United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 17-0159**
	)	**Issued: September 27, 2017**
DEPARTMENT OF THE NAVY, FLEET READINESS CENTER EAST, Cherry Point, NC, Employer	)	

Appearances:
Martin Kaplin, Esq., for the appellant[1]
Office of Solicitor, for the Director

Oral Argument June 20, 2017

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 1, 2016 appellant, through counsel, filed a timely appeal from a September 23, 2016 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 to consider 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.*

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a recurrence of disability commencing December 5, 2013, causally related to his accepted employment injury; and (2) whether OWCP's hearing representative properly denied appellant's request for the issuance of subpoenas.

FACTUAL HISTORY

On March 20, 2010 appellant, then a 54-year-old machinist supervisor, filed an occupational disease claim (Form CA-2) alleging that on March 4, 2010 he first became aware of the connection between his chronic beryllium disease and his federal employment exposure to machining beryllium copper. On the back of the form, the employing establishment noted that appellant first received medical treatment for this condition on August 4, 2009, but he did not stop work. OWCP accepted the claim for unspecified respiratory conditions due to beryllium dust.[3]

In an August 16, 2013 work capacity evaluation for cardiovascular/pulmonary conditions (Form OWCP-5b), Dr. Kent V. Lucas, a treating Board-certified internist, indicated that appellant was capable of working 40 hours per week with restrictions regarding exposure to hazardous materials/chemicals, as well as restrictions regarding walking, standing, lifting, bending, and pulling.

On October 15, 2013 Dr. Lucas diagnosed chronic inflammatory demyelinating polyneuropathy (CIDP), significant dyspnea, and a beryllium dust illness. He noted that appellant would be unable to work for several days per month due to treatment for his CIDP. Dr. Lucas noted that appellant had several falls at home and once at work over the past 18 months resulting in broken ribs and broken bones in his feet. Dr. Lucas opined that appellant could not work in industrial areas and required a handicap accessible work area due to this accepted work-related lung condition and his neurologic disorder.

Dr. Lucas further opined, in a December 4, 2013 report, that appellant was totally disabled from work due to a severe chronic neurologic problem which impacted his mobility and threatened his safety in his current work environment.

In a December 10, 2013 report, Dr. Lucas further found that appellant was totally disabled from working due to multiple medical conditions, including chronic berylliosis, extensive left leg deep vein thrombosis (DVT), CIDP, and numerous other medical conditions. Dr. Lucas noted that appellant was diagnosed with CIDP in 2010, which caused decreased and limited mobility. He reported that appellant had significant dyspnea on exertion due to his

[3] This claim was assigned OWCP File No. xxxxxx881. On April 13, 2010 appellant filed an occupational disease claim (Form CA-2) alleging that his hearing loss had been caused by his work duties. OWCP accepted the claim for bilateral sensorineural hearing loss and assigned OWCP File No. xxxxxx163. On October 23, 2010 OWCP granted a schedule award for 23 percent permanent impairment due to the accepted bilateral sensorineural hearing loss. OWCP combined File No. xxxxxx881 with File No. xxxxxx163 on July 20, 2105, with the former claim number designated as the master file number.

accepted chronic beryllium disease. Due to treatment for his CIDP, Dr. Lucas related that appellant would be unable to work for a few days each month, and required handicap accessible, nonindustrial areas in which to work.

On December 12, 2013 the employing establishment offered appellant a modified job of financial technician.

Dr. Lucas, in his December 26, 2013 report, noted that appellant was applying for disability retirement due to his multiple chronic illnesses including chronic borreliosis, CIDP, diabetes, DVT, asthma, hypertension, chronic low back pain with osteoarthritis, and hypercholesterolemia. He noted that appellant was wheelchair bound, had difficulty walking due to his CIDP, and currently was receiving plasma exchange therapy for his CIDP. Dr. Lucas opined that it was unlikely appellant would be able to work full time due to his medical conditions and his high risk for falls and personal injury.

Appellant retired on January 3, 2014.

On January 6, 2014 appellant declined the employing establishment's December 12, 2013 modified job offer of financial technician because, according to Dr. Lucas, appellant was permanently disabled from work due to his multiple medical conditions. He also contended that the worksite was unsafe as it failed to meet the American Barriers Act and handicap regulations, that the treatment he received for CIDP in the hospital three times a week rendered him unable to work, and that his neurological condition caused him to have multiple falls at both home and work. Appellant also contended that the job offer failed to comply with OWCP regulations regarding the offer of suitable work, which includes consideration of all medical conditions, including medical conditions arising subsequent to the accepted condition.

In a January 7, 2014 memorandum, the employing establishment informed OWCP that appellant had refused the December 12, 2013 modified job offer and had retired on January 3, 2014 due to his CIPD.

On March 25, 2014 appellant filed a claim for a recurrence of disability (Form CA-2a) commencing December 5, 2013.

In a letter dated May 29, 2014, OWCP informed appellant that the evidence of record was insufficient to establish his claim for a recurrence of disability. It noted that he did not stop working following the filing of his original claim and elected to retire on January 3, 2014 based on the worsening of his nonemployment-related medical conditions and the recommendation by his treating physician. OWCP advised appellant regarding the definition of a recurrence and the evidence required to support it. Appellant was afforded 30 days to provide the requested evidence.

In a June 4, 2014 letter, counsel contended that appellant's recurrence of disability was due to the withdrawal of his light-duty job and not due to a worsening of his accepted condition. He also contended that appellant's refusal of the December 12, 2013 job offer was irrelevant.

By letter dated July 25, 2014, the employing establishment explained that appellant had been reassigned to an office environment on February 9, 2011 from his machinist supervisor

position due to work restrictions set by his treating physician. On December 12, 2013 appellant was offered the position of financial technician, which was based on his work restrictions and was compliant with the Americans with Disabilities Act.

By decision dated August 1, 2014, OWCP denied appellant's claim for a recurrence of disability, beginning December 5, 2013, as he had failed to establish either a worsening of his accepted condition or a withdrawal of a light-duty job.

In a letter dated August 18, 2014, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on March 24, 2015.

In a January 13, 2015 report, Dr. David Maybee, a treating physician Board-certified in critical care, internal medicine, and pulmonary disease, diagnosed asthma and berylliosis. He reported a normal diffusion capacity, normal respiratory rate, and lungs clear to bilateral auscultation.

By decision dated July 6, 2015, the hearing representative set aside the August 1, 2014 decision and remanded the case for further development of the evidence. He instructed OWCP to develop the record with respect to whether appellant's light-duty job had been withdrawn and to determine the suitability of the December 12, 2013 job offer. The hearing representative also instructed OWCP to combine OWCP File Nos. xxxxxx881 and xxxxxx163 on remand.[4]

In a letter dated July 20, 2015, OWCP requested that the employing establishment provide information regarding the December 12, 2013 job offer and the light-duty job appellant had been performing prior to January 3, 2014.

On August 27, 2015 the employing establishment verified that in 2011 appellant accepted a temporary light-duty position in an office environment to accommodate his work restrictions. On September 25, 2013 appellant submitted a request for a reasonable accommodation which was reviewed and used to identify a suitable permanent position. A permanent position of financial technician was identified in December 2013 which was within appellant's work and nonwork-related restrictions. Discussions were had with appellant and the reasonable accommodations coordinator on January 3, 2014 to discuss accommodations and to view the work area. Following the meeting on January 3, 2014 appellant submitted his notice of retirement. As appellant had retired prior to declining the offered position, the employing establishment was unable to work with appellant to return him to a temporary position or address concerns regarding the offered permanent position. The employing establishment denied appellant's allegation that if he declined the offered position that no temporary job would be provided.

By decision dated December 10, 2015 OWCP denied appellant's claim for a recurrence of disability as he had not established a worsening of his accepted condition or that his light-duty job had been withdrawn. It also determined that the December 12, 2013 job offer of pay technician was suitable and within the restrictions noted by his treating physician.

[4] *Id.*

In a letter dated December 17, 2015, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on August 10, 2016.

In a letter dated December 28, 2015, counsel requested that a subpoena be issued to the employing establishment representative to testify and provide all e-mails and agency documents concerning appellant.

In a January 12, 2016 report, Dr. Maybee diagnosed allergic rhinitis, asthma, and berylliosis. He attributed most of appellant's shortness of breath to his CIDP. A physical examination revealed clear lungs to bilateral auscultation and normal respiratory rate.

In a letter dated August 8, 2016, the hearing representative denied counsel's request for subpoena as counsel had not explained how the attendance and testimony from employing establishment personnel would be directly relevant to the issue at hand or that it could not be obtained by other means. He further found that a subpoena was not the best way to obtain the requested documents.

By decision dated September 23, 2016, the hearing representative affirmed the December 10, 2015 decision. He found that appellant had failed to establish a worsening of his accepted condition or that his light-duty job had been withdrawn. The hearing representative also recommended OWCP consider combining File No. xxxxxx515[5] with the current claim, File No. xxxxxx881.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability is defined as the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6] The Board has held that whether a particular injury causes an employee to be disabled for work is a medical question that must be resolved by competent and probative medical evidence.[7] The weight of medical opinion is determined on the report of a physician, who provides a complete and accurate factual and medical history, explains how the claimed disability is related to the employee's work and supports that conclusion with sound medical reasoning.[8]

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden of

[5] Appellant had also filed a traumatic injury claim (Form CA-1) for a January 30, 2013 foot injury. The case had been administratively closed due to no loss of work and medical expenses that did not exceed $1,500.00.

[6] 20 C.F.R. § 10.5(x). *See S.F.*, 59 ECAB 525 (2008); *Albert C. Brown*, 52 ECAB 152 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

[7] *See R.C.*, 59 ECAB 546 (2008); *Carol A. Lyles*, 57 ECAB 265 (2005); *Donald E. Ewals*, 51 ECAB 428 (2000).

[8] *See C.S.*, Docket No. 08-2218 (issued August 7, 2009); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

proof to establish, by the weight of the reliable, probative, and substantial evidence, a recurrence of disability and to show that he cannot perform such light duty.[9] As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[10]

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for unspecified respiratory conditions due to beryllium dust. Appellant did not initially stop work and was subsequently provided a light-duty office job. He was offered a new light-duty position on December 12, 2013, which he did not accept. Appellant voluntarily retired on January 3, 2014 due to medical reasons. OWCP denied his claim as it found that he had not established a recurrence of disability on and after December 5, 2013. It found there was no evidence of a withdrawal of his light-duty job or that his accepted condition had materially worsened to cause total disability.

The Board finds that appellant has failed to establish a recurrence of disability commencing December 5, 2013, causally related to his accepted employment injury.

The record contains multiple reports from Dr. Lucas regarding appellant's work restrictions, chronic health issues, and increasing disability for work. In an August 16, 2013 OWCP-5b form, he concluded that appellant was capable of working with restrictions of no exposure to hazardous materials/chemicals. Dr. Lucas opined that appellant could not work in industrial areas, required handicap accessible work areas, and would be out of work several days per month due to treatment for appellant's CIDP. He attributed appellant's total disability to multiple health conditions including chronic berylliosis, extensive left leg DVT, CIDP, and numerous other medical conditions. The most recent December 2013 reports from Dr. Lucas indicated that appellant was disabled from any type of work due to CIDP, the treatment for that condition, and the disability it caused.

The Board has found that, when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA.[11] The reports from Dr. Lucas establish that appellant was not disabled due to his accepted work injury, but rather due to a nonwork-related condition, CIDP. Dr. Lucas failed to explain how appellant's disability from work commencing December 5, 2013 was causally related to a worsening of his accepted unspecified respiratory conditions due to beryllium dust. Rather, he attributed appellant's increasing disability to CIDP. The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to his or her employment injury and supports that conclusion with sound medical

[9] *K.C.*, Docket No. 08-2222 (issued July 23, 2009); *Richard A. Neidert*, 57 ECAB 474 (2006).

[10] *C.S.*, *supra* note 8; *Joseph D. Duncan*, 54 ECAB 471 (2003); *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); *Terry R. Hedman*, *supra* note 6.

[11] *A.M.*, Docket No. 09-1895 (issued April 23, 2010).

reasoning.[12] As these reports fail to meet that standard, they are insufficient to establish appellant's claim.

At oral argument counsel contended that the employing establishment had withdrawn appellant's light-duty job and the December 12, 2013 job offer was unsuitable.

The Board finds that the evidence of record does not establish that a light-duty job was withdrawn. As set forth above, it is appellant's burden of proof to establish that light-duty employment was in fact withdrawn.[13] While it is evident from the record that appellant retired on January 3, 2014 and did not accept the new December 10, 2013 job offer, there is insufficient evidence that the work stoppage was due to a withdrawal of light duty. Appellant has submitted no evidence supporting his contention that the December 10, 2013 job offer constituted a withdrawal of his temporary light-duty or that it was not within his work restrictions. The evidence from the employing establishment shows that it would have continued to accommodate appellant in the temporary light-duty job, or in the permanent job he had been offered, had he not retired. Appellant has not submitted any evidence refuting this or showing that the light-duty job had been withdrawn.

It is appellant's burden of proof to establish his claim. For the reasons noted above, the Board finds that appellant did not meet his burden of proof.

On appeal and at the oral argument, counsel contends that the December 10, 2013 job offer was not suitable and thus constituted a withdrawal of appellant's light-duty job. He also argues that appellant's retirement on January 3, 2014 was because of pressure from the employing establishment to accept the job offer as no other job would be provided. Counsel has provided no evidence to support that contention.

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.

LEGAL PRECEDENT -- ISSUE 2

Under 5 U.S.C. § 8126 of FECA, and its implementing regulations (20 C.F.R. § 10.619), subpoenas may be issued by the hearing representative for the attendance and testimony of witnesses and the production of relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means, and for witnesses only where oral testimony is the best way to ascertain the facts. A person requesting a subpoena must submit the request in writing no later than 60 days after the date of the original hearing request and explain why the testimony or evidence is directly relevant to the issues at hand, and why the information

[12] *V.L.*, Docket No. 12-1444 (issued November 27, 2012); *see also R.D.*, Docket No. 11-1551 (issued August 8, 2012).

[13] *J.F.*, 58 ECAB 124 (2006).

cannot be obtained without the use of a subpoena. The decision to grant or deny a subpoena request is within the discretion of OWCP's hearing representative.[14]

ANALYSIS -- ISSUE 2

In the present case, counsel requested that OWCP's hearing representative issue a subpoena to obtain testimony from employing establishment officials and various documents regarding the December 12, 2013 job offer and the light-duty job appellant had been performing. The hearing representative denied the request.

Although counsel argued that the testimony and requested documents were necessary to determine whether the light-duty job had been withdrawn, he did not provide any clear explanation as to why a subpoena was the best method to obtain this evidence or that there was no other method to obtain the information. The Board finds that the hearing representative did not abuse his discretion when denying the subpoena request.[15]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing December 5, 2013, causally related to his accepted employment injury. The Board further finds that an OWCP hearing representative properly denied appellant's request for the issuance of subpoenas.

[14] *See* 5 U.S.C. § 8126; 20 C.F.R. § 10.619. *See also J.M.*, Docket No. 16-1575 (issued May 25, 2017).

[15] *J.M.*, Docket No, 16-1575 (issued May 25, 2017); *D.O.*, Docket No. 15-1368 (issued October 22, 2015).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 23, 2016 is affirmed.

Issued: September 27, 2017
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