United States Department of Labor
Employees' Compensation Appeals Board

I.C., Appellant	)	
and	)	**Docket No. 17-1684**
	)	**Issued: January 22, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Thousand Oaks, CA, Employer	)	

Appearances:
Sally F. LaMacchia, Esq., 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 July 31, 2017 appellant, through counsel, filed a timely appeal from a July 11, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

[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.

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.[3]

ISSUE

The issue is whether appellant has met his burden of proof to establish total disability for the period commencing February 24, 2012 and continuing, causally related to his accepted June 2, 2007 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances as set forth in the prior decisions of the Board are incorporated herein by reference. The relevant facts are as follows.

On September 25, 2007 appellant, then a 45-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed carpal tunnel syndrome and other conditions due to factors of his federal employment. He noted that he first became aware of his condition on June 2, 2007 and realized its relation to his federal employment on August 21, 2007. Appellant stopped work on June 2, 2007 and has not returned to full-duty work.[5] By decision dated October 15, 2008, OWCP accepted his claim for right carpal tunnel syndrome. By decision dated April 16, 2015, it expanded the acceptance of the claim to include the additional conditions of bilateral carpal tunnel syndrome, bilateral lesion of ulnar nerve, thoracic or lumbosacral neuritis or radiculitis not otherwise specified, sprain of neck, and sprain of the lumbar back. In a February 23, 2012 report, Dr. Mark T. Montgomery, an orthopedic hand surgeon, advised that appellant was 12 weeks post right cubital tunnel release. He noted that appellant was moving out of the country to the Philippines in two weeks. Dr. Montgomery examined appellant and found that he was status post right cubital tunnel and right carpal tunnel release. He also found that appellant was post left cubital tunnel and left carpal tunnel release and ulnar nerve compression at the wrist. Dr. Montgomery also diagnosed left shoulder impingement, bilateral forearm tendinitis, trapezial and paracervical strain, and right thumb carpometacarpal (CMC) synovitis. He indicated that appellant was moving out of the country and it would take approximately three months for

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that following the July 11, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

[4] Docket No. 13-1686 (issued September 29, 2014); Docket No. 11-1808 (issued March 23, 2012); Docket No. 09-0481 (issued September 14, 2009).

[5] The Board notes that an SF-50 form was filed by the employing establishment on August 24, 2009, with an effective date of July 25, 2009, noting that appellant had separated from federal service due to "separation disability" as he had exhausted available leave entitlement.

him to reach a permanent and stationary status after his most recent surgery. Dr. Montgomery provided work restrictions to include no heavy, repetitive or forceful use of the hands.

In a July 26, 2012 report, Dr. Montgomery opined that appellant was permanent and stationary and that he had prophylactic work restrictions of no heavy lifting and no repetitive or forceful gripping, twisting, pushing, pulling or manipulating with the hands.

On April 28, 2015 appellant filed a claim for compensation (Form CA-7) for total disability for the period March 19, 2008 to May 30, 2015.

In a letter dated July 23, 2015, OWCP requested that Dr. Montgomery provide an opinion regarding whether appellant had continuing residuals or disability due to his accepted condition, whether he was capable of returning to work in any capacity, and whether additional medical treatment was warranted. It noted that in a report dated July 26, 2012 he had noted that appellant had reached maximum medical improvement (MMI) for his accepted conditions and was capable of returning to work with prophylactic restrictions against heavy lifting and repetitive or forceful gripping, twisting, pushing, pulling, or manipulating with the hands.

In a letter dated July 27, 2015, OWCP notified the employing establishment of appellant's April 28, 2015 claim for compensation. It noted that he stopped work on June 2, 2007 and that Dr. Montgomery had released him to modified duty on February 23, 2012. OWCP requested that the employing establishment determine whether modified work was available within the restrictions assigned by Dr. Montgomery in his July 26, 2012 report. It afforded the employing establishment 30 days to provide a written response to the request.

In an August 14, 2015 memorandum, OWCP accepted that appellant was totally disabled from work for the period March 19, 2008 to February 23, 2012 and explained that appellant was entitled to compensation for that period. It noted, however, that, with regard to the period February 24, 2012 and continuing, further development was needed to determine whether the employing establishment was able to accommodate his restrictions. OWCP also noted that, if appellant was receiving OPM benefits, and an election would have to be made as OPM and OWCP benefits were not payable for the same period of time.

On August 26, 2015 OWCP provided appellant with an election of benefits form (Form CA-1105).

In an August 18, 2015 report, Dr. Montgomery noted appellant's history and examined him, noting the complexity of the issues presented and indicating that he had been living in the Philippines and receiving treatment in that country. He diagnosed: right ring trigger finger; status post bilateral carpal tunnel releases, cubital tunnel releases, and ulnar nerve decompression at the wrists; bilateral forearm tendinitis; right thumb CMC tendinitis; bilateral shoulder impingement; and trapezial and paracervical strain. Dr. Montgomery noted that appellant had a flare up of his industrial injury. He opined that appellant's condition remained permanent and stationary with regard to his upper extremities. Dr. Montgomery noted that appellant required evaluation of his ongoing neck and back complaints by a spine specialist, and opined that appellant was not capable of performing his usual and customary duties. He provided work restrictions including no heavy, repetitive, or forceful use of the hands.

In a September 2, 2015 letter, counsel objected to OWCP requesting the employing establishment provide a response to whether they would have been able to provide modified work for appellant within the restrictions provided by Dr. Montgomery.

In a September 7, 2015 election form, appellant elected to receive FECA benefits in preference to OPM benefits and indicated that the effective date of his election was March 19, 2008.[6]

In a September 15, 2015 report, Dr. Kamyar Assil, Board-certified in pain management, noted appellant's medical history, his review of the medical record, and conducted a physical examination. He noted that appellant was not currently working, he had been receiving social security disability, and retirement benefits from OPM. Dr. Assil diagnosed bilateral upper extremity pain; neck pain and upper back pain; low back pain and right lower extremity pain with numbness and weakness; history of previous bilateral carpal tunnel release and ulnar nerve release surgeries at the wrist, and cubital tunnel release at the inner elbows; magnetic resonance imaging (MRI) scan evidence for cervical disc disease and upper thoracic disc disease; and lumbar spondylosis, degenerative disc disease. He noted that his ability to return to work is greatly limited and assigned restrictions of no repetitive bending or lifting, with lifting limited to no more than 15 pounds. Dr. Assil explained that appellant used a cane to ambulate, and any vocation for him should restrict ambulation.

In a letter dated September 30, 2015, OWCP explained that appellant stopped work in 2007 and officially separated from employment with the employing establishment on July 25, 2009. Furthermore, the acceptance of appellant's claim was not expanded until April 16, 2015. OWCP explained that it was developing the claim to determine entitlement to compensation benefits.

In letters dated November 6, 2015 and December 15, 2016, OWCP again requested that the employing establishment determine whether light-duty work would have been available within appellant's restrictions. In a December 20, 2016 response, S.S., a health and resource management specialist with the employing establishment, explained that modified duty would have been available in connection with his work injury. He explained, however, that appellant had voluntarily elected disability retirement and was officially separated from employment effective July 25, 2009, as noted on an attached PS Form 50. This form noted that his last day in pay status was October 5, 2007 and that he was separated due to being in a leave without pay status in excess.

In a January 17, 2017 development letter, OWCP advised appellant of the deficiencies in his claim. It explained that the employing establishment would have been able to accommodate a light-/limited-duty assignment within his medical restrictions for the claimed period had he not voluntarily retired and elected OPM benefits. OWCP requested that appellant provide evidence to support why he did not work the light-/limited-duty assignment and was now seeking compensation. It also noted that the record revealed that appellant was separated from his federal

[6] By letter dated September 21, 2015, OWCP requested that OPM provide an itemization of the amount of reimbursement and the period covered by OPM benefits during the period March 19, 2008 to February 23, 2012. OPM responded by letter dated May 4, 2016 noting that appellant had been paid OPM benefits in the sum of $34,811.80 for the period March 19, 2008 through February 23, 2012. OWCP made a subsequent retroactive payment of temporary total disability for the claimed period.

employment on July 25, 2009 and had not returned as he was currently receiving OPM benefits. Appellant was allotted 30 days to submit the additional evidence requested.

In a March 27, 2017 letter, counsel explained that the reason that appellant had not returned to light or limited duty was because he had not been presented with a written job offer of suitable work. She argued that he was not afforded the opportunity to accept or decline work, and he was not notified by OWCP or the employing establishment that suitable work was available. Counsel also repeated her disagreement with OWCP and its belated request to the employing establishment inquiring into whether suitable work was available.

In an April 5, 2017 letter, counsel repeated her prior arguments. She also argued that OWCP should have determined whether the position offered was suitable and consistent with appellant's restrictions.

By decision dated July 11, 2017, OWCP denied appellant's claim for wage-loss compensation for the period February 23, 2012 and continuing.

LEGAL PRECEDENT

OWCP regulations at 20 C.F.R. § 10.500(a) provides:

> "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 CA-7 to the extent that evidence contemporaneous with the period claimed on a CA-7 establishes that an employee had medical work restrictions in place; that light duty within those restrictions was available; and that the employee was previously notified in writing that such duty was available…. (The penalty provision of 5 U.S.C. § 8106(c)(2) will not be imposed on such assignments under this paragraph.)

Proceedings under FECA are nonadversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to compensation; however, OWCP shares responsibility in the development of the evidence to see that justice is done.[7]

ANALYSIS

The Board finds that this case is not in posture for decision.

The Board finds that it is unable to make an informed decision as to whether OWCP properly determined that appellant was not entitled to wage-loss compensation benefits under 20 C.F.R. § 10.500(a) for the period February 24, 2012 and continuing. The record lacks evidence establishing that light-duty employment within Dr. Montgomery's restrictions was contemporaneously made available to appellant and that he was notified in writing that such light-

[7] *William J. Cantrell*, 34 ECAB 1223 (1983).

duty was available. Although the employing establishment contended to OWCP that light-duty employment would have been available within the physician's restrictions on February 24, 2012, there is no evidence documenting a contemporaneous light-duty job offer to appellant. While OWCP requested that appellant provide evidence to support why he did not work the light-/limited-duty assignment and was now seeking compensation, it did not first establish that he was provided an offer of light-/limited-duty work. Without the evidence set forth above an informed decision cannot be reached on the relevant issue in this case. Therefore, further development is required. The case will accordingly be remanded to OWCP for further development of the evidence. Following this and any such further development as deemed necessary it shall issue a *de novo* decision regarding entitlement to disability for the claimed period.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: January 22, 2019
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