

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective November 14, 2018, pursuant to 20 C.F.R. § 10.500(a); and (2) whether appellant has met his burden of proof to establish a recurrence of disability, commencing September 24, 2018, causally related to his accepted June 3, 2016 employment injury.

FACTUAL HISTORY

On June 28, 2016 appellant, then a 38-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that he developed median mononeuropathy, lumbosacral and cervical radiculopathy, and Achilles tendinitis due to factors of his federal employment, including constant standing, walking, squatting, lifting, pushing, and pulling. He indicated that he first became aware of these conditions on June 3, 2016 and realized that they were related to his federal employment on June 28, 2016. On April 25, 2017 OWCP accepted cervical and lumbar radiculopathy as work-related conditions. It thereafter paid retroactive compensation on the supplemental rolls commencing June 3, 2016, and placed appellant on the periodic rolls effective April 30, 2017.

On November 1, 2017 OWCP accepted laceration of left hand and concussion with loss of consciousness of unspecified duration.⁴

In a letter dated October 31, 2017, Dr. Rebecca S. Valla, a Board-certified psychiatrist, noted that she first saw appellant on September 21, 2017 and indicated that his presenting problem was depression which, she opined, was related to his medical disability. She noted a history of cervical and lumbar radiculopathy caused by lifting, twisting, and pushing required in his job and the July 16, 2017 fall when he sustained laceration on his forehead and a concussion. Dr. Valla described his medical treatment history and complaints of continued post-concussive symptoms of episodic headaches, photosensitivity, irritability, and anxiety. She advised that on mental status examination appellant had a dysphoric and tearful affect, and his mood was dysthymic and hopeless. Dr. Valla diagnosed major depression, recurrent, moderate and referred him to a psychotherapist. She opined that appellant developed a consequential emotional condition from his employment injuries of lumbosacral radiculopathy, foraminal stenosis, and multilevel facet degenerative change. Dr. Valla indicated that his lower leg weakness and pain were the focus of emotional and psychological distress, which precluded him from resuming his normal employment.

A November 1, 2017 functional capacity evaluation (FCE) was suspended due to left lower extremity weakness, client safety, and risk of falling. The report was dated August 29, 2017.

⁴ Appellant fell at home on July 16, 2017 when his left leg gave way due to back pain and he fell through a glass door. He was seen that day in an emergency room and headache and concussion without loss of consciousness were diagnosed. A computerized tomography (CT) scan of the head that day demonstrated no acute abnormalities. On August 24, 2017 Dr. Christopher Morris, a Board-certified neurologist, noted a history that appellant had a fall at home with subsequent post-concussion symptoms. In reports dated March 29 to September 27, 2017, Dr. Andreas Runheim, Board-certified in neurology, noted complaints of neck, low back, and left leg pain. Following neurological examination, he diagnosed cervical and lumbosacral radiculopathy, acute left carpal tunnel syndrome, neck pain, paresthesia, and hypoesthesia of skin.

However, after several cancellations, the FCE was scheduled for November 1, 2017 and signed by a physical therapist on November 2, 2017.

On a work capacity evaluation (Form OWCP-5c), Dr. Seth Jaffe, an osteopath, noted that he had reviewed the report regarding the suspended FCE. He advised that, while appellant could not perform his usual job, he could work eight hours of sedentary duty daily with physical restrictions.

In April 2018 OWCP referred appellant to Dr. Shervin Eshraghi, a Board-certified neurologist, for a second opinion examination. In a report dated May 1, 2018, Dr. Eshraghi noted his review of the medical record and appellant's complaints of left leg numbness, tingling, and weakness and left inguinal pain. He described examination findings, noting that strength was 5/5 in both upper extremities and the right lower extremity, but diminished in the left lower extremity. Dr. Eshraghi reported that appellant grimaced and verbalized significant discomfort when moving his left leg for testing. Fasciculation, atrophy, resting tremor, bradykinesia, and rigidity were not present, and sensation to pinprick, cold, vibration, and proprioception were intact. Appellant could not perform heel to shin rises on the left due to pain, and his gait was noted to be highly antalgic. Dr. Eshraghi indicated that appellant used a cane for stabilization, that he complained of extreme discomfort and tingling when taking steps, and that he was quite uncoordinated with several near falls without using his cane. He saw no obvious difficulty with dorsiflexion and plantar flexion when walking, but indicated that appellant could not do tandem gait. Romberg sign was negative, and straight leg raise testing was positive at 45 degrees on the left with pain shooting down the posterior thigh. There was no Babinski or Hoffman's sign, and joints appeared normal without swelling, erythema, or tenderness.

In answer to specific OWCP questions, Dr. Eshraghi advised that appellant had no significant objective residuals of his prior concussion, and that his symptoms related to post-concussive syndrome had either resolved or were well controlled with treatment. He opined that appellant was capable of working in a sedentary job where he did not have to do lifting. Dr. Eshraghi noted that appellant's history and examination were suggestive of prominent lumbosacral radiculopathy, but indicated that appellant's behavior suggested some embellishment of his left leg pain and weakness, out of proportion to what one would expect to see based on his preserved reflexes and imaging findings. He noted that appellant's gait was somewhat inorganic and had some features inconsistent with extreme foot drop and plantar flexion weakness, which he observed when appellant, was sitting. Dr. Eshraghi suggested that, therefore, there was a component of malingering. He advised that appellant had reached maximum medical improvement (MMI) with regard to the concussion, noting that appellant's infrequent headaches were easily controlled without prescription medications. Dr. Eshraghi observed that appellant had no cognitive deficits, and that his irritability and sleep disturbances were being addressed appropriately and effectively with medication. He further advised that appellant had not reached MMI for his lumbar radiculopathy, noting that he had not responded to physical therapy, rest, medication, epidural steroids, or trigger point injections. Dr. Eshraghi indicated that a repeat electrodiagnostic study by a different neurologist would be reasonable to see if prior findings could be replicated and/or if it showed progression or improvement from prior findings, noting that this would help separate some of the real underlying pathology from appellant's somatization component. He concluded by indicating that, if there were convincing, ongoing electrical findings related to severe radiculopathy, then surgical intervention could be warranted. Alternatively, if

not, then Dr. Eshraghi would say that appellant's examination was discordant with imaging and electrodiagnostics, he would be considered to be at MMI.

In April 2018 OWCP also referred appellant to Dr. David M. Susco, a Board-certified psychiatrist, for a second-opinion evaluation regarding the emotional conditions. In a report received by OWCP on May 16, 2018,⁵ Dr. Susco described findings from a May 8, 2018 examination. He noted his review of the medical record and appellant's complaint of back and leg pain, and described the July 16, 2017 fall. Dr. Susco indicated that appellant reported that his physical condition had changed his life, leaving him unable to do things he previously enjoyed. He performed a mental status examination and diagnosed major depression. Dr. Susco opined that the diagnosed depression had developed as a consequence of pain due to the employment injury that appeared to be successfully treated with medication. He concluded that appellant was not disabled due to his psychiatric condition, but that he could not return to his previous job. Dr. Susco recommended retraining for gainful employment.

On May 29, 2018 OWCP expanded the acceptance of appellant's claim to include major depressive disorder, recurrent, moderate.

On June 13, 2018 the employing establishment forwarded a job offer dated May 25, 2018 in which it offered appellant a position as a fulltime modified mail processing clerk, effective June 2, 2018. The offer listed sedentary physical requirements. Appellant did not respond to the job offer.

On June 4, 2018 OWCP notified appellant that, based on the opinion of Dr. Eshraghi, it proposed to terminate his medical benefits for the accepted concussion condition. It afforded appellant 30 days to submit additional evidence and argument if he disagreed with the proposed termination of medical benefits for this condition.

In a letter dated June 7, 2018, Dr. Valla noted seeing appellant that day. She opined that, based on her evaluation of appellant's functioning, appellant could not work at any job at that time, and she could not predict if or when he would be able to work again.

The employing establishment again offered appellant the modified mail processing clerk position on July 9, 2018, effective July 23, 2018.⁶ The job offer indicated that the assignment would remain within the physical restrictions furnished by appellant's treating physician and advised him not to exceed the restrictions. It noted that the assignment was currently available and was subject to revision based on changes in his physical restrictions and/or the availability of adequate work. It noted that, if a revision were necessary, he would be given a revised written modified assignment.

⁵ The report contains a typographical error. It is dated October 19, 2017, but reports that the examination was performed on May 8, 2018.

⁶ The initial offer did not include days off. This was corrected in the offer effective July 23, 2018. The duties of this modified assignment were to monitor web cameras to determine the number of customers in line for eight hours, record and track wait time in line for eight hours, contact customers *via* e-mail and telephone for eight hours, and light data input, and answering telephone calls for eight hours. The physical requirements were a sedentary position, speaking on the telephone for eight hours. He could sit and stand as needed, no lifting was required, and he would use a computer mouse and do light data input.

On July 18, 2018 appellant, through counsel, informed OWCP that appellant was unable to accept the offered position due to medical restrictions of his accepted work injuries. He submitted a July 16, 2018 report in which Dr. Tuan Huynh, a family medicine specialist, noted that appellant suffered from multiple disc bulges in his lower back and that, due to his inability to sit or stand for an extended period, he could not accept the current work assignment.

By decision dated July 23, 2018, OWCP finalized the termination of appellant's medical benefits for the accepted concussion condition.⁷

In a letter dated August 6, 2018, OWCP advised appellant of its determination that the modified mail processing clerk position offered by the employing establishment was suitable based on the opinions of Dr. Eshraghi and Dr. Susco. It noted that it had been informed by the employing establishment that the position remained available and advised him that, pursuant to 5 U.S.C. § 8106(c)(2) of FECA, his wage-loss compensation and entitlement to a schedule award would be terminated if he did not accept the job offer or provide good cause for not doing so within 30 days of the date of the letter.

In correspondence dated August 21, 2018, counsel objected to this proposed termination. He maintained that Dr. Huynh's opinion was sufficient to establish that appellant's condition precluded employment.

On September 11, 2018 OWCP advised appellant that his reasons for refusing to accept the modified mail processing clerk position were unjustified. It discussed the evidence submitted by counsel and found that it failed to provide a valid reason for refusing to accept the position. OWCP advised appellant that his wage-loss compensation and entitlement to a schedule award would be terminated if he did not accept the position within 15 days of the date of the letter.

In correspondence dated September 20, 2018, counsel informed OWCP that, reluctantly and against the advice of two of his physicians, appellant would report as ordered, but indicated that he had not been provided direction on when, where, and to whom he was to report or how he would be accommodated with his cane. He concluded that appellant was awaiting direction to report as ordered.⁸

On Monday, September 24, 2018, A.K., a human resource specialist at the employing establishment, advised that appellant reported to work on September 24, 2018, but left after approximately one hour, indicating that he could not do the job. She attached a September 21, 2018 letter in which she informed counsel of appellant's reporting instructions and that he would be managed by B.G. and M.T. Also attached was a September 24, 2018 statement in which B.G. indicated that appellant had arrived for work at 8:10 that morning, but that she was not expecting him. B.G. noted that she asked appellant to wait while she sought clarification from management as to how to proceed but, before this was accomplished, he told her that he had been waiting long enough and contended that he was unable to perform the duties of the position.

⁷ Appellant did not timely file an appeal with the Board from that decision.

⁸ A magnetic resonance imaging scan of the cervical spine, obtained on August 29, 2018 revealed mild spondylosis at C4-5 and C5-6 and mild bilateral foraminal stenosis at C4-5.

On September 28, 2018 A.K. forwarded a form report indicating that appellant had refused the offered position. She noted that he left after approximately one hour, advising that he could not do the job, and had someone bring in a traumatic injury claim (Form CA-1) later that day, claiming aggravation of depression and anxiety.⁹

In a notice dated October 4, 2018, OWCP proposed to reduce appellant's compensation based on his refusal of the July 9, 2018 modified position. It advised him that it had reviewed the work restrictions provided by Dr. Eshraghi and Dr. Susco, and found that their opinions represented the weight of the medical evidence. OWCP further determined that the position offered appellant was within his restrictions. It informed him of the provisions of 20 C.F.R. § 10.500(a) and advised him that any claimant who declined a temporary light-duty assignment deemed appropriate by OWCP was not entitled to compensation for total wage loss. OWCP noted that the offered pay rate was greater than that when disability began and, therefore, there was no loss of wage-earning capacity (LWEC). It afforded appellant 30 days to accept the assignment and report to duty or provide a written explanation of his reasons for not accepting the assignment.

On October 10, 2018 appellant filed a notice of recurrence (Form CA-2a). He asserted that he had a panic attack from the stress of having to return to work on September 24, 2018, and that having to wait there aggravated his anxiety and depression. Appellant indicated that he was unable to function in the work environment and had subsequently seen Dr. Valla who diagnosed stress, anxiety, and panic attack coupled with post-traumatic stress disorder (PTSD). The employing establishment indicated that appellant returned to work for one hour and then filed a new CA-1 and a CA-2a.

In a development letter dated October 26, 2018, OWCP advised appellant of the type of evidence necessary to establish his recurrence claim. It afforded him 30 days to submit the requested evidence.

By decision dated November 13, 2018, OWCP finalized the October 4, 2018 proposal and terminated appellant's wage-loss compensation, effective November 14, 2018, because he failed to accept the July 9, 2018 temporary light-duty assignment in accordance with 20 C.F.R. § 10.500(a). It found that the weight of medical evidence rested with Drs. Eshraghi and Susco, who provided temporary restrictions. OWCP indicated that its procedures provided that a temporary light-duty assignment could be provided to an employee during a period of recovery, and that on November 8, 2018, appellant's employing establishment confirmed that the assignment remained available. Since he would have sustained no wage loss had he accepted the assignment, OWCP determined that he was not entitled to compensation.

By decision dated November 28, 2018, OWCP denied appellant's claim for a recurrence of disability. It indicated that appellant had not provided the evidence requested in the October 26, 2018 development letter and found that the medical evidence failed to establish that he was disabled due to a material change or worsening of his accepted conditions.

⁹ A CA-1 claim form is not found in the record before the Board.

On December 11, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review from the November 13, 2018 decision terminating his wage-loss compensation pursuant to 20 C.F.R. § 10.500(a).

In a March 5, 2019 brief, counsel asserted that the medical evidence refuted the termination. He noted Dr. Valla's diagnosis of PTSD and anxiety, and that OWCP had not considered Dr. Huynh's opinion.

At the telephonic hearing, held on March 14, 2019, the hearing representative identified the issue as termination, and counsel agreed. Dr. Valla testified that she originally diagnosed major depression, but that she had additionally diagnosed PTSD because appellant felt he would be forced to return to work or lose his compensation. She stated that the PTSD was still in an acute phase and became clear after September 24, 2018 and that she had also diagnosed anxiety because appellant reported that he could not do the offered job because he could not deal with the public or talk on the telephone. Dr. Valla testified that, based on her interactions with appellant, he had concentration issues and that she did not think he was malingering. She disagreed with Dr. Susco's opinion that appellant could return to work.¹⁰ Appellant briefly testified that when he reported for work on September 24, 2018, he was met by a greeter and not by a supervisor. He stated that he saw Dr. Valla on September 26, 2018. Counsel disagreed with the termination of wage-loss compensation and reiterated the arguments presented in his brief.

By decision dated April 24, 2019, OWCP's hearing representative identified the issue as whether appellant suffered a recurrence of disability; however, she affirmed the November 13, 2018 termination decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of compensation benefits.¹¹

OWCP regulations at section 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

¹⁰ Dr. Valla testified that she had produced written reports dated September 20, and 26, and December 3, 2018. However, these reports were not in the record before the Board prior to the April 24, 2019 decision.

¹¹ C.W., Docket No. 18-1779 (issued May 6, 2019); S.F., 59 ECAB 642 (2008).

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."¹²

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 of record 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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective November 14, 2018, pursuant to 20 C.F.R. § 10.500(a).

The record indicates that appellant was on the periodic rolls on July 9, 2018 when the employing establishment offered him the modified mail processing clerk position. The offer was temporary and in writing. It, therefore, comported with the procedural requirements of 20 C.F.R. § 10.500(a).¹⁵

The evidence of record establishes that, as of November 14, 2018, the date OWCP terminated appellant's wage-loss compensation pursuant to section 10.500(a), there was disagreement between Dr. Susco, OWCP's second opinion psychiatrist, and Dr. Valla, appellant's treating psychiatrist, as to whether appellant had the ability to perform the duties of the offered temporary mail processing clerk position.¹⁶

Dr. Valla began treating appellant on September 21, 2017, and on October 1, 2017 she opined that appellant had developed a consequential emotional condition, moderate major depression. She also advised that appellant could not work due to psychological distress caused by his lower leg weakness and pain. Dr. Susco provided a second opinion psychiatric evaluation, noting that he saw appellant on May 8, 2018. He advised that appellant was not disabled due to his psychiatric condition, but could not return to his previous job. Dr. Susco recommended retraining for gainful employment.

¹² 20 C.F.R. § 10.500(a).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1) (June 2013).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *R.C.*, Docket No. 18-0463 (issued February 7, 2020).

On May 29, 2018 OWCP accepted major depressive disorder. In correspondence dated June 7, 2018, Dr. Valla advised that, based on her evaluation of appellant's current functioning, he could not work at any job and she could not predict when he could return to work.

The Board thus finds that there is an unresolved conflict of medical evidence between the opinions of Dr. Susco and Dr. Valla as to whether appellant could perform the duties of the offered position on November 14, 2018, the effective date of the termination of his wage-loss compensation. Therefore, OWCP has not met its burden of proof to terminate appellant's wage-loss compensation as it should have referred appellant for an impartial medical evaluation to resolve the conflict prior to a termination of wage-loss compensation benefits.¹⁷

Based on the Board's finding in Issue 1, it is premature to address whether appellant met his burden of proof to establish any disability after the termination of wage-loss compensation.¹⁸

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective November 14, 2018, pursuant to 20 C.F.R. § 10.500(a).¹⁹

¹⁷ See *S.P.*, Docket No. 20-0196 (issued June 24, 2020).

¹⁸ The Board notes that at the March 14, 2019 hearing, the hearing representative identified the issue as termination, but in her April 24, 2019 decision, she identified the issue as whether appellant established a recurrence of disability, but then affirmed the November 13, 2018 decision terminating appellant's wage-loss compensation.

¹⁹ Upon return of the case file OWCP should consider administratively combining File No. xxxxxx135 for a September 24, 2018 traumatic injury with the present file.

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2019 and November 13 and 28, 2018 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: July 29, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board