U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. MADSEN and U.S. POSTAL SERVICE,
POST OFFICE, Frederic, WI

Docket No. 03-505; Submitted on the Record;
Issued July 8, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant is entitled to an additional four hours of wage-loss compensation for the period November 1991 to April 1996.

On August 2, 1989 appellant, then a 57-year-old rural letter carrier, filed an occupational disease claim alleging that on June 3, 1989 he first realized his right shoulder condition was due to his employment duties.[1] The Office of Workers' Compensation Programs accepted the claim for right shoulder impingement syndrome secondary to a right rotator cuff tear and authorized surgical repair.

Appellant accepted a light-duty job working four hours a day and returned to work on September 10, 1990.[2] The duties of the position included clerical work of "writing down name, rural route and box number of patrons on rural routes" and appellant would be directed to another office once all routes were completed at the employing establishment.

In a vocational rehabilitation report, for the period September 11 to November 21, 1990, the rehabilitation specialist noted: "[I]t appears there is enough work for [appellant] to continue indefinitely in his current position." In a November 30, 1990 entry, the vocational rehabilitation specialist noted that the employing establishment had "at least 12 to 18 months' work available to [appellant] in his current position" and "[t]here is a likelihood that there may be more work available." At the conclusion of his meeting with John Baskerville on November 30, 1990, the vocational rehabilitation specialist noted it was agreed that appellant would "continue on in the same position for as long as possible" and it was possible that appellant would "be extended to work in Washburn and adjacent counties."

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[1] Appellant retired and started receiving his retirement benefits effective April 28, 1996.

[2] The job offer indicated that the light-duty position was temporary and expected to last six months.

In a letter dated September 3, 1993, appellant's attorney noted that appellant had stopped working his light-duty job in November 1991, because his "problems became so severe that he was simply unable" to perform the light-duty position.

On January 10, 1994 appellant filed a claim for continuing compensation (Form CA-8) beginning November 1991, on the basis that his light-duty job working four hours a day ended in November 1991.

In a letter dated November 4, 1994, the employing establishment stated that appellant's light-duty job was open-ended and is still available. The employing establishment noted that appellant left work in 1992 and relocated to Arizona from Wisconsin because he was unable to work in the cold weather.

In a December 4, 1994 letter, the employing establishment issued a return to work letter and informed appellant he was now considered absent without leave for his failure to report for a medical examination to clear him to return to duty. The employing establishment advised appellant that his current limited-duty assignment remained available and that he should provide reasons for his failure to report for the medical examination and work.

In a letter dated December 14, 1994, appellant stated that he worked four hours a day in a light-duty job from September 1990 to November 1991. He then went to Alabama for the winter to avoid the cold weather. Upon his return from Alabama, he stated that he was told by the employing establishment that there was no part-time work within his restrictions available.

On March 14, 1995 the employing establishment offered appellant limited duty, working as a rural carrier, performing general clerk duties, working eight hours a day, which appellant rejected.

In a May 2, 1995 letter, the employing establishment noted that appellant refused a limited-duty job offer working eight hours a day. The employing establishment noted that appellant's limited-duty job had been and was still available to him, but since he went south one winter he has never returned to work.

In a follow-up letter dated October 25, 1995, Sherry Constans, United States Parcel Service injury compensation, stated all limited-duty jobs are considered permanent, not temporary or seasonal. She noted that appellant was provided with limited-duty work "assisting the District AIS Office with AIS field work" and that this work was and is still available to appellant.

On December 20, 1995 the employing establishment offered appellant a limited-duty job offer provided both four- and eight-hour tour duties, which he rejected on January 4, 1996.

By letter dated December 29, 1995, appellant advised the Office that he accepted civil service retirement benefits effective March 1, 1996. As of February 2, 1996, he indicated that he would no longer accept direct deposits for his partial disability payments.

In a letter dated January 2, 1996, appellant requested back pay from November 1991 to January 2, 1996 as his light-duty job of four hours a day ceased. He determined the amount he was owed for the additional four hours of compensation was $57,749.00.

On May 8, 1996 appellant filed a claim for compensation (Form CA-7) for the period January 1, 1992 to December 31, 1995.

On September 16, 1996 the Office requested that appellant submit written confirmation that the employing establishment did not have any light-duty work available for him from November 1991 to March 1995. The Office advised appellant that the employing establishment contended that the light-duty work was still available, but that he refused to perform the light-duty work offered. Lastly, the Office requested appellant to submit any separation papers he had from November 1991.

In a September 23, 1996 response, appellant contended that the 1990 job offer was temporary. He also noted that the March 1995 job was for eight hours and the employing establishment refused to change the hours to four hours a day.

By decision dated December 11, 1997, the Office found that appellant was not entitled to an additional four hours of compensation for the period November 1991 through April 28, 1996 when his retirement payments began. The Office found the evidence insufficient to establish that appellant stopped work because there was no more light duty available. The Office also found that the evidence was insufficient to establish that his condition had worsened.

In a letter dated January 8, 1998, appellant's counsel requested a review of the written record by an Office hearing representative.

By decision dated June 19, 1998, the Office denied appellant's request for modification of the December 11, 1997 decision.

In a letter dated August 31, 1998, appellant's counsel requested reconsideration and submitted evidence in support of his request.

The Board remanded the case to the Office as the case record had not been transmitted and instructed the Office to reconstruct the record and issue an appropriate decision.[3]

In a decision dated March 26, 2001, the Office reissued the December 11, 1997 decision denying appellant's claim for an additional four hours of compensation.

In a letter dated April 12, 2001, appellant requested an oral hearing on the issue of the denial of his claim for an additional four hours of compensation for the period November 1991 to April 1996.

By decision dated May 10, 2001, the Office denied appellant's request for an additional four hours of compensation for the period November 1991 to April 1996.

[3] Docket No. 99-221 (issued June 29, 2000).

In a letter dated April 23, 2001, appellant requested a hearing on his schedule award claim and the denial of his request for an additional four hours of compensation for the period November 1991 to April 1996. A hearing was held on September 26, 2001.

In a decision dated February 20, 2002, a hearing representative remanded the case on the issue of whether appellant was entitled to compensation for total disability from November 1991 to April 1996.[4] The hearing representative instructed the employing establishment to request Mr. Baskerville to provide a statement "specifically addressing the claimant's statements as to what transpired in November 1991 and April 1992" and to get Corrine Baker to provide a statement. The employing establishment was also instructed to "indicate whether the 911 address for Polk County was completed in 1991" and whether appellant was "told no additional work would be available until the spring or was he given a new assignment." The hearing representative also instructed the employing establishment to address appellant pay stubs and his leave and why appellant was authorized for leave when he allegedly had "abandoned" his position. The employing establishment was instructed to determine whether appellant was not able to work in Wisconsin during the winter and whether a limited-duty position was available to him upon his return to Wisconsin in the spring. Lastly, the employing establishment was to address appellant's contention that Mr. Baskerville told him no part-time work was available when appellant reported for work in the spring of 1992 and to verify appellant's statement that he attempted to get part-time work at another post office and was told no part-time work was available.

In a March 27, 2002 letter, the Office requested additional information from the employing establishment.

In a May 6, 2002 letter, Karen S. Sledd, an employing establishment human resources specialist, stated that she was unable to obtain any statements from Mr. Baskerville, postmaster and Ms. Baker, injury compensation specialist, as they were fearful of appellant's retaliation if they cooperated. Ms. Sledd indicated that, while she was unable to obtain the statements requested by the hearing representative, she did state that she had sufficient information to respond to the instructions of the hearing representative. She stated that the 1990 limited-duty job offer of four hours a day was open and available to appellant and that it had never been terminated. Ms. Sledd noted that appellant presented a medical slip to the employing establishment in November 1991 stating that he needed to move to a warmer climate during the winter season and he "indicated that [the Office] had already authorized the move." As appellant directly submitted his information to the Office, the employing establishment "did not question appellant's actions." The Office was not notified of his actions as the "Postal management believed he was unable to work in the cold environment" and that the Office authorized his move south for the winter based upon his physician's recommendation. Regarding his pay stubs, Ms. Sledd stated:

> "Although I did not receive a copy of the pay stubs mentioned in the transcript, computer records indicate that in most pay periods beginning July 1992, [appellant] was in [absent without leave] status. [He] received payment for

[4] The hearing representative affirmed a decision dated June 20, 1997 and amended July 24, 1997 awarding appellant a schedule award for a 20 percent impairment of his right upper extremity.

> requested leave, usually around the holidays, in 12 out of 722 pay periods between 1992 and 1995. The injury compensation Office was unaware of the submitted annual leave requests. I can only presume the [p]ostmaster approved the leave because [appellant] was still considered a current employee at the time and he did n[o]t know how else to handle it. On these days, he received eight hours of pay for his annual and four hours compensation. When [i]njury [c]ompensation discovered this practice, pay adjustments were administered to correct the overpayment of annual leave."

Appellant submitted copies of his pay stubs for pay periods 24 through 26 in 1991 and pay periods 1 through 9 in 1992 showing he was retained on the employing establishment's pay roll. The pay stubs noted codes "L" and "W" as to pay hours without any explanation of the codes. In addition, the pay stubs contain information on leave without pay and appellant's annual and sick leave status by indicating leave earned and used that year.

By decision dated May 10, 2002, the Office denied modification of its prior decision.

The Board finds that appellant is not entitled to an additional four hours of wage-loss compensation for the period November 1991 to April 1996.

An employee returning to light duty or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he cannot perform the light duty.[5] As part of his burden, the employee must show a change in the nature or extent of the injury-related conditions or a change in the nature or extent of the light-duty requirements.[6]

Appellant does not contend that he was disabled from his limited-duty position during the period November 1991 to April 1996; his contention on appeal is that the employing establishment did not have any light-duty work available for him as of November 1991. He submitted a copy of the job offer which noted the position was temporary and expected to last six months. The record contains a memorandum from the employing establishment noting his light-duty job was available, open ended and had not been withdrawn. Ms. Sledd's statement refutes appellant's allegations that the light-duty work was withdrawn. Her statement supports that the limited-duty position remained open and available for appellant and had not been terminated. Furthermore, the employing establishment did not question the medical slip submitted by appellant regarding a move south as it believed that the Office had approved it. Moreover, by appellant's own admission he stopped work in November 1991 to move to a warmer climate for the winter based upon his physician's recommendation. Furthermore, the record contains letters from the employing establishment dated October 25, 1995 and May 6, 2002 indicating that appellant's light-duty job was available to him as these jobs were permanent.

[5] *See Carlos A. Marrero*, 50 ECAB 117 (1998); *Terry R. Hedman*, 38 ECAB 222 (1986).

[6] *Id.*

Appellant has not provided sufficient evidence to support his allegation that the employing establishment withdrew his light-duty assignment. The pay stubs appellant submitted for 1991 and 1992 are insufficient to support his contention that he is entitled to an additional four hours of compensation. The pay stubs contain codes which are not explained and do not establish that his light-duty assignment was withdrawn. Consequently, there is nothing in the record clearly establishing that appellant's work stoppage in November 1991 was either involuntary or precipitated by his employment-related right shoulder condition. Moreover, he stated that he was capable of performing the light-duty assignment.[7] Inasmuch as appellant failed to establish that the employing establishment withdrew his light-duty assignment, the Office properly denied appellant's claim for compensation for an additional four hours of compensation for the period November 1991 through April 1996.

The May 10, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 8, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[7] 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 of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements. *Mary A. Howard,* 45 ECAB 646 (1994); *Terry R. Hedman, supra* note 5. In the instant case, the record is devoid of any evidence establishing either a change in the nature and extent of appellant's employment-related condition or a change in the nature and extent of his light-duty job requirements.