

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

K.T., Appellant)	
)	
and)	Docket No. 17-0009
)	Issued: October 8, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Little Rock, AR,)	
Employer)	
)	

Appearances:
Appellant, pro se
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 October 5, 2016 appellant filed a timely appeal from a September 20, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of disability on and after May 23, 2012 due to his accepted April 5, 2004 employment injuries.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On April 5, 2004 appellant, then a 38-year-old building equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that on that date he slipped on a wet ladder and fell onto a chair while in the performance of duty.³ OWCP accepted the claim for neck sprain, lumbar sprain, and rib sprain. Appellant returned to a light-duty job on April 12, 2004 with restrictions from his physician.⁴ The acceptance of the present claim was subsequently expanded to include consequential anxiety disorder with mixed anxiety and depressed mood; unspecified anxiety state; and major depression with recurrent episode (severe with mention of psychotic behavior). On June 11, 2010 appellant filed a notice of recurrence of disability (Form CA-2a) claiming wage-loss compensation due to a worsening of his accepted conditions. On June 11, 2012 he filed a claim for disability for the period commencing May 30, 2012.

On August 17, 2012 the employing establishment issued a notice of removal separating appellant from employment due to his failure to complete assigned work and unacceptable performance and conduct. Appellant thereafter filed a grievance challenging the notice of removal.

By decision dated September 27, 2012, OWCP denied appellant's recurrence of disability claim, finding that the factual and medical evidence of record was insufficient to establish disability due to a material change or worsening of his accepted work-related conditions. On October 9, 2012 appellant requested an oral hearing.

A telephonic hearing was held on February 11, 2013. By decision dated April 26, 2013, a hearing representative affirmed the September 27, 2012 decision finding that appellant's increased disability subsequent to May 23, 2012 was not a recurrence of the previously accepted conditions as the evidence of record did not establish a spontaneous worsening without an overt intervening incident or exposure.

On August 26, 2013 appellant requested reconsideration. He also continued to file claims for wage-loss compensation (Form CA-7).

In support of his claims for wage-loss compensation benefits appellant submitted an arbitration decision, dated August 1, 2013, which concluded that the employing establishment had just cause to discipline him. The decision, however, instructed the employing establishment to reduce appellant's removal to a suspension running from the date of removal to 30 days after

² Docket No. 11-0278 (issued October 6, 2011); Docket No. 14-0613 (issued October 9, 2014).

³ OWCP assigned this claim OWCP File No. xxxxxx098.

⁴ On June 5, 2007 appellant filed an occupational disease claim (Form CA-2), assigned OWCP File No. xxxxxx005 alleging stress and anxiety due to factors of his federal employment including conflicts with his supervisor over work his restrictions. He noted that he first became aware of his claimed emotional condition and related it to his federal employment on April 20, 2006.

the date of the arbitration decision. Lastly, the arbitration decision instructed that appellant's return to work was conditional and based on appellant providing acceptable medical documentation regarding the resolution of his medical issues. In reaching his decision, the arbitrator found that the evidence of record in his proceedings supported that appellant had "some type of medical condition which obviously" impacted his ability to perform assigned work.

In an August 28, 2013 letter, Dr. Phillip A. Tracy, a Board-certified family medicine physician, opined that appellant continued to be totally disabled from work due to his accepted depression and anxiety.

In reports dated August 7 and September 16, 2013 letter, Dr. James M. Sims, a psychiatrist, recommended that appellant be allowed to transfer to a different supervisor due to conflicts between them. In the September 16, 2013 report, he opined that appellant was unable to return to work due to his anxiety and major depression, recurrent episode, severe with psychotic behavior. Dr. Sims explained that appellant's past conflict with his supervisor "continues to cause him stress" and he worries about possible future contact with this supervisor.

By decision dated December 20, 2013, OWCP affirmed the April 26, 2013 decision without conducting a merit review. On January 3, 2014 appellant appealed to the Board. By decision dated October 9, 2014, the Board found that OWCP improperly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128 and remanded the case for further development.

In an October 8, 2014 notice of administrative separation, the employing establishment informed appellant that he would be separated from the establishment within 30 days from the date of the notice. The basis of the separation was due to his being medically unable to perform the essential requirements of his job, that he had been in a leave without pay status for more than one year due to his medical conditions, and that he had not been released by Dr. Sims, his treating physician, to return to work in any capacity. The employing establishment advised appellant that he could file for disability retirement.

In a February 3, 2014 report, Dr. Sims summarized appellant's employment injury history and noted one of the accepted conditions was major depression, recurrent episode, severe with mention of psychotic behavior. He noted that appellant had been sent home from work on May 16, 2012, which caused his depression and anxiety to become disabling. Dr. Sims opined that appellant was totally disabled from work commencing May 16, 2012 and ongoing.

In September 26 and October 15, 2014 reports, Dr. Phillip A. Tracy, an osteopath specializing in family medicine, noted that appellant presented with a diagnosis of anxiety and depression for which he was in ongoing counseling.

In an October 22, 2014 report, Dr. Tracy indicated that appellant remained disabled from work as appellant's anxiety and depression had worsened.

By decision dated February 6, 2015, OWCP affirmed the April 26, 2013 decision as modified. It denied his recurrence claim finding that the medical evidence of record did not contain a rationalized explanation of how specific work incidents or events could have caused a recurrence. OWCP noted that the medical evidence of record indicated that it was appellant's

own preexisting psychiatric condition that caused him not to follow orders from a management official on May 23, 2012, not his supervisor's alleged improprieties.

In a March 24, 2015 note, Dr. Tracy advised that appellant remained disabled from work due to his accepted employment-related emotional conditions. He noted on July 27, 2015 that the accepted psychiatric conditions were permanent and stable at that time.

In a March 24, 2015 note, Dr. Tracy noted that appellant had been diagnosed with anxiety and depression 11 years prior, and that the course of the condition had been progressive. He opined that appellant was now unable to work due to major depression which was severe with mention of psychosis and generalized anxiety state.

Appellant sought further treatment with Dr. Tracy who noted in a July 23, 2015 report that he was feeling more depressed and needed a refill of his medication. He indicated that resolution was at a standstill and that his lumbar spine condition and chronic pain were ongoing.

On October 14, 2015 appellant requested reconsideration of the February 6, 2015 decision and submitted additional medical evidence.

In a note dated October 6, 2015, Dr. Tracy noted his treatment of appellant for the past eight years and explained the history of the emotional condition. He opined that appellant was presently disabled and unable to return to work due to his accepted medical conditions, and that the continuing stress was not helping his conditions. In an October 28, 2015 report, Dr. Tracy reiterated that he was still disabled and unable to work.

Appellant was also examined by Dr. Tracy on September 15 and October 27, 2015. He noted the history of injury and discussed ongoing medication usage.

By decision dated January 21, 2016, OWCP affirmed the February 6, 2015 decision.

Appellant requested reconsideration on March 15, 2016. In support of his reconsideration request, he submitted February 22 and 29, 2016 reports by Dr. Tracy, narrative statements relating to his claim, as well as various documents already of record.

By decision dated September 20, 2016, OWCP denied modification of the January 21, 2016 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.⁶ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁷

⁵ *Supra* note 1

⁶ *See D.M.*, Docket No. 18-0527 (issued July 29, 2019); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁷ *W.H.*, Docket No. 19-0168 (issued May 10, 2019); *see D.G.*, Docket No. 18-0597 (issued October 3, 2018).

This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.⁸

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.⁹ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations and which is necessary because of a work-related injury or illness is withdrawn or altered so that the assignment exceeds the employee's physical limitations.¹⁰

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹¹

ANALYSIS

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

OWCP accepted appellant's April 5, 2014 claim for neck sprain, lumbar sprain, and rib sprain. It subsequently expanded the acceptance of the claim to include consequential anxiety disorder with mixed anxiety and depressed mood and unspecified anxiety state, and major depression with recurrent episode, severe with mention of psychotic condition. On April 12, 2004 appellant returned to light-duty work based on his physician's restrictions. Appellant thereafter filed claims for wage-loss compensation.

The evidence of record reveals that appellant was initially removed from his employment effective July 17, 2012 for refusing to perform an assignment given by his supervisor. However, an August 1, 2013 arbitration decision reduced appellant's removal to a suspension running from the date of the removal (July 17, 2012) to 30 days after the date of the arbitration decision (August 31, 2013). The Board notes that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA.¹² The Board

⁸ *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

⁹ 20 C.F.R. § 10.5(x); *see V.H.*, Docket No. 18-0456 (issued August 9, 2019).

¹⁰ *Id.*

¹¹ *See S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² Recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of duties or other downsizing. *See also H.L.*, Docket No. 17-1338 (issued April 25, 2018); *C.P.*, Docket No. 17-0549 (issued July 13, 2017); *John I. Echols*, 53 ECAB 481 (2002); *John W. Normand*, 39 ECAB 1378 (1988).

thus finds that appellant is not entitled to receive wage-loss compensation for the period of his suspension which ran from July 17, 2012 to August 31, 2013.

The Board finds that the evidence of record is insufficient to determine whether, at the time of the end of his suspension, a light-duty job remained available for appellant to perform or whether it had been withdrawn resulting in a recurrence of disability. As noted above, OWCP's regulations allow appellant to establish a recurrence of disability when a light-duty job is withdrawn or when there is a change in appellant's work restrictions.¹³ Accordingly, the evidence of record must be fully developed so that it contains accurate information regarding his claim in order to determine whether he sustained a recurrence of disability following the suspension.¹⁴

It is well established that, proceedings under FECA are not adversarial in nature and, while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁵ Accurate information regarding the period of appellant's suspension, and whether his limited-duty assignment was still available, is essential to determine whether he sustained a recurrence of disability. OWCP must, therefore, make proper factual findings as to the period of the suspension whether appellant's limited-duty assignment was still available following the suspension, and resulted in a recurrence of disability.¹⁶ This evidence is of the character normally obtained from the employing establishment and is more readily accessible to OWCP than to appellant.¹⁷ On remand OWCP shall request that the employing establishment furnish documentation regarding the period of appellant's suspension and also clarify whether appellant's modified-duty assignment was available or had been withdrawn at the end of the period of his suspension. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant is not entitled to wage-loss compensation for the period of his suspension. The Board further finds that the case is not in posture for a decision on the period of the suspension and his entitlement to compensation following the suspension.

¹³ *Id.*

¹⁴ See *D.M.*, *supra* note 6; *J.G.*, Docket No. 17-0910 (issued August 28, 2017); *M.A.*, Docket No. 16-1602 (issued May 22, 2017).

¹⁵ *D.M.*, *supra* note 6; *Donald R. Gervais*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233 (1983).

¹⁶ See *D.M.*, *supra* note 6; *Y.R.*, Docket No. 10-1589 (issued May 19, 2011).

¹⁷ *D.M.*, *supra* note 6; *J.T.*, Docket No. 15-1133 (issued December 21, 2015); *J.S.*, Docket No. 15-1006 (issued October 9, 2015).

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision of the Board.

Issued: October 8, 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