United States Department of Labor
Employees' Compensation Appeals Board

C.W., Appellant	)	
and	)	**Docket No. 18-1779**
	)	**Issued: May 6, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Macon, GA, Employer	)	

Appearances:
Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 25, 2018 appellant, through counsel, filed a timely appeal from a July 25, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the 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]

[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 following the July 25, 2018 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 additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective February 4, 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 January 10, 2017 appellant, then a 36-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 4, 2017 she sprained her back when she bent over to pick up a package while in the performance of duty. She stopped work on the date of her injury. On February 15, 2017 OWCP accepted appellant's claim for lower back strain. Appellant received continuation of pay (COP) through February 18, 2017, and OWCP paid wage-loss compensation for temporary total disability beginning February 19, 2017. OWCP subsequently placed her on the periodic compensation rolls, effective May 28, 2017.

In a report dated July 14, 2017, Dr. Shean E. Phelps, a family practitioner, noted a January 4, 2017 history of injury when appellant picked up a large package at work and felt a sharp pain in her back. He also noted there was no history of a previous injury to the lower back. Dr. Phelps examined appellant and reviewed her latest diagnostic study.[4] He diagnosed lower back strain and lumbar intervertebral disc disorders with myelopathy. Dr. Phelps recommended that appellant return to work with the temporary restrictions of no lifting, pushing, pulling, or carrying over 10 pounds; no prolonged siting, standing, or walking; and no squatting or twisting. He also indicated that she should be allowed to change positions frequently, wear a back brace, and stretch if needed.

In a September 25, 2017 report, Dr. Jeffrey A. Fried, a Board-certified orthopedic surgeon and second opinion examiner, indicated that he reviewed appellant's history, including a statement of accepted facts, and the medical record. He related her complaints of back and right leg pain. Upon examination of appellant's lumbar spine, Dr. Fried observed tenderness only to deep palpation. He reported limited range of motion of the back and positive straight leg raise testing on the right. Dr. Fried concluded that appellant's lumbar strain had resolved, but that her examination findings correlated with a protruding disc on the right. He diagnosed lumbar disc protrusion at L5-S1 and opined that it was work related. Dr. Fried reported that appellant could work in a full-time, limited-duty capacity. He completed a work capacity evaluation form (OWCP-5c), which noted restrictions of sitting for four hours per day, walking for three hours per day, standing for two hours per day, and one hour each of reaching, twisting, bending/stooping, squatting, kneeling, and operating a motor vehicle at work for more than two hours. Dr. Fried precluded reaching above shoulder and climbing. He also imposed a two-hour, 20-pound restriction with respect to pushing, pulling and lifting. Lastly, Dr. Fried indicated that appellant should have a 10-minute break every 2 hours.

On September 28, 2017 OWCP expanded acceptance of appellant's claim to include right-sided L5-S1 lumbar disc displacement.

[4] A July 13, 2017 lumbar magnetic resonance imaging (MRI) scan revealed a small midline disc protrusion at L4-5 and large broad-based right disc protrusion at L5-S1.

In a report dated September 28, 2017, Dr. Thomas Bernard, Jr., a Board-certified orthopedic surgeon, noted that he evaluated appellant for follow-up of a January 4, 2017 injury. He reported examination findings of back pain with sciatic stretch and flexion and bending to 30 degrees. Dr. Bernard diagnosed lumbar spondylosis, lumbar annular tear, and L5-S1 disc protrusion. He opined that appellant could work with a 10-pound weight restriction, no bending, stooping, or squatting, and the ability to change positions as needed.

On October 2, 2017 OWCP requested that the employing establishment, to the extent possible, prepare a written job offer consistent with Dr. Fried's September 25, 2017 multiple work restrictions.

On October 27, 2017 the employing establishment provided appellant a written job offer as a full-time modified rural carrier beginning November 4, 2017. The position was full time with an annual salary of $59,164.00. The duties of the modified assignment were answering the telephone for four hours, reviewing hold mail for accurate timely resume for two hours, and reviewing parcel return from street stop the clock scan, and applying change of address (COA) to Form 3982 for one hour. The physical requirements of the position included: sitting for four hours; bending, standing, pushing, pulling, walking, and lifting for two hours; and reaching, stooping, kneeling, and squatting for one hour.

On November 9, 2017 the employing establishment advised OWCP that appellant had not returned to work and had not responded to its October 27, 2017 job offer. It further noted that the position remained available.

On December 11, 2017 OWCP verified with the employing establishment that the modified rural carrier position was still available.

On December 13, 2017 OWCP issued appellant a notice of proposed reduction. It noted that it had been advised that she had not responded nor reported to the "temporary job assignment" offered by the employing establishment on October 27, 2017.[5] OWCP informed appellant that the modified job offer was within the work restrictions provided by Dr. Fried in his September 25, 2017 second opinion report. It also informed her of the provisions of 20 C.F.R. § 10.500(a) and further advised that her entitlement to wage-loss compensation would be reduced 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. OWCP noted that upon acceptance, appellant would sustain no loss in wage-earning capacity (WEC).

In a January 19, 2018 letter, the employing establishment confirmed that the October 27, 2017 job offer remained available and that appellant had neither responded, nor returned to work.

By decision dated January 31, 2018, OWCP terminated appellant's wage-loss compensation, effective February 4, 2018, pursuant to 20 C.F.R. § 10.500(a).

On February 22, 2018 appellant advised OWCP that she had returned to work that day in a full-time, limited-duty capacity.

[5] On December 11, 2017 OWCP verified with the employing establishment that the modified rural carrier position was still available.

On February 27, 2018 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. A hearing was held on June 20, 2018.

During the hearing, counsel provided a copy of a February 23, 2018 full-time modified rural carrier job offer that appellant accepted. The duties of the position involved answering the telephone (four hours), reviewing hold mail for accurate timely resume (two hours), applying COA to PS Form 3982 (one hour), and counting and recording mail during rural mail count (one hour). The physical requirements included: sitting for four hours; bending, standing, pushing, pulling, walking, and lifting for two hours; and reaching, stooping, kneeling, and squatting for one hour.

In an examination report dated April 5, 2018, Dr. Bernard related that appellant had returned to work in February 2018 and recently experienced a flare-up of pain in her back. Upon examination of her lumbar spine, he observed diffuse tenderness in the lumbosacral junction. Dr. Bernard diagnosed lumbosacral spondylosis without myelopathy. He indicated that appellant could continue working light duty.

In an April 17, 2018 letter, Dr. Steve Tafor, Board-certified in anesthesiology and pain medicine, indicated that he was unable to opine on appellant's ability to work.

Dr. Bernard continued to treat appellant and provided examination reports dated June 18 and July 11, 2018.

By decision dated July 25, 2018, an OWCP hearing representative affirmed the January 31, 2018 termination decision. She found that OWCP had properly terminated appellant's entitlement to wage-loss compensation, effective February 4, 2018, pursuant to 20 C.F.R. § 10.500(a).

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of compensation benefits.[6]

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 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."[7]

[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).

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 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.[8] 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.[9]

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)."[10]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective February 4, 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 4, 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.[11] If the offered employment is temporary and the employee does not accept the position section 10.500(a) applies.[12] 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.[13]

On October 27, 2017 the employing establishment provided appellant a written job offer as a full-time modified rural carrier beginning November 4, 2017.[14] The position was described as "full time with an annual salary of $59,164.00." Thereafter, on November 9, 2017, the employing establishment sent a letter to the claims examiner noting that the position offered to appellant "is a [f]ull-[t]ime, [n]on-[t]emporary assignment and remains available for her."

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

[9] *Id.*

[10] *Id.* at Chapter 2.814.8(c)(10).

[11] *Id*. at Chapter 2.814.4.

[12] *Supra* note 8.

[13] *Id*.

[14] The Board notes that, although the letter claims to provide a written job description of the alternate position, the record does not contain a copy of a position description.

However, when OWCP issued its notice of proposed termination of wage-loss compensation on December 13, 2017, it noted that it had been advised that she had not responded nor reported to the "temporary job" which was to commence November 4, 2017. There is no documentation of record supporting the status of the offered position as temporary in nature. Additionally, during the oral hearing, counsel stipulated to the fact that the job in question was in fact temporary in nature.

Appellant was a recipient of wage-loss compensation on the periodic rolls at the time of the October 27, 2017 offer of employment. Therefore, to terminate her wage-loss compensation pursuant to section 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 section 8106(c). As it cannot be established that appellant's job offer was a temporary position, OWCP has not met its burden of proof to terminate wage-loss compensation pursuant to section 10.500(a).

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective February 4, 2018, pursuant to 20 C.F.R. § 10.500(a) based on her earnings had she accepted a temporary, limited-duty assignment.

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 6, 2019
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