

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on January 28, 2009 appellant, then a 53-year-old former city carrier, slipped and fell on a tiled porch while delivering mail and sustained a lumbar sprain/strain, aggravation of underlying L1-2 disc herniation, aggravation of underlying L4-5 disc bulge, and lumbar radiculopathy. It began paying wage-loss compensation for temporary total disability on February 4, 2009. Commencing July 12, 2009, appellant returned to work for four hours a day in a temporary position as a modified letter carrier. OWCP paid wage-loss compensation for the remaining hours.

Dr. Gene I. Geld, an attending family practitioner, defined permanent work restrictions on July 20, 2010. Based on those restrictions, OWCP offered a temporary, part-time, limited-duty assignment for four hours a day. Appellant accepted the job offer on November 6, 2010 and began work shortly thereafter.

In early 2013, appellant obtained a third-party settlement from the owner of the property where the January 28, 2009 employment injury occurred. Effective April 7, 2013, OWCP stopped paying appellant FECA wage-loss compensation benefits because of a third-party surplus in excess of \$235,000.00. Although appellant remained entitled to FECA wage-loss compensation based on his inability to resume full-time work, he could not receive additional compensation until the third-party surplus was exhausted.³ Accordingly, OWCP began to offset appellant's 28-day periodic rolls payments against the third-party surplus.

On September 24, 2013 the Office of Personnel Management (OPM) approved appellant's application for disability retirement. Appellant voluntarily stopped work on September 28, 2013 in advance of his disability retirement. He used accrued sick leave through December 13, 2013. Appellant's last day in pay status was December 13, 2013.

On January 9, 2014 appellant filed a recurrence of disability (Form CA-2a), claiming disability commencing September 28, 2013. OWCP denied the recurrence claim by a May 27, 2014 decision, affirmed by a December 16, 2014 decision of a representative of OWCP's Branch of Hearings and Review. Subsequently, appellant appealed to the Board. In an April 29, 2015

² Docket No. 15-0465 (issued April 29, 2015); Docket No. 16-0834 (issued August 25, 2016); *Order Dismissing Appeal*, Docket No. 17-0946 (issued August 28, 2017).

³ See 5 U.S.C. § 8131(c), which provides: "The Secretary may prosecute or compromise a cause of action assigned to the United States. When the Secretary realizes on the cause of action, he shall deduct therefrom and place to the credit of the Employees' Compensation Fund the amount of compensation already paid to the beneficiary and the expense of realization or collection. Any surplus shall be paid to the beneficiary and credited on future payments of compensation payable for the same injury. However, the beneficiary is entitled to not less than one-fifth of the net amount of a settlement or recovery remaining after the expenses thereof have been deducted."

decision,⁴ the Board affirmed OWCP's December 16, 2014 decision, finding that appellant stopped work on September 28, 2013 due to voluntary retirement.

Dr. Geld noted in a December 10, 2015 letter that appellant's restrictions remained unchanged.

By decision dated February 26, 2016, OWCP found that appellant's actual earnings as a temporary limited-duty carrier, effective June 12, 2009, fairly and reasonably represented his wage-earning capacity. Appellant appealed to the Board. In an August 25, 2016 decision,⁵ the Board reversed OWCP's February 16, 2016 decision, as the February 26, 2016 LWEC determination was based improperly on a temporary position.

In an August 15, 2016 Form EN1032, appellant noted that as of January 2016 he had been employed as a food service assistant at a public school, earning \$8.25 an hour for 20 hours a week during the academic year.

Dr. Geld provided September 14 and December 14, 2016 reports in which he again noted that appellant's medical condition and work restrictions remained unchanged.

In December 28, 2016 and January 5, 2017 letters, appellant requested that OWCP provide an updated third-party surplus balance and the current figure deducted from his continuing compensation payments. He also requested that OWCP indicate whether it would find that his actual wages of \$8.25 for 20 hours a week as a food service worker fairly and reasonably represented his wage-earning capacity.⁶

In a January 5, 2017 letter, OWCP noted that the current balance of appellant's third-party surplus was \$152,561.97, and that \$1,734.00 was being withheld from his continuing compensation payments every 28 days.

In a January 24, 2017 letter, OWCP notified appellant that as he had not established a recurrence of disability, it would not alter the amount of his continuing compensation payments based on his actual earnings as a food service worker. It noted that he voluntarily stopped work on September 28, 2013 as he had elected disability retirement. Appellant's compensation, which was absorbed by the third-party surplus, would remain the same.

On January 28, 2017 appellant filed a claim for compensation (Form CA-7) for the period January 12, 2014 to January 7, 2017. He noted that, from January 2016 to June 2016, he was employed as a part-time food service assistant at a public school. Appellant also noted that he

⁴ Docket No. 15-0465 (issued April 29, 2015).

⁵ Docket No. 16-0834 (issued August 25, 2016).

⁶ Appellant submitted copies of his pay records from private sector employment from September 23, 2016 to February 23, 2017. Initially, he earned \$8.25 an hour, then \$9.00 an hour as of September 30 through December 31, 2016, and \$9.27 an hour effective January 1, 2017. Appellant worked a variable schedule from 15 to 20 hours a week.

received retirement benefits from the Social Security Administration (SSA) and through the Federal Employees Retirement System (FERS).

In January 30 and March 4, 2017 letters, appellant contended that his voluntary retirement on September 28, 2013 should not be construed as abandonment of suitable work. He asserted that he remained willing to perform any medically suitable job at the employing establishment.

In a March 14, 2017 letter, OWCP notified appellant that to establish a recurrence of disability, he must submit medical and factual evidence to establish that the accepted conditions spontaneously worsened such that he could no longer perform his date-of-injury position, or that his light-duty assignment had been withdrawn.

A March 28, 2017 periodic roll payment worksheet revealed that appellant's wage-loss compensation remained based on his date-of-injury position effective February 4, 2009, the date that disability began. OWCP paid appellant \$1,769.00 every 28 days, which was entirely absorbed by the third-party deduction.

Appellant provided a March 15, 2017 work capacity evaluation (OWCP-5c). Dr. Geld opined that appellant could not perform his full-time date-of-injury position, but could perform modified duty four hours a day, with pulling, pushing, and lifting limited to 20 pounds.

In a June 14, 2017 letter, Dr. Geld opined that the accepted conditions and appellant's restrictions remained unchanged.⁷

By decision dated September 5, 2017, OWCP denied appellant's claim for wage-loss compensation from January 12, 2014 to January 7, 2017. It found that appellant had not substantiated that his disability from the accepted injury had increased. OWCP further found that appellant's light-duty position was not withdrawn, but rather he had voluntarily elected disability retirement.⁸

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.⁹ 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 work-related injury or illness is withdrawn or when the physical requirements of such an

⁷ On August 23, 2017 appellant submitted a completed Form EN1032, in which he listed his wages of \$9.27 an hour or \$185.40 a week as a part-time food service worker. He noted that he received unemployment compensation from June 14 to September 5, 2017.

⁸ In an August 28, 2017 order, the Board dismissed appellant's appeal of a purported March 14, 2017 decision, which was an informational letter. The Board found that there was no adverse final decision of record issued within 180 days of March 28, 2017, the date appellant filed the appeal. Docket No. 17-0946 (issued August 28, 2017).

⁹ 20 C.F.R. § 10.5(x).

assignment are altered so that they exceed his established physical limitations.¹⁰ 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.¹¹ A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties, or other downsizing, or where a loss of wage-earning capacity determination is in place.¹²

Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.¹³

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing that the recurrence is causally related to the original injury.¹⁴ This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.¹⁵ The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.¹⁶

ANALYSIS

Appellant stopped work on September 28, 2013 in anticipation of his impending, voluntary retirement. On January 28, 2017 he claimed wage-loss compensation (Form CA-7) for the period January 12, 2014 to January 7, 2017. To prevail, appellant must establish either a change in the nature and extent of the injury-related conditions, or that his light-duty position had been withdrawn.

Appellant does not claim, nor does the record support, a change in the accepted injury-related lumbar conditions. Dr. Geld, an attending family practitioner, provided reports from September 14, 2016 to June 14, 2017 in which he opined that appellant's accepted lumbar condition remained unchanged. Appellant remained able to perform part-time, limited-duty work with no change in his restrictions. Accordingly, the medical evidence of record does not establish that appellant was totally disabled on or after September 28, 2013 due to his employment-related lumbar condition.

¹⁰ *Id.*

¹¹ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

¹² 20 C.F.R. §§ 10.5(x), 10.104(c) and 10.509; *see* Federal (FECA) Procedure Manual, *id.* at Chapter 2.1500.2b.

¹³ *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

¹⁴ 20 C.F.R. § 10.104(b); *see* Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1500.5 and 2.1500.6.

¹⁵ *See S.S.*, 59 ECAB 315, 318-19 (2008).

¹⁶ *Id.* at 319.

Additionally, appellant does not assert, nor does the evidence of record support, that the employing establishment withdrew his light-duty position. Rather, the factual evidence of record clearly establishes that appellant voluntarily elected to utilize disability retirement. OWCP had stopped paying appellant FECA wage-loss compensation effective April 7, 2013 because of a third-party surplus in excess of \$235,000.00. It offset appellant's \$1,769.00 in wage-loss compensation every 28 days against the amount of the surplus. Appellant stopped work effective September 28, 2013 to exhaust his accrued sick leave through December 13, 2013, prior to the commencement of his FERS-based disability annuity.

Appellant has established neither that the accepted lumbar injury had worsened such that he was totally disabled from work, nor that the employing establishment withdrew his preretirement light-duty position. Therefore, he has failed to meet his burden of proof in establishing a recurrence of disability commencing January 12, 2014.¹⁷

On appeal appellant contends that his January 31, 2017 Form CA-7 was a request for a recalculation of his benefits based on his actual earnings as a food service assistant. As noted above, he has not established a recurrence of disability which would require recalculation of his wage-loss compensation payments.

Appellant may submit additional 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 met his burden of proof to establish a recurrence of disability commencing January 12, 2014 causally related to his accepted January 28, 2009 employment injury.

¹⁷ *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 5, 2017 is affirmed.

Issued: March 15, 2018
Washington, DC

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

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

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