United States Department of Labor
Employees' Compensation Appeals Board

T.F., Appellant	)	
and	)	**Docket No. 16-0851**
	)	**Issued: June 19, 2017**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Platina, CA, Employer	)	

Appearances:
Edward L. Daniel, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 21, 2016 appellant, through his representative, filed a timely appeal from a September 23, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation effective February 8, 2015 based on his refusal of an offer of temporary suitable employment pursuant to 20 C.F.R. § 10.500(a).

On appeal, appellant's representative contends that the employing establishment's January 30, 2015 job offer was not valid because it failed to provide the specific requirements of the position. He further contends that OWCP did not consider travel restrictions imposed by an attending physician.

FACTUAL HISTORY

OWCP accepted that on October 19, 2012[3] appellant, then a 46-year-old supervisory forestry technician, sustained a back sprain while lifting a gear bag out of a cross box from the back of his pick-up truck at work. Appellant stopped work on October 26, 2012 and returned to full-time modified duty on December 10, 2012.

In a May 9, 2014 medical report, Dr. Rodney T. Phillips, an attending family practitioner, reviewed diagnostic test results and provided findings on physical examination. He diagnosed lumbar radiculopathy, lumbar disc disease, low back pain, and herniated disc. Dr. Phillips advised that appellant could perform modified activity with restrictions as of the date of his examination. The restrictions included: no lifting, pushing; pulling, or carrying over 20 pounds; no prolonged walking, standing, or sitting; no bending/stooping; and no driving for more than 20 minutes.

In a September 10, 2014 report, Dr. Phillips reiterated his diagnosis of low back pain. He found that appellant could work four hours a day with restrictions. Dr. Phillips reiterated his 20-minute driving restriction. He recommended limited continuous sitting to 20 minutes and 40 minutes total in 1 hour to 4 hours total in one shift. Continuous standing was limited to 15 minutes and 30 minutes total in 1 hour to 4 hours total in one shift. Continuous walking was limited to 15 minutes and 30 minutes total in 1 hour to 4 hours total in one shift. The record reflects that, from September 11 to 26, 2014, OWCP paid appellant wage-loss compensation on the supplemental rolls for four hours daily, for a total of 52 hours.

In a September 29, 2014 report, Dr. Phillips noted that appellant wished to have additional diagnoses added to his claim. He reiterated his diagnoses of lumbar disc disease, lumbar radiculopathy, and low back pain and restricted appellant from reaching over shoulder level, squatting, and kneeling, lifting, pushing, pulling, carrying, sitting, standing, walking, bending, and stooping. Dr. Phillips placed him off work on the date of his examination. OWCP commenced payment for temporary total disability compensation on the supplemental rolls on September 29, 2014. Wage-loss benefits were paid pursuant to a Form CA-7 claim for compensation submitted on appellant's behalf by the employing establishment.

[3] The Board notes that OWCP referred to October 18, 2012 as the date of injury. However, appellant's Form CA-1 indicates that the date of injury was October 19, 2012.

In an October 7, 2014 letter, OWCP advised appellant that it had received a telephone call from his physician's office explaining to OWCP that appellant's lumbar disc disease and lumbar radiculopathy was a consequence of his accepted condition. It informed him of the deficiencies of his claim and afforded 30 days to submit additional evidence and respond to its inquiries.

In an October 9, 2014 report, Dr. Phillips noted a history of the October 19, 2012 employment injury and appellant's subsequent medical treatment. He indicated that his continuing back symptoms had improved, but related that a magnetic resonance imaging scan revealed a herniated disc at L5-S1 with two- to three-millimeter displacement of the left S1 nerve root. Dr. Phillips related that appellant was six months out from the original onset which spoke for some stability. He related, however, that even patients who had surgery could have additional movement of the disc material which would cause more symptoms when they resumed normal activities. Dr. Phillips maintained that this was a risk that appellant needed to recognize as he resumed work. He recommended that appellant work smart and limit his risk as much as possible. Dr. Phillips opined that appellant's lumbar herniated disc and nerve root impingement conditions were work related. He proposed injections to help with these conditions. Dr. Phillips related that, if the injections were not helpful, then surgery was the only recourse.

On November 4, 2014 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Charles F. Xeller, a Board-certified orthopedic surgeon, for a second opinion as to whether the proposed lumbar surgery was related to his accepted employment injury.

In a December 5, 2014 report, Dr. Xeller provided a history of the October 19, 2012 employment injury and appellant's medical treatment. He reported findings on examination and provided an impression of an injury consistent with more than a back sprain/strain but, rather a herniated disc at L4-L5. Dr. Xeller recommended acceptance of this condition as related to the October 19, 2014 employment incident. He noted that appellant's condition was nonresponsive to conservative treatment. Dr. Xeller recommended a trial of epidural steroid injections and related that if it was unsuccessful, then a discectomy was needed. He concluded that due to the herniated disc at L4-L5, appellant could only perform sedentary work with restrictions. In a work capacity evaluation (Form OWCP-5c), Dr. Xeller indicated that appellant was not capable of performing his usual job, but could work eight hours a day with physical restrictions. He recommended that appellant avoid bending, stooping, and lifting. Dr. Xeller also recommended no squatting, climbing, engaging in repeated bending, or lifting more than 10 pounds.

On January 12, 2015 OWCP accepted appellant's claim for lumbar disc protrusion/ herniation at L5-S1. Appellant continued to receive wage-loss compensation on the supplemental rolls.

By letter dated January 12, 2015, OWCP requested that the employing establishment offer appellant a light-duty position within the restrictions set forth by Dr. Xeller.

On January 30, 2015 the employing establishment offered appellant a temporary light-duty sedentary position as a supervisory forestry technician, effective February 8, 2015, eight

hours a day, with a tour of duty from 8:00 a.m. to 4:30 p.m. Monday through Friday based on the restrictions found by Dr. Xeller. It stated that the position was being offered during his period of recovery until his physician fully releases him for his date-of-injury position. Restrictions for the position included avoiding bending, stooping, and lifting and no squatting, climbing, repetitive bending, or lifting more than 10 pounds. Physical requirements of the position were sitting, walking, standing, reaching, reaching above the shoulder, twisting, operating a motor vehicle at work and to and from work, repetitive wrist and elbow movements, pushing, pulling, and kneeling.

Duties of the position included developing and tracking training on the unit, developing the annual District Fire Preparedness Review Plan, and administrative tasks within an assigned office consisting of answering telephones, taking messages, filing, updating records, recording data, data entry, copying, printing, computer updates, and the revision of the District Safety Plan. Additional duties included jobs as assigned within restrictions such as driving, attending local meetings, and assisting with local training course presentations. The employing establishment informed appellant that his assigned duties would come from the reporting office at Harrison Gulch Ranger Station in Platina, California, and his duties would be accomplished at Hayfork District Office in Hayfork, California.

On February 5, 2015 appellant declined the position. He stated that the drive from his residence to Harrison Gulch Ranger Station was 53.82 miles one way or 1 hour and 10 minutes based on MapQuest.com.[4] Appellant related that he would have to drive an additional 27.12 miles or 42 minutes to the Hayfork District Office based on the same internet-based service.[5] He asserted that his commute exceeded his attending physician's 20-minute driving restriction.

In a February 2, 2015 Form OWCP-5c, Dr. Phillips found that while appellant could not perform his usual job, he could perform sedentary work, eight hours a day with restrictions. He could sit, stand, and walk, eight hours a day. Dr. Phillips restated his bending, stooping, squatting, kneeling, reaching, and 20-minute driving restrictions. He advised that appellant could not carry or lift more than 10 pounds. In a February 2, 2015 narrative report, Dr. Phillips reiterated his prior diagnoses of low back pain, lumbar disc disease, and lumbar radiculopathy. He released appellant to return to modified activity with restrictions on February 9, 2015. The restrictions included no pushing or pulling more than 10 pounds. Dr. Phillips restated appellant's sitting, standing, and walking restrictions.

On February 23, 2015 appellant filed a claim for compensation (Form CA-7) for leave without pay (LWOP) from February 8 to 21, 2015.

In a March 4, 2015 letter, OWCP advised appellant that it had reviewed the temporary light-duty job offer by the employing establishment and found it to be within the restrictions set

[4] Appellant supplied OWCP with a change of address on August 4, 2014. According to a recent search at www.MapQuest.com, the distance from appellant's address of record to the Harrison Gulch Ranger Station is 53.1 miles with an estimated travel time of one hour and two minutes.

[5] According to another recent search at www.MapQuest.com, the distance from the Harrison Gulch Ranger Station to the Hayfork District Office is 28.8 miles with an estimated travel time of 45 minutes.

forth by Dr. Xeller. It stated that Dr. Phillips' report and Form OWCP-5c dated February 2, 2015 did not outweigh the weight accorded to Dr. Xeller who provided a well-rationalized opinion and was better qualified as a Board-certified orthopedic surgeon. OWCP noted that upon acceptance of the assignment, appellant would be paid compensation based on the difference (if any) between the pay of the temporary light-duty assignment and the current pay of his date-of-injury position.[6] It discussed its regulations at 20 C.F.R. § 10.500(a) and advised appellant that his entitlement to wage-loss compensation would be terminated under 20 C.F.R. § 10.500(a) if he did not accept the temporary offered assignment or provide a written explanation of his reasons for not doing so within 30 days of the date of the letter.

On March 23, 2015 appellant informed the employing establishment that he was unable to drive from his home to the Harrison Gulch duty station.[7] He requested an assignment to a different location, but was told there was no available work assignment out of that office.

In a March 23, 2015 report, Dr. Michael D. Jorde, a Board-certified family practitioner, and in the same practice with Dr. Phillips, noted that appellant attempted to return to work on that date, but he was unable to drive one and one-half hours due to back pain. He reported findings on physical examination and diagnosed low back pain and lumbar disc disease. Dr. Jorde concluded that appellant could perform modified work with restrictions as of the date of his examination. The restrictions were the same restrictions, with the exception of the 20-minute driving restriction, set forth in Dr. Phillips' February 2, 2015 Form OWCP-5c and narrative reports.

In a March 25, 2015 report, Dr. Phillips noted that appellant had a "severe lapse" from driving one and one-half hours. He provided examination findings and reiterated his prior diagnoses of low back pain and lumbar disc disease. Dr. Phillips advised that appellant could perform modified work with restrictions as of March 23, 2015. In this report and a March 25, 2015 Form OWCP-5c, he reiterated appellant's sitting and driving restrictions.

By decision dated April 6, 2015, OWCP terminated appellant's wage-loss compensation, effective February 8, 2015. It noted that he had not accepted the temporary light-duty assignment, which was within his medical restrictions set forth by Dr. Xeller. OWCP further noted that the offered assignment was for 40 hours per week with wages of $61,307.00 per year, an amount that met or exceeded the current wages of appellant's date-of-injury position, and that, therefore, he would not suffer any wage loss if he accepted the assignment. It discussed its regulations at 20 C.F.R. § 10.500(a) and advised that his entitlement to wage-loss compensation would be terminated under 20 C.F.R. § 10.500(a) if he did not accept the offered assignment or provide good cause for not doing so within 30 days of the date of the letter. OWCP found that, therefore, the termination of appellant's wage-loss compensation effective February 8, 2015 was justified under 20 C.F.R. § 10.500(a).

[6] The record reveals that the annual salary of the offered temporary light-duty assignment was $61,307.00 and the current pay of appellant's date-of-injury position was $60,700.00.

[7] On March 24, 2015 the employing establishment informed OWCP that appellant had gone to his desired office location rather than the office location of the offered position.

On April 20, 2015 appellant filed an additional claim for compensation (Forms CA-7) for the period February 22 to April 4, 2015.

In a June 27, 2015 letter, appellant, through his representative, requested reconsideration. He asserted that the January 30, 2015 job offer was not valid because it failed to provide the specific requirements of the position and any special demands of the workload or unusual working conditions. The representative further asserted that Dr. Xeller's report did not constitute the weight of the medical opinion evidence as he had not addressed appellant's sitting and driving restrictions. He also asserted that OWCP failed to request a supplemental report from Dr. Xeller clarifying whether his restrictions were temporary or permanent.

In a decision dated September 23, 2015, OWCP denied modification of its April 6, 2015 termination decision. It again found that appellant failed to accept the temporary light-duty assignment offered by the employing establishment which was within his medical restrictions. OWCP also found that, therefore, the termination of appellant's wage-loss compensation effective February 8, 2015 was justified under 20 C.F.R. § 10.500(a).

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[8] Section 10.500(a) states that appellant is only entitled to wage-loss compensation for the periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.[9]

OWCP procedures note that 20 C.F.R. § 10.500 provides the basic rules governing continuing receipt of compensation benefits and return to work as follows:

> (a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage-loss claimed on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing establishment had offered, in accordance with OWCP procedures, a temporary light-duty assignment

[8] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[9] 20 C.F.R. § 10.500(a).

within the employee's work restrictions. (The penalty provision of 5 U.S.C. 8106(c)(2) will not be imposed on such assignments under this paragraph.)"[10]

When it is determined that an employee is no longer totally disabled from work and is not on the periodic rolls, OWCP procedures state that the claims examiner should determine whether light-duty work was available within the employee's medical restrictions during the period for which compensation is claimed and a development letter should be sent to appellant setting forth the standards under section 10.500(a) including medical evidence required to establish a claim for wage-loss compensation. The claims examiner should also obtain documentation from the employing establishment that written notification of light-duty work availability was provided to the employee, if not already in the file.[11] The claims examiner, when adjudicating the claim for wage-loss compensation, must also determine whether the evidence of record establishes that the employee was provided with written notification of a light-duty job assignment, that the job was within the employee's restrictions, and that the job was available to the employee during the period wage-loss compensation was claimed.[12]

ANALYSIS

OWCP accepted that appellant sustained an employment-related back sprain and lumbar disc protrusion/herniation at L5-S1. Appellant received disability compensation on the supplemental rolls. On January 30, 2015 the employing establishment offered appellant a temporary, light-duty, sedentary position as a supervisory forestry technician on a full-time basis. The position involved developing and tracking training on a unit, developing the annual District Fire Preparedness Review Plan, performing administrative tasks within the assigned office that consisted of answering telephones, taking messages, filing, updating records, recording data, data entry, copying, printing, computer updates, and plan revision such as District Safety Plan. Additional duties included jobs as assigned within restrictions that included driving, attending local meetings, and assisting with local training course presentations. Physical requirements of the position were sitting, walking, standing, reaching, reaching above the shoulder, twisting, operating a motor vehicle at work and to and from work, repetitive wrist and elbow movements, pushing, pulling, and kneeling. Restrictions for the position included avoiding bending, stooping, and lifting and no squatting, climbing, repetitive bending, or lifting more than 10 pounds. The position required appellant to report to the Harrison Gulch Ranger Station in Platina, California and the Hayfork District Office in Hayfork, California to perform his work duties. The employing establishment maintained that the duties of the position met the restrictions provided by Dr. Xeller, a Board-certified orthopedic surgeon and OWCP referral physician. In a December 5, 2014 report, Dr. Xeller examined appellant and found that he could only perform sedentary work with restrictions that included no stooping, squatting, climbing, repeated bending, or lifting more than 10 pounds. Appellant refused to accept the position and,

[10] *Id.* at § 10.500(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.2(c)(a) (June 2013).

[11] *Id.* at Chapter 2.814.9(b)(2) (June 2013).

[12] *Id.*; *see also* Chapter 2.814.9(b)(3) (June 2013).

as a result, in decisions dated April 6 and September 23, 2015, OWCP terminated his wage-loss compensation, effective February 8, 2015, under 20 C.F.R. § 10.500(a).

The Board finds that OWCP properly terminated appellant's wage-loss compensation effective February 8, 2015 under 20 C.F.R. § 10.500(a). Appellant did not accept a temporary light-duty assignment offered by the employing establishment, which was within his medical restrictions and his vocational ability. The assignment would have paid wages that exceeded those paid by his date-of-injury position. Therefore, the termination of appellant's wage-loss compensation effective February 8, 2015 was justified under 20 C.F.R. § 10.500(a).[13]

The Board also finds that the medical evidence of record shows that appellant could in fact perform the temporary light-duty assignment offered by the employing establishment in January 2015. The physical requirements of the offered temporary light-duty assignment were within his medical restrictions as provided by Dr. Xeller in his December 5, 2014 report. The Board notes that the medical restrictions provided by Dr. Xeller in this report constitutes the best picture of appellant's ability to work around the time that the employing establishment offered him the temporary light-duty assignment. His report, which is detailed and well rationalized, is entitled to the weight of the evidence and establishes that he has the ability to perform the offered light-duty employment.[14]

Appellant contended before OWCP and on appeal that Dr. Xeller had not considered the sitting and driving restrictions of Dr. Phillips, his attending family practitioner. Dr. Phillips examined appellant and diagnosed work-related lumbar strain, lumbar radiculopathy, herniated disc at L5-S1, and nerve root impingement at left S1. He found that appellant could perform modified work, four hours a day with restrictions that included, among other things, no continuous sitting for 20 minutes or 40 minutes total in one hour shift and no driving longer than 20 minutes. Dr. Phillips recommended that he recognize the risk of additional movement of disc material, which would cause more symptoms, when he returned to work. He suggested that appellant work smart and limit his risk as much as possible. Although Dr. Phillips suggested that his work-related conditions necessitated the above-noted restrictions, he did not provide a clear opinion in this regard or provide a rationalized medical opinion explaining how a work-related condition justified such restrictions. He did not explain how specific findings on examination and/or diagnostic testing supported this level of disability. The Board has held that a medical opinion not fortified by medical rationale is of little probative value.[15] Moreover, Dr. Phillips attributed appellant's need for work restrictions as a way to prevent future injury. The Board has long held that prophylactic work restrictions do not establish a basis for wage-loss compensation.[16] A fear of future injury is not compensable under FECA.[17] In addition, the Board notes that unlike Dr. Phillips, Dr. Xeller is a specialist in the appropriate field of

[13] *See supra* note 10.

[14] *See generally H.Y.*, Docket No. 14-0019 (issued March 24, 2014).

[15] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954).

[16] *K.J.*, Docket No. 16-0846 (issued August 18, 2016); *D.N.*, Docket No. 14-657 (issued June 26, 2014).

[17] *K.J., id., Manuel Gill*, 52 ECAB 282, 286 n.5 (2001).

medicine.[18] The Board finds, therefore, that Dr. Phillips' opinions are insufficient to establish that appellant was physically unable to perform the duties of the offered position. Dr. Xeller's opinion continues to carry the weight of the medical evidence.

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 OWCP met its burden of proof to terminate appellant's wage-loss compensation effective February 8, 2015 based on his refusal of an offer of temporary suitable work pursuant to 20 C.F.R. § 10.500(a).

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[18] *Elizabeth Merriweather*, Docket No. 93-1486 (issued September 15, 1994); *Elmore T. Carter*, Docket No. 93-2475 (issued February 23, 1994).