United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 20-1535**
	)	**Issued: April 7, 2021**
U.S. POSTAL SERVICE, PLYMOUTH POST OFFICE, Plymouth, PA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 17, 2020 appellant filed a timely appeal from an April 28, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective April 24, 2020, 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 9, 2018 appellant, then a 25-year-old city carrier assistant (CCA), filed a traumatic injury claim (Form CA-1), alleging that she injured her right ankle on January 8, 2018

[1] 5 U.S.C. § 8101 *et seq.*

when she slid on ice while descending porch steps while in the performance of duty. She stopped work on January 8, 2018 and was treated in a hospital emergency department.[2] OWCP accepted the claim for a right ankle contusion and right ankle sprain. It subsequently expanded its acceptance of the claim to include instability of the right ankle.

Dr. Michael P. Banas, a Board-certified orthopedic surgeon, provided reports from February 2 through March 29, 2018, who diagnosed a right ankle contusion with bony inflammation of the distal tibia, right ankle lateral ligamentous sprain, and right ankle midfoot sprain/contusion.[3] He noted that physical therapy and an ankle brace had improved appellant's symptoms.[4] Dr. Banas held appellant off from work.

On June 12, 2018 Dr. John A. Lynott, Board-certified in orthopedic surgery and orthopedic sports medicine, performed an OWCP-authorized right ankle arthroscopy with debridement, open peroneal tendon exploration and debridement, and open lateral ligament reconstruction.[5] Appellant remained off work. OWCP paid her wage-loss compensation for work absences commencing June 11, 2018.

On January 9, 2019 OWCP obtained a second opinion report from Dr. Peter A. Feinstein, a Board-certified orthopedic surgeon. Dr. Feinstein reviewed medical records and a statement of accepted facts (SOAF). On examination he noted multiple surgical scars on right foot, sensory changes in the right lateral foot, and an antalgic gait. Dr. Feinstein returned appellant to full-time sedentary duty with restrictions of no standing, squatting, kneeling, or climbing, and no walking other than bathroom breaks and entering and leaving the premises. In an April 3, 2019 addendum report, he clarified that appellant was physically able to drive a motor vehicle to work and that his work restrictions were temporary lasting 12 to 18 months.[6]

[2] January 12, 2018 right ankle, foot, and hip x-rays were negative for fracture and dislocation. A January 18, 2018 magnetic resonance imaging (MRI) scan of appellant's right ankle demonstrated contusions of the distal tibia, talus, calcaneus, and cuboid bones, with no fracture or internal derangement of the ankle joint.

[3] A March 21, 2018 MRI scan of the right ankle demonstrated contusions of the talus, calcaneus, improving, less edema, tenosynovitis of the flexor hallucis longus tendon, flexor digitorum longus tendon, and tibialis posterior tendon, and edema of the fibulocalcaneal ligament suggesting a partial tear.

[4] Appellant participated in physical therapy treatments from February through May 2018.

[5] Appellant participated in physical therapy treatments from July 2018 through April 2019.

[6] On December 3, 2018 OWCP offered appellant a position as a modified CCA at the sedentary physical demand level. The job required answering telephones, filing, stamping envelopes, processing box mail, and unspecified duties within her restrictions. Appellant declined the offer on December 14, 2018, and voluntarily resigned from the employing establishment that day. By proposed notice dated April 30 and finalized May 31, 2019, OWCP terminated her wage-loss compensation effective May 31, 2019 under 20 C.F.R. § 10.500(a) as she declined to accept the offered modified-duty assignment. On June 14, 2019 appellant requested reconsideration. She asserted that she resigned from the employing establishment due to managerial harassment. By decision dated September 11, 2019, OWCP vacated the May 31, 2019 decision and reinstated wage-loss compensation benefits. It found that the December 3, 2018 job offer did not adequately describe the assigned duties.

In a January 17, 2019 report, Dr. Lynott found the offered position suitable work within appellant's medical limitations. He returned her to work effective December 14, 2018.

In a March 25, 2019 report, Dr. Lynott noted that appellant had experienced right ankle swelling after recent long walks and had somewhat limited inversion and eversion of the right ankle.

In a September 30, 2019 letter, the employing establishment advised that appellant had begun private sector employment in July 2019 as a mailroom clerk and backup driver for a health care technology company.

In an October 28, 2019 report, Dr. Lynott noted that appellant felt unable to deliver mail due to continued discomfort and paresthesias in the right foot and ankle. On examination he observed limited range of right ankle motion with full strength. Dr. Lynott indicated that "extended walking as required to deliver mail" would result in incomplete healing. He completed a work capacity evaluation -- musculoskeletal conditions (Form OWCP-5c) returning appellant to full-time medium duty with squatting and climbing limited to four hours. Dr. Lynott also noted a 10-pound weight restriction for climbing and a 15-pound weight restriction for squatting.

On October 28, 2019 OWCP referred appellant, the medical record, and updated SOAF to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion regarding whether appellant continued to have residuals of the accepted injury and if she could return to full-duty work. In a November 19, 2019 report, Dr. Draper noted his review of the medical record and SOAF. On examination of the right ankle, he found well-healed surgical scars, 15 degrees extension, 40 degrees flexion, 20 degrees inversion, 10 degrees eversion, and a negative anterior Drawer sign. Dr. Draper diagnosed a right ankle sprain, right ankle instability, and postsurgical status. He opined that appellant had reached maximum medical improvement (MMI), but she remained symptomatic and her accepted conditions had not completely resolved. Dr. Draper found appellant able to perform modified-duty work with standing and walking for up to four hours, pushing and pulling up to six hours, and lifting limited to 50 pounds occasionally and 25 pounds frequently.

On January 23, 2020 OWCP reduced appellant's wage-loss compensation to zero effective July 8, 2019, as she no longer had "any disability as defined in 20 C.F.R. § 10.5(f)." It found that her actual private sector earnings of $475.98 a week as a mailroom clerk/backup driver exceeded the wages for her job and step as a CCA when injured of $401.94 a week.

On January 28, 2020 the employing establishment offered appellant a temporary light-duty assignment as a CCA, casing mail/centralized delivery up to four hours, curbside delivery up to six hours, and park and loop delivery up to four hours. The physical requirements were listed as sitting/driving up to six hours, walking and standing up to four hours, lifting and carrying up to 25 pounds frequently and 50 pounds occasionally up to six hours. The position had a variable schedule of 33 to 40 hours a week, with wages of $570.24 to $691.20 a week. Appellant refused the position and did not report for duty.

In a notice of proposed termination dated March 23, 2020, OWCP proposed to terminate appellant's wage-loss compensation in accordance with 20 C.F.R. § 10.500(a) based on her refusal

of the January 28, 2020 temporary light-duty position. It advised appellant that it had reviewed the work restrictions provided by Dr. Draper and found that his opinion represented the weight of the medical evidence. OWCP further determined that the position offered appellant was within her restrictions. It informed her of the provisions of 20 C.F.R. § 10.500(a) and advised her 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, he "would not be entitled to ongoing wage-loss compensation." It afforded appellant 30 days to accept the assignment and report to duty or provide a written explanation of her reasons for not accepting the assignment. Appellant did not respond.

In an April 24, 2020 e-mail, the employing establishment confirmed that the offered position remained open and available.

By decision dated April 28, 2020,[7] OWCP finalized the March 23, 2020 proposed notice of termination and terminated appellant's wage-loss compensation, effective April 24, 2020, because she failed to accept the January 28, 2020 temporary light-duty assignment in accordance with 20 C.F.R. § 10.500(a). It found that the weight of the medical evidence rested with Dr. Draper, 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 April 24, 2020 the employing establishment confirmed that the assignment remained available. As appellant would have sustained no wage loss had she accepted the assignment, OWCP determined that she was not entitled to wage-loss compensation; however, her medical benefits and entitlement to a schedule award were unaffected.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[8]

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

[7] On its face, OWCP's decision is dated both April 24, 2020 and April 28, 2020. The decision was imaged into the electronic case record on April 28, 2020.

[8] *D.K.*, Docket No. 19-1178 (issued July 29, 2020); *S.F.*, 59 ECAB 642 (2008).

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."[9]

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.[10] 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.[11]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's entitlement to wage-loss compensation, effective April 24, 2020.

The record indicates that the January 28, 2020 job offer was temporary and in writing. It therefore comported with the procedural requirements of 20 C.F.R. § 10.500(a).[12]

The evidence of record establishes that, as of April 24, 2020, the date OWCP terminated appellant's wage-loss compensation, there was a conflict of medical opinion evidence between Dr. Draper, OWCP's second opinion orthopedic surgeon, and appellant's physician Dr. Lynott, a treating orthopedic surgeon, as to whether appellant had the ability to perform the duties of the offered temporary modified rural carrier position.[13]

Dr. Lynott began treating appellant in June 2018 and on June 12, 2018 performed authorized right ankle arthroscopy with open lateral ligament reconstruction. He initially held her off work, and on December 14, 2018, returned her to modified work. In an October 28, 2019 chart note, Dr. Lynott indicated that "extended walking as required to deliver mail" would result in incomplete healing of the accepted injury. In an accompanying work capacity evaluation, he found appellant able to perform full-time sedentary or medium level work with weight limitations for climbing and squatting.

[9] 20 C.F.R. § 10.500(a).

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

[11] *Id*.

[12] *Id.*

[13] *F.R.*, Docket No. 20-0789 (issued December 1, 2020); *D.K.*, *supra* note 8.

In contrast, in his November 19, 2019 report, Dr. Draper opined that appellant could perform full-time modified duty with standing and walking up to four hours and pulling and pushing up to six hours. This difference of opinion is crucial as the offered modified position required walking and standing for up to four hours a day. Dr. Draper found appellant able to perform these duties, whereas Dr. Lynott opined that she could not.

The Board thus finds that there is an unresolved conflict of medical evidence between the opinions of Dr. Lynott and Dr. Draper as to whether appellant could perform the duties of the offered position on April 24, 2020, the effective date of the termination of her wage-loss compensation. Therefore, OWCP has not met its burden of proof to terminate appellant's wage-loss compensation as it should have referred her for an impartial medical evaluation to resolve the conflict prior to a termination of wage-loss compensation benefits, pursuant to 5 U.S.C. § 8123(a).

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective April 24, 2020, 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 April 24, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 7, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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