

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

K.B., Appellant)	
)	
and)	Docket No. 24-0007
)	Issued: April 12, 2024
U.S. POSTAL SERVICE, JOHNSTOWN)	
PROCESSING & DISTRIBUTION CENTER,)	
Johnstown, PA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On October 4, 2023 appellant, through counsel, filed a timely appeal from a September 22, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective December 27, 2022, because she refused an offer of suitable work, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary limited-duty assignment.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 29, 2018 appellant, then a 45-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day she injured her lower back by lifting a mail tray while in the performance of duty. She stopped work on the date of the claimed injury. OWCP accepted appellant's claim for intervertebral disc disorders with L4-5 disc herniation and radiculitis of the lumbar region, and paid her wage-loss compensation on the supplemental rolls, effective June 24, 2018, and on the periodic rolls, effective February 3, 2019.

On August 14, 2019 appellant underwent discectomy and fusion surgery at L4-5 and, on August 16, 2019, she underwent laminectomy and fusion surgery. Both procedures were authorized by OWCP.

In a March 15, 2022 report, Dr. Michael Drass, a Board-certified pain management physician, opined that appellant could not work at all, even sedentary work, due to back pain from her April 29, 2018 employment injury. On June 13, 2022 Dr. Alexander Yu, a Board-certified neurosurgeon, reported the findings of his physical examination, including 5/5 strength in the bilateral upper and lower extremity muscle groups, except for 4+/5 strength in the bilateral hip flexors. Appellant was intact to light touch in the upper and lower extremities, except for hypersensitivity of the left lateral thigh. Dr. Yu diagnosed chronic bilateral low back pain with left-sided sciatica. A lumbar spine magnetic resonance imaging (MRI) scan obtained on the same date demonstrated interval changes at L4-5 level with no spinal stenosis at that level, and moderate progression of spinal stenosis L3-4.

On May 12, 2022 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. Mitchell Antin, an osteopath and Board-certified orthopedic surgeon, for an examination and assessment of her injury-related condition and ability to work.

In a June 13, 2022 report, Dr. Yu, a Board-certified neurosurgeon, indicated a prior history of a lumbar fusion and that she developed adjacent level stenosis. Appellant has primary complaints of back pain but also has chronic left thigh numbness/hyperesthesias, and leg weakness after 10 minutes of standing or walking. Dr. Yu recommended diagnostic testing and physical therapy.

In a June 20, 2022 report, Dr. Antin discussed appellant's factual and medical history, including the findings of previous physical examinations and diagnostic tests. He reported the findings of his physical examination, noting that appellant demonstrated no pain complaints and swung her lower extremities freely on the examination table. Appellant exhibited a normal stance and gait without limp, and had a negative Trendelenburg test. Dr. Antin noted that appellant complained of pain upon lumbar motion. Appellant had no atrophy in her lower extremities and motor strength and sensation were intact in these extremities. Dr. Antin diagnosed intervertebral disc disorder with radiculitis at L4-5, disc herniation at L4-5, degenerative disc disease at L3-4, lumbar post-laminectomy syndrome, acquired grade 1 spondylolisthesis at L4-5, and chronic back pain. He opined that appellant still had residuals of the April 29, 2018 employment injury and that she had reached maximum medical improvement (MMI). Dr. Antin determined that appellant could not return to her date-of-duty job but was capable of part-time sedentary work. In a June 20, 2022 work capacity evaluation (Form OWCP-5c), he indicated that appellant could sit for up to four hours per day, walk for up to four hours, stand for up to two hours, operate a motor vehicle to and from work for up to one hour,

and perform each of the actions of pushing, pulling, or lifting up to 10 pounds for up to four hours. Appellant could not squat, kneel, climb, or operate a motor vehicle at work, and she needed to take a 15-minute break each two hours.

On July 29, 2022 the employing establishment offered appellant a temporary position as a modified mail processing clerk for 20 hours per week. The position involved casing letters for up to four hours per day, and collecting mail for up to one hour. The physical requirements included sitting for up to four hours, standing for up to one hour, walking for up to one hour, simple grasping for up to four hours, and performing each of the actions of pushing, pulling, or lifting up to 10 pounds for up to one hour. Appellant did not accept the position.

In a July 18, 2022 attending physician's report (Form CA-20), Dr. Yu indicated that appellant had been totally disabled from work since April 29, 2018.

In an August 29, 2022 report, Dr. Yu and Dr. Dorian Kusyk, a Board-certified neurosurgeon, diagnosed chronic bilateral low back pain with left-sided sciatica and cervical myelopathy.³

OWCP provided Dr. Antin with a position description of the temporary modified mail processing clerk position and requested that he provide a supplemental opinion regarding appellant's ability to perform the duties of the position. In a September 4, 2022 supplemental report, Dr. Antin indicated that a July 11, 2022 MRI scan and July 13, 2022 x-rays demonstrated further progression of appellant's spinal stenosis at L3-4 and L5-S1 and that she had left and right severe foraminal stenosis. However, he advised that he had reviewed the position description of the modified mail processing clerk position and opined that the position was acceptable given appellant's medical condition.

On October 17 and November 16, 2022 the employing establishment advised OWCP that the temporary modified mail processing clerk position was still available to appellant.

In a November 22, 2022 notice, OWCP advised that it proposed to reduced appellant's wage-loss compensation, under 20 C.F.R. § 10.500(a), given her ability to earn wages in the temporary position of modified mail processing clerk on a part-time basis. It informed her that the opinion of Dr. Antin, OWCP's referral physician, demonstrated her ability to perform the duties of the position. OWCP afforded appellant 30 days to accept the offered position or submit evidence or argument demonstrating valid reasons for not accepting the position. No response was received.

By decision date December 22, 2022, OWCP expanded the acceptance of appellant's claim to include post-laminectomy syndrome, unspecified disruption of wound, intervertebral disc degeneration at L3-4, and permanent aggravation of spondylolisthesis at L4-5.

By decision dated December 27, 2022, OWCP reduced appellant's wage-loss compensation effective the same date, under 20 C.F.R. § 10.500(a), based on the opinion of Dr. Antin. It calculated the reduction in compensation by comparing the wages of the offered temporary position of modified mail processing clerk with the current wages of appellant's date-of-injury position.

³ In late August 2022, appellant retired on disability retirement. On November 18, 2022 she elected to receive FECA benefits in lieu of OPM retirement benefits.

On January 3, 2023 OWCP received a unsigned report concerning appellant's medical condition.

On January 11, 2023 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on July 19, 2023, counsel argued that the modified position offered to appellant was not "real" and that the medical evidence of record did not show that appellant could perform the duties of the position.

By decision dated September 22, 2023, OWCP's hearing representative affirmed the December 27, 2022 decision.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁴ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ In general, the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.⁶

Section 10.500(a) of OWCP's regulations provides that benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage-loss claimed on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available.⁷

When a claimant is on the periodic rolls, OWCP's procedures similarly provide that, if the evidence establishes that injury-related residuals continue and result in work restrictions; light duty within those work restrictions is available; that the employee was notified in writing that such light duty was available, then wage-loss benefits are not payable for the duration of light duty availability.⁸ OWCP's procedures explain that this is because such benefits are payable only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁹ When a claimant is on the

⁴ *L.L.*, Docket No. 18-1426 (issued April 5, 2019); *C.C.*, Docket No. 17-1158 (issued November 20, 2018); *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁵ *A.D.*, Docket No. 18-0497 (issued July 25, 2018). In general, the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury. See 20 C.F.R. § 10.5(f).

⁶ See 20 C.F.R. § 10.5(f).

⁷ 20 C.F.R. § 10.500(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Position Offers and Return to Work*, Chapter 2.814.9c(1)(a) (June 2013).

⁹ *Id.*

periodic rolls, a pretermination notice must be issued if the claims examiner is removing the claimant from the periodic rolls and ceasing his/her wage loss compensation payments.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective December 27, 2022, because she refused an offer of suitable work, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary-limited duty assignment.

On July 29, 2022 the employing establishment offered appellant the temporary position of modified mail processing clerk on a part-time basis. Appellant did not accept the position and, in a December 27, 2022 decision, OWCP reduced her wage-loss compensation effective the same date, under 20 C.F.R. § 10.500(a).

The Board finds that OWCP properly reduced appellant's wage-loss compensation effective December 27, 2022 under 20 C.F.R. § 10.500(a). Appellant did not accept a temporary light-duty assignment offered by the employing establishment, which was within her medical restrictions and her vocational ability. Utilizing the wages paid by the assignment, OWCP properly calculated the proper reduction in appellant's wage-loss compensation given the wages paid by her date-of-injury position. Therefore, the reduction of appellant's wage-loss compensation effective December 27, 2022 was justified under 20 C.F.R. § 10.500(a).¹¹

In a June 20, 2022 report, Dr. Antin, the OWCP referral physician, opined that appellant could not return to her date-of-duty job but was capable of part-time sedentary work. In a June 20, 2022 Form OWCP-5c, he indicated that appellant could sit for up to four hours per day, walk for up to four hours, stand for up to two hours, operate a motor vehicle to and from work for up to one hour, and perform each of the actions of pushing, pulling, or lifting up to 10 pounds for up to four hours. In a September 4, 2022 supplemental report, Dr. Antin advised that he had reviewed the position description of the modified mail processing clerk position and opined that the position was acceptable given appellant's medical condition.

The Board finds that the medical evidence of record establishes that appellant could perform the temporary light-duty assignment offered by the employing establishment on July 29, 2022. The position involved working 20 hours per week and its physical requirements were within her medical restrictions as provided by Dr. Antin. The Board notes that the medical restrictions provided by Dr. Antin constitute the weight of medical evidence regarding appellant's ability to work at the time that the employing establishment offered her the temporary light-duty assignment.

In a March 15, 2022 report, Dr. Drass, an attending physician, opined that appellant could not work at all, even sedentary work, due to back pain from her April 29, 2018 employment injury. In a July 18, 2022 Form CA-20, Dr. Yu, another attending physician, indicated that appellant had been totally disabled since April 29, 2018. However, both Drs. Drass and Yu did not provide adequate medical rationale in support of their opinions on disability. The Board has held that a report is of limited probative value if it does not contain adequate medical rationale

¹⁰ *Id.* at Chapter 2.814.9c(1)(a).

¹¹ *Id.*

explaining its opinion on a given claimant's level of disability.¹² These reports do not demonstrate that appellant could not perform the position offered by the employing establishment.

The evidence of record reflects that appellant did not accept a temporary light-duty assignment offered by the employing establishment, which was suitable and would have paid her increased wages. Therefore, the Board finds that OWCP properly reduced her wage-loss compensation, effective December 27, 2022, pursuant to 20 C.F.R. § 10.500(a).

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective December 27, 2022, because she refused an offer of suitable work, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary-limited duty assignment.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹² See *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).