

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

---

**J.S., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
WILMINGTON VA MEDICAL CENTER,  
Wilmington, DE, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 24-0140  
Issued: March 27, 2024**

*Appearances:*

*Michael D. Overman, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On December 1, 2023 appellant, through counsel, filed a timely appeal from a June 6, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

---

<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the June 6, 2023 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether OWCP has met its burden of proof to terminate appellant's entitlement to wage-loss compensation, effective October 17, 2022, pursuant to 20 C.F.R. § 10.500(a), based on his earnings had he accepted a temporary light-duty assignment.

## **FACTUAL HISTORY**

On April 21, 2022 appellant, then a 56-year-old air conditioning equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that on April 14, 2022 he felt pain in his lower back when transferring a small pump while in the performance of duty. He stopped work that day and returned to work on April 16, 2022.

In an April 22, 2022 emergency room note, Dr. Alexander Fishman, an osteopath specializing in emergency medicine, noted the history of appellant's work injury. He provided an assessment of musculoskeletal back pain with likely sciatica symptoms on right side and restricted appellant to minimal heavy lifting.

OWCP received several reports from Dr. Aman Jalali, a Board-certified internist, who noted the history of the work injury. In a May 9, 2022 report, Dr. Jalali indicated that appellant's radicular symptoms started on April 14, 2022 after which he presented to the emergency room department. He provided examination findings and provided assessment of pain 10/10 with movement, lumbar sacral sprain, osteoarthritis, and degenerative disc disease. Dr. Jalali noted that appellant had been taking sick and annual leave. In a May 13, 2022 report, he opined that appellant's magnetic resonance imaging (MRI) scan of the lumbar spine was consistent with his reported symptoms and examination findings at L2-L4. Dr. Jalali recommended a neurosurgery consultation. He attached appellant's diagnostic studies. The May 10, 2022 lumbar spine x-ray revealed mild degenerative change of the lumbar spine. The May 12, 2022 lumbar spine MRI scan reported findings compatible with disc extrusion at L3-L4, canal stenosis and foraminal narrowing as detailed.

In a May 17, 2022 attending physician's report (Form CA-20), Dr. Jalali opined that appellant's low back strain, lumbar radiculopathy and L3-L4 disc extrusion were caused or aggravated by his April 14, 2022 employment activity as he never had lumbar radiculopathy symptoms prior to the April 14, 2022 injury. He noted that appellant had been referred to a neurosurgeon. In a duty status report (Form CA-17) of the same date, Dr. Jalali advised that appellant could work with restrictions of intermittent lifting of 10 pounds .25 hours per day, that he could sit, stand, walk, a one-half hour a day, but could not climb, bend/stoop, twist, pull/push, but could perform simple grasp, fine manipulation (including keyboarding) an hour per day.

In a May 24, 2022 letter addressed to appellant at "address, Camden DE," the employing establishment indicated that a verbal offer of a full-time light-duty assignment, during his period of recovery, was made to appellant based on the medical reports of Dr. Fishman and Dr. Jalali. The assignment was to begin on May 25, 2022. The job description indicated that the duties involved moving recycling containers from medical center floors to loading dock; removing cardboard from containers and placing in the dumpster; escorting contractors in the medical center by walking and opening doors; performing data entry on computer while sitting; answering telephones and documenting messages; filing and organizing documents; and miscellaneous walking, talking and performing sedentary administrative duties. The physical requirements

involved sitting, standing, walking, kneeling, bending, pulling, pushing, simple grasping, keyboarding, talking, reaching, working outside, working inside, using a two-way radio, moving lightweight items working around noise.

Appellant worked in the light-duty position for one day only on May 25, 2022. In a May 31, 2022 statement, he indicated that he never received the job offer letter.

In a June 3, 2022 report, Dr. Steven Fulop, a Board-certified neurosurgeon, noted appellant's history of injury, reviewed diagnostic studies and presented examination findings. He opined that appellant had right L3 possible L4 radiculitis due to herniated nucleus pulposus from work-related activity. Dr. Fulop opined that appellant could not work or safely drive in his current condition and recommended approximately eight weeks off work. In a June 13, 2022 Form CA-17, he opined that appellant was totally disabled from work due to lumbar radiculopathy.

In a June 22, 2022 narrative report, Dr. Fulop described the circumstances that led appellant to being unable to commute to work to perform either regular or light-duty work. He noted the April 14, 2022 work incident and described appellant's symptoms and medical course of treatment. Dr. Fulop opined that the lifting event at work on April 14, 2022 was directly related to the progression of appellant's condition and the diagnosis of an acute L3 and L4 radiculopathy due to the herniated disc fragment. He further offered medical rationale to support his opinion that appellant's symptoms of leg weakness, numbness and extreme pain in the lower back which radiated to the right leg stemming from the affected nerves seen on MRI scan made it unsafe for him to drive a vehicle and was not conducive to optimal recovery even in a light-duty work environment.

By decision dated July 6, 2022, OWCP accepted the claim for intervertebral disc disorders at L3-L4 with radiculopathy. It noted that appellant had filed a claim for compensation (Form CA-7) for leave buy back and advised him of the process necessary to validate the claim request. In the accompanying notice to the employing establishment, OWCP noted that the employer reported that appellant did not respond to the job offer. It indicated that the May 24, 2022 letter from the employing establishment which contained the job offer did not have appellant's full mailing address listed and that it was plausible that appellant did not receive the job offer. OWCP requested that if the job offer was still available, the employing establishment should amend the letter with appellant's mailing address and send out a job offer with a current date.

OWCP continued to receive CA-7 forms for disability from work and additional medical evidence, including diagnostic reports.

In an August 25, 2022 memorandum of telephone call (Form CA-110), the employing establishment confirmed that the light-duty position remained available to appellant. It noted that the original light-duty job offer had been e-mailed to appellant's supervisor who had met with appellant.

On September 2, 2022 the employing establishment presented verification from appellant's supervisor of a meeting with appellant to discuss his light-duty assignment and the subsequent declination of such assignment.

In a September 7, 2022 letter, Dr. Jalali indicated that the form reports dated June 3, 2022 were not generated by him as the signature was not his.<sup>4</sup> He advised that when he last saw appellant on May 17, 2022 appellant could work light duty and he had listed work restrictions on the May 17, 2022 Form CA-17. Dr. Jalali also noted Dr. Fulop's opinion regarding appellant's ability to perform light-duty work.

On September 13, 2022 OWCP issued a notice of proposed termination of entitlement to wage-loss compensation. It informed appellant that it found the May 24, 2022 light-duty job offer suitable and in accordance with the work restrictions provided by Dr. Fishman and Dr. Jalali in their respective reports of April 24 and May 17, 2022, and that the employing establishment confirmed that the position remained open and available. OWCP advised him that his restrictions were temporary in nature and that a temporary light-duty assignment may be provided to an employee during a period of recovery. It further advised appellant of the provisions of 20 C.F.R. § 10.500(a) and noted that the offered pay rate of \$1,372.20 per week for working 40-hour weeks would meet or exceed his date-of-injury pay rate and, therefore, he would not be entitled to ongoing wage-loss compensation. OWCP afforded him 30 days to accept the assignment and report to duty or provide a written explanation of his reasons for not accepting the assignment.

In a September 14, 2022 narrative report, Dr. Fulop opined that as a result of appellant's activity restriction, time off work and therapy he received, appellant had demonstrated improvements in the frequency and severity of his back and right leg pain caused by the herniated discs he suffered lifting a pump at work on April 14, 2022. He explained that a surgeon is typically conservative with the recommendations for activity restrictions because excess movements and exertion can exacerbate acute nerve injuries and lead to setbacks in pain control and even neurologic deterioration. Dr. Fulop opined that while appellant may technically be capable of performing light-duty work and even commuting to work, he believed that this would put him at risk of exacerbation to his condition which could lead to a laminotomy and discectomy. Additional medical evidence including copies of Dr. Fulop's progress notes from July 5, 2022 onwards were provided. Dr. Fulop reported that appellant's physical activity was limited by pain and leg strength/sensation compromised by nerve root compression by L3-L4 disc herniation.

In an October 13, 2022 Form CA-110, the employing establishment indicated that the job offer remained available to appellant.

By decision dated October 17, 2022, OWCP terminated appellant's wage-loss compensation, effective that date, pursuant to 20 C.F.R. § 10.500(a). It found that he failed to accept the May 24, 2022 temporary light-duty assignment. OWCP noted that the decision did not terminate appellant's entitlement to medical benefits.

---

<sup>4</sup> In a June 2, 2022 Form CA-20 report, Dr. Jalali purportedly diagnosed right L3-L4 herniated disc with L3 radiculopathy which he opined was caused or aggravated by the April 14, 2022 work injury as appellant was asymptomatic prior to the injury. He also opined that appellant was totally disabled and could resume light-duty work on August 1, 2022. In a June 3, 2022 Form CA-17, Dr. Jalali purportedly indicated that appellant could sit 3 to 4 hours per day, stand 2 to 3 hours per day, walk 1 to 2 hours per day, perform simple grasping 2 to 3 hours per day, fine manipulation 2 to 3 hours per day, reach above shoulder 1 to 2 hours per day, drive .05 hours per day.

On October 24, 2022 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on March 22, 2023.

Prior to and after the hearing, OWCP received medical reports summarizing appellant's current back condition. On February 3, 2023 appellant underwent a right-sided L3-4 minimally invasive hemilaminectomy and discectomy, which Dr. Fulop performed.

By decision dated June 6, 2023, OWCP's hearing representative affirmed OWCP's October 17, 2022 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.<sup>5</sup>

OWCP regulations at 20 C.F.R. § 10.500(a) provides 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 procedures, a temporary light-duty assignment within the employee's work restrictions.”<sup>6</sup>

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.<sup>7</sup> When the light-duty assignment either ends or is no longer

---

<sup>5</sup> *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).

<sup>6</sup> 20 C.F.R. § 10.500(a).

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

available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.<sup>8</sup>

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 upon the temporary actual earnings WEC [wage-earning capacity] calculation (just as if he/she had accepted the light-duty assignment)."<sup>9</sup>

### **ANALYSIS**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's entitlement to wage-loss compensation, effective October 17, 2022, pursuant to 20 C.F.R. § 10.500(a), based on his earnings had he accepted a temporary light-duty assignment.

OWCP accepted that appellant sustained intervertebral disc disorders at L3-4 with radiculopathy as a result of the April 14, 2022 employment injury. It subsequently denied appellant's claim for wage-loss compensation as he failed to accept a temporary light-duty assignment which it found accommodated his current work restrictions as provided by Dr. Fishman and Dr. Jalali in their respective reports of April 24 and May 17, 2022.

The Board finds, however, that the evidence of record does not contain a valid written job offer for the temporary light-duty assignment. OWCP, in its July 6, 2022 acceptance decision, specifically noted that the May 24, 2022 letter from the employing establishment which contained the job offer did not have appellant's full mailing address listed. It requested that, if the job offer was still available, the employing establishment amend the letter with appellant's mailing address and send out a job offer with a current date. This was not done. Rather, the evidence of record indicates that appellant's supervisor met with appellant and discussed the job offer. 20 C.F.R. § 10.500(a) specifically requires that the employee be previously notified in writing that such duty was available. As appellant never received a properly addressed written job offer, OWCP improperly denied appellant wage-loss compensation benefits pursuant to 20 C.F.R. § 10.500(a).<sup>10</sup>

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's entitlement to wage-loss compensation, effective October 17, 2022, pursuant to 20 C.F.R. § 10.500(a), based on his earnings had he accepted a temporary light-duty assignment.

---

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at Chapter 2.814.9c(8).

<sup>10</sup> See *D.S.*, Docket No. 23-0667 (issued November 16, 2023); *A.W.*, Docket No. 21-1287 (issued September 22, 2023).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 6, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 27, 2024  
Washington, DC

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

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

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