United States Department of Labor
Employees' Compensation Appeals Board

D.O., Appellant	)	
and	)	**Docket No. 15-1368**
	)	**Issued: October 22, 2015**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORATION SECURITY ADMINISTRATION, Portland, OR, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 2, 2015 appellant, through counsel, filed a timely appeal from January 5 and May 22, 2015 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.

ISSUES

The issues are: (1) whether an OWCP hearing representative properly denied a request for a subpoena; and (2) whether appellant has established a recurrence of disability commencing January 13, 2014.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 18, 2012 appellant, then a 34-year-old transportation security officer, filed a Form CA-2, an occupational disease claim, for compensation alleging that he sustained injuries as a result of his federal employment. He described the nature of the injuries as pain in both wrists, hands, forearms, and elbows. Appellant stated that in March 2001 he began to have wrist pain and, by January 2012 the pain had spread to his forearms and elbows on an almost daily basis. As to job duties, he submitted a May 31, 2012 letter stating that his job in the baggage area involved constant lifting of heavy bags, twisting of the wrists, and gripping with his hands.

OWCP accepted the claim on June 26, 2012 for bilateral medial epicondylitis, and on November 1, 2012 expanded the acceptance of the claim for a left thumb sprain. The record indicates that in July 2012 appellant moved and began work in a light-duty position at the employing establishment. Appellant stopped working in February 2013 and received wage-loss compensation through June 15, 2013.

The attending physician, Dr. Sandra Collins, a Board-certified orthopedic surgeon, submitted a June 4, 2013 report providing results on examination. She noted that a functional capacity evaluation had been performed on May 22, 2013. Dr. Collins diagnosed medial epicondylitis and bilateral wrist sprain/strains. She indicated that appellant could return to full duty.

According to the employing establishment, appellant returned to regular duty as of June 24, 2013. He requested to work on the "checkpoint" but there were no openings at that time for a checkpoint officer.

On July 6, 2013 appellant again stopped work and filed a traumatic injury claim (Form CA-1) alleging that he injured his back while lifting a heavy bag.[2] OWCP accepted the claim for lumbosacral and thoracic sprains. The employing establishment offered appellant a light-duty position on July 9, 2013 and he returned to light duty. In a report dated September 22, 2013, Dr. Andrew M. Gross, a Board-certified anesthesiologist, diagnosed lumbosacral spondylosis without myelopathy, thoracic spine pain, thoracic or lumbosacral neuritis, and lumbago. He indicated that appellant continued to work light duty. In a work capacity evaluation (OWCP-5c) dated November 21, 2013, Dr. Gross diagnosed lumbar strain and annular tear at L2-3. He indicated that appellant could return to regular duty January 6, 2014.

Appellant requested on January 12, 2014 a transfer from baggage work to checkpoint duty. He also requested information as to the possibility of working part time. In a January 29, 2014 response from the employing establishment human resource specialist, appellant was directed to report to work on January 30, 2014 for sedentary duties. The employing establishment indicated that forms were enclosed and help would be provided as to processing a request for part-time hours. Appellant acknowledged in a January 29, 2014 response that he was grateful the employing establishment was willing to accommodate him. In a brief letter dated

[2] Appellant also filed a Form CA-2 claim on July 23, 2013, alleging that his right wrist condition had been aggravated by his light-duty job from September 2012 to January 2013. This claim was denied by decision dated October 16, 2013.

January 30, 2014, he advised the employing establishment that "due to personal circumstances and health reasons" he was resigning from his current position.

In a report dated January 16, 2014, Dr. Collins indicated that appellant was working regular duty in baggage and was seen for his bilateral wrist complaints. She reported that his condition had been improving until he went back to work in baggage just over a week earlier. Dr. Collins provided results on examination and diagnosed bilateral wrist sprain and bilateral medial epicondylitis. She recommended a position other than baggage work to avoid reinjury, and reported work restrictions that included 100 pounds pushing/pulling, overhead lifting of 30 pounds, 75 pounds two-handed carry, and 40 pounds one-handed carry.

Appellant completed a Form CA-2a, claim for recurrence of disability, on January 31, 2014. He reported the date of the recurrence as January 13, 2014 and the date of the original injury as January 12, 2012.

In a report dated February 13, 2014, Dr. Collins provided results on examination and indicated that appellant had quit working. She repeated the work restrictions reported in the January 16, 2014 report.

OWCP sent appellant a March 14, 2014 letter requesting that he submit additional factual and medical evidence with respect to his claim of a recurrence of disability. It indicated that, if he was claiming a light-duty job was withdrawn, he should provide additional explanation and discuss his work duties.

Appellant provided a March 31, 2014 statement that his duties had not been modified because the human resources specialist had "disregarded" the work restrictions from Dr. Collins. He asserted that his light-duty job had been withdrawn in June 2013 and January 2014 because the employing establishment stated that there were no work restrictions, when there were restrictions from Dr. Collins. Appellant stated that every time he returned to work in the baggage area his symptoms worsened. He also alleged that he had anxiety, heart palpitations, and sleep disorder caused by work stress and injuries.

By decision dated June 9, 2014, OWCP denied the claim for a recurrence of disability. It found the evidence was insufficient to establish a recurrence of disability.

In a letter dated October 17, 2014, appellant, through counsel, requested a hearing before an OWCP hearing representative. Counsel argued that the employing establishment had never offered appellant a part-time light-duty position, and it was clear that the previous light-duty position was no longer available. In addition, he requested that a subpoena be issued to the human resources specialist for testimony as to a light-duty position, and "all documents" related to an offered position.

By letter dated January 5, 2015, the hearing representative denied the request for a subpoena. She found the relevant evidence could be obtained in writing from the human resource specialist. In addition, the hearing representative indicated that, if the final decision was adverse, appellant could appeal the subpoena issue at that time. On January 8, 2015 appellant, through counsel, requested a review of the written record rather than an oral hearing.

The human resources specialist submitted a statement dated January 30, 2015. She stated that appellant began work at the current location in July 2012, when he worked in a light-duty position in the Coordination Center. The human resources specialist reported that he continued to work light duty in the checkpoint area, at the exit lane to ensure security measures. Appellant was then off work commencing February 2, 2013, and was released to regular duty on June 4, 2013. The human resources specialist stated that he was returned to regular duty in the baggage area, and although he had requested to work the checkpoint duty, there were no openings at that time. She noted that on July 6, 2013 appellant filed a traumatic injury claim for appellant's back, and he was again placed on light duty until he was released for full duty on January 6, 2014. The human resources specialist indicated that he had requested to work in the checkpoint area. According to the human resources specialist, she spoke to appellant on January 24, 2014 and explained that a security officer does not lift luggage above the waist and he would have to get clarification from his physician, Dr. Collins on work restrictions. The human resources specialist stated that as of January 29, 2014 she had not received any additional medical evidence and she asked him whether he still wanted to work part time at the checkpoint position. She referred to the e-mail correspondence with appellant and indicated that on January 29, 2014 she told him that he must return to work but he would be assigned to the checkpoint line pending receipt of new medical evidence.

By decision dated March 27, 2015, the hearing representative affirmed the June 9, 2014 decision. She found the evidence was insufficient to establish a recurrence of disability.

In a letter dated April 13, 2015, appellant, through counsel, requested reconsideration. He submitted a February 18, 2014 report from Dr. Gross, who provided results on examination. The history provided noted the July 6, 2013 back injury. Dr. Gross stated that appellant was doing well, but was no longer working at the employing establishment. He stated that, when appellant returned to regular duty, he experienced increased discomfort and likely would need a permanent light- to medium-duty work environment. Dr. Gross indicated that appellant had work restrictions that included 30 pounds lifting.

By decision dated May 22, 2015, OWCP reviewed the case on its merits and denied modification. It found the evidence was insufficient to warrant modification.

LEGAL PRECEDENT -- ISSUE 1

Section 8126 of FECA provides that the Secretary of Labor, on any matter within his jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[3] The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.[4] In requesting a subpoena, a claimant must explain why the testimony is relevant to the

[3] 5 U.S.C. § 8126(1).

[4] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[5] Section 10.619(a) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[6] The hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[7] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.[8]

ANALYSIS -- ISSUE 1

In the present case, counsel requested that the hearing representative subpoena the human resources specialist from the employing establishment, regarding the issue of availability of light duty. The hearing representative denied the request, explaining that relevant information could be obtained by a written statement from the individual on the issues presented.

As noted above, the hearing representative has discretion with respect to the issuance of subpoenas. Appellant argued that testimony from the human resources specialist was necessary, without providing any valid explanation as to why testimony was necessary. The hearing representative reasonably determined that the evidence could be provided through written evidence from the human resources specialist. In this case, the human resources specialist did provide a detailed written statement as to the relevant issues regarding the availability of light duty for appellant, as it related to his claim for a recurrence of disability. Counsel also provided a general request for all documents related to an offered position. There was no evidence presented that subpoenas were necessary with respect to the development of the relevant evidence in this case. The Board finds no abuse of discretion related to the denial of a subpoena request.

On appeal, counsel states that the only way to determine if there was a light-duty position was to subpoena the human resources specialist and any documents. For the reasons noted above, the Board finds there was no abuse of discretion by the hearing representative.

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[5] *Id*.

[6] *Id*. at § 10.619(a)(1).

[7] *See Gregorio E. Conde*, *supra* note 4.

[8] *Claudio Vazquez*, 52 ECAB 496 (2001).

LEGAL PRECEDENT -- ISSUE 2

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 or new exposure to the work environment that caused the illness.[9]

An employee who claims a recurrence of disability due to an accepted employment injury has the burden of proof to establish by the weight of substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound reasoning.[10] Where no such rationale is present, medical evidence is of diminished value.[11]

The term "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 work-related injury is withdrawn or when the physical requirements of such an assignment are altered so that they exceed the employee's physical limitations.[12]

ANALYSIS -- ISSUE 2

In the present case, appellant filed a claim for a recurrence of disability commencing January 13, 2014. He has argued before OWCP that there was a withdrawal of light duty at that time. In this regard, the Board notes that, while a withdrawal of a light duty may support a claim for a recurrence of disability,[13] there was no evidence a light-duty job was withdrawn in this case. The record indicates that appellant had been returned to regular duty by Dr. Collins on June 4, 2013 following the occupational disease claim. Appellant then sustained a traumatic injury on July 6, 2013 to his back in claim file number xxxxxx959, and was again placed on light duty.[14] He was eventually returned to regular duty by Dr. Gross on January 6, 2014. The record indicated that on January 12, 2014 appellant was working his regular duty in the baggage area, and he at that time requested to work in the checkpoint area. The employing establishment was considering his request and indicated its willingness to accommodate appellant with the submission of additional medical evidence. On January 29, 2014 appellant resigned from federal employment. There was no evidence that as of January 13, 2014 he was working a light-duty

[9] 20 C.F.R. § 10.5(x); *R.S.*, 58 ECAB 362 (2007).

[10] *I.J.*, 59 ECAB 408 (2008); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[11] *See Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[12] *See J.F.*, 58 ECAB 124 (2006); *see also* 20 C.F.R. § 10.5(x).

[13] *See Jackie B. Wilson*, 39 ECAB 915 (1988).

[14] The July 6, 2013 employment injury is not before the Board on this appeal.

position based on the accepted conditions in this case, nor any evidence that such a position was withdrawn.

The claim for a recurrence of disability commencing January 13, 2014 therefore requires medical evidence that as of that date appellant was disabled due to the accepted conditions of bilateral medial epicondylitis and left thumb sprain. In a January 16, 2014 report, Dr. Collins provided work restrictions. This report is not sufficient to establish a recurrence of disability in this case. Dr. Collins did not discuss causal relationship between any work restrictions and the employment injury in this case. She refers to wrist complaints, which were not accepted conditions in the current claim. In addition, Dr. Collins appears to relate appellant's conditions to an aggravation by recent work duties, which would be a new claim for injury.[15] Furthermore, she indicates that the work restrictions were to prevent a reinjury. The possibility of a future injury does not constitute an injury under FECA and therefore no compensation can be paid for such a possibility.[16]

The Board accordingly finds that the report from Dr. Collins is not sufficient to establish a recurrence of disability as of January 13, 2014. The February 18, 2014 report from Dr. Gross is also of diminished probative value to the issue. Dr. Gross treated appellant for the July 6, 2013 employment-related back injury, in claim file number xxxxxx959 and this is the injury he noted in his history. He does not provide a rationalized medical opinion that appellant was disabled due to the accepted conditions in this case, claim file number xxxxxx983.

It is appellant's burden of proof to establish his claim. For the reasons noted, the Board finds appellant did not meet his burden of proof in this case.

On appeal, appellant again asserts that a light-duty job was withdrawn. As discussed above, the evidence of record does not support such a finding. 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.

CONCLUSION

The Board finds no abuse of discretion with respect to denial of a subpoena request. The Board further finds appellant has not established a recurrence of disability commencing January 13, 2014.

[15] Even if the same part of the body is involved, an aggravation from new exposure to work actors is a new injury not a recurrence of disability. *B.C.*, Docket No. 14-0690 (issued August 27, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(c)(5) (October 2013).

[16] *Gaetan F. Valenza*, 39 ECAB 1349, 1356 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 22 and January 5, 2015 are affirmed.

Issued: October 22, 2015
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board