

FACTUAL HISTORY

On November 4, 2003 appellant, then a 42-year-old mail handler, filed a traumatic injury alleging that on October 6, 2003 he injured his low back while lifting a box in the performance of duty. OWCP accepted his claim for lumbar herniated nucleus pulposus on February 10, 2004. Appellant returned to light-duty work on February 18, 2004.

The employing establishment informed appellant on March 10, 2004 that he failed to report for duty on March 8, 2004 and that he failed to provide appropriate notification. It found that appellant was absent without leave on March 8, 2004.

Appellant filed a claim for recurrence of disability on June 29, 2004 alleging that he returned to full duty in March 2004 and on June 15, 2004 had to stop work due to recurrent pain and disability.

By decision dated October 5, 2004, OWCP denied appellant's claimed recurrence of disability. Appellant requested an oral hearing before an OWCP hearing representative on October 25, 2004. In a decision dated September 28, 2005, the hearing representative denied appellant's claim for recurrence and suggested that the evidence was supportive of a new traumatic injury.

Appellant filed a second claim for traumatic injury on October 17, 2005 and alleged that he sustained a low back injury on June 14, 2004 while pulling in the performance of duty.² OWCP accepted this claim for aggravation of displaced lumbar disc and thoracic or lumbosacral radiculopathy. It combined appellant's claims on January 20, 2006 with claim number xxxxxx983 serving as the master file. OWCP authorized continuation of pay on April 12, 2006. It granted appellant compensation from July 30, 2004 through January 6, 2006.

On August 3, 2006 the employing establishment stated that appellant's light-duty position was available and that appellant was not prohibited from returning to work. It also stated that appellant had not provided medical documentation and that he had been provided an absence inquiry letter on March 16, 2006 requesting documentation to substantiate his extended absence.

The employing establishment provided appellant with a second absence inquiry letter on August 21, 2006. It stated that he had been absent for an extended time and had not provided acceptable documentation.

On October 17, 2006 appellant underwent an intradiscal electrothermal disc decompression, nucleotomy and annuloplasty.

OWCP entered appellant on the periodic rolls on July 26, 2007 effective January 7, 2006.

On August 29, 2007 OWCP requested that the employing establishment provide information regarding whether appropriate light duty was available. The employing establishment provided information regarding a modified mail handler position on

² Claim number xxxxxx357.

August 29, 2007. It offered appellant that light-duty assignment on October 30, 2007. In a letter dated December 6, 2007, OWCP informed him that the light-duty position was suitable work. It allowed appellant 30 days to accept the position or offer his reasons for refusal.

By decision dated January 8, 2008, OWCP noted that appellant had responded to their offer but that the reasons he gave for refusing the position were not valid. It allowed him 15 days to accept the position.

Appellant returned to the modified mail handler position effective October 25, 2007. In a decision dated February 14, 2008, OWCP terminated his compensation effective January 18, 2008 because his actual wages met or exceeded his date-of-injury position. Appellant accepted a light-duty position on January 18, 2008.

In a letter dated June 27, 2008, the employing establishment informed appellant that he was not eligible for Family and Medical Leave Act (FMLA) coverage as he did not have the required one year of qualifying employment. It directed him to submit acceptable documentation from the first day of his absence explaining the reason for his absence. The employing establishment allowed three days for a response.

On August 4, 2008 the employing establishment informed appellant that he was charged with absence without leave from June 7 through August 5, 2008. Appellant filed a grievance on September 6, 2008 alleging that he received a notice of removal for unacceptable conduct (Attendance AWOL) on August 20, 2007. He alleged that he had been absent due to his mother's terminal illness and his own health problems.

On August 27, 2008 OWCP accepted appellant's claim for the additional condition of thoracic or lumbosacral neuritis or radiculitis.

Appellant submitted a statement dated April 10, 2009 alleging that his mother died on October 19, 2008.

Appellant underwent an anterior lumbar interbody fusion at L5-S1 on June 10, 2009.

On June 29, 2009 appellant filed a claim for compensation requesting wage-loss compensation from August 8, 2008 through May 31, 2009.

On August 8, 2009 appellant submitted an arbitration decision dated August 28, 2009 finding that the employing establishment had just cause to provide him with a notice of removal for unacceptable conduct on August 20, 2008, specifically absence without leave. The arbitrator noted that appellant's mother had been diagnosed with a terminal condition on June 6, 2008 and that appellant notified his supervisor and provided medical documentation from the emergency room. The arbitrator noted that appellant was excused for work the day his mother was taken to the emergency room on June 6, 2008. Appellant did not, however, call or report for duty again until June 20, 2008 when he requested light-duty work and provided medical documentation of work restrictions. His supervisors provided him with a light-duty request form and directed him to have his doctor to complete it and then return to work. Appellant's supervisors told him that he would not be allowed to work until after his doctor completed the light-duty form. Appellant stated that he had difficulties obtaining an appointment and did not see his physician until

August 2008. The arbitrator found that it was unreasonable for appellant to be absent from work for two months with no communication with his employer.

By decision dated August 18, 2009, OWCP denied appellant's claim for compensation for the period August 8, 2008 through May 31, 2009. Appellant requested a review of the written record. By decision dated December 1, 2009, the hearing representative reversed OWCP's decision and found that appellant had established entitlement to compensation for the period August 8, 2008 to May 31, 2009.

In a letter dated September 5, 2009, appellant stated that the employing establishment did not have a just cause for removing him from his position. He stated that he provided documentation concerning his mother's terminal illness and resulting death. Appellant also stated that he was charged with absence without leave on dates that he was totally disabled due to his employment injuries. He argued that the employing establishment removed him unjustly and that the action was punitive as there were no other disciplinary actions against appellant.

Appellant's attending physician, Dr. Bryce L. Benbow, an osteopath, opined on March 9, 2010 that appellant could return to sedentary work. He completed a work capacity evaluation on March 9, 2010. Dr. Benbow indicated that appellant could work six hours a day with restrictions of sitting up to six hours, walking, standing and reaching for one hour each, pushing and pulling for two to four hours as well as lifting for two hours with no squatting, kneeling or climbing.

OWCP informed appellant on April 20, 2010 that he should make every effort to return to regular work within one year. It found that the medical evidence established that he could return to limited-duty work. OWCP referred appellant for vocational rehabilitation.

The employing establishment informed OWCP that appellant was not provided with a job offer as he was terminated for disciplinary issues not related to his injuries.

Dr. Benbow provided an additional work capacity evaluation on June 1, 2010. He again opined that appellant could work six hours a day, sitting up to six hours, walking and standing for one hour each and reaching up to two hours with no reaching above the shoulder or twisting. Dr. Benbow found that appellant could push and pull up to 10 pounds for four hours a day and lift up to 10 pounds for two hours a day.

The vocational rehabilitation counselor completed a report on June 15, 2010 and found that appellant was capable of performing the position of cashier or medical records clerk.

Appellant underwent a functional capacity evaluation. In a November 16, 2010 work capacity evaluation, Dr. Benbow found that appellant was able to work eight hours a day with the following restrictions: sit and reach for six hours a day, stand and reach for two hours and reach above the shoulder for one hour. He indicated that appellant could not twist, stoop or bend, but that appellant could operate a motor vehicle for four hours a day. Dr. Benbow restricted appellant's pushing and pulling to 10 pounds for up to four hours a day and lifting was restricted to 10 pounds for two hours a day. He found that appellant could squat for two hours and kneel and climb for 30 minutes.

Dr. Benbow also completed a narrative report on November 16, 2010, stating that appellant could return to some light, sedentary work. He also recommended a dorsal column stimulator.

Placement with new employers services were provided for 90 days. However, appellant was unable to secure a position.

In a letter dated May 24, 2011, OWCP proposed to terminate appellant's compensation benefits. It noted that he was capable of working eight hours a day with restrictions and that the employing establishment had terminated him for unacceptable attendance on August 20, 2008. OWCP found that Dr. Benbow reported on November 16, 2010 that appellant no longer had disability or restrictions from working as a result of his accepted employment injury.

By decision dated July 1, 2011, OWCP terminated appellant's compensation benefits effective July 3, 2011. It reviewed the work restrictions provided by Dr. Benbow in his November 16, 2010 report and stated that appellant would have been able to return to a light-duty position at the employing establishment had he not been terminated for cause.

Appellant's representative requested an oral hearing on September 11, 2011. By decision dated October 17, 2011, the Branch of Hearings and Review denied appellant's request for an oral hearing as untimely. In exercising its discretion, the Branch of Hearings and Review further denied the request, finding that the issue could be addressed through the reconsideration process.

Dr. Edward F. Wolski, a family practitioner, submitted medical reports dated October 14, 2011 indicating that appellant was partially disabled and capable of working.

Appellant requested reconsideration on February 8, 2012. He argued that OWCP improperly terminated appellant's compensation benefits as appellant's attendance deficiencies were the result of the accepted work injury. Appellant further argued that he continued to experience disability due to his accepted employment injuries.

Appellant also submitted additional medical evidence from Dr. Benjamin C. Dagley, an osteopath. In a report dated January 30, 2012, Dr. Dagley opined that appellant was totally disabled and unable to work since the June 10, 2009 surgery.

By decision dated March 15, 2012, OWCP denied modification of its prior decision.

Appellant requested reconsideration on January 10, 2013. He alleged that OWCP had not reviewed the medical evidence including a report dated October 14, 2011 from Dr. Wolski and Dr. Dagley. Appellant's representative further alleged that the basis for appellant's termination from employment by the employing establishment was associated with his employment injury.

By decision dated March 21, 2013, OWCP denied modification of its prior decisions.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ After it has determined that an employee has 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 the employment.⁴

ANALYSIS -- ISSUE 1

In terminating appellant's monetary compensation, OWCP made no accurate finding with respect to whether appellant's disability had ceased. It erroneously stated in the May 24, 2011 proposed termination that Dr. Benbow reported on November 16, 2010 that appellant had no disability or restrictions as a result of his employment injuries. The Board finds that Dr. Benbow did not make such a finding, instead continuing to support appellant's partial disability for work. OWCP did not discuss whether the weight of the medical evidence established that appellant was physically capable of returning to work as a mail handler, the position he held at the time of his injury. Finally, it did not establish that appellant suffered no loss of wage-earning capacity after July 3, 2011, the date OWCP terminated his monetary compensation.

OWCP terminated appellant's monetary compensation on the grounds that his current disability for work was the result of being terminated for cause by the employing establishment, implicitly finding that his disability for work was no longer causally related to the employment-related conditions accepted by OWCP. In similar cases where employment has been terminated for misconduct and disability is subsequently claimed, the Board has held that disability benefits are payable regardless of whether the termination of employment was for cause if the medical evidence establishes that appellant was unable to perform his assigned duties due to his injury-related condition.⁵ As OWCP did not evaluate the medical evidence to determine whether appellant continued to experience disability as a result of his injury-related condition, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits and that the September 3, 2013 decision must be reversed.⁶

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits effective July 3, 2011.

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ *Id.*

⁵ *L.B.*, Docket No. 10-1213 (issued November 23, 2010); *Regina C. Burke*, 43 ECAB 399 (1992).

⁶ Due to the disposition of this issue by the Board, the second issue on appeal is rendered moot and will not be addressed.

ORDER

IT IS HEREBY ORDERED THAT the September 3, 2013 decision of the Office of Workers' Compensation Programs is reversed.⁷

Issued: September 24, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁷ Richard J. Daschbach, Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after May 16, 2014.