

employing establishment intended to accommodate appellant indefinitely, only that it intended to do so while appellant awaited a decision on his retirement or until he was reassigned; and (3) there is no evidence that any reassignment was available or offered to appellant prior to his resignation.

FACTUAL HISTORY

On January 25, 2012 appellant, a 39-year-old technician cashier, filed an occupational disease claim (Form CA-2), alleging that he developed carpal tunnel syndrome due to factors of his federal employment, including repetitive work with a cash register. OWCP accepted the claim for bilateral carpal tunnel syndrome and authorized right carpal tunnel surgery. On February 17, 2012 Dr. Robert Amster, a Board-certified emergency and occupational medicine physician, advised that appellant was capable of returning to work with the following restrictions: limited use of right and left wrists; must use wrist splints; must take a 5-minute stretch break every 60 minutes from keyboard; and no pushing, pulling, or lifting over 10 pounds. On February 27, 2012 the employing establishment offered and appellant accepted a limited-duty cashier position within the medical restrictions imposed by Dr. Amster. OWCP paid wage-loss compensation until appellant returned to full-time, light-duty work effective August 8, 2012.

On December 10, 2012 appellant filed a claim for a schedule award (Form CA-7). By decision dated June 26, 2013, OWCP granted him a schedule award for eight percent permanent impairment of the right upper extremity and eight percent permanent impairment of the left upper extremity. The award ran for 49.92 weeks for the period October 12, 2012 to September 26, 2013.

On February 26, 2013 the employing establishment removed appellant from employment for cause.

On October 9, 2013 appellant filed a claim for wage-loss compensation (Form CA-7) for the period September 27, 2013 and continuing.

In a November 19, 2013 letter, the employing establishment advised OWCP that appellant was not on leave without pay (LWOP) as he had been terminated for cause for “engaging in criminal misconduct.” It further indicated that, at the time appellant had been employed, the employing establishment was accommodating his restrictions, and, if he had not been terminated for cause, it would have continued to do so. The employing establishment submitted a January 4, 2013 agency certification of reassignment and accommodation efforts which included a supervisor’s statement that appellant had been reassigned to a light-duty position and would remain on light duty until he retired or was reassigned.

By decision dated April 11, 2014, OWCP denied appellant’s claim for wage-loss benefits commencing September 27, 2013 because he had been terminated for cause from the employing establishment. It found no evidence that he was terminated because of the effects of his work injury and that light-duty work would have remained available to him if he had not been terminated for cause.

On April 16, 2014 appellant's counsel requested an oral hearing before an OWCP hearing representative and submitted a November 13, 2014 brief arguing that appellant's termination for cause had been rescinded.

A telephonic hearing was held before an OWCP hearing representative on November 13, 2014. Appellant testified that his supervisor filled out his disability retirement paperwork and noted that he would remain on light duty until he retired or was reassigned. He stated that he was allowed to resign from federal service for personal reasons rather than to be removed for cause. This was a result of a settlement agreement which provided that the termination would be expunged from his record. Appellant submitted copies of the May 16, 2013 settlement agreement, the employing establishment decision dated May 30, 2013, and a notification of personnel action (SF-50) effective February 26, 2013 indicating voluntary resignation for personal reasons.

On January 29, 2015 OWCP expanded appellant's claim to include bilateral lesion of the ulnar nerve. It authorized left ulnar nerve transposition surgery, which was performed by Dr. Enass Rickards, a Board-certified orthopedic surgeon, on April 6, 2015. In an April 15, 2015 report, Dr. Rickards noted that appellant was complaining of a lot of pain and swelling following his surgery and opined that he was totally disabled for four weeks.

By decision dated January 29, 2015, the OWCP hearing representative set aside the April 11, 2014 decision and remanded the case for further development.

In a February 17, 2015 letter, OWCP advised the employing establishment that the evidence of record was unclear as to whether it would have continued to provide appellant with light-duty work within his accepted medical restrictions and requested written clarification on the matter.

In a letter dated April 17, 2015, the employing establishment responded that it had not advised appellant to apply for disability retirement, although it may have been presented as an option.

By decision dated May 29, 2015, OWCP denied appellant's claim for wage-loss compensation benefits on and after September 27, 2013. It found that appellant's work stoppage was not due to his physical inability to perform his assigned duties, but rather a result of misconduct. OWCP further found that appellant would have continued to have been accommodated with light duty in perpetuity but for his termination for cause and his subsequent voluntary resignation on February 26, 2013.

On June 4, 2015 counsel requested reconsideration, arguing that the employing establishment failed to establish that it would have continued to accommodate appellant with indefinite light-duty work, despite OWCP's request to confirm its ability to continue to provide such work. Appellant submitted reports dated June 3, 2014 through August 3, 2015 from Dr. Robert Warren, a Board-certified neurologist, who diagnosed polyneuropathy and mild carpal tunnel syndrome at the left wrist. He further submitted physical therapy notes dated May 8 through June 1, 2015 and reports dated May 13 through June 4, 2015 from Dr. Rickards

who opined that he was totally disabled for work due to his status post left ulnar nerve transposition surgery.

By decision dated September 2, 2015, OWCP denied appellant's request for reconsideration without considering the merits of the claim.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA² sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...." In general the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."³ This meaning, for brevity, is expressed as disability for work.⁴ For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.⁵ Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.⁶

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. 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 as that term is used under FECA, and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁷

In cases where employment has in fact been terminated for misconduct and disability is subsequently claimed, the Board has noted that in general the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.⁸ Where employment is terminated, disability benefits would be payable if the evidence of record established that the claimant was terminated due to injury-

² 5 U.S.C. § 8102(a).

³ 20 C.F.R. § 10.5(f); *see also* *William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

⁴ *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁵ *See William A. Archer*, 55 ECAB 674 (2004).

⁶ *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁷ *Id.*

⁸ *See Ralph Dennis Flanagan*, Docket No. 94-1569 (issued May 28, 1996).

related physical inability to perform assigned duties or the medical evidence of record established that the claimant was unable to work due to an injury-related disabling condition.⁹

ANALYSIS -- ISSUE 1

OWCP initially accepted bilateral carpal tunnel syndrome and authorized right carpal tunnel surgery. It granted appellant a schedule award for eight percent permanent impairment of the right arm and eight percent permanent impairment of the left arm. The record establishes that on February 27, 2012 the employing establishment offered and appellant accepted a limited-duty cashier position within the medical restrictions imposed by his treating physician, Dr. Amster. Effective February 26, 2013, appellant was terminated from the employing establishment for misconduct. The removal for cause was later changed to a voluntary resignation.¹⁰ There is no evidence that, beginning February 26, 2013, appellant was terminated from his job because of his accepted injury and the employing establishment advised that appropriate limited duty would have been provided but for his termination and resignation. At the time of his termination, there was no medical evidence that his accepted conditions precluded him from performing his assigned light duties or that he was unable to work due to an injury-related disabling condition. The Board has held that, when a claimant stops work for reasons unrelated to his accepted employment injury, he has no disability within the meaning of FECA.¹¹ The Board affirms OWCP's denial of wage-loss compensation beginning September 27, 2013 until its expansion of the claim in early 2015.

On January 29, 2015 OWCP expanded appellant's claim and accepted bilateral lesion of the ulnar nerve. It also authorized left ulnar nerve transposition surgery, which was performed by Dr. Rickards on April 6, 2015. As noted, OWCP continued to deny appellant's claim for wage-loss compensation in its May 29, 2015 decision.

The Board finds that this case is not in posture for decision regarding whether appellant has met his burden of proof to establish that he was totally disabled due to his employment injury for the period commencing April 6, 2015. In connection with its denial of appellant's claim, OWCP failed to adequately consider the medical evidence he submitted in support of his claim for disability.¹² Appellant submitted reports dated April 15 to June 4, 2015 from Dr. Rickards who opined that he was totally disabled for work due to his authorized left ulnar nerve transposition surgery. In its May 29, 2015 decision, OWCP improperly suggested that the fact that appellant was terminated from the employing establishment for misconduct effective

⁹ *Id.*

¹⁰ The Board notes that appellant reached a settlement agreement with the employing establishment to rescind and expunge any reference of this removal in his personnel file and then voluntarily resign for personal reasons effective February 26, 2013.

¹¹ *E.S.*, Docket No. 11-657 (issued February 9, 2012); *see John W. Normand*, 39 ECAB 1378 (1988).

¹² *See J.J.*, Docket No. 14-1380 (issued October 22, 2014) (where the claimant was terminated for misconduct effective September 4, 2009 and OWCP later authorized right shoulder surgery on October 17, 2012, the Board found that OWCP failed to adequately address the medical evidence the employee submitted in connection with her claim for compensation for the period commencing October 17, 2012 and remanded her claim for disability).

February 26, 2013 served as a bar to his receipt of disability compensation after that point. The Board has held that, even if a claimant were terminated for misconduct, disability benefits would be payable if the evidence of record established that the claimant was unable to work at some point thereafter due to a work-related disabling condition.¹³

The Board finds that OWCP failed to adequately address the medical evidence that appellant submitted in connection with his claim for disability for the period commencing April 6, 2015. It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁴ Accordingly, OWCP's May 29, 2015 decision will be set aside in part and the case will be remanded for consideration of his claim for disability. After such development as it deems necessary, OWCP shall issue an appropriate decision on appellant's disability claim.

CONCLUSION

The Board finds that OWCP properly denied wage-loss compensation for the period September 27, 2013 to April 6, 2015. The Board finds that the case is not in posture for decision with regard to total disability beginning on or around April 6, 2015.¹⁵

¹³ *Id.*

¹⁴ See *Phillip L. Barnes*, 55 ECAB 426 (2004); *Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002).

¹⁵ In light of the Board's disposition of the disability issue, the second issue of whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits is moot.

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 18, 2016
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