United States Department of Labor
Employees' Compensation Appeals Board

H.L., Appellant	)	
and	)	**Docket No. 17-1338**
	)	**Issued: April 25, 2018**
U.S. POSTAL SERVICE, POST OFFICE, North Hollywood, CA, Employer	)	

Appearances:
Zepuor Parsanian, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 1, 2017 appellant, through his representative, filed a timely appeal from an April 14, 2017 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 appellant has established a recurrence of total disability from April 24, 2014 through September 18, 2015.

FACTUAL HISTORY

On July 6, 2005 appellant, then a 36-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained shoulder injuries as a result of his federal employment duties. OWCP accepted the claim for bilateral rotator cuff syndrome and partial right rotator cuff tear. Appellant received wage-loss compensation from June 5, 2005 to December 26, 2006.

Appellant underwent right shoulder arthroscopic surgery on April 6, 2011, performed by Dr. Jean Ding, a Board-certified orthopedic surgeon. He received additional wage-loss compensation from April 18 through September 27, 2011.

The record indicates that appellant filed a notice of recurrence (Form CA-2a) claiming disability commencing July 13, 2012. By report dated July 9, 2012, Dr. Ding wrote that appellant had bilateral shoulder pain after lifting, and was temporarily totally disabled. In an August 28, 2012 report, he reported that appellant had pain in the shoulders when lifting at work, and was totally disabled until September 3, 2012.

By decision dated September 5, 2012, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish the claim.

Appellant requested reconsideration on November 16, 2012. He submitted a January 24, 2013 report from Dr. Ding, reporting that appellant had work restrictions that included 10 pounds lifting and no work at the shoulder level or overhead.

By decision dated February 13, 2013, OWCP denied modification. It found the medical evidence submitted did not establish an employment-related recurrence of disability.

The record indicates that appellant accepted a light-duty clerk position on April 8, 2013. The position was full time, with no lifting, pushing, or pulling over five pounds, and limited work at or above shoulder level.

An August 5, 2013 letter from an employing establishment manager related that appellant had filed a claim alleging that he reinjured his shoulders on July 16, 2013. The manager asserted that although appellant alleged that he had lifted a parcel weighing more than five pounds and injured his shoulders, none of the parcels weighed more than five pounds.

On August 20, 2013 appellant accepted another light-duty job offer as a modified distribution clerk, with the limitations of five pounds for lifting, pulling, or pushing, and limited work at or above shoulder level. In a report dated March 24, 2014, Dr. Ding indicated that appellant could work modified duty with no lifting, pushing, or pulling over five pounds, and limited work at or above shoulder level. By report dated April 28, 2014, he provided the same work restrictions.

In a letter dated September 14, 2015, appellant's representative advised OWCP that Dr. Ding was no longer treating appellant. According to the representative, appellant had been notified by OWCP that his claim had been closed since March 2015 due to lack of activity.

OWCP determined that a referral for a second opinion examination was appropriate to determine appellant's current employment-related disability. In a report dated November 4, 2015, Dr. Kevin Pelton, a Board-certified orthopedic surgeon selected as a second opinion examiner, provided a history and results on examination. He diagnosed status post arthroscopic surgeries, and acquired bilateral shoulder adhesive capsulitis. Dr. Pelton opined that the capsulitis condition was a result of the shoulder surgeries, and appellant had continuing moderate-to-severe loss of range of motion in the shoulders. He concluded that appellant could work with no lifting over 20 pounds and no overhead work.

By letter dated December 8, 2015, OWCP advised appellant that the claim had been reopened for medical treatment.

According to a January 11, 2016 letter from appellant's representative, he had been "removed from his limited[-]duty job offer as of April 24, 2014 due to [the employing establishment's] false determination that claimant has made a fraudulent report of injury that has been disputed by Dr. Pelton's November 2015 report." The representative argued that appellant was entitled to compensation commencing April 24, 2014.

On March 8, 2016 appellant submitted a claim for compensation (Form CA-7) for disability from April 24, 2014 to January 27, 2016. The record indicates that on February 2, 2016 appellant accepted a modified distribution clerk job offer.

With respect to appellant's work stoppage, the record contains an April 24, 2014 memorandum from the employing establishment. The memorandum indicated that appellant had been issued a notice of removal on November 15, 2013, for failure to follow instructions/ unacceptable conduct. The employing establishment wrote that appellant was allowed to work until he was "arrested at work" by agents from the employing establishment Office of Inspector General (OIG).[3]

In an investigation report dated May 20, 2015, the OIG reported that appellant had filed a claim for an injury on July 16, 2013. The report discusses witness statements and surveillance of appellant, and finds the evidence was inconsistent with appellant's claim of injury. The evidence included an October 30, 2014 document from the Los Angeles County Superior Court, indicating an arrest warrant had been issued on April 8, 2014, and on April 25, 2014 appellant had pleaded not guilty to violations of section 550(b)(1) of the California Penal Code.[4] The court document indicated the case was dismissed as the action was not brought to court in a timely manner.

[3] Appellant filed a claim for an emotional condition causally related to the incidents on April 24, 2014, assigned OWCP File No. xxxxxx093. That claim is not presently before the Board.

[4] This section involves the making of false or misleading statements with respect to insurance claim benefits.

In a grievance settlement dated September 10, 2015, it was agreed that there was just cause for issuing the notice of removal for failure to follow instructions/unacceptable conduct.[5] The notice of removal was reduced to a time-served suspension and the settlement indicated appellant could return to work as soon as possible and that, if appellant provided updated medical restrictions, he would return to work September 2, 2015.

Appellant submitted to the employing establishment a September 15, 2015 report from Dr. Emerald Tay, a family practitioner. Dr. Tay indicated that appellant could work with a five-pound restriction for lifting, pushing, and pulling, with no repetitive work above the shoulder.

By decision dated June 14, 2016, OWCP denied the claim for wage-loss compensation from April 24, 2014 to January 27, 2016. It found that the light-duty job had accommodated appellant's work restrictions and the medical evidence did not establish any total disability.

On June 28, 2016 appellant requested a hearing before an OWCP hearing representative. A hearing was held on February 8, 2017. Appellant's representative asserted that the employing establishment removed appellant from his light-duty job and did not allow him to come back to work.

By decision dated April 14, 2017, the hearing representative denied appellant's claim for wage-loss compensation for the period April 24, 2014 through September 18, 2015. He found that, during that period, appellant had been removed from his job due to misconduct, and the medical evidence of record did not establish a recurrence of total disability causally related to the accepted work injury. The hearing representative indicated that appellant had submitted medical restrictions on September 18, 2015, and was entitled to compensation from September 19, 2015 until he returned to work on January 27, 2016.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6] Recurrence of disability also means an inability to work that takes place 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[7] Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty.[8] A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct,

[5] The agreement was signed by a union representative and an employing establishment labor relations specialist.

[6] 20 C.F.R. § 10.5(x).

[7] *Id.*

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a)(4) (June 2013).

nonperformance of job duties, downsizing, or the existence of a loss of wage-earning capacity determination.[9]

When an employee, who is disabled from the job he or she held when injured due to employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either 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

The issue is whether appellant has established a recurrence of total disability for the period April 24, 2014 through September 18, 2015. The hearing representative found that appellant had not established a recurrence of total disability commencing April 24, 2014. In this regard, the record indicates that the employing establishment had issued a notice of removal in November 2013. Appellant was allowed to work until he was arrested at work by the employing establishment's OIG agents on April 24, 2014 for making false statements regarding a benefits claim. While the criminal action was apparently dismissed on procedural grounds, the work stoppage in this case was clearly based on misconduct by appellant. A grievance settlement agreement dated September 10, 2015 acknowledged that there was just cause for issuing the notice of removal for failure to follow instructions/unacceptable conduct.

Therefore the record indicates that the withdrawal of the light-duty job on April 24, 2014 was based on misconduct by appellant. As indicated above, a withdrawal of light duty due to the claimant's own misconduct does not establish a recurrence of disability.[11] The withdrawal itself is accordingly found not to constitute a recurrence of disability in this case.

To establish a recurrence of disability, the medical evidence of record must establish that appellant was unable to perform the job duties due to an employment-related condition.[12] The medical evidence of record does not establish a recurrence of total disability commencing April 24, 2014. Dr. Ding continued to report the same work restrictions, including a five-pound lifting restriction, in his April 28, 2014 report. There was no indication of any change in the nature and extent of appellant's condition or other probative medical evidence establishing a recurrence of total disability.

The referral to the second opinion physician, Dr. Pelton, was not for the purpose of determining a recurrence of disability as of April 24, 2014. He did not examine appellant until

[9] *J.F.*, 58 ECAB 124 (2006); *see also* 20 C.F.R. §§ 10.5(x), 10.104(c) and 10.509; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013).

[10] *Terry R. Hedman*, 38 ECAB 222 (1986).

[11] *See also C.P.*, Docket No. 17-0549 (issued July 13, 2017) (termination of employment for cause did not establish recurrence of disability).

[12] *Id.*

November 4, 2015, and he only provided current work restrictions. The Board notes that the restrictions provided by Dr. Pelton were not outside the light-duty job requirements.

The Board accordingly finds that appellant has not established a recurrence of total disability. The evidence of record indicates that the work stoppage on April 24, 2014 was due to appellant's own misconduct and no probative medical evidence was provided to establish a recurrence of total disability from April 24, 2014 through September 18, 2015.[13]

On appeal appellant's representative asserts that the issue is whether OWCP properly followed its procedures for terminating or reducing compensation. The issue in the case is whether appellant has established an employment-related disability commencing April 24, 2014. It is appellant's burden of proof to establish the claim, not OWCP's burden of proof to terminate or reduce compensation.[14] The representative also argued that appellant did not sign the September 9, 2015 settlement, but the agreement was signed by a union representative and provided that appellant could return to work.[15] The evidence of record establishes that the light-duty job was withdrawn for reasons of misconduct by appellant.

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 a recurrence of total disability from April 24, 2014 through September 18, 2015.

[13] *Supra* note 11.

[14] *See N.R.*, Docket No. 16-0417 (issued August 11, 2016).

[15] *See Joseph Pietro*, Docket No. 99-1386 (issued November 2, 2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 14, 2017 is affirmed.

Issued: April 25, 2018
Washington, DC

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

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

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