

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

K.B., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
Laguna Niguel, CA, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 13-1455
Issued: January 8, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 31, 2013 appellant filed a timely appeal from a December 4, 2012 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 sustained a recurrence of total disability commencing June 30, 2008 causally related to his accepted employment injuries.

FACTUAL HISTORY

This case has previously been before the Board. In a March 8, 2011 decision, the Board affirmed a February 1, 2010 OWCP decision, finding that appellant had not established a

¹ 5 U.S.C. § 8101 *et seq.*

recurrence of total disability commencing June 30, 2008 causally related to his accepted employment injuries. The Board found that he had failed to provide any evidence to establish a change in the nature and extent of his employment-related conditions or a change in the nature and extent of his limited-duty requirements such that he was unable to perform his limited-duty mission support specialist position. Appellant filed a petition for reconsideration and, on August 26, 2011, the Board granted the petition, but denied his request for oral argument.² The Board found that the March 8, 2011 decision was not properly issued as it had not been served on appellant's authorized representative. Consequently, the Board reissued the March 8, 2011 decision on September 6, 2011 to all appropriate parties in the case.³ Appellant filed a petition for reconsideration. The Board, by an order dated June 14, 2013, granted appellant's petition for reconsideration and reaffirmed the September 6, 2011 decision.⁴ The facts of the case are set forth in the Board's prior decisions and orders and are incorporated herein by reference.⁵ The relevant facts are set forth below.

On March 7, 2005 OWCP accepted that appellant, a safety manager, sustained bilateral plantar fasciitis due to factors of his federal employment under File No. xxxxxx420.⁶ On November 1, 2005 it accepted that appellant had sustained a recurrence of disability from August 22, 2005 through March 2, 2008 due to the withdrawal of his full-time modified-duty position and reassignment to a position that exceeded his physical restrictions. Appellant returned to work on March 3, 2008 in a modified mission support specialist position as a result of a February 14, 2008 Merit Systems Protection Board settlement agreement and a February 19, 2008 work release from Dr. Sylvia A. Gisi, an attending family practitioner, who advised that he could return to work in the modified position.

The duties of the position required appellant to participate and contribute to management decisions in assigned program areas; apply a wide range of administrative programs concepts, laws, policies, practices, and analytical/diagnostic methods and techniques to address substantive technical issues or problems characterized by complex, controversial and/or sensitive matters that contained several interrelated issues; provide comprehensive advisory and technical services on substantive organizational functions and work practices; develop new or modified administrative program work methods, approaches or procedures for delivering effective services to customers; and develop and deliver briefings, project papers, status/staff reports and correspondence to managers to foster understanding and acceptance of findings and recommendations. The position also required appellant to consult with a supervisor to discuss

² *Order Granting Petition for Reconsideration and Denying Request for Oral Argument*, Docket No. 10-1155 (issued August 26, 2011).

³ Docket No. 10-1155 (issued September 6, 2011).

⁴ *Order Granting Petition for Reconsideration and Reaffirming Prior Board Decision*, Docket No. 10-1155 (issued June 14, 2013).

⁵ By an order dated January 8, 2013, the Board dismissed appellant's appeal in Docket No. 12-1855 on the grounds that it was inadvertently assigned a docket number as it was not a valid appeal since appellant was seeking reconsideration in Docket No. 10-1155. *See* Docket No. 12-1855 (issued January 8, 2013).

⁶ The Board notes that appellant also filed a claim under File No. xxxxxx418 which OWCP accepted for lumbar strain. OWCP combined both of his claim files into a master claim assigned File No. xxxxxx420.

timeframes and scope of assignments, including possible stages and possible approaches. He was required to determine the most appropriate principles, practices and methods to apply in all phases of assignments. The supervisor reviewed completed work for soundness of overall approach, effectiveness in meeting requirements or producing expected results, the feasibility of recommendations and adherence to policies and procedures. Appellant had to use guidelines that often were ambiguous and expressed conflicting or incompatible goals and objectives which required his extensive interpretation and exercise of broad latitude in determining the intent of applicable guidelines, in proposing policy and guidelines for specific areas of work and in formulating interpretations that may take the form of proposed policy statements and new guidelines. The work consisted of addressing substantive technical issues or problems characterized by complex, controversial and/or sensitive matters that contained several interrelated issues. Appellant was required to assess situations that were complicated by ambiguous, disputed, conflicting and/or incomplete data requiring significant reconstruction to isolate issues and/or problems. He was also required to exercise originality and ingenuity by analyzing and refining existing work methods and techniques. The work involved resolving or advising on complex problems and issues that typically required analyzing and/or troubleshooting a wide range of unusual conditions. The work ultimately affected the objectives and effectiveness of the agency's activities, missions and programs. The assessment, analysis, and ultimate resolution of problems promoted the overall quality, effectiveness and efficiency of program operations. The work was primarily sedentary and typically performed in an adequately lighted, well-ventilated and climate-controlled office. Appellant was required to perform other duties as assigned.

Effective June 30, 2008, appellant resigned from his modified mission support specialist position due to extreme duress.

On September 1, 2012, less than one year from the Board's September 6, 2011 merit decision, appellant requested reconsideration before OWCP of the February 10, 2010 denial of his recurrence claim. He contended that the modified mission support specialist position did not fairly and reasonably represent his wage-earning capacity and that OWCP erred in determining that he worked in the position for 60 days. Appellant stated that he was not qualified to perform this position and that his work duties changed which required him to work outside his physical restrictions. He also stated that, since the position was a makeshift position, it could not be used by OWCP to make a loss of wage-earning capacity determination. Appellant contended that there was a conflict in medical opinion at the time OWCP erroneously forced him to file a recurrence of disability claim.

In an undated narrative statement, Sharon Schichel, a legal assistant, related that she turned over her supply clerk duties to appellant as requested by James Penny, an acting "SOS." On April 14 or 15, 2008 she explained the supply duties to appellant which included making a new station "prox" card if an individual lost the card or if the person left the card at home. Ms. Schichel also explained the chain of command to him. She witnessed Rhonda Kruse, an employee, turnover station keys and station "prox" cards to appellant. Ms. Schichel observed an employee ask appellant for a new "prox" card because he left his card at home.

Appellant resubmitted a partially illegible declaration dated September 11, 2008 from Karen Rubio, assistant director for mission support. Ms. Rubio stated that she was inundated

with e-mails from appellant concerning his complaints about his work location and assignments and outstanding reasonable accommodation requests, not being in charge of other mission support employees or a bargaining unit member and request for a desk audit. She investigated whether he had any outstanding reasonable accommodation requests and determined that he had none. Ms. Rubio explained to appellant how he could request a desk audit. She advised him to contact the Federal Labor Relations Authority about becoming a bargaining unit member. Ms. Rubio met with senior officers to resolve appellant's complaints that his work assignments were either beneath him or not desired. She arranged for him to receive training to work on a project with the sector intelligence unit. Ms. Rubio later assigned appellant to work in the finance department because he did not have a security clearance to work in the intelligence unit. She advised him that his medical limitations would be accommodated, but he refused to submit any further medical information regarding his restrictions, stating that the employing establishment already knew his limitations. There was some confusion regarding his work hours, but Ms. Rubio advised him to work the schedule he was given until the issue was resolved. She concluded that she made an extraordinary effort to address appellant's concerns and spent more time with him than with any other employee to develop a good situation for him.

Appellant also resubmitted a June 4, 2011 letter in which he requested modification of OWCP's loss of wage-earning capacity determination. He contended that the determination was in error as it was based on a makeshift position that did not fairly and reasonably represent his wage-earning capacity. Appellant also contended that an OWCP claim's examiner did not review the contrary evidence, there was a conflict in medical opinion and he never worked in any position for 60 days. He resubmitted OWCP's August 9, 2012 response letter which stated that it had not issued a loss of wage-earning capacity decision under his claims.⁷ OWCP advised appellant to exercise his appeal rights associated with the Board's March 8 and September 6, 2011 decisions.

In a December 14, 2012 decision, OWCP denied modification. It found that he had not submitted any medical evidence to establish that total disability from his limited-duty mission support specialist position. OWCP further found that appellant had not submitted any evidence to establish a change in his work assignment or that the limited-duty position required him to work outside his physical restrictions.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁸ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his

⁷ In the August 9, 2012 letter, OWCP included appellant's occupational disease claim for stress, sleeping problems, indigestion, exhaustion and a racing heart under File No. xxxxxx416 when it stated that no loss of wage-earning decision had been issued in his claims. In a July 10, 2006 decision, it denied his occupational disease claim on the grounds that he failed to submit any factual evidence to support his claim.

⁸ 20 C.F.R. § 10.5(x).

or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁹

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.¹⁰

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.¹¹

ANALYSIS

The Board previously found that appellant had not sustained a recurrence of disability as of June 30, 2008 causally related to his accepted employment-related lumbar strain and bilateral plantar fasciitis as there was no evidence to establish a change in his employment-related conditions and or a change in the nature and extent of his limited-duty work assignments. Appellant requested reconsideration before OWCP and submitted additional evidence. He must demonstrate either that his condition has changed such that he could not perform the activities required by his modified job or that the requirements of the limited light-duty job changed. The Board again finds that the record contains no evidence that the limited light-duty job requirements were changed or withdrawn or that appellant's employment-related conditions changed such that they precluded him from performing limited light-duty work.

It is appellant's contention before OWCP and on appeal that he sustained a recurrence of disability on June 30, 2008 because he was not qualified to perform the duties of the modified mission support specialist position and his work duties changed as he was reassigned to another position prior to his work stoppage on June 30, 2008 which required him to work outside his physical restrictions. He contended that neither he nor his physician was allowed to review a description of the new position he was assigned to prior to his work stoppage as required by statute. Although appellant contended that he worked in such positions prior to stopping work on June 30, 2008 he did not submit evidence to support his contentions.

⁹ *Id.*

¹⁰ *Albert C. Brown*, 52 ECAB 152, 154-155 (2000); *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

¹¹ *James H. Botts*, 50 ECAB 265 (1999).

The record establishes that appellant's own physician, Dr. Gisi, released him as capable of performing the duties of the modified mission support specialist position on February 19, 2008. Further, Ms. Rubio, assistant director for mission support, refuted appellant's allegations of working outside his physical restrictions by pointing out that he had no outstanding reasonable accommodation requests and that he refused to provide her with any further information regarding his medical limitations which she was willing to accommodate. She stated that she made an extraordinary effort to address his complaints about his work duties and environment, and to provide a good situation for him. Ms. Rubio also stated that she explained to appellant how he could request a desk audit to become a supervisor. She related that she directed him to the Federal Labor Relations Authority to obtain information about becoming a bargaining unit member.

Ms. Rubio reassigned appellant to work on a project in the intelligence unit and allowed him to receive training for the job as a result of her consultation with senior officers at work. She advised that he was subsequently reassigned to the finance department because he did not have a security clearance to work in the intelligence unit. Ms. Rubio allowed appellant to continue to work his same work hours until the confusion regarding his work schedule was resolved.

While Ms. Schichel stated that she relinquished her supply clerk duties to appellant as requested by Mr. Penny and witnessed Ms. Kruse hand over her work duties to appellant and him perform these duties, this evidence is insufficient to establish that the work duties were inappropriate for appellant's employment-related medical conditions. Further, appellant did not submit a medical opinion stating that he was physically incapable of performing the new work duties. The evidence of record shows that when he stopped work on June 30, 2008 he had limited-duty work within his work restrictions available to him. The Board finds, therefore, that appellant has not shown that he sustained a recurrence of total disability commencing June 30, 2008 due to a change in the nature and extent of his limited-duty requirements.

The Board also finds that appellant did not sustain a recurrence of disability due to a change in the nature and extent of his accepted conditions. Appellant failed to submit any rationalized medical evidence from an attending physician as to his inability to perform his assigned work duties.

Appellant has not met his burden of proof to establish a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the limited light-duty requirements which would prohibit him from performing the limited light-duty position he assumed after he returned to work.

On appeal, appellant requested that the Board remand the case to an impartial OWCP claims examiner who has not made prior decisions on his claim. He has not submitted any evidence to establish that his case should be remanded to OWCP.

Appellant contended on appeal that OWCP's June 12, 2009 decision failed to include findings of fact and clear reasoning in accordance with OWCP regulations and Board precedent which would have allowed him to understand the defect in his claim and submit evidence necessary to overcome the defect. The Board does not have jurisdiction over the June 12, 2009

decision, which originally denied appellant's claim for a recurrence of disability commencing June 30, 2008, as it was not issued within 180 days of his appeal on May 31, 2013.¹²

Appellant also contended that his constitutional rights were ignored by an OWCP claims examiner who failed to properly review and respond to the arguments and new evidence he submitted on reconsideration. He argued that the claims examiner never determined whether he had any employment-related disability from March 3 to June 30, 2008 due to his accepted back condition under File No. xxxxxx418, whether the employing establishment provided the requested reasonable accommodations set forth by his physician or whether his job duties changed due to his new position. A review of the record reveals that arguments and evidence submitted by appellant on reconsideration were in the case record at the time of OWCP's December 4, 2012 decision which denied modification of its denial of his recurrence of disability claim. As stated, the record also reveals that OWCP combined appellant's claims under File Nos. xxxxxx420 and xxxxxx418 into a master claim assigned File No. xxxxxx420. There is no evidence that it failed to properly review the case record or consider the recurrence of disability issue presented in this case. As the Board has found on this appeal, appellant did not submit any evidence to establish that there was a change in the nature and extent of the employment-related conditions or a change in the nature and extent of the limited light-duty requirements which prevented him from performing the modified-duty position he assumed after he returned to work. Accordingly, appellant has not established that he sustained a recurrence of disability.

Lastly, appellant contended that his modified mission support specialist position and newly reassigned position did not fairly and reasonably represent his loss of wage-earning capacity. He argued that the positions were odd-lot or makeshift and OWCP did not make a suitability determination regarding the positions. To the extent that appellant is seeking modification of a loss of wage-earning capacity determination the Board notes that this issue is not presently before the Board as there is no final decision issued by OWCP on this aspect of his claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability commencing June 30, 2008 due to his accepted employment injuries.

¹² For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. See 20 C.F.R. § 501.3(e) (2009).

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board