United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 14-0987**
	)	**Issued: September 10, 2015**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Anchorage AK, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 25, 2014 appellant, through counsel, filed a timely appeal from an October 8, 2013 merit decision 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 appellant established a recurrence of total disability commencing December 12, 2005 due to his accepted employment injury.

On appeal, counsel contends that the employing establishment withdrew appellant's light-duty work assignment in December 2005, noting that there was no reduction-in-force, OWCP had not issued a loss of wage-earning capacity decision based on his light-duty job, and that his removal was not for cause. He further contends that appellant was unable to perform the

[1] 5 U.S.C. § 8101 *et seq.*

regular work duties of his date-of-injury position as his physicians stated that he could only work with accommodations.

FACTUAL HISTORY

This case has previously been before the Board.[2] In a March 27, 2013 decision, the Board set aside a February 15, 2012 OWCP decision denying a merit review which found that appellant had filed an untimely request for reconsideration and had failed to establish clear evidence of error. The Board found that he had filed a timely request for reconsideration from OWCP's February 7, 2011 merit decision. The case was remanded for OWCP to evaluate appellant's request under the proper standard of review for a timely reconsideration request. The facts and circumstances outlined in the prior Board decision are herein incorporated by reference. The relevant facts of the case are set forth below.

On December 11, 2002 appellant, a then 57-year-old GS-14 supervisory personnel management specialist, filed an occupational disease claim alleging coronary heart disease and "psychological [injury]" due to his employment. He had been on extended leave due to his two heart attacks (one occurring in 1998 and one in 2001), which he claimed were the result of years of intimidation, harassment, and abuse by his supervisor, E.F., manager of the human rights division. Appellant filed his claim after his supervisor issued an October 30, 2002 notice of removal based on his unavailability for duty and his inability to perform the essential functions of his position due to his medical condition.

On November 5, 2002 rather than being removed from his position, appellant elected to retire from federal service retroactive to January 31, 2002. His retirement Notification of Personnel Action (SF-50) noted in the remarks section that, in order to preserve his retirement benefits, he was retiring under duress prior to being removed. It noted: "[Employing establishment] has refused to grant my request for reasonable accommodation."[3] Appellant had also previously filed an Equal Employment Opportunity (EEO) complaint against his supervisor.

OWCP developed the claim by requesting further information from the employing establishment and appellant on January 17, 2003. The claim was denied on October 31, 2003. Appellant requested a hearing.

OWCP later received a copy of appellant's EEO settlement agreement, dated April 24, 2003. The employing establishment agreed to offer appellant an appointment for a period of two years, to commence no later than 60 days from the date of settlement. Appellant would be paid at his previous salary as of July 27, 2001. He was also provided the option, within two years from the date of settlement to request that his current retirement date be withdrawn and that he be placed in leave without pay status for one year from that existing date. Appellant

[2] Docket No. 12-1596 (issued March 27, 2013).

[3] Dr. Joel B. Wieman, PhD., a licensed psychologist, reported in his July 3 and October 29, 2002 reports that appellant would be able to work full time without issue as long as he did not have to work for his current supervisor. Dr. Mark Selland, Board-certified in cardiology and in internal medicine, submitted a report to the employing establishment physician, Dr. Robert Riggs, noting that appellant could return to work as long as he was no longer exposed to the extreme stress to which he had been exposed in his job situation.

returned to the employing establishment on a temporary appointment effective December 13, 2003. Under a waiver granted by the Office of Personnel Management (OPM) he continued to receive his annuity during this period of employment in addition to his salary. At the end of the appointment on December 12, 2005 pursuant to the EEO settlement agreement, appellant voluntarily retired.

By decision dated March 26, 2004, the hearing representative affirmed the October 31, 2003 denial of the claim. Upon further development of the claim, however, on May 24, 2007 OWCP accepted post-traumatic stress disorder (PTSD) due to his employment as a supervisory personnel management specialist.

On September 23, 2008 appellant filed two claims for wage-loss compensation (Form CA-7) – one for the period February 22, 2002 to December 13, 2003 (prior to his reinstatement due to the EEO settlement agreement) and the second for the period commencing December 12, 2005 (the period after the reinstatement) and continuing. By letter dated March 31, 2009, OWCP granted wage-loss compensation for the period February 22, 2002 through December 13, 2003. It noted that appellant would need to elect between FECA or OPM retirement benefits. By document dated April 6, 2009, appellant elected FECA benefits effective February 22, 2002 and OPM was reimbursed for the annuity payments received by him during this period.

A supplemental payment record for the period February 22, 2002 through December 13, 2003 reflects that appellant was paid $133,218.58 gross compensation with a $57,463.46 net payment after reimbursing OPM for the annuity payment. On that same document, OWCP notes: "[Appellant] following his successful pursuit of due process obtained light[-]duty work with the [employing establishment] following this period. [The denial of] [h]is claim with OWCP was reversed and so became payable."

Appellant thereafter complained to OWCP that it had failed to address his second claim for compensation for the period commencing December 12, 2005 and continuing. OWCP, by letter dated December 14, 2009, requested that he provide supporting medical evidence to establish his claim for wage-loss compensation for this second, additional period.

In treatment notes dated January 31, 2006 to October 9, 2007, Dr. William G. Campbell, a Board-certified psychiatrist, advised that appellant was feeling better and addressed a decrease in his antidepressant medication dosage.

In progress notes dated June 3 and September 30, 2008 and March 16, 2009, Dr. Eric W. Garby, an attending Board-certified psychiatrist, listed findings on physical and mental examination. He addressed appellant's emotional condition and treatment plan. In an April 24, 2008 medical report, Dr. Garby obtained a history of appellant's work-related stress, psychiatric and medical treatment, and family and social background. He listed findings on physical and mental examination. Dr. Garby advised that there was no family history of unipolar or bipolar mood disorder, anxiety, or addictions. There was also no evidence of adverse prenatal or perinatal event, developmental delay and conduct, or oppositional problems. There was probable alcohol abuse, rule out dependency. There was no evidence of preexisting depression or anxiety. Dr. Garby noted that there was a very difficult situation beginning in 1997, which appeared to

reach its crescendo in 2001 during which time appellant met the criteria for alcohol dependency and adjustment disorder with both depressive and anxious features. Since then he had continued anxiety. Dr. Garby concluded that appellant had residual symptoms although his depression appeared to have largely remitted.

In a May 1, 2008 report, he again obtained a history of appellant's work-related stress and psychiatric, family, and social background. Dr. Garby listed findings on mental examination and diagnosed recurrent severe major depressive disorder without psychotic features on Axis 1 and coronary artery disease status post myocardial infarction times two on Axis 4. He ruled out alcohol abuse on Axis 2 and found a global assessment of function of 70 on Axis 5. Dr. Garby found no diagnosis on Axis 3. In a June 19, 2009 report, he opined that based on his interview and review of appellant's medical record, his workplace environment created a situation of fear, anxiety and learned helplessness which caused his incapacity to perform professionally. The history related to Dr. Garby by appellant was clear, consistent, reproduced on several occasions, and accorded with outside data. Appellant described an environment in which he was not given support or structure sufficient to perform his tasks. He was subjected to personal and professional verbal abuse and to capricious and at times mercurial demands by his immediate supervisor.

Prior to this situation, the record reflects that appellant functioned in the same position at a very high level. He continued to maintain that level for a number of years until the progressive effects of sustained anxiety led to syndromal depression and other significant physical health issues such as, myocardial infarction. Dr. Garby concluded that it was clear that appellant's resultant incapacitation was directly related to his workplace situation. In addition, it was psychiatrically contraindicated for appellant to return to the same work situation, namely with the same supervisor.

On January 10, 2010 Dr. Garby reiterated his prior diagnosis of major depressive disorder without psychotic features and found that appellant had PTSD. His symptoms included sadness or dysphoria, anhedonia, or lack of joy, insomnia which included initial middle and terminal sleep changes, changes in both appetite and weight, problems with poor concentration, short-term memory and ability to complete complex tasks, feelings of guilt, failure, hopelessness and helplessness, and a passive wish for death and eventually active suicidal ideation. In addition, appellant experienced heightened anxiety with episodic periods of feeling overwhelmed associated with a sense of vigilance or arousal. He also experienced significant activation when exposed to elements or triggers of the above, avoidance and reexperiencing in the form of nightmares and intrusive daytime thoughts. Dr. Garby opined that, based on an interview of appellant and a review of his psychiatric records, his condition was exacerbated by his workplace environment. Elements that contributed to appellant's exacerbation included increasing his scope of responsibilities with greater expectations for performance or output with little additional support leading to a climate of heightened anxiety. There was a significant relational issue between him and his supervisor which significantly added to his anxiety or stress level. Dr. Garby stated that appellant was clear and consistent as he related the above data which was corroborated by outside records. Specifically, appellant's position changed, expectations placed upon him and his subordinates increased, and the amount of time spent at his place of employment increased dramatically. He arrived earlier, left later, and worked through lunch and on weekends. Appellant received recognition for his work from multiple sources, but did not

receive compensation. Despite the above, he fell behind expectations, his relational problem with his supervisor was exacerbated, and he was subjected to personal attacks and verbal abuse. Dr. Garby concluded that, prior to the change in expectations and administration, appellant had a long history of doing well.

In a March 16, 2010 report, Dr. Garby again recommended that appellant should not work with his supervisor, E.F., based on the severity of his depression, anxiety, and the likelihood of exacerbation of his symptoms if he was placed in a similar work situation with E.F.

In an October 20, 2008 letter, the employing establishment controverted appellant's claim for recurrence due to his departure from its rolls by way of voluntary nondisability retirement. It noted that, at the time of his retirement, he had received a notice of proposed removal, but the removal documentation was required to be expunged from his record. The employing establishment requested that OWCP deny appellant's claim in the absence of contemporaneous medical evidence precluding him from work at the time of his voluntary retirement on December 12, 2005 due to his accepted employment condition.

By decision dated February 7, 2011, OWCP denied appellant's claim for compensation commencing December 12, 2005. It found that the medical evidence was not contemporaneous to the claimed period of disability and did not address his disability during this claimed period.

By letter dated May 7, 2011, appellant requested reconsideration.

In an August 11, 2011 decision, OWCP denied merit review of appellant's claim finding that he had failed to show that OWCP had erroneously applied or interpreted a point of law, advance a point of law not previously considered by OWCP, or include pertinent new and relevant evidence sufficient to warrant merit review of its prior decision.

On February 6, 2012 appellant requested reconsideration of the last merit decision, dated February 7, 2011, and submitted additional medical evidence. In an undated report, Dr. Garby noted that he had examined appellant on October 10, 2011 and reviewed medical records of Dr. Campbell, and Dr. Wieman. He reiterated his prior diagnoses of severe major depressive disorder without psychotic features and PTSD. Dr. Garby referenced his previous correspondence that described his symptomatology in detail. He noted appellant's treatment by other physicians and reported that all findings were consistent. Dr. Garby advised that appellant's condition tended to be a chronic condition characterized by periods of relative affective and anxiety stability, but he was at a greatly increased risk for recurrence of syndromal depression and/or triggering/exacerbation of PTSD symptomatology. Appellant would likely require ongoing treatment for the foreseeable future, if not for the rest of his life. His illness had been markedly exacerbated and his course had worsened when he was placed in professional environments evocative of his initial presentation. Dr. Garby stated that accommodations to prevent overwhelming anxiety involved reducing appellant's workload and ensuring that he would not be placed with his previous supervisor which led to severe deterioration of his condition. He concluded that appellant's condition existed prior to the time he initially sought treatment and has continued through the present.

In a February 4, 2012 letter, Dr. Campbell stated that Dr. Wieman had referred appellant to him for medication treatment of anxiety and depression in 2001. He treated him until the end of 2007 and then referred him to Dr. Garby for follow-up psychiatric treatment.

By decision dated February 15, 2012, OWCP denied appellant's February 6, 2012 request for reconsideration, finding that it was untimely filed and failed to present clear evidence of error. Appellant appealed to the Board, which as noted, remanded the case to OWCP on March 27, 2013.[4]

In an April 11, 2013 decision, OWCP denied modification of its February 7, 2011 decision. It found that the medical evidence failed to establish that appellant was totally disabled commencing December 12, 2005.

By letter dated October 7, 2013, appellant, through counsel, requested reconsideration. Counsel contended that the employing establishment withdrew appellant's light-duty work assignment in December 2005 and that he was unable to perform his regular work duties due to at least one work restriction. He further contended that the withdrawal of appellant's job was not due to a reduction-in-force, OWCP had not issued a loss of wage-earning capacity decision based on appellant's light-duty job, and he had not been removed for cause. Counsel also contended that the medical evidence established that appellant was unable to perform his regular-duty work. Appellant resubmitted duplicate copies of Dr. Garby's undated and January 10, 2010 reports.

In an October 8, 2013 decision, OWCP denied modification of its February 7, 2011 decision. It found that appellant voluntarily retired in December 2005. OWCP further found that the medical evidence submitted had been previously considered and was not contemporaneous to the period of disability commencing December 12, 2005.

LEGAL PRECEDENT

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 establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability and show that such light duty cannot be performed. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of light-duty requirements.[5]

It is well established that, when a light-duty position made specifically to accommodate the claimant's condition due to the work injury is withdrawn, a claimant has established a change in the nature and extent of the light-duty requirements.[6] OWCP's procedure manual recognizes

[4] *See supra* note 2.

[5] *Gary L. Whitmore*, 43 ECAB 441 (1992).

[6] 20 C.F.R. § 10.5x; *see, e.g., Jackie B. Wilson*, 39 ECAB 915 (1988) (the employing establishment no longer had any work within appellant's work restrictions).

that a recurrence of disability includes the withdrawal of a light-duty assignment.[7] OWCP regulations recognize certain situations where work stoppage would not be considered a recurrence, such as termination for nonperformance or misconduct, or a reduction-in-force.[8]

ANALYSIS

OWCP accepted that appellant sustained PTSD while working as a supervisory personnel management specialist. Appellant claimed compensation for disability commencing December 12, 2005. In several decisions, OWCP denied his claim finding that the evidence was insufficient to establish that the claimed disability was due to his accepted emotional condition. Appellant has the burden of establishing by the weight of the substantial, reliable, and probative evidence, a causal relationship between his claimed disability and the accepted condition.[9] The Board finds this case is not in posture for decision.

The record establishes that appellant was paid total disability compensation for the period February 22, 2002 through December 13, 2003. He had been receiving retirement benefits for that period of time; however he elected on August 7, 2009 to receive FECA benefits. On August 11, 2009 appellant was paid supplemental disability compensation in the gross amount of $133,218.58 with a $57,463.46 net payment after reimbursing OPM for the previously paid annuity. On this payment document, OWCP noted, "[Appellant] following his successful pursuit of due process obtained a light[-]duty work with the [employing establishment] following this period." "This period" refers to the period from February 22, 2002 to December 13, 2003.

From December 13, 2003 through December 11, 2005, pursuant to his EEO settlement agreement, appellant returned to work for the employing establishment in a light-duty position. The only restriction required by appellant's physicians for appellant to return to full-time work was that he not work for his previous supervisor. For that period of time, the employing establishment was able to accommodate his restriction, pursuant to the EEO settlement agreement. At the end of that period, appellant had agreed under the EEO settlement agreement that he would retire. The settlement agreement specifically declared that it was not to have any affect on his pursuit of his workers' compensation claim. Appellant filed a Form CA-2 claim for a recurrence of total disability effective the last day of his light-duty position. According to the regulations and OWCP's procedure manual, a recurrence of disability is defined as an inability to work that takes place when a light-duty assignment made specifically to accommodate an employees' physical limitations due to his or her work-related injury or illness is withdrawn.

The facts in this case are somewhat complicated by the involvement of the EEO settlement agreement. However, the Board finds that the employing establishment, pursuant to that agreement, was able to provide appellant a light-duty position that met appellant's restriction of not working for his previous supervisor. Immediately, prior to that appointment, appellant had been paid full-time disability compensation. At the termination of the light-duty position,

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a)(4) (June 2013).

[8] *Supra* note 6 at § 10.5x.

[9] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

there is nothing in the record to establish that the light-duty position was withdrawn due to his misconduct, nonperformance of his job, or a reduction-in-force.[10]

Upon withdrawal of the light-duty assignment, appellant had previously agreed to retire, but retirement does not preclude a later election of FECA benefits. The record reflects that he had requested information about electing FECA benefits, actually electing FECA benefits in lieu of retirement benefits for the prior period of disability by the form dated April 6, 2009. OWCP has failed to properly develop the case following the withdrawal of appellant's light-duty position. Since the last period of disability, there has been no wage-earning capacity decision issued, his benefits were never terminated, and as noted on the supplemental disability payment form, the stated reason for stopping the compensation for total disability was that he "obtained light[-]duty work with the [employing establishment] following this period." The Board will remand the case for OWCP to properly develop this case as a withdrawal of a light-duty position.[11]

OWCP denied appellant's recurrence claim also under the premise that his medical reports were not contemporaneous with the 2005 date. The evidence in this case has been medically consistent from the acceptance of the claim. Appellant was allowed to work full time provided he did not work with one particular supervisor. The employing establishment, after providing him a suitable light-duty position for two years, has failed to extend or to provide him with another position within his medical restrictions. Accordingly, OWCP must develop this case as one where a light-duty position was withdrawn.

On appeal, counsel contends that the employing establishment withdrew appellant's light-duty work assignment in December 2005, noting that there had been no reduction-in-force, OWCP had not issued a loss of wage-earning capacity decision based on his light-duty job, nor was there any removal for cause. He further contends that appellant was unable to perform the regular work duties of his date-of-injury position as his physicians opined that he could only work with accommodations. The employing establishment controverted appellant's claim and stated in its October 20, 2008 letter that he had previously received a notice of proposed removal (noting that the removal action had been expunged from appellant's personnel record pursuant to the EEO settlement agreement) and he had voluntarily retired on December 12, 2005.

The Board finds merit in counsel's argument and finds the employing establishment's position to be inconsistent with the facts of this case. The case will be remanded for review under the proper standard for withdrawal of a light-duty position.

CONCLUSION

The Board finds that this case is not in posture for decision as to whether appellant has established a recurrence of total disability commencing December 12, 2005 due to his accepted employment injury.

[10] *Supra* note 7 at Chapter 2.1500.7.

[11] *See Mary Palladino*, Docket No. 94-320 (issued September 5, 1995); *Gordan Lockwood*, Docket No. 99-485 (issued July 20, 2001).

ORDER

IT IS HEREBY ORDERED THAT the October 8, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings and issuance of a *de novo* decision consistent with the decision of the Board.

Issued: September 10, 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