

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

A.H., Appellant

and

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

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**Docket No. 18-0960
Issued: January 29, 2019**

Appearances:

Howard L. Graham, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 9, 2018 appellant, through counsel, filed a timely appeal from a February 20, 2018 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.³

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.*

³ The Board notes that by a November 11, 2017 decision, OWCP granted appellant a schedule award for six percent permanent impairment of the right upper extremity. As appellant has not appealed from the November 11, 2017 OWCP decision, it is not properly before the Board for review. See 20 C.F.R. § 501.3.

ISSUE

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

FACTUAL HISTORY

On December 7, 2015 appellant, then a 55-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she injured her right upper extremity due to excessive use while in the performance of duty. She stopped work on December 3, 2015.

OWCP initially denied the claim on April 7, 2016 as appellant had not established the alleged employment factors. In correspondence dated January 6, 2017, received by OWCP on January 9, 2017, appellant, through counsel, requested a hearing with OWCP's Branch of Hearings and Review.⁴ By decision dated February 2, 2017, an OWCP hearing representative denied the hearing request because it was untimely filed, noting that the issue could equally be addressed by requesting reconsideration with OWCP.

On April 3, 2017 appellant, through counsel, requested reconsideration. In a duty status report (Form CA-17) dated March 9, 2017, Dr. David J. Hagen, a Board-certified family physician, advised that appellant could return to work in a modified position. He provided restrictions of lifting and carrying five pounds for two hours daily, kneeling, bending, stooping, simple grasping, and fine manipulation to four hours daily, driving a vehicle to two hours daily, and no climbing, pulling, pushing, or reaching above the shoulder.

By decision dated June 21, 2017, OWCP found the evidence submitted sufficient to warrant modification and vacated the April 7, 2016 decision.⁵ It accepted tenosynovitis of the right shoulder, medial epicondylitis of the right elbow, and infective tenosynovitis of the right wrist.

Appellant thereafter submitted claims for compensation (Form CA-7) for the period December 20, 2015 to February 19, 2016, March 7 to May 25, 2016, and May 26, 2016 to June 25, 2017. She also forwarded a June 12, 2017 letter from the Office of Personnel Management (OPM) indicating that her disability retirement application had been approved.

In duty status reports dated April 11 and June 30, 2017, Dr. Hagen repeated his restrictions. Appellant telephoned OWCP, indicating that she was electing disability retirement effective May 26, 2016. OWCP paid appellant supplemental rolls wage-loss compensation from December 20, 2015 to February 19, 2016, and March 7 to May 25, 2016.

⁴ Counsel attached a hearing request dated April 18, 2016. There is no record of its receipt by OWCP prior to January 9, 2017.

⁵ The record indicates that under OWCP File No. xxxxxx007 OWCP accepted right radial styloid tenosynovitis and right shoulder tendinitis, and that under that claim appellant returned to full duties in July 2013. In a February 21, 2017 decision, under that claim, an OWCP hearing representative denied appellant's claim for recurrent disability. He noted that she had filed the instant claim, adjudicated under OWCP File No. xxxxxx464.

On July 6, 2017 the employing establishment offered appellant a modified rural carrier assignment. The duties were: case labels for 1 hour; Redbook and WebEES for 30 minutes to 2 hours; pull weeds and trim bushes for 4 to 6 hours; and sweep sidewalks and rake for 1 to 2 hours. The physical requirements included: standing, walking, and twisting 8 hours intermittently; kneeling, bending, and stooping 2 to 4 hours intermittently; simple grasping 0 to 4 hours intermittently; and fine manipulation 30 minutes to 2 hours. The effective/available date was July 8, 2017.

Appellant telephoned OWCP on July 10, 2017, indicating that she had retired. An employing establishment notice of separation and notification of personnel action processed on July 10, 2017 indicated that appellant retired on OPM disability effective June 26, 2017.

By letter dated July 10, 2017, counsel maintained that the job offer was unacceptable because appellant did not have the physical ability to pull weeds, trim bushes, sweep, and rake.

On July 17, 2017 OWCP paid appellant compensation on the supplemental rolls for the period May 26, 2016 through June 23, 2017.

In a treatment note dated June 30, 2017, received by OWCP on July 18, 2017, Dr. Hagen noted that appellant's right upper extremity pain remained problematic and that she could not use her right arm for any repetitive motion or activity above the chest level. Following physical examination, he diagnosed tenosynovitis of the right shoulder which disabled her from the rural carrier job, medial epicondylitis of the right elbow, aggravated by gripping, and tenosynovitis of the right wrist. Dr. Hagen advised that appellant was totally disabled from the rural mail carrier position.

In a notice dated August 7, 2017, OWCP proposed to terminate appellant's wage-loss compensation.⁶ It advised her that it had reviewed the work restrictions provided by Dr. Hagen on June 30, 2017 and determined that the modified rural carrier position offered appellant was within her restrictions. OWCP informed appellant of the provisions of 20 C.F.R. § 10.500(a) and advised her that her entitlement to wage-loss compensation would be terminated under this provision if she did not accept the offered temporary assignment or provide a written explanation with justification for her refusal within 30 days. It noted that upon acceptance, as appellant's pay would be equal to or greater than the current pay of the job held when injured, she would have sustained no wage loss if she had accepted the position.

Dr. Hagen forwarded treatment notes dated July 25 and August 7, 2017 in which he described physical examination findings, reiterated his diagnoses, and noted that appellant was permanently disabled from her job. On a work capacity evaluation (Form OWCP-5c) dated July 25, 2017, Dr. Hagen again provided physical limitations with a 10-pound lifting restriction for 2 hours daily. He continued to advise that appellant could not push, pull, or reach above the shoulder.

⁶ The notice was initially sent on July 17, 2017, but as it was not forwarded to counsel, it was resent on August 7, 2017.

By decision dated September 11, 2017, OWCP terminated appellant's wage-loss compensation in accordance with 20 C.F.R. § 10.500(a), effective September 8, 2017. It noted that she had not accepted the temporary modified position which was found to be within Dr. Hagen's restrictions.

In a request postmarked September 19, 2017, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. She resubmitted the July 25, 2017 work capacity evaluation completed by Dr. Hagen.

By decision dated February 20, 2018, an OWCP hearing representative affirmed the September 11, 2017 decision that terminated appellant's wage-loss compensation pursuant to 20 C.F.R. § 10.500(a). She found that the offered position was within Dr. Hagen's restrictions, and that appellant had been afforded 30 days to accept the position. The hearing representative concluded that, as OWCP complied with the provisions of section 10.500(a) of its regulations, it properly terminated appellant's wage-loss compensation effective September 8, 2017.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁷

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.)"

When it is determined that an employee is no longer totally disabled from work and is not on the periodic rolls, OWCP procedures provide that the claims examiner should determine whether light-duty work is available within the employee's medical restrictions during the period for which compensation is claimed and a development letter should be sent to appellant setting forth the standards under section 10.500(a) including medical evidence required to establish a claim for wage-loss compensation. The claims examiner should also obtain documentation from the employing establishment that written notification of light-duty work availability was provided

⁷ S.V., Docket No. 17-1268 (issued March 23, 2018); I.J., 58 ECAB 408 (2008).

to the employee, if not already in the file.⁸ The claims examiner, when adjudicating the claim for wage-loss compensation, must also determine whether the evidence of record establishes that the employee was provided with written notification of a light-duty job assignment, that the job was within the employee's restrictions, and that the job was available to the employee during the period wage-loss compensation was claimed.⁹

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation under section 20 C.F.R. § 10.500(a).

The Board finds that appellant filed claims for compensation (Form CA-7) and received compensation on the supplemental rolls through June 23, 2017. No additional claims for compensation were filed. The Board further finds that OWCP had not made a determination as to appellant's loss of wage-earning capacity (LWEC). As of June 25, 2017 appellant commenced receipt of OPM retirement benefits and no longer sought benefits under FECA. As appellant was not on the periodic rolls, nor was there an LWEC determination in place, OWCP erred in invoking the termination provisions of 20 C.F.R. § 10.500(a).

Should appellant file a proper election form and choose to return to FECA compensation by filing a claim for compensation, and she returns to the periodic compensation rolls, OWCP may request that the employing establishment offer appellant a light-duty employment position and then invoke the provisions of section 10.500(a).

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation pursuant to 20 C.F.R. § 10.500(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9(b)(2) (June 2013).

⁹ *Id.*; see also Chapter 2.814.9(b)(3) (June 2013).

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 29, 2019
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