

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective February 16, 2018, pursuant to 20 C.F.R. § 10.500(a) based on her earnings had she accepted a temporary, limited-duty assignment.

FACTUAL HISTORY

On February 9, 2011 appellant, then a 53-year-old medical instrument technician, filed a traumatic injury claim (Form CA-1) alleging that on February 1, 2011 she sustained an injury when she pulled a chair with a broken wheel while in the performance of duty. OWCP initially accepted her claim for lumbar sprain, but later expanded the accepted conditions to include sciatica and displacement of lumbar intervertebral disc without myelopathy. Appellant later stopped work and received wage-loss compensation on the periodic rolls commencing June 29, 2014.⁴

On August 30, 2016 the employing establishment offered appellant a light-duty assignment. The assignment was for full-time work and had an annual salary of \$61,036.00. The assignment's physical requirements included sitting and using a computer for data entry and conducting research. The position allowed for the ability to reposition as needed for comfort and required lifting, pushing, and pulling up to 10 pounds. It did not require overhead use of the arms, bending, squatting, or twisting.

Appellant did not accept the offered position and she submitted reports from Dr. Babak Khamsi and Dr. Thomas Haider, both Board-certified orthopedic surgeons, who provided opinions that she was temporarily totally disabled.

By decision dated November 16, 2016, OWCP terminated appellant's wage-loss compensation effective August 30, 2016 pursuant to 20 C.F.R. § 10.500(a) based on her earnings had she accepted the limited-duty assignment. However, by decision dated August 31, 2017, a representative of OWCP's Branch of Hearings and Review reversed OWCP's termination action due to OWCP's failure to provide her with a notice of proposed termination.

In September 2017, OWCP referred appellant to Dr. Steven M. Ma, a Board-certified orthopedic surgeon, for a second opinion examination and requested that he provide an opinion on her ability to work.

In an October 18, 2017 report, Dr. Ma reported his findings on physical examination and noted that they did not support appellant's severe pain complaints nor did they warrant additional surgery. He concluded that the examination findings, as well as the results of a July 20, 2017

⁴ Appellant has a prior claim, filed under a separate claim number, for an August 27, 2009 injury which was accepted for cervical and lumbar strains. She also filed claims for March 11 and July 30, 2003 injuries which were administratively handled by OWCP due to no lost time from work. Appellant underwent OWCP-approved low back surgery on January 23, 2014 which included decompression/fusion procedures between the L3 and S1 disc levels.

functional capacity evaluation, showed that she could currently perform the duties of the light-duty assignment offered by the employing establishment on August 30, 2016.

On December 1, 2017 the employing establishment again offered appellant a light-duty assignment.⁵ In a December 1, 2017 letter, a human resources specialist indicated that the medical evidence of record showed that she could perform restricted work in a light-duty assignment. The specialist indicated that the light-duty assignment was based on appellant's medical restrictions as detailed by Dr. Ma. She noted that the offer served as assurance that appellant's duties during her period of recovery would not exceed the physical requirements outlined in the offer. An attached document for the administrative support position bore the heading "Veterans Health Administration -- Light[-]Duty Assignment" and described the duties of the assignment which were mostly clerical in nature. The assignment was for full-time work and had an annual salary of \$61,036.00. The assignment's physical requirements included sitting and using a computer for data entry and conducting research. The position allowed the ability to reposition as needed for comfort and required lifting, pushing, and pulling up to 10 pounds. It did not require overhead use of the arms, bending, squatting, or twisting.

On December 6, 2017 the employing establishment advised OWCP that appellant had refused the offered light-duty assignment and that she had indicated that she would obtain work restrictions from her attending physicians. On December 12, 2017 OWCP received an undated report from Dr. Khamsi who indicated that appellant could only perform the light-duty position for six hours per day with frequent breaks.⁶

In a December 12, 2017 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation pursuant to 20 C.F.R. § 10.500(a) based on her earnings had she accepted a temporary, limited-duty assignment. It noted that it had been advised that she accepted a "temporary light[-]duty assignment" offered by the employing establishment on December 1, 2017, but that she, on her own accord, had limited her performance of work to six hours per day effective December 12, 2017. OWCP indicated that the weight of the medical evidence, represented by Dr. Ma's opinion, showed that appellant could perform the temporary assignment as offered. It noted that her case would be held open for 30 days to afford her an opportunity to accept the full assignment and report to duty, or arrange for a report date without penalty. If appellant chose not to accept "this assignment in full," she was required to provide a written explanation of her reasons during the allotted period. OWCP noted, "If you decline to report to the temporary light[-]duty assignment, and fail to demonstrate that the declination is justified (within the allotted 30 days), your right to wage[-]loss compensation will be terminated indefinitely since this light[-]duty assignment has no projected end date."

⁵ The assignment would be available to appellant on December 6, 2017 and it appears that the assignment had the same duties/physical requirements as the assignment that was offered to her on August 30, 2016. The Board notes that appellant was receiving wage-loss compensation on the periodic rolls at the time the employing establishment offered the light-duty assignment on December 1, 2017.

⁶ It appears that appellant attempted to perform the offered light-duty position for a brief period. However, the precise extent of this attempt is unclear from the case record.

In a January 8, 2018 letter, counsel argued that appellant had not completely abandoned the light-duty assignment. She asserted that the reports of attending physicians showed that appellant could not perform the assignment for eight hours per day.

Appellant submitted several reports from attending physicians, including a December 26, 2017 report from Dr. James I. Rho, a Board-certified anesthesiologist, who advised that she reported that she had returned to work, but could not tolerate an eight-hour work shift. Dr. Rho recommended that she work six hours per day. In a January 9, 2018 report, Dr. Haider noted that appellant had reported her back had worsened due to prolonged sitting at work and he indicated that she was temporarily totally disabled. On February 6, 2018 he noted her complaints of back pain and indicated that she could not return to work. Dr. Haider advised that appellant was awaiting surgery intended to relieve her intense lower back pain.

By decision dated February 16, 2018, OWCP terminated appellant's wage-loss compensation, effective February 16, 2018, pursuant to 20 C.F.R. § 10.500(a) based on her earnings had she accepted a temporary, limited-duty assignment. It indicated that the weight of the medical evidence, represented by Dr. Ma's opinion, showed that she could perform the full time light-duty assignment.

On March 13, 2018 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing, held on August 14, 2018, counsel argued that the reports of attending physicians showed that appellant could not perform the offered light-duty assignment on a full-time basis. Appellant submitted additional reports of Dr. Khamsi and Dr. Haider which discussed her medical condition in late-2018.

By decision dated October 29, 2018, OWCP's hearing representative affirmed OWCP's February 16, 2018 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.⁷

OWCP regulations at 20 C.F.R. § 10.500(a) provide in relevant part:

“(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

⁷ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

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 within the employee's work restrictions."⁸

When it is determined that an appellant is no longer totally disabled from work and is on the periodic rolls, OWCP's procedures provide that the claims examiner should evaluate whether the evidence of record establishes that light-duty work was available within his or her restrictions. The claims examiner should provide a pretermination or prereduction notice if appellant is being removed from the periodic rolls.⁹ When the light-duty assignment either ends or is no longer available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.¹⁰

OWCP's procedures further advise, "If there would have been wage loss if the claimant had accepted the light-duty assignment, the claimant remains entitled to compensation benefits based on the temporary actual earnings WEC calculation (just as if he/she had accepted the light-duty assignment)."¹¹

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective February 16, 2018, pursuant to 20 C.F.R. § 10.500(a) based on her earnings had she accepted a temporary, limited-duty assignment.

OWCP has terminated appellant's wage-loss compensation on February 16, 2018 pursuant to 20 C.F.R. § 10.500(a). The Board is unable to determine from the current record whether its termination of her benefits is proper under section 10.500(a) as it cannot be established whether she had been offered a temporary or a permanent employment position. OWCP procedures require that, when an employing establishment provides an alternate employment position to a partially disabled employee who cannot perform his or her date-of-injury position, it must be determined whether the offered position is permanent or temporary in nature.¹² If the employment offered to an employee on the periodic rolls is temporary and the employee does not accept the position section 10.500(a) applies.¹³ However, if the offered employment is permanent in nature and the employee does not accept the position the penalty provisions under 5 U.S.C. § 8106(c) apply.¹⁴

⁸ 20 C.F.R. § 10.500(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9(c)(1) (June 2013).

¹⁰ *Id.*

¹¹ *Id.* at Chapter 2.814.8(c)(10).

¹² *Id.* at Chapter 2.814.4.

¹³ *Supra* note 8.

¹⁴ *See C.W.*, Docket No. 18-1779 (issued May 6, 2019) (termination under 20 C.F.R. § 10.500(a) reversed given that it was unclear whether the assignment offered to the claimant on the periodic rolls was temporary in nature).

On December 1, 2017 the employing establishment provided appellant a written job offer as a full-time modified administrative assistant beginning December 6, 2017. The document effectuating the offer bore the heading “Veterans Health Administration – Light[-]Duty Assignment.” The assignment was for an administrative assistant with full-time work and had an annual salary of \$61,036.00. The cover letter for the written job offer, completed by a human resources specialist for the employing establishment, provided notice that the offer served as assurance that appellant’s duties during her period of recovery would not exceed the physical requirements outlined in the offer. However, the specialist did not provide an indication as to whether the offered assignment was temporary or permanent and her notice is vague in the absence of further clarifying documentation in the case record. When OWCP issued its notice of proposed termination of wage-loss compensation on December 12, 2017, it noted that appellant had limited her work to six hours per day in the “temporary light-duty assignment” provided by the employing establishment.¹⁵ The Board finds, however, that there is no documentation of record supporting the status of the offered assignment as temporary in nature.

Appellant was a recipient of wage-loss compensation on the periodic rolls at the time of the December 1, 2017 offer of employment. Therefore, to terminate her wage-loss compensation pursuant to 20 C.F.R. § 10.500(a), OWCP had the burden of proof to establish that the employment position was temporary in nature. This determination is critical as a permanent job offer would require OWCP to terminate benefits in compliance with the strict provisions of 5 U.S.C. § 8106(c). As it cannot be established that the assignment offered to appellant was a temporary position, OWCP has not met its burden of proof to terminate wage-loss compensation pursuant to section 10.500(a).¹⁶

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant’s wage-loss compensation, effective February 16, 2018, pursuant to 20 C.F.R. § 10.500(a) based on her earnings had she accepted a temporary, limited-duty assignment.

¹⁵ Although OWCP characterized the assignment as a “temporary light-duty assignment,” it also indicated in its December 12, 2017 notice that “this light[-]duty assignment has no projected end date.”

¹⁶ See *C.W.*, *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 12, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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