

ISSUES

The issues are: (1) whether appellant established a recurrence of disability on and after December 4, 2012; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits, pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant argues that his compensation is below acceptable levels due to the denial of his restoration rights under federal law.

FACTUAL HISTORY

This case has previously been before the Board. On May 14, 2001 appellant, then a 40-year-old special agent, filed a traumatic injury claim alleging that on April 27, 2001 he sustained injuries to his right knee, left wrist, right ankle, and lower back due to a work-related automobile accident. OWCP accepted the claim for right knee open wound, lumbar sprain/strain, right ankle strain/sprain, and left wrist strain/sprain, which was subsequently expanded to include closed fracture of the right metatarsal, and right chondromalacia of the patella. It authorized right knee arthroscopic surgery, which was performed on November 12, 2002, and right ankle arthroscopic surgery, which was performed on January 14, 2003. By letter dated January 27, 2003, OWCP placed appellant on the periodic rolls for temporary total disability. On June 4, 2003 appellant had metatarsophalangeal arthroscopy surgery.

In the first decision dated July 11, 2006, the Board reversed a January 11, 2005 OWCP decision.³ In the January 11, 2005 decision, OWCP had found that appellant's earnings as an insurance investigator fairly and reasonably represented his wage-earning capacity and had reduced his compensation accordingly. The Board found that OWCP improperly relied upon the opinion Dr. Patrick J. Barry, an orthopedic surgeon, as he was not the physician selected to act as the impartial specialist. Thus, the Board found that there was unresolved conflict in the medical opinion evidence between Dr. Michael A. Abrahams, an attending Board-certified orthopedic surgeon, and Dr. D. Barry Lotman, a second opinion Board-certified orthopedic surgeon, with regard to appellant's work restrictions and the extent of his remaining residuals.

In the second appeal, the Board issued an order dismissing appellant's appeal on July 25, 2007.⁴ The Board found it lacked jurisdiction as OWCP had not issued a final adverse decision within a year of his November 26, 2006 appeal.

In the third appeal, the Board issued an order dated January 30, 2008, which dismissed appellant's appeal.⁵ The Board found that at the time of his appeal on April 9, 2007 OWCP had not issued a final decision on reduction of his wage-loss compensation. On April 5, 2007 OWCP had issued a notice of proposed reduction of wage-earning capacity. In a January 14, 2009

³ Docket No. 06-503 (issued July 11, 2006).

⁴ *Order Dismissing Appeal*, Docket No. 07-407 (issued July 25, 2007).

⁵ *Order Dismissing Appeal*, Docket No. 07-1734 (issued January 30, 2008).

decision the Board reversed a May 20, 2007 OWCP decision reducing his compensation based upon a constructed loss of wage-earning capacity determination.

On March 12, 2012 OWCP accepted the conditions of right hip trochanteric bursitis, left knee chondromalacia, left ankle synovitis, left foot plantar fasciitis, and left heel spur as consequential injuries. On December 21, 2012 the Board reversed an April 23, 2012 OWCP loss of wage-earning capacity decision.⁶ The Board found that OWCP failed to fully consider all the criteria for making a retroactive wage-earning capacity decision when it found that appellant's actual earnings as an attorney represented his wage-earning capacity. In view of the Board's decision on the merits, the Board found the issue of whether OWCP properly denied his request for a merit review under 5 U.S.C. § 8128(a) in its April 30, 2012 decision to be moot.

On August 13, 2013 the Board issued an order dismissing appellant's appeal on the grounds that there were no final adverse OWCP decisions issued under FECA.⁷ The Board found that, while the case record contained documents from OWCP dated March 15 and 19, 2013, none of these documents constituted a final adverse OWCP decision. On March 10, 2014 the Board affirmed a July 29, 2013 OWCP decision concerning appellant's pay rate.⁸ The Board found that OWCP properly computed his pay rate beginning July 13, 2013 based on his November 11, 2012 recurrence of disability. The facts of the cases as set forth in the Board's prior decisions are hereby incorporated by reference.

The relevant evidence considered appellant's recurrence claim beginning December 4, 2012 is set forth below.

On April 25, 2012 OWCP received a copy of an April 18, 2012 settlement agreement between appellant and the employing establishment. The agreement, provided that the employing establishment would retroactively reinstate him to his position of special agent, which included back pay, salary increases, cost-of-living increases, updating the payroll account for retirement purposes, and any benefits due appellant back to 2004. Appellant would be placed in an OWCP/leave without pay (LWOP) status upon the date of his reinstatement and would continue in this status throughout the medical evaluation process period. It was stipulated in the agreement that a form documenting his resignation was to be completed in case he failed his fitness-for-duty examination, which would take place in Washington, DC.

On October 3, 2012 appellant elected to receive benefits under FECA effective April 6, 2012 or any other data OWCP deems best to my benefit. He referenced an April 2012 settlement agreement with the employing establishment. Appellant submitted corrective SF-50's provided by employing establishment for the period May 15, 2005 through May 8, 2011.

In a letter dated October 25, 2012, appellant noted that he returned to federal service effective September 9, 2012. In e-mail correspondence dated October 19, 2012 contained in the

⁶ Docket No. 12-1157 (issued December 21, 2012).

⁷ *Order Dismissing Appeal*, Docket No. 13-1014 (issued August 13, 2013).

⁸ Docket No. 13-1833 (issued March 10, 2014).

letter, the employing establishment informed him that he had been placed in an OWCP/LWOP status.

On January 29, 2013 OWCP received a December 4, 2012 SF-50 showing that appellant resigned from the employing establishment effective that day. It showed that his adjusted based salary was \$103,889.00.

By letter dated March 15, 2013, OWCP placed appellant on the periodic rolls for temporary total disability effective September 9, 2012.

In a letter dated March 31, 2013, appellant contended that his resignation effective December 4, 2012 should be considered as a recurrence of disability and, thus, his pay rate should be based on the salary he was earning as of that date. In support of this argument he noted that he had been restored to full-duty retroactively due to the 2004 settlement agreement. Appellant argued that the employing establishment withdrew a light-duty position on or about December 4, 2012 based on its determination that he could not perform the full duties of his date-of-injury position.

On February 19, 2014 appellant filed a claim for a recurrence of disability beginning December 4, 2012. He noted the date he returned to work as September 9, 2012. Under description of how the recurrence occurred, appellant related that he had been retroactively restored to duty as the result of a settlement agreement. Based on a fitness-for-duty examination, the employing establishment "determined that it would not continue my limited-duty assignment."

The employing establishment controverted appellant's recurrence claim. Michael R. Huff, unit chief, stated that the information appellant provided on the form is misleading as he did not return to work on September 9, 2012. Mr. Huff related that the employing establishment returned appellant to its rolls in a LWOP status for the period September 9 to December 4, 2012. As a result of failing the employing establishment's fitness-for-duty examination appellant resigned and, thus, is not entitled to a recurrent pay rate as he never returned to work.

In a letter dated February 26, 2014, OWCP noted receipt of appellant's claim for a recurrence of disability beginning December 4, 2012. It informed him that a recurrence was defined as either a spontaneous change in his condition or the withdrawal of a light-duty job made to accommodate his condition due to the accepted employment injury.

In a March 5, 2014 letter, appellant argued that OWCP failed to act on his requests regarding his restoration duty pursuant to 5 U.S.C. § 8151(b)(1) and 5 C.F.R. § 353.301. He noted that OWCP had been provided with a copy of the settlement agreement, but offered no comment or identified any problems with the agreement or the revocation period contained in the agreement. Appellant indicated that, contrary to the employing establishment's assertion, he never agreed to resign and that the employing establishment failed to provide him with a reasonable accommodation.

In a second letter dated March 5, 2014, appellant argued that he had never resigned from the employing establishment and alleged that the employing establishment was violating 5 C.F.R. § 353.301 and the Rehabilitation Act of 1973 as his requests for restoration and reasonable accommodation to his special agent position were refused.

In a March 11, 2014 letter, appellant reiterated his arguments regarding restoration rights under 5 C.F.R. § 353.301 and his request to return to his position as a special agent with reasonable accommodations. He related that he had performed a light-duty position for the employing establishment from 2001 until November 2002 when he was removed from the employing establishment's rolls.

By correspondence dated March 12, 2014, appellant noted that his claim for a recurrence of disability beginning December 4, 2012 was based on the employing establishment's failure to provide him with reasonable accommodations. He related that a copy of the settlement agreement between the employing establishment and himself had been sent to OWCP to ensure that it was consistent with OWCP policy and did not violate the law. Appellant argued that both OWCP and the employing establishment were violating the Rehabilitation Act of 1973 as his recurrence beginning December 4, 2012 was based on a withdrawal of a light-duty position made to accommodate restrictions due to his accepted employment injuries.

In a letter dated March 24, 2014, OWCP informed appellant that the evidence of record did not establish that he had returned to work on September 9, 2012. It noted that the employing establishment placed him in LWOP status until December 4, 2012, the date of his resignation from the employing establishment.

In an April 2, 2014 letter, appellant noted that he did sign a form permitting the employing establishment to process his resignation as a part of the settlement agreement. He noted that he had reported to the employing establishment headquarters as well as requesting reasonable accommodation permitting him to return to work. Appellant noted that from September 18 to 20, 2012 he was on official employing establishment business as he traveled to headquarters as ordered by the employing establishment and considered in the settlement agreement. He again argued that both the employing establishment and OWCP were in violation of the Rehabilitation Act of 1973 by denying his request for restoration rights.

By correspondence dated April 7, 2014, appellant related that he discussed his return to work and employing establishment restoration rights with an OWCP claims examiner. The claims examiner informed him that his three-day reporting to employing establishment headquarters was not considered a return to work and it was his "obligation to provide proof that the days in question was (sic) 'return to work.'" He stated that OWCP should have contacted the employing establishment to determine whether the three-day period constituted a return to work, which it failed to do.

By decision dated April 9, 2014, OWCP denied appellant's claim for a recurrence of disability beginning December 4, 2012.

On August 4, 2014 appellant requested reconsideration of the April 9, 2014 OWCP decision without accompanying argument or submission of evidence.

By decision dated September 23, 2014, OWCP denied reconsideration.

LEGAL PRECEDENT -- ISSUE 1

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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁹ Recurrence of disability 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.¹⁰ Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty.¹¹ A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties or other downsizing or where a loss of wage-earning capacity determination is in place.¹²

Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light-duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.¹³

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing that the recurrence is causally related to the original injury.¹⁴ This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.¹⁵ The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.¹⁶

⁹ 20 C.F.R. § 10.5(x). *See also* A.M., Docket No. 09-1895 (issued April 23, 2010); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

¹⁰ *Id.* at § 10.5(x). *See also* J.F., 58 ECAB 124 (2006); *Hubert Jones, Jr., id.*

¹¹ *Id.* at § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a)(4) (June 2013).

¹² *Id.* at §§ 10.5(x), 10.104(c) and 10.509; *see* Federal (FECA) Procedure Manual, *id.* at Chapter 2.1500.2(b) (June 2013).

¹³ *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

¹⁴ 20 C.F.R. § 10.104(b); *see* Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1500.5 and 2.1500.6 (June 2013).

¹⁵ *See S.S.*, 59 ECAB 315 (2008).

¹⁶ *Id.*

ANALYSIS -- ISSUE 1

On February 19, 2014 appellant filed a claim for a recurrence of disability beginning December 4, 2012 based on the withdrawal of a light-duty position. He does not argue a worsening of his condition. In support of his contention that a light-duty position had been withdrawn, appellant stated that he had been restored to federal duty pursuant to the settlement agreement and the employing establishment's determination that he could not perform the full duties of a special agent constituted a withdrawal of light-duty work. OWCP denied his recurrence claim as there was no evidence supporting his claim that he returned to work and the employing establishment withdrew a light-duty position.

The initial question presented is whether appellant actually returned to work with the employing establishment. For a recurrence of disability to occur, the injured worker must have returned to work. The record before the Board lacks any evidence that appellant returned to work with the employing establishment on September 4, 2012. A review of the settlement agreement indicated that he was paid back wages from 2004 and placed on the employing establishment rolls effecting September 9, 2012 pending a determination of his ability to perform the duties of his position. A fitness-for-duty examination found that appellant was unable to perform the duties of the position of special agent and, thus, the form documenting his resignation was finalized on December 4, 2012. In a March 15, 2013 letter, OWCP informed him that he had been placed on the periodic rolls for temporary total disability beginning September 4, 2012. There is no evidence that appellant returned to work at the employing establishment or that a job had been withdrawn. He has failed to establish that he sustained a recurrence of disability commencing December 4, 2012, the date of his resignation from the employing establishment, as he did not return to work, a light-duty job was not offered, and there was no withdrawal of a light-duty job.

On appeal, appellant argues retaliation by OWCP for his complaints that the employing establishment violated the Rehabilitation Act of 1973 regarding his request for restoration. He also argued collusion between OWCP and the employing establishment regarding the violation of the settlement agreement signed by him and the employing establishment. Lastly, appellant argues the correspondence between a senior claims examiner and Mr. Huff establishes OWCP's assistance in keeping his "compensation below acceptable levels" and denying his right to restoration. The issue of his restoration rights is for the employing establishment or Office of Personnel Management to address as OWCP lacks the authority to order restoration.¹⁷ As neither OWCP nor the Board have jurisdiction over this issue,¹⁸ appellant's contentions do not establish that he sustained a recurrence of disability on December 4, 2012 due to a withdrawal of a limited-duty assignment.

¹⁷ See *Pedro Beltran*, 44 ECAB 222 (1992); *Charles J. McCuiston*, 37 ECAB 193 (1985) (claims for job restoration are not within the scope of FECA).

¹⁸ See *Nathan Stelly*, 46 ECAB 396, 401 (1995).

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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁹ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.²⁰ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.²¹ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.²²

ANALYSIS -- ISSUE 2

On September 5, 2014 OWCP received appellant's August 4, 2014 reconsideration request which was within one-calendar year of OWCP's April 9, 2014 decision denying his recurrence claim. Appellant's request was therefore timely. The question for determination is whether his request met at least one of the three standards for obtaining a merit review of his case.

Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law. He did not advance a relevant legal argument not previously considered by OWCP, and he did not submit relevant and pertinent new evidence not previously considered by OWCP.

Appellant submitted an appeal request form with a checkmark indicating that he was requesting reconsideration. He made no argument and submitted no evidence to support his request. Such a bare request for reconsideration is insufficient on its face to meet any of the standards for obtaining reconsideration. The Board will therefore affirm OWCP's September 23 2014 decision denying appellant's request.

¹⁹ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

²⁰ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

²¹ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

²² *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

CONCLUSION

The Board finds that appellant failed to establish that he sustained a recurrence of disability on December 4, 2012. The Board also finds that OWCP properly denied his August 4, 2014 reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 23 and April 9, 2014 are affirmed.

Issued: June 2, 2015
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board