

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

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| J.T., Appellant |) | |
| |) | |
| and |) | Docket No. 15-1133 |
| |) | Issued: December 21, 2015 |
| U.S. POSTAL SERVICE, VALLEY VILLAGE |) | |
| POST OFFICE, North Hollywood, CA, Employer |) | |

Appearances:
Zepuor Parsanian, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 23, 2015 appellant, through his representative, filed a timely appeal of a December 4, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant is entitled to wage-loss compensation for the period November 4, 2013 through February 7, 2014.

On appeal appellant's representative contends that appellant had agreed to work, but the employing establishment sent him home because no work was available.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 26, 2000 appellant then a 52-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that on November 18, 1999 he tore the cartilage in his left knee due to his job duties. He asserted that he was climbing a flight of stairs and felt a pinch and “give way” sensation in his left knee while carrying his mailbag. Appellant continued to deliver the remainder of his route. He verbally reported his injury to his supervisor and continued to work for six months before seeking medical treatment.

In a decision dated August 4, 2000, OWCP accepted appellant’s claim for internal derangement of the left knee. Appellant underwent an arthroscopy of the left knee on May 22, 2000 with resection of medial synovial plica, partial synovectomy, and partial lateral meniscectomy. He underwent a second left knee arthroscopy on January 3, 2006.

The employing establishment offered and appellant accepted a series of limited-duty and full-time positions from April 10, 2006 through May 29, 2012. On May 29, 2012 the employing establishment offered appellant a full-time position split between the Van Nuys and the North Hollywood offices working from 6:00 a.m. to 2:30 p.m. delivering express mail and regular mail on various routes. The physical requirements were listed as standing up to 2 hours, driving up to 2 hours, and walking up to 30 minutes. Appellant accepted this limited-duty position on May 29, 2012.

Appellant’s attending physician, Dr. Kevin J. Pelton, a Board-certified orthopedic surgeon, recommended additional left knee surgery on May 10, 2012. OWCP authorized this medical treatment on July 18, 2012. Dr. Pelton performed a diagnostic arthroscopy of the left knee with a partial lateral meniscectomy and synovectomy on August 31, 2012. On December 20, 2012 he released appellant to return to sedentary work, while lifting, pulling, and pushing less than five pounds.

On February 8, 2013 the employing establishment offered appellant a full-time modified city carrier position at the North Hollywood office which required 8 hours of sedentary work and 15 minutes of driving. The duties were processing priority mail parcels and weighing and rating postage due parcels in the Van Nuys post office from 9:45 a.m. until 3:30 p.m. and then driving to Sherman Oaks post office to clear carriers from 3:45 p.m. to 6:15 p.m. Appellant accepted this position on February 8, 2013.

Dr. Pelton repeated appellant’s sedentary work restrictions including no pushing, pulling, or lifting more than five pounds on February 11, 2013. On March 21, 2013 he indicated that appellant could perform sedentary work and could stand for 30 minutes and sit for 30 minutes with no pushing, pulling, or lifting more than five pounds. Dr. Pelton found that appellant could lift, push, and pull up to 10 pounds on June 6, 2013. On September 26, 2013 he found that appellant could stand or walk for 20 minutes per hour.

Appellant filed a series of claims for compensation (Form CA-7) requesting compensation for leave without pay from July 27 through November 1, 2013. On the reverse of the forms, his supervisor indicated that appellant was working modified duties and partial days. The supervisor was unable to identify enough available work within appellant’s restrictions. Appellant completed time analysis forms (CA-7a) and indicated that no other work was offered

by the supervisor at the Van Nuys office. OWCP authorized compensation benefits from July 29 through November 1, 2013.

On November 26, 2013 appellant filed a Form CA-7 requesting compensation for leave without pay taken from November 4 through 15, 2013. On the reverse of the form, appellant's supervisor indicated that work was available eight hours a day with modified duties. She submitted an e-mail dated December 2, 2013 noting that there was eight hours of work available for appellant at the Van Nuys station, but that he was afraid of the manager there and worked partial days at Sherman Oaks.

OWCP requested additional information in support of appellant's disability for work for the period November 4 through 15, 2013 on December 9, 2013. It stated that the employing establishment indicated that eight hours of work was available and asked appellant to provide evidence supporting why he did not perform the light-duty assignment and sought compensation. OWCP allowed appellant 30 days for a response.

Dr. Pelton completed a report on November 14, 2013 and found on November 7, 2013 that appellant could walk or stand no more than 20 minutes every hour.

Appellant filed a Form CA-7 requesting compensation for leave without pay from November 18 through 29, 2013. Appellant's supervisor stated that work was available for eight hours a day. Appellant alleged that no other work was offered by the supervisor at Van Nuys.

In a letter dated December 17, 2013, OWCP requested additional factual and medical evidence in support of appellant's Form CA-7 for the period November 18 through 29, 2013. It noted that the employing establishment stated that eight hours of work was available and directed appellant to provide evidence to support why he did not perform the light-duty assignment offered. OWCP afforded 30 days for a response.

Appellant submitted a statement dated July 20, 2013 alleging that there was a disagreement with his supervisor at the Van Nuys office on July 19, 2013. He stated that immediately after he clocked in, Mr. Y, the station manager, directed him to answer the telephones. Appellant replied that he did not know how and asked questions about transferring calls. Mr. Y told him to "shut up and listen." Appellant asserted, "You don't tell me to shut up." Mr. Y instructed appellant to be quiet and listen, then provided him with basic directions on how to answer the telephone. Appellant requested to move the tubs of nixie to the telephone area stating that his hip and knee were bothering him. Mr. Y directed appellant to go home. Appellant stated that he would be okay once the telephone and nixie were in the same area because he would not have to arise and move from one area to the other. Mr. Y instructed appellant to report to his office. Appellant requested a union representative, but was told that there were none available. Mr. Y stated, "I don't want you here anymore, clock out and report to Sherman Oaks for your normal report time. You are refusing to answer the telephones." Appellant disputed this assertion and stated, "I'm not refusing, I will answer the telephones." Mr. Y continued to repeat that he did not want appellant at Van Nuys and that he was only to report to Sherman Oaks on his following work dates. Appellant alleged that Mr. Y did not treat him with dignity and respect and that he was unprofessional and out of control.

Appellant submitted a statement dated August 22, 2013 and alleged that he was subjected to verbal abuse and a hostile work environment at the Van Nuys post office. He stated that on July 19, 2013 he was performing his limit-duty job assignment when a supervisor, Mr. Y, approached him and asked him to answer the telephone. Appellant declined as he did not know how to answer or transfer calls and stated that this was not part of his job duties. He alleged that Mr. Y rudely told him to “shut up.” Appellant informed Mr. Y that he should not tell him to shut up and Mr. Y directed him to be quiet and listen to instructions for operating the telephones. He alleged that the instructions were not thorough. Appellant then requested to move his work to the location of the telephone because his knee was hurting due the need to go back and forth between the two locations. He alleged that Mr. Y informed him that if he was hurting he was not needed. Appellant responded that he would answer the telephone, but that Mr. Y then instructed him to go home. He stated that since July 19, 2013 he had not been provided with another job offer or received any compensation. Appellant alleged that Mr. Y was a dangerous person when he became frustrated or angry and that Mr. Y created an intimidating atmosphere jeopardizing appellant’s health and safety. He stated, “No matter if I know how to answer phones, I should not be forced to do it except a new job offer with duties of answering phones added to the assignment.”

Appellant’s union representative alleged that Mr. Y sent appellant home and told him not to report back to Van Nuys after a dispute during which appellant was directed to answer the telephones. He stated that appellant never refused to answer the telephones and that Mr. Y withdrew appellant’s light-duty assignment. Appellant filed a grievance regarding this event. The representative alleged that management failed to properly provide appellant a written job offer before determining that he refused suitable work.

In a letter dated December 30, 2013, appellant stated that he was unaware that eight hours of work was available for him at Van Nuys until receiving a letter dated December 9, 2013. He stated that he had not received a job offer. Appellant stated that he was willing to work within his restrictions.

Dr. Pelton examined appellant on January 2, 2014 and listed his restrictions as standing or walking for 30 minutes out of an hour. On February 11, 2013 he indicated that appellant’s restrictions were sedentary work only with no pushing, pulling, or lifting more than five pounds.

In a decision dated February 13, 2014, OWCP found that full-time light-duty work was available within appellant’s restrictions and denied his claim for the period of disability beginning November 4, 2013. Appellant requested an oral hearing before OWCP’s Branch of Hearings and Review on February 20, 2014.

In letters dated January 27 through February 7, 2014 and from February 13 through 14, and 18 through 21, 2014, received by OWCP on March 6, 2014, the employing establishment stated that it was unable to identify enough available work within appellant’s medical restrictions for him to complete a full day of work.

In a report dated August 29, 2013, the employing establishment stated that after interviewing coworkers regarding the exchange between appellant and Mr. Y, these employees did not support appellant’s allegations regarding the interaction with Mr. Y. This report found

that Mr. Y attempted to calm appellant down and directed him to proceed to an office, but that appellant, contrary to Mr. Y's request, walked out of the employing establishment.

The employing establishment submitted three statements dated July 24, 2013 from appellant's coworkers alleging that appellant raised his voice and refused to comply with Mr. Y's requests.

In e-mails dated July 19, 2013, appellant's supervisor stated that she requested appellant to answer the telephones on July 17, 2013. She attempted to show him how to operate the telephone system and he was not receptive. On July 19, 2013 appellant's supervisor asked that Mr. Y instruct appellant to help answer the telephones. She stated that appellant was uncooperative and insisted that he did not know how to answer the telephones. Appellant's supervisor concluded that appellant was very combative and acted like a child that could not figure out what to do.

Mr. Y noted that appellant's supervisor asked him to instruct appellant to answer the telephones because appellant had too many excuses and would not follow her instructions. He stated:

"I instructed [appellant] to answer the [tele]phone. [Appellant] won't let me talk to him, he keeps on interrupting me and will not listen to me, he tells me that it will be hard for him to answer the [tele]phone and do nixies at the same time, he talks while I'm giving him instructions. After a few minutes and [appellant] seems to give me all the excuses and telling me that his back will be hurting if he answers the [tele]phone. I then instructed him to clock out because he is refusing to work."

The employing establishment offered appellant limited-duty assignments which he accepted on April 4 and June 16, 2014. Appellant returned to work as a full-time customer care agent effective October 18, 2014.

Appellant submitted a witness statement describing the events of July 19, 2013. The witness stated that Mr. Y seemed very upset at appellant. The witness stated that Mr. Y yelled at appellant for refusing to work and that appellant denied this allegation. The witness alleged that Mr. Y ordered appellant to leave and not come back. She stated that Mr. Y instructed appellant to report to Sherman Oaks because he did not want him at Van Nuys anymore. Appellant then walked to the time clock and stated that he was leaving because Mr. Y ordered him to, not because he was refusing to work.

Appellant testified at the oral hearing on September 10, 2014. He stated that he lost wages from November 4, 2013 through February 7, 2014. Appellant's representative argued that the employing establishment's witness statements were inconsistent and that the employing establishment had not established that appellant refused suitable work. He asserted that appellant had not refused a job offer, but that management told him to go home removing him from his limited-duty job offer. Appellant testified that Mr. Y came to the Van Nuys office to perform route inspections and that he was in fear for his life. He alleged that when Mr. Y instructed him to answer the telephones he did so in a very belligerent and hostile manner. Appellant asserted that Mr. Y pounded the telephone keys such that he wanted to escape Mr. Y.

By decision dated December 4, 2014, OWCP's hearing representative found that OWCP had met its burden of proof to deny appellant's compensation benefits from November 4, 2013 through February 7, 2014. He determined that section 10.500(a)² of OWCP's regulations governed the situation as appellant had medical work restrictions in place, light-duty work within those work restrictions was available, and appellant had been notified that such duty was available. The hearing representative found that appellant was instructed to answer the telephone at work, that this activity was within his restrictions, and that appellant refused to work in this capacity. He found that appellant was sent home due to failure to follow instructions, but that there was no evidence that the employing establishment withdrew appellant's modified job. OWCP's hearing representative affirmed OWCP's February 13, 2014 decision denying appellant's claim for wage loss for the period in question.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.³ A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct or nonperformance of job duties.⁴ When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that her or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show 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.⁵

OWCP regulations have codified this by noting that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury. An employee is not entitled to compensation for any wage loss to the extent that evidence establishes that an employee had medical work restrictions in place, that light duty within those work restrictions was available, and that the employee was previously notified in writing that such duty was available.⁶

² 20 C.F.R. § 10.500(a).

³ *Id.* at § 10.5(x).

⁴ *Id.* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2(b) (June 2013).

⁵ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ 20 C.F.R. § 10.500(a).

If the claim for recurrence of disability for work is based on modification of the claimant's duties or physical requirements of the job, the claimant should be asked to describe such changes. If the evidence establishes that the limited-duty position has changed such that it no longer accommodates the claimant's work restrictions, OWCP should accept the recurrence.⁷

ANALYSIS

The Board finds the case not in posture for a decision.

Appellant accepted a light-duty position on February 8, 2013 which entailed processing priority parcels and weighing and rating postage due parcels in the Van Nuys post office from 9:45 a.m. until 3:30 p.m. and then driving to Sherman Oaks post office to clear carriers from 3:45 p.m. to 6:15 p.m. He worked in this position until July 19, 2013 when he engaged in a verbal exchange with Mr. Y regarding his ability and willingness to answer the telephone in addition to his assigned duties. Mr. Y stated, "After a few minutes and [appellant] seems to give me all the excuses and telling me that his back will be hurting if he answers the [tele]phone. I then instructed him to clock out because he is refusing to work." He stated that he directed appellant to go home as he felt that appellant was refusing to work. After July 19, 2013 appellant reported to work only at the Sherman Oaks office for 2½ hours of work each day. Appellant's supervisor completed his CA-7 forms and indicated that full-time, light-duty work was not available within appellant's work restrictions. OWCP authorized compensation for partial disability through November 1, 2013.

On November 26, 2013 appellant filed a Form CA-7 requesting leave-without-pay compensation from November 4 through 15, 2013. On the reverse of the form, appellant's supervisor indicated that work was available eight hours a day with modified duties. She submitted an e-mail dated December 2, 2013 noting that there was eight hours of work available for appellant at the Van Nuys station.

The Board finds factual inconsistencies in the record such that it is unable to determine whether appellant was disabled from work beginning November 4, 2013 due to his accepted condition. Appellant's supervisor supported his disability for work from July 21 through November 1, 2013 because there was no light-duty work available for appellant within his restrictions. She then determined that there was light duty available for appellant, but the record does not reflect that appellant received an additional light-duty job offer after the February 8, 2013 offer. The Board is unable to determine the basis for the conclusion that there was full-time light-duty work available for appellant on November 4, 2013. The factual basis must be established since appellant's supervisor previously certified that eight hours of work was not available from July to November 2013 and beginning January 27, 2014 the employing establishment indicated that full-time work was only intermittently available to appellant. The record before the Board does not clearly establish that appellant was offered an appropriate light-duty position in writing in accordance with OWCP's regulations.⁸ The Board is further unable to

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6.a(3) (June 2013).

⁸ See *Z.B.*, Docket No. 12-1164 (issued December 14, 2012) (finding that OWCP had not made adequate findings of facts regarding whether appellant's allegations that his employment was withdrawn, that he was offered inappropriate work, and ultimately not allowed to work at all and remanding for further development of factual evidence from the employing establishment).

determine whether Mr. Y appropriately withdrew appellant's light-duty position for refusal to work. There is no evidence in the record supporting further disciplinary action against appellant after July 21, 2013 and as previously noted, his supervisor continued to support his partial disability on the basis that no work was available.

On remand OWCP must develop the case and make factual findings on the status of appellant's employment at the time he requested compensation on November 4, 2013. This evidence is of the character normally obtained by the employing establishment and is therefore more readily accessible to OWCP than to appellant. It is a well-established principle that OWCP must make findings of fact and offer a statement of reasons in its final decision.⁹ Once factual findings are made, OWCP should evaluate the evidence to determine whether a period of disability was established beginning on November 4, 2013.

CONCLUSION

The Board finds that this case is not in posture for decision and must be remanded for additional development of the factual evidence from the employing establishment.

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2014 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: December 21, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

⁹ 20 C.F.R. § 10.126.