

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

_____)	
D.S., Appellant)	
)	
and)	Docket No. 23-0667
)	Issued: November 16, 2023
U.S. POSTAL SERVICE, ROCKY POINT POST OFFICE, Rocky Point, NY, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
*Thomas S. Harkins, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 5, 2023 appellant, through counsel, filed a timely appeal from a November 9, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 an 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 April 15, 2022, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

FACTUAL HISTORY

On August 14, 2020 appellant, then a 55-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 14, 2020 she sustained left foot and ankle injuries when she stepped out of her postal vehicle and her ankle rolled while in the performance of duty. She stopped work on the date of injury. By decision dated September 18, 2020, OWCP accepted appellant's claim for sprain of the tibiofibular ligament of the left ankle. It paid her wage-loss compensation on the supplemental rolls for disability from work commencing October 1, 2020, and on the periodic rolls commencing June 20, 2021.

On January 25, 2021 appellant underwent OWCP-authorized left ankle arthroscopic debridement, Brostrum-Gould reconstruction, and splint application, performed by Dr. John Feder, a Board-certified orthopedic surgeon.

In a report dated September 8, 2021, Dr. Feder followed up with appellant for her left ankle condition. On physical examination of the left ankle, he observed minimal diffuse swelling, a healed incision, a positive Tinel's sign, and a mildly antalgic gait. Range of motion testing demonstrated dorsiflexion to 15 degrees, plantar flexion to 30 degrees, and inversion and eversion to 20 degrees. Strength testing was normal. Dr. Feder noted that appellant could not perform a heelrise. He opined that her impairment was total, and that she could not return to work. Dr. Feder diagnosed the accepted condition of sprain of the anterior talofibular ligament of the left ankle. He also diagnosed neuropathy of the left peroneal nerve, and possible incisional neuroma.

On October 6, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine her work capacity.

In a report dated November 2, 2021, Dr. Sultan noted his review of the SOAF, related the history of appellant's August 14, 2020 employment injury, and her subsequent medical treatment. He provided findings on examination of her left ankle and foot. Dr. Sultan diagnosed soft tissue trauma to the left ankle with multiple ligament disruptions causally connected to the August 14, 2020 work injury. He opined that appellant's work-related left ankle condition had not resolved, noting that it was still partially active on objective testing, and that it had not yet reached a fixed and stable state. Dr. Sultan advised that she was not currently capable of returning to her date-of-injury position as a rural carrier. He recommended work restrictions of indoor light-duty work. Dr. Sultan, in an accompanying work capacity evaluation (Form OWCP-5c) dated November 2, 2021, indicated that appellant could perform light work with restrictions of no pushing, pulling, or lifting over 20 pounds for eight hours per day.

On November 30, 2021 the employing establishment offered appellant a modified-duty rural carrier position, which was to become effective on December 4, 2021. The position involved withdrawing letters, flats, small parcels and rolls, and parcels up to 1 hour per day; casing flats and

letters, tagging parcels, and ordering small parcels and rolls up to 2 hours per day; pulling down a route including, accountable and pickups up to 1 hour per day; maintaining the authorized vehicle utilization system (AVUS) and casing other routes for up to 1 hour and 30 minutes per day; filing maintenance and paperwork for up to 1 hour per day; inspecting empty equipment for up to 10 minutes per day; and maintaining case labels throughout the office for up to 1 hour and 20 minutes per day. The physical requirements of the modified assignment included pushing, pulling, and lifting no more than 20 pounds, eight hours per day. The annual salary was listed as \$77,290.00. On the second page, the offer of modified assignment noted that “this assignment will remain within the physical restrictions furnished by your treating physician. You are advised not to exceed these restrictions. This assignment is currently available and is subject to revision based on the changes in your physical restrictions and/or the availability of adequate work. If a revision is necessary, you will be given a revised written modified assignment.” The offer also advised on the third page that this “[j]ob offer is available indefinitely, during the period of recovery while [appellant’s] work restrictions are temporary in nature and until medical documentation compels a change.”

On December 9, 2021 appellant refused the position. She advised that Dr. Feder had not cleared her to accept the job offer.

On January 3, 2022 OWCP received a May 26, 2021 report from Dr. Feder wherein he assessed sprain of the anterior talofibular ligament of the left ankle, and neuropathy of the left peroneal nerve. He indicated that appellant could not return to work.

On January 3, 2022 the employing establishment confirmed that the offered position remained available to appellant.

By notice dated January 4, 2022, OWCP advised appellant of its proposed termination of her wage-loss compensation in accordance with 20 C.F.R. § 10.500(a) based on her refusal of the November 30, 2021 temporary light-duty assignment of a modified rural carrier. It advised that it had reviewed the work restrictions provided by Dr. Sultan and found that his opinion represented the weight of the medical evidence. OWCP further determined that the offered position was within appellant’s restrictions and remained available. It informed 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 actual earnings in the offered temporary light-duty assignment met or exceeded the wages of the position appellant had held when injured. It afforded her 30 days to accept the assignment and report to duty or demonstrate that her refusal was justified.

On January 22, 2022 appellant again refused the modified assignment offer, explaining that her refusal was based on the advice of Dr. Feder. She submitted a duty status report (Form CA-17), and a form dated January 5, 2022 wherein Dr. Feder indicated that appellant could not return to work in any capacity at this time.

In a letter dated January 29, 2022, counsel argued that OWCP had failed to appoint an impartial medical examiner (IME) to resolve the conflict of medical opinion between Dr. Sultan and Dr. Feder, and thus, had not met its burden of proof to terminate appellant’s wage-loss compensation.

By decision dated April 15, 2022, OWCP terminated appellant's wage-loss compensation effective that date, because she failed to accept the temporary light-duty assignment in accordance with 20 C.F.R. § 10.500(a). It found that, if she had accepted the position, she would have had no wage loss.

On October 21, 2022 appellant, through counsel, requested reconsideration. Counsel provided a September 21, 2022 report from Dr. Feder. On physical examination of the left ankle, Dr. Feder observed tenderness at the lateral and deltoid ligaments, and a mildly antalgic gait. He again diagnosed the accepted condition of left ankle sprain of the anterior talofibular ligament and reiterated his diagnosis of neuropathy of the left peroneal nerve. Additionally, Dr. Feder diagnosed deltoid ankle sprain, talonavicular contusions, and complex regional pain syndrome (CRPS). He opined that appellant was disabled from her usual occupation, but that she was a candidate for modified work with unscheduled breaks for pain.

By decision dated October 25, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a). It noted that Dr. Feder's September 21, 2022 report was not received.

On November 9, 2022 OWCP issued a decision which superseded the October 25, 2022 decision. It reviewed Dr. Feder's September 21, 2022 report and denied modification of its April 15, 2022 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.³

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 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

³ *C.G.*, Docket No. 21-0171 (issued November 29, 2021); *T.C.*, Docket No. 20-1163 (issued July 13, 2021); *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

procedures, a temporary light-duty assignment within the employee's work restrictions."⁴

When it is determined that, an employee 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.⁵ 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.⁶ OWCP's procedures further advise, "If there still 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 [wage-earning capacity] calculation (just as if he/she had accepted the light[-]duty assignment)."⁷

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective April 15, 2022, pursuant to 20 C.F.R. § 10.500(a).

OWCP terminated appellant's wage-loss compensation on April 15, 2022, pursuant to 20 C.F.R. § 10.500(a). The Board, however, is unable to determine from the current record whether its termination of her benefits is proper under 20 C.F.R. § 10.500(a) since it cannot be established whether she had been offered a temporary or a permanent employment position. OWCP's 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. If the employment offered to an employee on the periodic rolls is temporary and the employee does not accept the position, section 20 C.F.R. § 10.500(a) applies.⁸ 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.⁹

The evidence of record contains a written job dated November 30, 2021, for a modified rural carrier position beginning December 4, 2021. The job offer noted the duties and physical requirements of the modified assignment. The assignment was for full-time work and had an annual salary of \$77,290.00. The offer also indicated that the position was available indefinitely during the period of recovery while the claimant's work restrictions were temporary in nature.

⁴ 20 C.F.R. § 10.500(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1) (June 2013).

⁵ *Id.* at Chapter 2.814.9c(1)(b) (June 2013).

⁶ *Id.* at Chapter 2.814.9c(1)(d) (June 2013).

⁷ *Id.* at Chapter 2.8149c(8) (June 2013).

⁸ A.W., Docket No. 21-1287 (issued September 22, 2023); R.S., Docket No. 20-1004 (issued March 15, 2021).

⁹ *Supra* note 4.

OWCP subsequently issued a notice of proposed termination of wage-loss compensation on January 4, 2022. It noted that appellant had been provided with a temporary light-duty assignment as a modified rural carrier on November 30, 2021. The Board finds, however, that the documentation of record supporting that the offered assignment was temporary in nature is unclear.¹⁰ The November 30, 2021 job offer did not indicate in the description found on the first page of the modified job offer whether the position was temporary or permanent. The employing establishment provided a cover letter which neither advised appellant nor OWCP as to whether the modified rural carrier position was temporary or permanent.

Appellant began receiving wage-loss compensation on the periodic rolls, effective June 20, 2021, and remained on the periodic rolls at the time of the November 30, 2021 job offer. Therefore, to terminate her wage-loss compensation benefits pursuant to 20 C.F.R. § 10.500(a), OWCP had the burden of proof to establish that the offered 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 5 U.S.C. § 8106(c). As it cannot be established that appellant's job offer was a temporary position, the Board finds that OWCP has not met its burden of proof to terminate wage-loss compensation pursuant to 20 C.F.R. § 10.500(a).¹¹

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective April 15, 2022, pursuant to 20 C.F.R. § 10.500(a).

¹⁰ See *A.W.*, *supra* note 8; *C.C.*, Docket No. 19-0241 (issued August 12, 2019).

¹¹ *A.W.*, *id.*; *C.W.*, Docket No. 18-1779 (issued May 6, 2019).

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 16, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board