United States Department of Labor
Employees' Compensation Appeals Board

V.C., Appellant	)	
	)	**Docket No. 24-0841**
and	)	**Issued: October 25, 2024**
U.S. POSTAL SERVICE, METROPOLITAN STATION, Brooklyn, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On August 14, 2024 appellant, through counsel, filed a timely appeal from a July 24, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 has met his burden of proof to establish a recurrence of disability commencing December 8, 2023, causally related to his accepted September 6, 2022 employment injury.

[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 September 7, 2022 appellant, then a 42-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 6, 2022 a manager hit his left wrist during an argument which caused him to drop his cellular phone while in the performance of duty. He noted that his manager questioned him about being back at the station, and the number of parcels he had delivered. Appellant's manager yelled at another manager to accompany her and appellant to look at appellant's postal truck. She then questioned him and became irate. Appellant asked her not to speak to him in that tone, but she refused to stop. He told her that he was going to record her, and in response she swung at him, hitting his hand, which caused him to drop his cellular phone, and which caused injury to his hand. Appellant stopped work on September 6, 2022. On September 21, 2022 OWCP accepted the claim for unspecified sprain of left wrist. It paid appellant wage-loss compensation on the supplemental rolls as of October 22, 2022, and on the periodic rolls from December 4, 2022 through October 7, 2023.

In a June 22, 2023 attending physician's report (Form CA-20), Dr. Donald E. Moore, an emergency medicine physician, released appellant to return to full-time, limited-duty work with no lifting more than 20 pounds with his left hand.

In a June 28, 2023 report, Dr. Leon Sultan, a Board-certified orthopedic surgeon and an OWCP second opinion physician, opined that appellant could return to his date-of-injury position with no lifting and carrying more than 20 pounds at a time using both hands, eight hours per day.

On July 18, 2023 the employing establishment offered appellant a full-time, temporary limited-duty position as a modified city carrier working 9.50 hours per day, which was effective July 20, 2023, and based on the physical restrictions set by Dr. Sultan.

On August 29, 2023 appellant, through counsel, refused the job offer, contending that it exceeded his work restrictions.

On September 27, 2023 the employing establishment revised its job offer to require appellant to work eight hours per day with occasional lifting up to 20 pounds. On October 4, 2023 appellant accepted the job offer, and returned to work on October 7, 2023.

On December 8, 2023 appellant was sent home by his manager. The employing establishment advised him that his modified position would remain available until he was authorized to return to work.

On December 18, 2023 appellant filed a notice of recurrence (Form CA-2a) alleging disability as of December 8, 2023 when the employing establishment withdrew his modified-duty position. He noted that management related that his job duties/job offer could not be honored until completion of his arbitration involving the September 6, 2022 employment injury.

In a development letter dated December 26, 2023, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations and explain why he was sent home from work and not allowed to perform his modified position. It afforded 30 days to submit the requested information.

On December 29, 2023 the employing establishment responded to OWCP's development letter. It confirmed that appellant's modified position remained available, but that he was fired from his position. The employing establishment noted that an October 12, "202[2]"[3] Notice of removal for conduct unbecoming a postal employee was issued to appellant due to his threatening behavior and verbal threats of physical harm to management on September 6, 2022. A prearbitration was scheduled for the end of January 2024, and depending on the outcome it would be determined whether appellant could return to his job. The employing establishment noted that on November 9, 2023 management sent an e-mail inquiring about whether appellant would be allowed to work, although there was an impasse in the settlement of the October 12, "202[2]" notice of removal. On December 6, 2023 management received a response, and on December 8, 2023 issued the notice of removal. The employing establishment contended that it did not withdraw appellant's light-duty assignment, rather, the change occurred due to his misconduct. It also noted that on December 8, 2023 appellant threatened an employing establishment partner, and used foul language toward him. The employing establishment then checked e-mails and found an earlier e-mail from labor relations which questioned why appellant was still working. At that time, management informed appellant verbally that because his notice of removal was at impasse, he would not be allowed to work.

The employing establishment submitted the October 12, 2022 notice of removal. The document contained a recitation of the September 6, 2022 employment injury. Also, it noted that on September 6, 2022 appellant failed to follow instructions because he was not given authorization for union time, he failed to deliver all his packages before returning to the station, and he had not favorably conducted himself at work.

In a development letter dated January 10, 2024, OWCP requested that appellant submit additional medical evidence establishing his claimed disability following his removal from employment on December 9, 2023. It indicated that as appellant claimed a stoppage of work within 90 days of his return to duty, he should submit medical evidence to establish that the claimed disability was causally related to the accepted condition.

In a January 8, 2024 letter, counsel contended that the employing establishment withdrew its limited-duty job offer by sending appellant home, which constituted a recurrence as a matter of law.

An unsigned duty status report (Form CA-17) dated January 18, 2024, indicated that appellant could work with restrictions.

In a Form CA-20 report also dated January 18, 2024, Dr. Basil Nwaoz, a plastic surgeon, indicated that appellant was totally disabled from work commencing December 22, 2023, and that he could return to modified work on March 18, 2024.

A prearbitration settlement dated January 30, 2024 provided that the October 12, 2022 notice of removal would be rescinded, and appellant would be made whole for all lost wages and benefits. It noted that he would receive the difference between lost wages and benefits he had received from OWCP.

[3] This letter incorrectly noted the date of the notice of removal as October 12, 2023.

By decision dated February 21, 2024, OWCP denied appellant's claim for a recurrence disability commencing December 9, 2023 due to his accepted employment injury. It explained that the medical evidence of record was insufficient to establish disability from work due to a material change/worsening of his accepted work-related conditions.

On February 29, 2024 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on June 11, 2024.

A March 21, 2024 Form CA-20 report from Dr. Nwaoz released appellant to return to full-duty work.

A February 27, 2024 Step B decision, which resulted from appellant's grievance, found that the employing establishment improperly issued the October 12, 2022 notice of removal after appellant had obtained PS Form 2499 (offer of modified assignment [limited duty]) and had returned to work. It rescinded the notice of removal and ordered appellant to be made whole for all lost wages and benefits.

In reports dated January 18 and March 21, 2024, Dr. Nwaoz examined appellant and diagnosed triangular fibrocartilage complex. In the January 18, 2024 report, he opined that appellant was temporarily totally disabled. In the March 21, 2024 report, Dr. Nwaoz opined that appellant had 25 percent temporary impairment and could return to work.

By decision dated July 24, 2024, an OWCP hearing representative affirmed the February 21, 2024 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5] The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.[6] For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.[7] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.[8]

[4] *Id*.

[5] *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

[6] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[7] *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

[8] *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291-92 (2001).

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 that had resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment. This term also means an ability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness is withdrawn or altered so that the assignment exceeds the employee's physical limitations.[9] A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties, downsizing, or the existence of a loss of wage-earning capacity determination.[10]

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 of proof 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 of proof, 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 limited-duty job requirements.[11]

The Board has noted that the term disability means the incapacity because of injury to earn the wages which the employee was receiving at the time of such injury. Disability benefits are payable regardless of whether the termination of employment was for cause if the medical evidence establishes that appellant was unable to perform his assigned duties due to his injury-related condition.[12]

ANALYSIS

The Board finds that appellant has met his burden of proof to establish a recurrence of disability commencing December 8, 2023, causally related to his accepted September 6, 2022 employment injury.

Appellant alleged a recurrence of disability commencing December 8, 2023, as his modified-duty position as city carrier at the employing establishment was withdrawn. The evidence of record reveals that he was removed from his employment effective December 8, 2023 for conduct unbecoming a postal employee, as he physically and verbally threatened management on September 6, 2022. The employing establishment confirmed that appellant's modified-duty position remained open and available to him during the claimed period of disability. OWCP's regulation relates that a recurrence of disability does not apply when a light-

[9] 20 C.F.R. § 10.5(x); *see D.T.*, Docket No. 19-1064 (issued February 20, 2020).

[10] *H.L.*, Docket No. 17-1338 (issued April 25, 2018); *C.P.*, Docket No. 17-0549 (issued July 13, 2017); *J.F.*, 58 ECAB 124 (2006); *see also* 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013).

[11] *G.P.*, Docket No. 21-0112 (issued July 14, 2021); *J.S.*, Docket No. 19-1402 (issued November 4, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

[12] *See K.E.*, Docket No. 19-1922 (issued July 10, 2020); *T.L.*, Docket No. 09-1066 (issued February 17, 2010).

duty assignment is withdrawn for reasons of misconduct.[13] However, a January 30, 2024 pre-arbitration settlement rescinded appellant's removal from work, and ordered the employing establishment to make him whole for all lost wages and benefits. Appellant's inability to perform the duties of his light-duty assignment as of December 8, 2023 was therefore due to the employing establishment's improper determination that appellant had engaged in misconduct. As previously noted, to establish a recurrence of disability 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 limited-duty job requirements. While the medical evidence of record did not establish a change in the extent of appellant's injury-related condition, for which he had been provided light-duty work, the evidence does establish that the employing establishment in effect changed the requirements of the limited-duty position, by not allowing appellant to work, prior to the determination of whether appellant's removal for misconduct was proper. The Board, therefore, finds that the employing establishment improperly withdrew appellant's light-duty job, because he was not properly removed from duty due to misconduct. As appellant's light-duty position was improperly withdrawn by the employing establishment, he is eligible to receive FECA disability benefits. The Board notes in this regard that the pre-arbitration settlement dated January 30, 2024 provided that appellant would be made whole for all lost wages and benefits. Further, the February 27, 2024 Step B decision, also ordered appellant to be made whole for all lost wages and benefits. Therefore, if appellant has not been made whole pursuant to these agreements, he shall be entitled to receipt of FECA benefits for his recurrence of disability commencing December 8, 2023.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish a recurrence of disability commencing December 8, 2023, causally related to his accepted September 6, 2022 employment injury.

[13] 20 C.F.R. § 10.5(x).

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2024 merit decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 25, 2024
Washington, DC

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board