United States Department of Labor
Employees' Compensation Appeals Board

JOHN P. BATISTE, Appellant	)	
and	)	**Docket No. 05-732**
	)	**Issued: November 22, 2005**
U.S. POSTAL SERVICE, DISTRIBUTION CENTER, New Orleans, LA, Employer	)	

Appearances:
John P. Batiste, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 7, 2005 appellant filed a timely appeal from a December 27, 2004 decision of the Office of Workers' Compensation Programs denying compensation for reduced hours from November 15, 2001 to January 22, 2003. Pursuant to 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 appellant is entitled to compensation following a reduction in the hours he worked during the period November 15, 2001 to January 22, 2003.

FACTUAL HISTORY

On June 15, 1999 appellant, then a 49-year-old flexible mail clerk, filed a claim for injury to his low back sustained on June 14, 1999 while picking up mail trays. He did not stop work. Appellant was provided a limited-duty job within his physical restrictions as of June 15, 1999

hand stamping mail and doing patch up. The claim was accepted by the Office for a lumbar strain.[1]

In an October 28, 2000 memorandum, the employing establishment noted that all part-time flexible clerks and mail handlers who were on limited or light duty and unable to work their assigned duties would be scheduled to work at 1:00 a.m. for six days a week, unless restrictions indicated otherwise.

The record reflects that appellant filed claims for intermittent wage loss for the period prior to November 15, 2001.[2] He submitted additional claims for leave without pay for 1.5 hours a day during the period November 15, 2001 to January 22, 2003, when his employment was terminated.[3] The Office accepted that appellant sustained a recurrence of total disability and he received compensation from January 22, 2003 to August 28, 2004. He accepted a limited-duty job offer at the employing establishment working four hours a day as of August 28, 2004. By decision dated November 29, 2004, the Office found that appellant's actual earnings fairly and reasonably reflected his wage-earning capacity.[4]

With regard to the issue on appeal, in a December 31, 2002 decision, the Office found that the evidence was not sufficient to establish that appellant sustained a recurrence of disability from January 25, 2001 to December 13, 2002. Appellant requested a hearing before an Office hearing representative, which was held on August 26, 2003. He testified that his work hours at the employing establishment were reduced and that he did not receive compensation for lost time.[5]

In a November 19, 2003 decision, an Office hearing representative found that appellant was entitled to compensation for lost wages claimed during the period January 25 to August 13, 2001, noting that appellant was not accorded an appropriate accommodation and that his modified duty exceeded his work restrictions. The hearing representative noted that the Office had already paid wage-loss compensation from August 13 to November 15, 2001 and found that appellant was not entitled to compensation from November 15, 2001 to January 22, 2003. He noted that the employing establishment stated that the reduced work schedule effective November 2001 was based on the available workload and not due to appellant's accepted injury.

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[1] By decision dated June 7, 2000, the Office denied appellant's claim for wage-loss compensation for April 4 to 7, 2000. This decision was affirmed by an Office hearing representative on June 4, 2001.

[2] The employing establishment noted that appellant averaged 36.03 hours per week based on his earnings for 1 year prior to his injury. On February 4, 2001 an employing establishment human resource specialist noted that appellant needed to be provided with a minimum of 36.5 hours of work a week, based on his claims for wage loss due to lost time. A November 14, 2001 memorandum noted that appellant had been sent home as the chairs at the facility were not of the type required for lumbar support.

[3] Appellant filed claims for 1.5 hours leave without pay for each day he worked. The employing establishment indicated that the amount of leave used varied from .04 to 3.25 hours during this period.

[4] On appeal, appellant did not seek review of the wage-earning capacity determination.

[5] Appellant submitted a decision of an Equal Employment Opportunity Commission judge who found that the employing establishment did not reasonably accommodate his disability by providing an adequate chair.

On November 14, 2004 appellant requested reconsideration of the hearing representative's decision. By decision dated December 27, 2004, the Office denied modification of the November 19, 2003 decision.

LEGAL PRECEDENT

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform a light-duty position, the employee has the burden to establish a recurrence of disability by the weight of the reliable and probative evidence. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[6]

ANALYSIS

The Board finds that the case is not in posture for decision. The evidence of record reflects that there was a change in the nature and extent of the light-duty job requirements. At the time of injury, appellant was a flexible mail clerk working an average of 36.03 hours per week for the year prior to his lumbar strain of June 14, 1999. He was thereafter provided with limited-duty work and received compensation benefits for intermittent periods of wage-loss attributable to residuals of his accepted condition. The record contains evidence that the employing establishment modified the work schedule of the part-time flexible clerks who were on limited or light duty. The new schedule provided work at 1:00 a.m., six hours a day for up to six days a week.

The medical evidence of record consists of reports from Dr. Joshua H. Kaufman, an attending physician Board-certified in physical medicine and rehabilitation. He provided work restrictions, noting that appellant could work up to eight hours a day subject to limitations on lifting, sitting, standing and walking. Dr. Kaufman advised that appellant should limit work to five days a week, but could work six days a week at his own discretion. He noted that these restrictions were permanent. The records from the employing establishment reveal that appellant returned to work as of November 17, 2001 to a schedule of 6 hours a day for 5 days a week or 30 hours per week.[7] As of August 7, 2002, his work hours were reduced by Dr. Kaufman to four hours a day, five days a week due to residuals of his accepted condition. These restrictions were reiterated by the physician in a November 26, 2002 report.

The evidence reflects for the period November 17, 2001 to August 7, 2002, appellant was provided with limited-duty work for 30 hours a week. Although the medical evidence for this period reveals that he was found capable by Dr. Kaufman of working 36 to 40 hours a week, the employing establishment schedule provided reduced hours of limited duty, as noted. While the reduced hours were stated to be based on the available workload, this constitutes *prima facie* evidence of a change in the nature and extent of appellant's limited-duty work assignment by the employing establishment under *Hedman*. For the period commencing August 7, 2002 to

[6] *See Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

[7] Appellant work hours were 1:00 a.m. to 7:00 a.m., Saturday through Wednesday.

January 22, 2003, the medical evidence of record reflects a change in the nature and extent of appellant's injury-related condition as reported by Dr. Kaufman. He reduced appellant to limited duty four hours a day, five days a week. Although the employing establishment was requested by the Office to provide a description of appellant's work assignments and schedule related to the period of claimed leave without pay, the record on appeal does not contain a clear response for review by the Board. The case will therefore be remanded to the Office for further development of appellant's claim and an appropriate decision applying the *Hedman* principles.[8]

CONCLUSION

The case is not in posture for decision and is remanded to the Office for further development on appellant's entitlement to compensation for the period November 17, 2001 to January 22, 2003.

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2004 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further development consistent with this decision of the Board.

Issued: November 22, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[8] The Board notes that the December 24, 2004 decision contains reference to a November 19, 2003 decision by the Board in this case. This was error as the November 19, 2003 decision in this case was of the Office hearing representative.