

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

L.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Auburn, WA, Employer**

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**Docket No. 17-0405
Issued: January 25, 2019**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 14, 2016 appellant, through counsel, filed a timely appeal from an October 19, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's entitlement to wage-loss compensation, effective January 11, 2016, pursuant to 20 C.F.R. § 10.500(a).

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.*

FACTUAL HISTORY

On April 7, 2014 appellant, then a 35-year-old sales associate, filed a traumatic injury claim (Form CA-1) alleging that on April 4, 2014 she strained her left shoulder when lifting a full tub of flats while in the performance of duty. OWCP accepted the claim on April 28, 2014 for left shoulder muscle spasm. On July 1, 2014 it expanded acceptance of the claim to include left shoulder closed acromioclavicular dislocation, left superior glenoid labrum lesion, and other affections of the left shoulder not otherwise classified.

Appellant submitted claims for compensation (Form CA-7) for disability from work commencing June 4, 2014. The time analysis forms (Form CA-7a) indicated that she was working intermittent part-time hours. Appellant stopped work on August 9, 2014. On October 3, 2014 she underwent left shoulder arthroscopic surgery. Appellant began receiving wage-loss compensation on the periodic rolls commencing September 21, 2014.

The record indicates that on February 9, 2015 the employing establishment offered appellant a temporary, four-hour per day, light-duty job as a sales solution team member, which required intermittent use of a telephone and intermittent light typing. Other physical requirements of the modified employment position were provided. A statement of accepted facts (SOAF) dated September 3, 2015, indicates that appellant accepted that light-duty job and returned to part-time work for four hours per day beginning February 17, 2015.³ She thereafter filed Form CA-7 claims for compensation for the remaining four hours of wage loss each day.

In a letter dated March 26, 2015, Dr. Nha Ton, an osteopath, explained that appellant had been excused from work for the period March 19 to 26, 2015, but was cleared to return to work on March 27, 2015. In a report dated April 21, 2015, he provided a history and results on examination. Dr. Ton reported that appellant had left shoulder pain with intermittent numbness, and would decrease her work to four days per week at four hours per day. Appellant stopped work again on April 29, 2015, but later returned to part-time work on intermittent dates, working up to four hours per day.

By report dated May 27, 2015, Dr. Ton indicated that appellant reported that her left shoulder had been getting worse and she had to leave work the previous day due to shoulder pain. He opined that she could only work light duty for four hours a day, three days per week.

On September 3, 2015 OWCP referred appellant along with a SOAF and the medical record to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion examination to determine the nature and status of her left shoulder condition.

Appellant stopped work again on October 7, 2015 as Dr. Ton recommended time off from work due to clicking and popping with movement, bicep pain, and some numbness over the left deltoid area. OWCP continued to pay her wage-loss compensation at the established four hours per day on the supplemental rolls.

³ A fiscal note dated March 2, 2015 reveals that appellant continued to receive wage-loss compensation on the periodic rolls through March 7, 2015, which created an overpayment of compensation in the amount of \$1,827.35.

In a report dated October 20, 2015, Dr. Dinenberg provided a history and results on examination. He diagnosed chronic left shoulder impingement, causally related to the April 4, 2014 employment injury and noted objective findings including diminished range of motion of the left shoulder secondary to pain. Dr. Dinenberg did not consider further surgical treatment to be necessary as a result of the accepted employment injury. He found that appellant was at maximum medical improvement (MMI) for her left shoulder condition. Dr. Dinenberg opined that she could work full time in the sales solution team position, without restrictions. In an attached work capacity evaluation form (Form OWCP-5c) he assigned restrictions for the left shoulder for reaching above the shoulder level, and for repetitive pushing, pulling, and lifting up to 10 pounds for three hours per day.

On November 5, 2015 the employing establishment offered appellant a temporary full-time, light-duty position as a sales solution team member. The job offer indicated that the employment position was available beginning November 9, 2015, and that it was subject to revision based on changes in appellant's physician restrictions or the availability of adequate work.

On November 9, 2015 Dr. Ton opined that appellant should remain off work until November 16, 2015 due to her left shoulder injury.

On November 12, 2015 OWCP issued appellant a notice of proposed termination. It noted that it had been advised that she had not reported for the job assignment offered by the employing establishment on November 5, 2015. Appellant was advised that OWCP found that the job was within the work restrictions provided by Dr. Dinenberg in his second opinion examination. OWCP noted that her family physician, Dr. Ton, had not discussed a reason for reducing her work hours or placing her off work. It indicated that its procedures held that a temporary light-duty job may be provided when a claimant has stable and had well-defined or permanent restrictions. OWCP cited to 20 C.F.R. § 10.500(a) and asserted that a claimant who declines a temporary light-duty job assignment is not entitled to compensation for the duration of the assignment. It further advised appellant "If you decline to report to the temporary light[-]duty assignment on a full-time basis and you 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. [Appellant's] entitlement to medical benefits or schedule award will not be affected by this determination."

Beginning November 27, 2015, appellant filed Form CA-7 claims for wage-loss compensation for total disability from work from November 16 through December 25, 2015. In support of her claims, she filed additional medical evidence including a November 19, 2015 note from Dr. Ton, wherein he contended that her absences from November 16 to 23, 2015 should be excused due to left shoulder pain. In a note dated November 23, 2015, appellant opined that she should remain off work on December 24, 2015.⁴

⁴ Appellant remained on the supplemental rolls through December 25, 2015, with payment for 40 hours of lost time for the period December 14 through 25, 2015.

In a report dated January 4, 2016, Dr. Ton noted appellant's job offer and released her to light-duty work from January 4 through 10, 2016 and then full-duty work starting on January 11, 2016.

By decision dated January 11, 2016, OWCP terminated appellant's entitlement to wage-loss compensation, effective January 11, 2016.⁵ It explained that the termination was due to her failure to accept the November 5, 2015 temporary light-duty offer.

On January 19, 2016 appellant, through counsel, requested a hearing before an OWCP hearing representative. A hearing was held on August 11, 2016. During the hearing, appellant asserted that she had accepted the job on January 11, 2016. She indicated, however, that she was told the job was no longer available. Appellant further noted that she again returned to work as of February 9, 2016 at a new duty station after an additional offer of work was made by the employing establishment.

By decision dated October 19, 2016, OWCP's hearing representative affirmed the January 11, 2016 decision. The hearing representative found that OWCP had properly terminated appellant's entitlement to wage-loss compensation, effective January 11, 2016, pursuant to 20 C.F.R. § 10.500(a).

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.⁶ Section 10.500(a) states that appellant is only entitled to wage-loss compensation for the periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁷

OWCP procedures note that 20 C.F.R. § 10.500 provides the basic rules governing continuing receipt of compensation benefits and return to work as follows:

“(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

⁵ OWCP initially issued a decision dated December 23, 2015 that terminated wage-loss compensation effective December 28, 2015. However, it subsequently determined that appeal rights had not been properly included with that decision.

⁶ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁷ 20 C.F.R. § 10.500(a).

available. Similarly, an employee receiving continuing periodic payments for disability was not prevented 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. (The penalty provision of 5 U.S.C. 8106(c)(2) will not be imposed on such assignments under this paragraph)."⁸

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective January 11, 2016, pursuant to 20 C.F.R. § 10.500(a) as the medical evidence of record shows that she could in fact perform the light-duty assignment offered by the employing establishment on November 5, 2015.

The physical requirements of the offered temporary light-duty assignment were within appellant's medical restrictions provided by Dr. Dinenberg, in his capacity as a second opinion referral physician.

In his report dated October 20, 2015, Dr. Dinenberg noted appellant's history of injury and treatment and opined that she was at MMI for her left shoulder condition and was not in need of additional surgical treatment. He further opined that she was capable of working full time in the temporary light-duty sales solution team position without restrictions after reviewing the position description provided to him for review. Dr. Dinenberg did note that appellant required work restrictions for her left shoulder, but they did not impact her ability to perform the full-time position.

The evidence establishes temporary light-duty work within the restrictions set by Dr. Dinenberg was available as of November 5, 2015 and that appellant was notified in writing on November 5, 2015 of the available job which was within her work restrictions.⁹

Furthermore, appellant's own treating physician, Dr. Ton, in a January 4, 2016 note, released appellant to full-duty employment starting on January 11, 2016, which is the date that OWCP used as the effective date of the termination. There is no contemporaneous medical evidence of record which restricted appellant from returning to work in the offered temporary light-duty position of a sales solution team member at the time of the termination pursuant to 20 C.F.R. § 10.500(a).

Thus, the Board finds that OWCP met its burden of proof to terminate appellant's entitlement to compensation, effective January 11, 2016, pursuant to 20 C.F.R. § 10.500(a).

⁸ *Id.*; see also *T.F.*, 16-0851 (issued June 19, 2017); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.2(c)(a) (June 2013).

⁹ See *S.M.*, Docket No. 15-1667 (issued April 20, 2016).

On appeal, counsel contends that the decision of October 19, 2016 is contrary to fact and law. For the reasons set forth above the Board finds that, under the provisions of 20 C.F.R. § 10.500(a), OWCP properly terminated appellant's compensation.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's entitlement to wage-loss compensation, effective January 11, 2016, pursuant to 20 C.F.R. § 10.500(a).

ORDER

IT IS HEREBY ORDERED THAT the October 19, 2016 decision of the Office of Workers' Compensation Programs is affirmed.¹⁰

Issued: January 25, 2019
Washington, DC

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

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

¹⁰ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.