United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 19-1255**
	)	**Issued: January 24, 2020**
U.S. POSTAL SERVICE, THOUSAND OAKS POST OFFICE, San Antonio, TX, Employer	)	

Appearances:
Andrew Douglas, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 13, 2019 appellant, through counsel, filed a timely appeal from an April 5, 2019 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.

[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.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective May 8, 2017, pursuant to 20 C.F.R. § 10.500(a) based on his earnings had he accepted a temporary limited-duty assignment.

FACTUAL HISTORY

On April 18, 2014 appellant, then a 64-year-old city mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day he injured his left leg when he fell from the step of his Long Life Vehicle while in the performance of duty. OWCP accepted the claim for sprain of the left shoulder and upper acromioclavicular and sprain of left knee and leg. Appellant subsequently fell on June 16, 2014 injuring the right side of his body. OWCP accepted the injury as a consequential fall. It expanded acceptance of the claim to include additional conditions of bilateral tear of the medial meniscus, bilateral old disruption of the anterior cruciate ligaments, bilateral chondromalacia patellae, bilateral sprain of the hips and thighs, sprain of the left shoulder and upper arm superior glenoid labrum lesion, other affections of the left shoulder region not elsewhere classified, disorder of the left bursae tendon shoulder region, and bilateral rupture of quadriceps tendon. OWCP paid appellant intermittent compensation on the supplemental rolls from June 14, 2014. Appellant stopped work on September 21, 2014 and has not returned. OWCP paid him wage-loss compensation on the periodic compensation rolls as of September 21, 2014.

On January 9, 2017 OWCP referred appellant for a second opinion examination with Dr. Albert E. Sanders, a Board-certified orthopedic surgeon, to determine the status of appellant's accepted conditions and work capacity.[3] It requested that Dr. Sanders obtain a functional capacity evaluation (FCE) if necessary. In a report dated February 8, 2017, Dr. Sanders reviewed appellant's history of injury along with a statement of accepted facts and the medical record. He presented his examination findings of the upper and lower extremities, finding that appellant had weakness in the left quadriceps and mild atrophy, mild tenderness along the bilateral knee joint lines and greater trochanter, and decreased range of motion of bilateral shoulders and left biceps atrophy due to the accepted employment-related conditions. Dr. Sanders opined that appellant may benefit from additional physical therapy and a home exercise program to improve strength and range of motion in both legs. He also opined that appellant was partially disabled as a result of the employment injury and was capable of working light duty with restrictions.

In a March 1, 2017 report, Dr. Sanders indicated that appellant had undergone an FCE that day during which appellant demonstrated reliable effort. In an addendum to his previous February 8, 2017 report, he related that appellant's March 1, 2017 FCE demonstrated that appellant had difficulty performing weight-bearing activities and was unable to lift over 10 pounds. Dr. Sanders opined that appellant was capable of returning to work in a light-duty capacity with restrictions, including no lifting, pushing, or pulling over 20 pounds; no standing/walking/ stooping/overhead reaching more than 2 hours; and avoiding activities such as kneeling, squatting, bending, etc.

[3] In 2015 and 2016, appellant also underwent OWCP-directed second opinion examinations and was found capable of working full time with restrictions.

Dr. Sanders also completed a March 6, 2017 work capacity evaluation (Form OWCP-5c) indicating that appellant had temporary restrictions for full-time light duty. This included a two-hour limitation on walking, standing, reaching above shoulder and bending/stooping and a two-hour limitation of no more than 20 pounds on pushing, pulling, and lifting. Appellant was restricted from squatting, kneeling, and climbing. He related that these restrictions should remain in place for three months.

In a March 15, 2017 letter, OWCP requested that the employing establishment provide appellant with a light-duty job within the temporary work restrictions provided by Dr. Sanders, whose opinion represented the weight of the medical evidence.

Also, on March 15, 2017, OWCP provided a copy of Dr. Sanders' February 8, 2017 report and March 1, 2017 FCE to Dr. Michael Charlton, a Board-certified orthopedic surgeon and appellant's treating physician, and requested that he respond to the findings and opinions expressed by Dr. Sanders as to appellant's extent of disability and ongoing residuals of the April 18, 2014 employment injury. It afforded Dr. Charlton 30 days to respond.

On March 28, 2017 the employing establishment provided appellant an offer of modified assignment (limited) duty as a modified city carrier, effective March 30, 2017. Appellant's duties included changing parcel locks, changing locks on cluster box units, and Express Mail delivery as needed. The assignment involved intermittent standing, walking, and reaching above shoulder no more than two hours. The job offer also noted that it was based upon Dr. Sanders' temporary restrictions of no walking, standing bending/stooping, and reaching above the shoulder for more than two hours, and no more than two hours of pushing, pulling, or lifting up to 20 pounds and no squatting or kneeling.

In a March 31, 2017 letter, the employing establishment noted that appellant reported to work on March 30, 2017 and that he saw a union official. It noted that he refused the position. The employing establishment confirmed that the job remained available.

In a notice dated April 7, 2017, OWCP proposed to reduce appellant's compensation based on his refusal of the March 28, 2017 light-duty offer. It advised him that it had reviewed the work restrictions provided by Dr. Sanders and found that it 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 calculated that appellant's compensation should be adjusted to $1,151.13 every four weeks using the formula set forth in *Albert C. Shadrick*,[4] which was equal to or greater than the current pay of the job held at the time of injury; 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 job assignment.

[4] 5 ECAB 376 (1953); *see* 20 C.F.R. § 10.403.

On May 8, 2017 the employing establishment advised that appellant had not reported to work. It also verified that the light-duty job offer remained available.

By decision dated May 8, 2017, OWCP terminated appellant's wage-loss compensation, effective that day, because he failed to accept the March 28, 2017 temporary light-duty assignment in accordance with 20 C.F.R. § 10.500(a). It noted that he had not accepted the modified job offer, which was within the restrictions provided by Dr. Sanders in his February 8, 2017 report. OWCP further noted that it had not received any additional evidence or argument to support his refusal of the light-duty job offer. It noted that, as described in the April 7, 2017 notice of proposed termination, appellant's actual earnings in that assignment would have met or exceeded the current wages of the job held when injured; therefore, appellant would have sustained no wage loss had he accepted the assignment. Since he would have sustained no wage loss had he accepted the assignment, OWCP determined that he was not entitled to compensation.

In a May 18, 2017 report, appellant's physician, Dr. Charlton, indicated that he concurred with Dr. Sanders' assessment of appellant.

On June 5, 2017 appellant requested an oral hearing before an OWCP hearing representative. In a November 3, 2017 letter, he noted his disagreement with the FCE and Dr. Sanders' examination, which he indicated was an unfair and biased medical examination. Appellant further indicated that he had reported to work on March 30, 2017 and was asked by a supervisor if he was there to work, to which he replied that "I am here. I have not heard from my doctor." He noted that the supervisor then told him to go home and that he would get back to him. Appellant indicated that he never heard back. When he called OWCP on or about May 30, 2017 about the assignment, he was told that his file had been transferred.

OWCP received copies several diagnostic imaging reports from 2014, 2016, and 2017.[5]

In an April 17, 2017 report, Kenneth P. Rivera, a physician assistant, provided an assessment of chronic bilateral knee pain and weakness with possible chronic regional pain syndrome. He indicated that appellant either needed a modified job or that he needed to retire.

In June 13 and 30, 2017 OWCP-5c forms, Dr. Andrew J. Sheean, an internal medicine specialist, indicated that appellant had permanent restrictions for sedentary work.

A telephonic hearing was held on November 7, 2017. By decision dated January 8, 2018, an OWCP hearing representative affirmed OWCP's May 8, 2017 termination of wage-loss benefits. The hearing representative found that although appellant had returned to the employment

[5] A July 16, 2014 x-ray of appellant's right knee noted severe soft tissue swelling of right knee and increased joint effusion. An August 2, 2016 magnetic resonance imaging (MRI) scan of his lumbar spine, noted multilevel degenerative changes, and mild bilateral due to disc bulge at several levels. A February 2, 2017 computerized tomography (CT) scan of appellant's pelvis and hip, detailed chronic findings. A March 23, 2017 MRI scan of his left knee noted an impression of status post quadriceps tendon repair with underlying quadriceps tendinopathy; patellar tendinopathy; prepatellar soft tissue mass; and moderate-to-severe chondromalacia in three compartments. A March 23, 2017 MRI scan of appellant's right knee noted essentially normal findings and a March 23, 2017 MRI scan lower extremity of his bilateral thighs noted a high signal intensity in both sartorius, both rectus morris, and left semitendinosus muscles.

establishment pursuant to the temporary job offer, his comments and behavior were not reflective of acceptance of the offered position.

On January 7, 2019 OWCP received counsel's request for reconsideration. Counsel provided opinions, along with appellant's December 21, 2018 statement, as to why appellant could not work the March 28, 2017 job offer. He argued that Dr. Sanders' report needed clarification as a discrepancy existed between his OWCP-5c, which indicated that appellant could provide two hours of bending and his report, which indicated that appellant should avoid bending. Furthermore, while the FCE demonstrated that appellant was unable to lift over 10 pounds, Dr. Sanders provided a 20 pounds lifting restriction. Counsel indicated that as the job offer did not have a 10-pound lifting limitation or a prohibition on bending, the March 28, 2017 modified city carrier position exceeded appellant's physical abilities and, therefore, was not suitable.

By decision dated April 5, 2019, OWCP denied modification of its January 8, 2018 decision.

LEGAL PRECEDENT

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 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."[6]

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. When the light-duty assignment either ends or is no longer

[6] 20 C.F.R. § 10.500(a).

available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.[7]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective May 8, 2017, pursuant to 20 C.F.R. § 10.500(a), based on his earnings had he accepted a light-duty assignment.

OWCP relied upon the findings of Dr. Sanders, the second opinion physician, to determine that the temporary modified letter carrier position offered to appellant on March 28, 2017 was within appellant's medical restrictions. In his report dated February 8, 2017, Dr. Sanders indicated that appellant had residuals from the employment injury and that he may benefit from additional physical therapy and a home exercise program to improve strength and range of motion in both legs. He also opined that appellant was partially disabled as a result of the employment injury, but was able to work light duty with restrictions. At OWCP's request, Dr. Sanders obtained an FCE and thereafter in a March 1, 2017 report indicated that appellant's March 1, 2017 FCE demonstrated that appellant was unable to lift any objects over 10 pounds. The FCE evaluation report also indicated that appellant could not stoop or bend.

Dr. Sanders, however, then completed a Form OWCP-5c on March 6, 2017 and related, without explanation, that appellant was capable of lifting up to 20 pounds and that he could perform bending activities with a two-hour limitation. Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[8] As Dr. Sanders provided inconsistent work restrictions, to meet its burden of proof OWCP should have clarified appellant's ability to lift up to 20 pounds and bend for up to two hours a day, before finding that the temporary job offer, was within appellant's work restrictions.[9]

The Board, therefore, finds that OWCP improperly terminated appellant's wage-loss compensation, effective May 8, 2017, without clarification regarding Dr. Sanders' limitations on lifting and bending. Due to this lack of clarity, OWCP failed to meet its burden of proof to terminate his compensation benefits.[10]

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

[8] *C.C.*, Docket No. 19-0241 (issued August 12, 2019).

[9] *Supra* note 7.

[10] *See D.T.*, Docket No. 19-0579 (issued October 22, 2019); *E.G.*, Docket No. 18-0710 (issued February 12, 2019); *R.W.*, Docket No. 16-1053 (issued December 6, 2016); *see J.R.*, Docket No. 13-0720 (issued October 21, 2013); *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective May 8, 2017, pursuant to 20 C.F.R. § 10.500(a), based on his earnings had he accepted a temporary light-duty assignment.

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 24, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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