United States Department of Labor
Employees' Compensation Appeals Board

T.K., Appellant	)	
and	)	**Docket No. 15-1635**
	)	**Issued: September 15, 2015**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, San Francisco, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 26, 2015 appellant, through counsel, timely appealed an April 13, 2015 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 the claim.

ISSUE

The issue is whether appellant is entitled to compensation for a loss in wage-earning capacity effective December 14, 2014.

FACTUAL HISTORY

Appellant, a 54-year-old former maintenance worker, injured his lower back in the performance of duty on November 10, 2012. At the time of injury, he was constructing a horse

[1] 5 U.S.C. §§ 8101-8193.

gate, which involved moving nine buckets of gravel from the back of a pick-up truck. Appellant also graded dirt and removed vegetation. While lifting the last bucket of gravel, he felt a dull, achy pain that turned to a sharper pain in his left waistband, buttock, and hamstring.

On February 7, 2013 OWCP accepted the claim for lumbosacral sprain. Appellant received continuation of pay from November 14 through February 1, 2012.[2] Afterwards, OWCP paid him wage-loss compensation for temporary total disability through November 7, 2013. Appellant worked from November 8 until December 19, 2013, when the employing establishment sent him home because it was unable to accommodate his latest work restrictions. OWCP resumed payment of wage-loss compensation through January 11, 2014. Appellant returned to his full-time, regular duties effective January 14, 2014.

Dr. Michael E. Hebrard, a Board-certified physiatrist, provided new work restrictions on March 17, 2014, which included limitations on lifting, bending, stooping, sitting, and walking.[3] On March 31, 2014 he extended the previous work restrictions, and imposed a two-hour limitation with respect to driving.

In a follow-up report dated May 12, 2014, Dr. Hebrard advised that appellant was restricted to performing sedentary work. He imposed a 10-pound limitation with respect to lifting, pushing, and pulling. Additionally, appellant was precluded from working at or above shoulder level. Lastly, Dr. Hebrard indicated that appellant should be allowed to sit and stand at will.

On May 20, 2014 the employing establishment processed a claim for compensation (Form CA-7) for intermittent wage loss during the period May 4 to 17, 2014. Under section 14 (remarks) of the employing establishment's portion of the claim form it was note that as of June 2, 2014, "no work available to accommodate work restrictions/limitations."

On June 2, 2014 the employing establishment informed appellant that there was no limited-duty work available within his limitations. Dan Collman advised appellant *via* e-mail that upon reviewing his physician's restrictions and the upcoming work schedule, he did not see any work that met appellant's limitations. Consequently, he instructed appellant to turn in his sensitive property the following morning. Mr. Collman also requested that appellant notify him immediately should his condition change, and further advised that he would notify appellant when there was limited-duty work available within his restrictions.

On June 26, 2014 appellant reached a settlement agreement with the employing establishment regarding an equal employment opportunity (EEO) complaint he had filed more than a year prior. The May 7, 2013 EEO complaint was for alleged discrimination based on age, race, national origin, physical disability, and reprisal. In accordance with the June 26, 2014 settlement agreement, the employing establishment placed appellant on administrative leave as

[2] In February 2013, appellant was released to return to work in a limited-duty capacity; however, the employing establishment advised that it was unable to accommodate his work restrictions.

[3] Dr. Hebrard began treating appellant on November 30, 2012. His initial diagnoses included lumbar radiculitis, sciatica, lumbosacral strain, and underlying bilateral hip strain.

of June 1, 2014, and he was to remain in paid leave status for up to one year (June 1, 2015). During this one-year period, appellant was expected to apply for federal disability retirement through the Office of Personnel Management (OPM). The employing establishment also agreed to support his application for disability retirement, as well as attempt to secure work within his medical restrictions. Appellant could also seek early retirement or find a transferrable position within the Federal Government on his own. If a year passed without securing a new position or obtaining OPM's approval for disability retirement, the settlement agreement allowed the employing establishment to then terminate his services because of a medical inability to perform the essential functions of his job. The employing establishment also agreed to pay appellant $7,500.00 within 60 days of execution of the settlement agreement. According to paragraph five (Complainant's Knowing and Voluntary Release of All Claims), "nothing in [the] agreement [was] to be construed as a waiver of [appellant's] right to file an OWCP claim...."

In a July 14, 2014 follow-up report, Dr. Hebrard advised that appellant was "medically disabled from his previous course of employment."

An August 26, 2014 lumbar x-ray revealed grade 1 anterolisthesis (L4 over L5), with bilateral facet joint arthrosis. In a similarly dated report, Dr. Hebrard requested that appellant's claim be expanded to include lumbosacral radiculitis and lumbar disc degeneration.[4] He also noted that appellant was restricted to sedentary work where he could sit and stand as needed.

In his September 16, 2014 follow-up treatment notes, Dr. Hebrard again requested that appellant's claim be expanded to include lumbosacral radiculitis, spondylodesis, and lumbar disc degeneration. Additionally, he noted that appellant was restricted to sedentary work.

Effective December 14, 2014, appellant returned to work as a medical support assistant with the Department of Veterans Affairs (DVA) in Palo Alto, CA.[5] Personnel records (Standard Form 50/B) indicated that his employment with the National Park Service (NPS) ended on December 13, 2014. Appellant had been earning $28.47 a hour as a NPS maintenance worker (GS-8, Step 3). His new position with DVA paid an annual salary of $39,941.00 (GS-5, Step 3).

On January 12, 2015 appellant filed a claim (Form CA-7) for lost wages beginning December 14, 2014, which he identified as a "Downgrade." He later explained that he was seeking compensation due to a loss in wage-earning capacity as a result of his December 14, 2014 transfer to DVA.

OWCP subsequently inquired about the circumstances surrounding appellant's December 2014 transfer from NPS to DVA. In a January 25, 2015 response, appellant indicated that NPS was unable to accommodate his work restrictions as of June 1, 2014. At that time, he was sent home and placed on administrative leave. NPS reportedly placed appellant on paid leave rather than process his recurrence claim (Form CA-2a) and/or claim for compensation (Form CA-7). Appellant further indicated that he did not resign from NPS, nor was he forced to transfer to DVA; however, he noted that NPS would have dropped him from its rolls as of

[4] Dr. Hebrard previously made similar requests to expand appellant's accepted condition(s).

[5] Appellant previously worked for DVA in 2010 as a housekeeping aide.

June 2015. He stated that he applied for the DVA position through USAJOBS, and had also applied for numerous other positions within the Department of Interior (DOI) that met his current work limitations. Lastly, appellant explained that once he obtained employment, DVA's human resources department advised NPS/DOI of the employment offer, and submitted a request for transfer.

On February 26, 2015 OWCP requested additional information from both appellant and NPS. It provided NPS a copy of his January 25, 2015 statement and asked for comment. OWCP also requested confirmation of appellant's leave status at the time of separation, and the actual date he was last employed by NPS/DOI. Additionally, it asked NPS/DOI to state the reason for appellant's separation. Lastly, OWCP asked appellant's former employer if it was able to accommodate appellant's work-related injury. Both parties were allotted 30 days to submit the requested factual information.

NPS did not respond to OWCP's February 26, 2015 inquiry.

Appellant responded on February 29, 2015. He re-submitted Mr. Collman's June 2, 2014 e-mail advising that there was no limited-duty work available at NPS. Appellant also provided OWCP a copy of the June 26, 2014 EEO settlement agreement. He stated that between June 2 and 26, 2014, NPS refused to process his Form CA-7s, and instead placed him on paid administrative leave. Appellant further explained that in accordance with the June 26, 2014 EEO settlement agreement, he remained on paid administrative leave until his (December 13, 2014) separation from NPS and had he not found other employment or retired, NPS would have separated him from service after one year of paid administrative leave.

OWCP also received follow-up treatment notes from Dr. Hebrard dated January 22 and February 10, 2015. Dr. Hebrard reported that appellant was currently working at a new facility performing administrative work while seated at a desk. He also reported that appellant's long commute -- 1½ to 2½ hours in each direction -- severely aggravated his lower back. Dr. Hebrard continued to restrict appellant to performing sedentary work, and asked that he be allowed to work an early schedule (7:30 a.m. to 4:30 p.m.) so as to avoid driving in heavy traffic conditions.

Dr. Mohinder S. Nijjar, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant on February 10, 2015. He diagnosed lumbar sprain/strain and grade 1 anterolisthesis (L4 over L5), with bilateral facet joint arthrosis. Dr. Nijjar explained that so-called developmental/degenerative anterolisthesis is usually found at the L5-S1 level, whereas the traumatic type is found at the L4-5 level, as was the case with appellant's anterolisthesis. Accordingly, he attributed appellant's current lumbar condition to the November 10, 2012 employment injury. Dr. Nijjar indicated that appellant continued to suffer residuals of the work injury, which included radicular pain with hypoesthesia in the lower extremity. Although aware that appellant currently worked as a medical support assistant, he did not otherwise comment on whether the injury-related residuals limited the type of work appellant could perform.

In a March 24, 2015 follow-up report, Dr. Hebrard noted that appellant's current physical examination revealed left lower extremity weakness, as well as paresthesia radiating at the L4-5 nerve distribution. He also reported that appellant ambulated with an antalgic gait on the left side. Dr. Hebrard continued to restrict appellant to sedentary work.

In April 2015, OWCP expanded appellant's claim to include grade 1 anterolisthesis (L4 over L5) with bilateral facet joint arthrosis.

In an April 13, 2015 decision, OWCP denied appellant's claim for wage-loss compensation beginning December 14, 2014. It found that he was not actually sent home without pay or terminated, but instead chose to resign to take another position. OWCP further explained that had appellant waited until his administrative leave was exhausted, he would not have experienced wage loss as of December 14, 2014.

LEGAL PRECEDENT

Each disabled employee is obligated to perform such work as he can.[6] If an employee cannot return to the job held at the time of injury due to partial disability from the effects of the work-related injury, but has recovered enough to perform some type of work, he or she must seek work.[7] In the alternative, the employee must accept suitable work offered to him.[8] This work may be with the original employing establishment or through job placement efforts made by or on behalf of OWCP.[9] From time to time, OWCP may require the employee to report his efforts to obtain suitable employment, whether with the Federal Government, State and local Governments, or in the private sector.[10] Compensation for partial disability is determined in accordance with 5 U.S.C. § 8115 and 20 C.F.R. § 10.403. If the employee has actual earnings which fairly and reasonably represent his wage-earning capacity, those earnings will form the basis for payment of compensation for partial disability.[11]

ANALYSIS

OWCP denied appellant's claim for compensation because he returned to work too soon. As noted, appellant filed a claim for lost wages beginning December 14, 2014 because the position he accepted with DVA paid less than his date-of-injury position as a maintenance worker with NPS. He apparently had not worked since June 3, 2014, but reportedly continued to receive his regular pay based on a June 26, 2014 EEO settlement agreement and according to the agreement, under certain circumstances he could have continued to receive paid administrative leave through June 1, 2015. However, appellant found suitable employment with another federal agency, and returned to work on December 14, 2014. Based on the limited information provided, it appears that his new job with DVA paid approximately $9.00 less an hour than what he earned as a maintenance worker with NPS.

[6] 20 C.F.R. § 10.500(b).

[7] *Id.* at § 10.515(b).

[8] *Id.*

[9] *Id.*

[10] *Id.* at § 10.515(e).

[11] *Id.* at § 10.403(a).

In its April 13, 2015 decision, OWCP explained that "[u]nfortunately, your proactive behavior of finding a suitable position -- albeit at a lower pay -- in this case prevents you from being entitled to benefits because but for this action you would have still been paid administrative leave and no wage loss would have occurred [as of December 14, 2014]." As noted, it essentially denied wage-loss compensation because appellant returned to work too soon.

Although the EEO settlement agreement is relevant to the current issue, this agreement does not dictate or otherwise alter the parties' rights and responsibilities under FECA. Moreover, the EEO agreement clearly indicated that "nothing in [it] ... [was] to be construed as a waiver of [appellant's] right to file an OWCP claim...."

On June 2, 2014 Mr. Collman advised appellant that NPS was unable to accommodate his injury-related work restrictions. It appears that but for the June 26, 2014 EEO settlement agreement, appellant would have likely experienced compensable wage loss as of June 3, 2014. The agreement required the employing establishment to carry appellant on administrative leave for up to one year beginning June 1, 2014. Under the circumstances, appellant could not claim FECA wage-loss compensation while receiving pay for leave.[12] Effective December 14, 2014, he began working for DVA. As such, the employing establishment was no longer required to carry him on paid administrative leave. At that point, appellant ostensibly experienced a loss in wage-earning capacity because he was earning less as a medical support assistant with DVA than he previously earned in his date-of-injury position. In denying his claim for a loss in wage-earning capacity, OWCP essentially penalized him for resuming gainful employment sooner rather than later.

The notion that appellant should have remained on paid leave status through June 1, 2015 is contrary to FECA's requirement that a partially disabled employee must seek employment and accept suitable work offered to him. As such, OWCP's April 13, 2015 decision shall be set aside.

The Board notes that NPS did not respond to OWCP's February 26, 2015 development letter.[13] Thus, it is unclear if NPS made any effort to accommodate appellant's injury-related work restrictions between June 3 and December 13, 2014. Moreover, it is unclear whether NPS facilitated appellant's transfer to DVA. Also, apart from a few SF-50s, there is scant information about appellant's pay status during the above-noted period. Additionally, the record is devoid of any information about the specific duties and physical requirements of appellant's latest job such that a determination as to suitability can be made. As such, the case shall be remanded for further development and proper adjudication of the issue of whether appellant demonstrated a loss in wage-earning capacity on or after December 14, 2014.

[12] *Id.* at § 10.401(a).

[13] The employing establishment is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. 20 C.F.R. § 10.118. As evidence appearing in the employer's files is not generally available to claimants, the employing establishment must assemble and submit such evidence. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4(b) (June 2011).

After OWCP has developed the record consistent with the above-noted directive, it shall issue a *de novo* decision regarding appellant's claim for wage-loss compensation beginning December 14, 2014.

CONCLUSION

The case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: September 15, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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