

**United States Department of Labor
Employees' Compensation Appeals Board**

B.P., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
FACILITY SE, Panama City, FL, Employer**

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**Docket No. 17-1430
Issued: September 13, 2018**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

CHRISTOPHER J. GODFREY, Chief Judge

PATRICIA H. FITZGERALD, Deputy Chief Judge

ALEC J. KOROMILAS, Alternate Judge

On June 20, 2017 appellant, through counsel, filed a timely appeal from a March 27, 2017 decision of the Office of Workers' Compensation Programs (OWCP). The appeal was docketed as No. 17-1430.

On January 28, 2016 appellant filed a notice of recurrence (Form CA-2a) and alleged that on December 1, 2015 he stopped work due to his May 10, 2011 employment injury. He alleged that he was assigned light-duty employment from August 2011 through December 2015 when he was directed to return to his date-of-injury position as a carpentry worker without restrictions. Appellant asserted that the employing establishment did not continue to offer him any additional light-duty assignments after December 2015 despite his permanent work restrictions.

By decision dated March 27, 2017, OWCP's hearing representative affirmed an April 5, 2016 OWCP decision, which denied appellant's claim for a recurrence of disability commencing

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.

December 7, 2015.² He found that the second opinion report of Dr. Cory Gaiser, an osteopath, Board-certified by the American Osteopathic Board of orthopedic surgery, was entitled to the weight of the medical evidence as to appellant's work restrictions. The hearing representative determined that appellant no longer had any disability from his work-related injuries of May 10, 2011, that he continued to have residuals of his work injury, which did not prevent him from performing his usual duties, and that the employing establishment withdrew his modified-duty work appropriately.

The Board, however, finds that OWCP failed to make the necessary inquiries and specific findings regarding appellant's light-duty work status and offers of employment.

On March 19, 2012 the employing establishment offered appellant a light-duty position as a lead management assistant. By letter dated March 21, 2012, OWCP informed appellant that the lead management assistant position was considered suitable work. Appellant commenced work in that offered position. Following an April 8, 2014 functional capacity examination (FCE), on August 19, 2014 he was found to be unable to perform the duties of his date-of-injury carpenter job, which required "heavy work." The FCE found that appellant was able to perform "medium work" and the employing establishment then offered him a position as a materials expeditor, which required "medium work." The record is unclear whether appellant accepted the position of materials expeditor or whether he continued in the light-duty lead management assistant position through December 2015.

Dr. Gaiser completed a work capacity evaluation (Form OWCP-5c) on December 2, 2015 and indicated that appellant could not return to his date-of-injury position. He found that appellant could work eight hours a day with restrictions performing a medium strength level position based on the FCE. Dr. Gaiser indicated that appellant could sit five hours a day, walking five hours a day, standing three hours a day, reach for three hours a day, and bend or stoop for three hours a day. Appellant could lift up to 40 pounds and push and pull up to 50 pounds occasionally.

On December 2, 2015 the employing establishment informed appellant that he was to "return to the carpenter shop for duty."

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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term 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.³

On remand OWCP should further develop the record to determine what light-duty positions appellant performed following his work injury, the dates that those light-duty positions were offered to appellant, what position appellant was working when he stopped work in

² December 7, 2015 is the date that the employing establishment terminated appellant's pay.

³ 20 C.F.R. § 10.5(x).

December 2015, and whether light-duty work remained available to appellant when he stopped work in December 2015. It should obtain a position description for each position offered to appellant to determine whether the work offered to appellant was within the restrictions as set forth in the FCE and by the physicians of record.

Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision.

IT IS HEREBY ORDERED THAT the March 27, 2017 decision is set aside and the case is remanded for further action consistent with this order of the Board.

Issued: September 13, 2018
Washington, DC

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

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

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