U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL C. GRACI and U.S. POSTAL SERVICE,
POST OFFICE, Staten Island, NY

Docket No. 98-497; Submitted on the Record;
Issued September 24, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had not established a recurrence of total disability commencing May 9, 1997.

In the present case, the Office accepted that appellant, a letter carrier, sustained a fractured left tibia in the performance of duty on August 16, 1996, when he fell down a set of steps. On April 3, 1997 the employing establishment offered appellant a light-duty position at four hours per day as a modified letter carrier. Appellant initially declined the offer on April 14, 1997, but on May 9, 1997 he accepted the job offer. The record indicates that appellant worked for two hours on May 9, 1997 and then stopped working. On May 14, 1997 appellant filed a notice of recurrence of disability commencing on May 9, 1997.

By decision dated October 28, 1997, the Office determined that appellant had not met his burden of establishing a recurrence of disability.

The Board has reviewed the record and finds that appellant remained entitled to compensation for total disability after May 9, 1997.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[1]

In the present case, appellant was receiving compensation on the periodic roll and then attempted to return to a light-duty position at four hours per day on May 9, 1997. Appellant continued to be entitled to compensation with respect to the four hours per day he did not work;

[1] *Patricia A. Keller*, 45 ECAB 278 (1993).

the Office, however, shifted the burden of proof to appellant to establish entitlement to the remaining four hours per day, citing *Terry R. Hedman.*[2] The *Hedman* case provides that when an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability.[3]

In the October 28, 1997 decision, the Office cited the above authority and determined that appellant had not met his burden in establishing total disability commencing May 9, 1997. Before the burden shifts to appellant under *Hedman*, however, there must be a return to work or the medical evidence must establish that light duty can be performed. The Board has held that a short-lived or unsuccessful attempt to return to work does not automatically discharge the Office's burden to justify termination of compensation.[4] In this case, appellant returned to work in a light-duty position for approximately two hours, which is not itself sufficient to shift the burden to appellant.

Moreover, the medical evidence of record did not establish that the light-duty job could be performed as of May 9, 1997. In a report dated January 7, 1997, Dr. Lester Lieberman, an orthopedic surgeon, had opined that appellant could work four hours per day in a desk job. Appellant's attending physicians, however, reviewed the offered light-duty position and stated that appellant remained totally disabled. In a report dated April 10, 1997, Dr. Eric Senat, an orthopedic surgeon, opined that appellant could not perform the duties of the offered light-duty position. In a report dated April 26, 1997, Dr. Jack B. DeAngelo, Jr., a specialist in physical medicine, also opined that appellant could not perform the light duties offered.

The Office declared a conflict in the medical evidence and referred appellant to Dr. Milton M. Smith, a Board-certified orthopedic surgeon. The July 16, 1997 report from Dr. Smith does not, however, resolve the relevant issue on appeal. Dr. Smith provided a history and results on examination, opining that appellant "is able to return to work in a sedentary position only, eight hours per day. He cannot work as a letter carrier." The issue is whether appellant was able to work the offered light-duty position as of May 9, 1997. Dr. Smith's opinion on this issue is not well rationalized as it does not discuss the modified light duty to which appellant returned or his capacity for the selected position.

Accordingly, the Board finds that the Office erroneously placed the burden of proof on appellant with respect to the additional four hours of compensation commencing May 9, 1997. The burden remained on the Office and the Office failed to meet its burden in this case.

The Board notes that the record contains a decision dated December 29, 1997 regarding termination of appellant's compensation. Appellant filed his appeal in this case, on

[2] *Terry R. Hedman*, 38 ECAB 222 (1986).

[3] *Id.*

[4] *Janice F. Migut*, 50 ECAB ___ (Docket No. 96-1861, issued December 1, 1998); *Theresa M. Dwonch*, 29 ECAB 828 (1978).

November 26, 1997. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and those Office decisions which change the status of the decision on appeal are null and void.[5] Since the December 29, 1997 decision was issued while the Board had jurisdiction over the case and since the decision changes the status of the case on appeal, the Board finds that the December 29, 1997 decision is null and void.

The decision of the Office of Workers' Compensation Programs dated October 28, 1997 is reversed.

Dated, Washington, D.C.
September 24, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[5] *Douglas E. Billings*, 41 ECAB 880, 895 (1990).