Department of Labor
Employees' Compensation Appeals Board

V.P., Appellant	)	
and	)	**Docket No. 13-580**
	)	**Issued: May 7, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Mahopac, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 15, 2013 appellant filed a timely appeal from the September 17, 2012 and January 3, 2013 merit decisions of the Office of Workers' Compensation Programs (OWCP). 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 OWCP properly adjudicated the case as a recurrence of disability commencing May 10, 2012 causally related to his December 23, 2000 employment injuries.

On appeal, appellant contends that there is a conflict in medical opinion between his attending physician and an OWCP second opinion physician which requires a referee opinion.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board with respect to appellant's claim for a schedule award.[2] In a September 27, 2004 decision, the Board set aside OWCP's February 24, 2004 decision finding that he had no more than 16 percent impairment of the right lower extremity. The Board remanded the case to OWCP for further development regarding the percentage of permanent impairment to the right lower extremity. The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference.

OWCP accepted that on December 23, 2000 appellant, then a 47-year-old associate rural carrier, sustained a trimalleolar fracture and osteoarthritis of the right ankle when he slipped on an icy patch on a driveway. He stopped work on December 24, 2000. On April 26, 2001 appellant returned to part-time, limited-duty work.

On March 9, 2002 appellant returned to work in a full-time, limited-duty position working 35 hours per week. He filed claims for compensation (Form CA-7) for leave without pay (LWOP) from May 10 through July 27, 2012. The employing establishment stated on the forms that no work was available. On May 15, 2015 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of disability on May 10, 2012 due to the withdrawal of his light-duty assignment as no work was available within his restrictions.

In a May 9, 2012 e-mail, Peter J. Morrisey, an employee, instructed the Mahopac management team not to schedule appellant, a limited-duty rural carrier associate, for work effective the next day until he was given a different duty assignment location. He had attempted to get this done for the prior several months without success. Mr. Morrisey was not going to make up any more work for appellant because he had identified a potential job offer assignment that fell within his restrictions. He noted that the employing establishment was in dire straits financially and could not afford this type of assignment anymore because of volume and workload changes that were now part of the regular workforce job requirements.

In a July 16, 2012 medical report, Dr. Victor Khabie, a Board-certified orthopedic surgeon, noted that appellant was status post open reduction internal fixation (ORIF) of his right ankle and status post a slip and fall. He provided physical examination findings. Dr. Khabie advised that appellant could perform limited duty, which was unavailable. He provided physical restrictions.

In a July 16, 2012 letter, appellant noted his receipt of Mr. Morrissey's May 9, 2012 e-mail and noted that he was not offered a new assignment within his limitations. A union official advised appellant that the Department of Labor would pay him for missing work hours. A union steward informed him that no work was available anywhere due to changes within the employing establishment. Appellant contended that he was unable to return to full-duty work due to his physical restrictions, which were caused by his December 23, 2000 employment injuries.

[2] Docket No. 04-1354 (issued September 27, 2004).

By decision dated August 3, 2012, OWCP accepted that appellant sustained a recurrence of disability on May 10, 2012.[3] It requested that he submit a Form CA-7 if he lost time from work due to the recurrence.

On August 13, 2012 OWCP advised appellant that his claim for compensation could not be processed at that time because the medical evidence of record was insufficient to establish that he was disabled from May 10 through July 27, 2012 due to his December 23, 2000 work injuries. It requested that he submit medical evidence establishing disability for work during the entire claimed period.

In August and September 2012, appellant filed CA-7 forms requesting compensation for LWOP from July 28 through September 7, 2012.

In a report dated July 16, 2012, Dr. Khabie provided additional physical examination findings. He reiterated that appellant was capable of performing limited-duty work within certain physical restrictions and that this type of work was not available.

By decision dated September 17, 2012, OWCP denied appellant's claim for compensation from May 10 to September 7, 2012 as he failed to submit rationalized medical evidence to establish that his current disability and work restrictions were caused by his December 23, 2000 employment injuries.

By letter dated September 18, 2012, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Joseph P. Laico, a Board-certified orthopedic surgeon, for a second opinion to determine whether appellant had any residuals or need for further medical treatment causally related to his accepted employment-related injuries and whether he had the capacity to return to his regular work as a rural letter carrier.

On October 9, 2012 appellant requested reconsideration of the September 17, 2012 decision.

In an October 2, 2012 report, Dr. Khabie reviewed a history of the December 23, 2000 employment injuries. He provided findings on physical examination and advised that appellant had reached maximum medical improvement. Appellant had nine percent impairment to his right lower extremity. Dr. Khabie noted appellant's restrictions. In a December 6, 2012 report, he advised that appellant was permanently partially disabled as he was status post a right ankle fracture dislocation. Dr. Khabie further advised that appellant's disability was directly related to his December 23, 2000 right ankle injury. He noted that, although appellant had been approved for limited-duty work with the listed restrictions, no such work was available.

In an October 11, 2012 report, Dr. Laico obtained a history of the December 23, 2000 employment injuries and appellant's medical treatment, occupational and social background. He reviewed the medical record, noted appellant's right ankle complaints and listed findings on physical examination. Dr. Laico diagnosed fracture and dislocation of the right distal tibia and

[3] The record indicates that OWCP determined appellant's pay rate for compensation purposes, but it did not pay him any disability compensation for his accepted May 10, 2012 recurrence of disability. Instead, it chose to develop his additional claims for compensation.

fibula of the ankle. Appellant was status post ORIF fracture dislocation of the right ankle. Dr. Laico advised that appellant's fractured right ankle had healed in an excellent position. Appellant had no signs of osteoarthritis in the right ankle. Dr. Laico stated that there was a small area of chondromalacia noted at the posterolateral aspect of the tibia on a November 7, 2002 magnetic resonance imaging scan, but this would not impact appellant's condition. Appellant did not suffer any other conditions resulting from the December 23, 2000 employment injuries. No further treatment or evaluation was necessary for the accepted conditions. Dr. Laico opined that appellant was able to perform his regular duties as a rural letter carrier with no restrictions on a full-time basis.[4]

In a January 3, 2013 decision, OWCP denied modification of the September 17, 2012 decision. It found that the weight of the medical evidence rested with Dr. Laico's opinion and established that appellant was no longer disabled due to his accepted December 23, 2000 employment injuries. OWCP determined that there was no evidence to substantiate his restrictions or inability to return to full-time, full-duty work.

LEGAL PRECEDENT

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or application.[5] The Board has upheld OWCP's authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.[6] The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute.[7]

It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits.[8] This holds true where OWCP later decides that it erroneously accepted a claim.[9] Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to employment. It is required to provide a clear explanation of the rationale for rescission.[10]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint

[4] By letter dated December 13, 2012, the employing establishment instructed appellant to return to full-duty work on December 15, 2012 as a rural carrier associate with no restrictions based on Dr. Laico's October 11, 2012 report.

[5] 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

[6] *John W. Graves*, 52 ECAB 160 (2000).

[7] *See* 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

[8] *See Linda L. Newbrough*, 52 ECAB 323 (2001).

[9] *Id.*

[10] *See Andrew Wolfgang-Masters*, 56 ECAB 411 (2006); *see also* 20 C.F.R. § 10.610.

a third physician who shall make an examination.[11] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12]

ANALYSIS

OWCP accepted that appellant sustained a trimalleolar fracture and osteoarthritis of the right ankle while working as a rural carrier associate on December 23, 2000. Following this injury, he returned to full-time limited-duty work on March 9, 2002. On May 25, 2012 appellant filed a CA-7 form claiming compensation for LWOP from May 10 to 18, 2012 due to his December 23, 2000 work injuries. He stopped work on May 9, 2012 claiming that the employing establishment no longer had any work available within his restrictions. On August 3, 2012 OWCP accepted that appellant sustained a recurrence of disability on May 10, 2012 when the employing establishment no longer had any work available within his physical restrictions. It instructed him to file a claim for time lost from work. Appellant filed additional CA-7 forms claiming compensation for LWOP from May 10 through September 7, 2012. In decisions dated September 17, 2012 and January 3, 2013, OWCP denied his claims, finding that he no longer had any disability and work restrictions causally related to the accepted employment injuries.

The Board finds that OWCP did not properly adjudicate the issue presented. As OWCP accepted that appellant sustained a recurrence of disability, it has the burden of proof to rescind acceptance of his claim.[13] The issue is whether it met its burden of proof to rescind acceptance of its finding that he sustained a recurrence of disability on May 10, 2012.

In finding that appellant did not sustain a recurrence of disability as of May 10, 2012 OWCP relied on the October 11, 2012 report from Dr. Laico, a referral physician, who found that appellant did not suffer any other conditions resulting from the December 23, 2000 employment injuries; that no further treatment or evaluation for the accepted conditions were necessary; that appellant had no residuals of the accepted December 23, 2000 employment injuries; and that he could perform his regular rural letter carrier duties with no restrictions on a full-time basis.

The reports from Dr. Khabie, appellant's treating physician, found that appellant was permanently partially disabled due to the accepted employment injuries and that he could perform limited-duty work with restrictions.

The Board finds that a conflict in medical opinion exists between Dr. Laico and Dr. Khabie on the issue of whether appellant has any continuing work-related residuals and the extent of disability. Because there is an unresolved conflict in medical opinion between these

[11] 5 U.S.C. § 8123(a).

[12] 20 C.F.R. § 10.321.

[13] *See supra* note 9.

two physicians, the case will be remanded to OWCP for referral to an impartial medical examiner.[14] Appellant contended that he sustained a recurrence of disability due to the withdrawal of his limited-duty work assignment as no work was available within his restrictions, OWCP should verify this and consider whether FECA Bulletin No. 09-05 (issued August 18, 2009) is applicable. FECA Bulletin No. 09-05 outlines OWCP procedures when limited-duty positions are withdrawn pursuant to the National Reassessment Process and no loss of wage-earning capacity determination has been issued.[15] After this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant sustained a recurrence of disability commencing May 10, 2012 causally related to his December 23, 2000 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2013 and September 17, 2012 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 7, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[14] *Supra* note 12 at § 8123; *see Y.A.*, 59 ECAB 701 (2008).

[15] *See* FECA Bulletin No. 09-05 (issued August 18, 2009), §§ I.B.1-3.