

FACTUAL HISTORY

This case has previously been before the Board. On November 3, 1998 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained whiplash and low back pain as the result of a November 2, 1998 motor vehicle accident. He returned to limited-duty work on November 4, 1998. Appellant began working less than eight hours a day on November 12, 1998. OWCP accepted his claim on November 12, 1998 for cervical and thoracic strains. Appellant underwent a magnetic resonance imaging (MRI) scan of his cervical and lumbar spine on December 28, 1998. This scan demonstrated minimal degenerative disc disease at C5-6 and C6-7 as well as left paramedian disc protrusion at L4-5 with narrowing of the left neural foramen. Appellant underwent a second lumbar MRI scan on September 20, 1999 which continued to demonstrate a left disc protrusion at L4-5. On May 3, 2000 OWCP also accepted bulging L4-5 disc as a result of the November 2, 1988 employment injury.

Appellant completed claims for compensation (Form CA-7) for the dates April 20, 2000 through May 11, 2001 and claimed that he was not engaged in any salaried employment, commission, volunteer, or self-employment. OWCP authorized compensation payments for April 20 through July 28, 2000 in the amount of \$1,288.58. It authorized compensation benefits from July 29 through August 25, 2000 on September 15, 2000.

The employing establishment offered appellant a limited-duty assignment on August 7, 2000 which required 4 hours a day of standing, sitting, and walking for 30 minutes each, carrying, lifting, and pulling up to 15 pounds as well as twisting, reaching, pushing, bending, and climbing as restricted by pain. On August 22, 2000 it noted that he cased mail for four to six hours a day.

On August 29, 2000 Dr. Ishver H. Desai, an internist, described appellant's history and reviewed his MRI scans. He opined that appellant's degenerative disc disease at C5-6 and C6-7 was not preexisting but was directly related to the disc injury during the work-related accident. Dr. Desai advised that it was common to have degenerative disc disease after a disc injury. He found that appellant was not capable of lifting or carrying more than five pounds for more than five minutes at a time. Dr. Desai opined that appellant could work a sitting job four hours a day with hourly breaks to stretch and walk.

OWCP authorized wage-loss compensation for 32 hours of leave without pay from October 7 through 20, 2000. It also authorized compensation benefits from December 30, 2000 through January 12, 2001 on February 2, 2001 and from February 17 through March 2, 2001.

Appellant's field nurse completed a November 6, 2000 report noting that appellant was in a September 13, 2000 nonwork-related motor vehicle accident. She reported that he continued working four to five hours a day and that his physician had not lifted restrictions. The field nurse completed a report on January 4, 2001 and indicated that appellant had been working four to five hours a day, five days a week for the past two years. Dr. Desai completed a Form CA-17 on April 17, 2001 and indicated that appellant could work four hours a day.

On April 18, 2001 the employing establishment offered appellant a limited-duty full-time letter carrier position. Appellant accepted this full-time light-duty position on May 8, 2001. He was to stand, walk, and sit for no more than four hours each and to lift up to no more than five pounds eight hours a day.

On May 18, 2001 appellant participated in an interview with a postal inspector. He reported during that interview that he played music and had a studio in his home. Appellant indicated that he played bass guitar on the weekends and recorded music for other people occasionally. He noted that his business name was Sonic Crave.

Appellant completed a Form CA-7 on May 31, 2001 covering the period May 5 through 18, 2001. He reported:

“I have made money from my musician hobby in which I recently inc[orporated] namely Sonic Crave Music, Inc. This section was never explained to me, so perhaps you can give me specifics. I had a meeting with two ladies from the Great Lakes Injury Compensation, and one lady told me there’s a line on Form CA-7 I should fill out. This is very unclear to me and I am overwhelmed with the compensation paperwork....”

Appellant completed an additional Form CA-7 on June 12, 2001 requesting compensation from May 19, to June 1, 2001 and indicated that he had a “musical hobby.”

In a letter dated June 29, 2001, the employing establishment issued appellant an emergency placement in an off-duty status effective June 27, 2001. It found that he had failed to provide correct earning information on his Form CA-7, that his explanation was unacceptable, and that his actions inappropriate.

OWCP received a September 4, 2001 investigative report from the U.S. Postal Inspection Service, Northern Illinois Division. A postal inspector noted that while receiving wage-loss compensation from OWCP appellant was employed as a member of the music group, Bang, beginning in March 2000. Appellant related that he played music on weekends and that he considered this to be a hobby. Ronald R. Rando, leader of Bang indicated that appellant joined the band on March 1, 2000 and that appellant received \$8,885.00 in 2000 and \$2,500.00 in 2001.

The postal inspector interviewed Dr. Desai on August 14, 2001. Although Dr. Desai refused to offer his medical opinion on appellant’s ability to work eight hours a day prior to August 14, 2001, he determined that appellant could attempt to work eight hours a day with frequent breaks and the same lifting restrictions.

On November 9, 2001 the employing establishment provided appellant with a notice of removal on the basis of unacceptable conduct as evidenced by his failure to disclose pertinent information on his Form CA-7. It found that appellant was in violation of the Employee and Labor Relations Manual provisions regarding standards of conduct, unacceptable conduct and behavior, personal habits, and loyalty.

In a letter dated February 8, 2002, OWCP made a preliminary finding of overpayment in the amount of \$10,594.25 as appellant had forfeited his compensation benefits from March 2000

to June 2001. Appellant requested a prerecoumment hearing on March 1, 2002. In a note dated March 14, 2002, Dr. Desai indicated that appellant's pain had increased. He recommended that appellant attempt a trial return to work four hours a day with restrictions and gradually attempt to return to eight hours. Dr. Desai opined that appellant would be unable to return to work full time even with restrictions. By decision dated January 17, 2003, the hearing representative remanded appellant's claim for a formal forfeiture decision and development of the medical evidence.

OWCP referred appellant for a second opinion evaluation with Dr. Leonard R. Smith, a Board-certified orthopedic surgeon, on February 27, 2003.

Dr. Smith completed a report on March 27, 2003 and provided a history of injury as well as medical treatment. He diagnosed soft tissue injuries of the cervical spine and bulging disc at L4-5. Dr. Smith opined that appellant could perform the duties of a full-time letter carrier with the exception of heavy lifting. He reported no restrictions on sitting, standing, walking, kneeling, bending, twisting, pushing, pulling, or operating a vehicle eight hours a day.

By decision dated May 2, 2003, OWCP found that appellant forfeited his entitlement to compensation from March 2000 to June 2001 because he had failed to report earnings pursuant to 5 U.S.C. § 8106(b). It found that appellant knowingly omitted his outside earnings on his Form CA-7s from March 2000 to June 2001 and forfeited all compensation for that period.

In a May 2, 2003 letter, OWCP issued a preliminary finding that a \$10,594.25 overpayment occurred for the period March 2000 to June 2001 pursuant to section 8106(b) due to appellant's failure to report earnings from outside employment on CA-7 forms. It found that he was at fault in creating the overpayment. OWCP informed appellant that, if he disagreed with the preliminary finding, he could, within 30 days, submit evidence or argument to OWCP, or request a prerecoumment hearing with the Branch of Hearings and Review.

On May 27, 2003 appellant requested a prerecoumment hearing before an OWCP hearing representative on the issue of fault and eligibility for waiver of recovery at the overpayment.

At the hearing on January 21, 2004, appellant testified that he began playing in the band every weekend and that he had previously played in several bands both with and without compensation, that he had reported any earnings to the Internal Revenue Service, but did not consider this a job.

In a May 12, 2004 decision, the hearing representative affirmed OWCP's decisions regarding forfeiture, overpayment and fault for the period March 2000 through June 2001 in the amount of \$10,594.25. He concluded that this amount was due and payable.

The Board reviewed the May 12, 2004 OWCP hearing representative's decision on January 12, 2006 and found that the language in the CA-7 forms of record was not of such a specific nature so as to reasonably put appellant on notice that he had to report all earnings, no matter the source. The Board found that OWCP failed to meet its burden of proof to establish forfeiture of his right to compensation for the periods claimed, and that OWCP erred in

determining that an overpayment of compensation was created. It reversed OWCP's May 12, 2004 decision.²

On April 13, 2005 the United States Attorney declined to pursue appellant's prosecution due to the combination of the low amount, the fact that appellant was ordered to repay the amount, and the fact that the civil division was pursuing damages. The civil division also dismissed the action.

Following the Board's January 12, 2006 decision, Dr. Desai completed reports on February 27, 2006 and January 31, 2008 and continued to support residuals of appellant's November 2, 1998 employment injury. He opined that appellant's pain had not improved since 1998, that appellant had significant disability, and that appellant's work restrictions were lifting no more than 5 to 10 pounds working 4 hours a day and gradually attempting to increase his work capacity. Dr. Desai concluded that he doubted that appellant would be able to work full time without limitations.

On May 3, 2011 appellant filed a Form CA-7 requesting wage-loss compensation from June 30, 2001 through May 3, 2011. Appellant filed a separate Form CA-7 on May 28, 2011 requesting a schedule award.

In a letter dated June 20, 2011, OWCP requested additional medical evidence in support of appellant's claim for a schedule award.

Appellant submitted notes from Dr. Desai dated June 30, August 8 and 18, September 1 and 22, October 17, November 14, and December 12, 2011 addressing his low back pain. Dr. Desai opined that this condition was work related due to an automobile accident. He indicated that appellant was employed part time and diagnosed cervical and lumbar myelopathy as well as unspecified thoracic or lumbar neuritis/radiculopathy.

On January 9, 2012 Dr. Desai provided a treatment note diagnosing disc disorder with myelopathy in the cervical and lumbar spines as well as radiculopathy. He completed similar notes on February 6, March 5 and 29, April 24, May 24, June 21, July 19, August 16, September 17, October 30, 2012. Dr. Desai completed an attending physician's report (Form CA-20) dated September 26, 2012 and diagnosed degenerative disc disease, disc bulge, disc herniation, and lumbosacral deconditioning syndrome. He completed a duty status report (Form CA-17) dated October 9, 2012 and indicated that appellant could work four hours a day with restrictions on lifting of 10 pounds.

Dr. Desai completed a narrative report on October 30, 2012 and attributed appellant's ongoing symptoms of pain in the lower back radiating down to the left leg and neck pain radiating down the right arm to his November 2, 1998 employment-related automobile accident. He found that appellant's condition had not improved since 1998. Dr. Desai opined that appellant could return to work on a trial basis with limitations including lifting no more than 10 pounds, and standing and walking less than two hours a day. He continued to provide his treatment notes on December 11, 2012 and January 11, 2013. Dr. Desai diagnosed backache

² Docket No. 05-1500 (issued January 12, 2006).

unspecified and opined that this condition was related to appellant's work injury when his car was rear ended by another. He indicated that appellant was working part time.

By decision dated February 27, 2013, OWCP denied appellant's claim for a schedule award as he had failed to establish permanent impairment due to his accepted employment injuries. Appellant requested an oral hearing from OWCP's Branch of Hearings and Review. He withdrew this request on May 28, 2013.

Dr. Desai continued to submit his treatment notes and requested an additional MRI scan.

Appellant submitted a copy of his February 25, 2002 grievance settlement indicating that his emergency placement in off-duty status was mutually agreed to be held in abeyance pending the disposition of charges brought by the Office of the United States Attorney.

By decision dated December 4, 2013, OWCP denied appellant's claim for compensation from June 27, 2001. It found that the issue was whether he continued to be totally disabled for all employment as a result of his November 2, 1988 work injury and whether his entitlement to wage-loss compensation should continue as a result of justifiable administration actions leading to removal by the employing establishment. OWCP found that appellant had been officially removed from federal employment due to unacceptable conduct on September 23, 2005, specifically due to his failure to disclose pertinent information on his Form CA-7s. OWCP further found that appellant had accepted a full-time light-duty position on May 8, 2001 and that the medical evidence indicated that he could work eight hours a day with restrictions. On November 15, 2013 the employing establishment confirmed that the May 8, 2001 job offer would have remained available had he not been suspended and removed for unacceptable conduct. OWCP found that appellant's removal was justifiable termination and had no bearing on the accepted work injury.

Appellant requested an oral hearing on December 29, 2013. He testified at the hearing on July 29, 2014. Dr. Desai provided an August 5, 2014 report and opined that appellant's current back and lower extremity conditions as well as his neck and right arm conditions were due to his November 2, 1998 employment injury. He further indicated that appellant had limitations including lifting no more than 5 to 10 pounds. Dr. Desai opined that appellant could work four hours a day with sitting for 30 minutes, walking and standing for less than two hours a day each, and performing only occasional stooping. He noted that appellant required frequent breaks.

By decision dated October 21, 2014, an OWCP hearing representative found that appellant had not established any period of total disability on or after June 27, 2001 due to his accepted employment injury. She found that the employing establishment made appellant a full-time job offer with Dr. Desai's April 17, 2001 restrictions on April 18, 2001 and that appellant accepted this position on May 8, 2001. The hearing representative concluded that there was insufficient medical evidence establishing that appellant was totally disabled as of June 27, 2001 or at the time of his termination by the employing establishment, to establish his entitlement to wage-loss compensation benefits. She relied on Dr. Smith's March 27, 2003 second opinion report.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.³ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁴ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁵ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.⁶ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.⁷

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish a recurrence of total disability and that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁸ When a light-duty position is withdrawn, it is appellant's burden to establish that any increase in disability for work is due to the accepted injury, rather than another cause.⁹

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.¹⁰ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of

³ *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

⁵ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); *C.S.*, Docket No. 08-2218 (issued August 7, 2009).

⁶ *Merle J. Marceau*, 53 ECAB 197 (2001); *C.S., id.*

⁷ *Id.*

⁸ *See John I. Echols*, 53 ECAB 481 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁹ *C.S., supra* note 5.

¹⁰ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

disability or a basis for payment of compensation.¹¹ The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹²

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish disability on or after June 27, 2001.

Appellant returned to work on November 4, 1998 and continued to perform light-duty work until June 27, 2001. On that date, he stopped work as the employing establishment withdrew his light-duty assignment on the basis that he had provided inaccurate earnings information on his Form CA-7s which were found to be inappropriate. Appellant has alleged that his light-duty work was improperly withdrawn and that he, therefore, is entitled to compensation benefits from June 27, 2001.

OWCP regulations provide that a claimant sustains a recurrence of disability 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, except when such withdrawal occurs for reasons of misconduct, nonperformance of the job duties, or a reduction in force.¹³ The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA.¹⁴ In this case, the evidence establishes that appellant's light-duty position as a modified letter carrier was withdrawn by the employing establishment. Therefore, appellant has the burden to establish that the withdrawal was due to the accepted injury, rather than to another cause.

OWCP accepted appellant's claim for cervical and thoracic strains as well as bulging disc L4-5. Appellant returned to light-duty work on November 4, 1998 and continued to perform light-duty work within his restrictions. On May 8, 2001 he accepted a light-duty letter carrier position working eight hours a day standing, walking, and sitting for up to four hours each. Appellant was to lift up to five pounds. The record does not establish that he stopped work until June 27, 2001 when the employing establishment issued an emergency placement in an off-duty status and withdrew his light-duty position. The employing establishment terminated appellant's employment on November 9, 2001 on the basis of unacceptable conduct as evidenced by his failure to disclose pertinent information on his Form CA-7. It determined that he was in violation of the Employee and Labor Relations Manual provisions regarding standards of conduct, unacceptable conduct and behavior, personal habits, and loyalty.

¹¹ *Id.*

¹² *Id.*

¹³ See 20 C.F.R. § 10.5(x).

¹⁴ See *John I. Echols*, supra note 8; *John W. Normand*, 39 ECAB 1378 (1988). Disability is defined to mean the incapacity because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total. See 20 C.F.R. § 10.5(f).

On appeal, appellant's representative argues that because the Board reversed OWCP's finding of forfeiture which was based on appellant's failure to disclose pertinent information on his Form CA-7's, appellant's position was improperly withdrawn and he, therefore, is entitled to compensation benefits. This argument is without merit. The Board has no jurisdiction over the employing establishment's decision regarding termination of appellant's employment. There is no evidence in the record supporting that the employing establishment terminated appellant due to his work-related condition. The record supports that the employing establishment terminated appellant due to his reporting failures on his Form CA-7's. The issue in this case is whether appellant was terminated by the employing establishment for reasons causally related to the accepted injury. The preponderance of the evidence establishes that appellant was terminated for reasons that were not related to his accepted condition.¹⁵

Appellant has also submitted medical evidence in support of his claim for periods of total disability on or after July 21, 2001. He submitted a series of medical reports from Dr. Desai supporting partial disability for work. Dr. Desai did not provide any evidence, in the form of medical rationale explaining that appellant was totally disabled due to his accepted conditions for any period of time after July 21, 2001. These reports do not support appellant's claim for any period of total disability on or after July 21, 2001 or a material change in the nature and extent of appellant's injury-related condition resulting in total disability for work.

Dr. Smith, OWCP's second opinion physician, completed a report on March 27, 2003 describing appellant's history of injury as well as his medical treatment. He diagnosed soft tissue injuries of the cervical spine and bulging disc at L4-5. Dr. Smith opined that appellant could perform the duties of a full-time letter carrier with the exception of heavy lifting. He reported no restrictions on sitting, standing, walking, kneeling, bending, twisting, pushing, pulling, or operating a vehicle eight hours a day. This report does not support appellant's allegations of periods of total disability due to his accepted employment injury which occurred on or after July 21, 2001.

Appellant has failed to establish by the weight of the reliable, probative, and substantial evidence, a change in the nature and extent of the injury-related condition resulting in his inability to perform the duties of his modified employment, or to provide rationalized opinion evidence establishing that he was physically disabled as of July 21, 2001. He has also failed to establish that his light-duty job was withdrawn for reasons related to his accepted condition. Accordingly, the Board finds that he has not met his burden of proof.

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 that appellant has not established disability on or after July 21, 2001.

¹⁵ *John W. Normand, supra note 14; Major W. Jefferson, 47 ECAB 295 (1996); C.S., supra note 5.*

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2014 decision the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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