

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

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M.P., Appellant)	
)	
and)	Docket No. 19-0991
)	Issued: January 21, 2020
DEPARTMENT OF VETERANS AFFAIRS,)	
JAMES A. HALEY MEDICAL CENTER,)	
Tampa, FL, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

On April 5, 2019 appellant filed a timely appeal from a February 7, 2019 decision of the Office of Workers' Compensation Programs (OWCP).¹ The Clerk of the Appellate Boards docketed the appeal as No. 19-0991.

On April 20, 2017 appellant, then a 49-year-old program support assistant, filed a traumatic injury claim (Form CA-1) alleging that on April 18, 2017 she injured both lower extremities when she slipped and fell while in the performance of duty. She stopped work on the date of injury. OWCP accepted the claim for unspecified closed fracture of shaft of right tibia and expanded acceptance of the claim to include sprain of the lumbar spine and pelvis, and sprain of the right hamstring. Appellant thereafter filed several claims for compensation (Form CA-7) seeking wage-loss compensation benefits. OWCP paid her wage-loss compensation on the supplemental compensation rolls commencing June 12, 2017.

¹ The Board notes that following the February 7, 2019 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 evidence for the first time on appeal. *Id.*

On September 28, 2017 the employing establishment offered appellant a temporary-modified assignment within the restrictions provided by Dr. William Dinenberg, a Board-certified orthopedic surgeon who was serving as an OWCP second opinion physician. Appellant refused the offered position on October 3, 2017.

In a notice dated December 11, 2017, OWCP proposed to terminate appellant's wage-loss compensation, based on the restrictions provided by Dr. Dinenberg. It informed appellant of the provisions of 20 C.F.R. § 10.500(a) and advised her that her entitlement to wage-loss compensation would be terminated under this provision if she did not accept the offered temporary assignment or provide a written explanation with justification for her refusal within 30 days.

Appellant disagreed with the proposed termination and submitted medical evidence.

By decision dated January 22, 2018, OWCP terminated appellant's wage-loss compensation, effective January 23, 2018, pursuant to 20 C.F.R. § 10.500(a). It notified her that if she disagreed with the decision, she should follow the attached appeal rights, and if the September 28, 2017 job offer was withdrawn or her work-related medical condition worsened such that she could not perform these duties, she could file a notice of recurrence (Form CA-2a).

On April 24, 2018 appellant requested reconsideration and submitted a number of medical reports. By letter dated May 4, 2018, OWCP forwarded a copy of appellant's reconsideration request to the employing establishment. By decision dated July 19, 2018, it denied modification of its prior decision.

Appellant next requested reconsideration on November 20, 2018 and submitted additional medical evidence. Along with her reconsideration request, she submitted a claim for ongoing wage-loss compensation (Form CA-7) commencing January 22, 2018. By letter dated November 29, 2018, OWCP forwarded a copy of appellant's reconsideration request to the employing establishment.

By decision dated February 7, 2019, OWCP denied modification of its prior decisions. It found that appellant was not entitled to continuing compensation following the January 23, 2018 termination since compensation was not payable during the duration of the temporary assignment.

Having reviewed the case record, the Board finds this case is not in posture for decision.

OWCP's procedures describe the circumstances for offering a temporary position in accordance with 20 C.F.R. § 10.500(a) of its regulations. Section 2.814.9c(1)(d) provides that when the temporary light-duty assignment ends or the work is no longer available, the claimant is entitled to compensation and should be placed back on compensation rolls as long as medical evidence supports any disabling residuals of the work-related disability.² Section 2.814.9c(10) provides that when a temporary light-duty assignment ends or the work is no longer available, the

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

claimant should submit a Form CA-2a or Form CA-7, with verification from the employing establishment that the work is no longer available.³

Appellant submitted a wage-loss compensation claim, Form CA-7, to OWCP with her November 20, 2018 reconsideration request. She had also requested reconsideration on April 24, 2018. In its letters to the employing establishment following the April 24 and November 20, 2018 reconsideration requests, OWCP did not ask the employing establishment whether the temporary assignment remained available.

The Board finds that it is unable to make an informed decision as to whether appellant has established entitlement to wage-loss compensation benefits, claimed on her Form CA-7 claims for wage-loss compensation, under 20 C.F.R. § 10.500(a) because it did not ascertain whether the temporary assignment, on which the termination of wage-loss compensation was based, remained available. In the February 7, 2019 decision, OWCP specifically found that appellant was not entitled to continuing compensation following the January 23, 2018 termination since compensation was not payable during the duration of the assignment. However, OWCP's finding is incorrect as this denial of wage-loss compensation is not a suitable work termination under 5 U.S.C. § 8106(c)(2), a statutory provision which serves as a penalty for refusing a position found to be suitable for an employee on the periodic compensation rolls.⁴

It is well established that proceedings under the Federal Employees' Compensation Act⁵ (FECA) are not adversarial in nature, and that, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. OWCP has an obligation to see that justice is done.⁶ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.⁷

Without information regarding the availability of the temporary-modified position, an informed decision cannot be reached on the relevant issue in this case.⁸ The case must, therefore, be remanded for OWCP to obtain information from the employing establishment as to whether the temporary-modified assignment remains available and, if not, when it became unavailable for the periods covered by appellant's Form CA-7 claims. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

³ *Id.* at Chapter 2.814c(10).

⁴ *See* 5 U.S.C. § 8106(c)(2).

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ *S.C.*, Docket No. 19-0920 (issued September 25, 2019).

⁷ 20 C.F.R. § 10.121.

⁸ *I.C.*, Docket No. 17-1684 (issued January 22, 2019).

IT IS HEREBY ORDERED THAT the February 7, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: January 21, 2020
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board