

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

E.H., Appellant

and

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**

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**Docket No. 10-1702
Issued: March 24, 2011**

Appearances:

*Norman R. McNutley, Jr., Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2010 appellant, through his attorney, filed a timely appeal from a February 22, 2010 merit decision of the Office of Workers' Compensation Programs denying his claim for disability compensation. Pursuant to the Federal Employees' Compensation Act¹ 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 established that he was disabled beginning October 15, 2008 causally related to his July 6, 2007 employment injury.

FACTUAL HISTORY

On October 11, 2007 appellant, then a 55-year-old lead firefighter, filed an occupational disease claim alleging that he sustained back pain due to factors of his federal employment.

¹ 5 U.S.C. § 8101 *et seq.*

Appellant voluntarily retired from the employing establishment effective October 29, 2007. He cited his reason for retirement as “to obtain retirement benefits.”

In a report dated August 14, 2007, Dr. Stacia A. Smith, an attending Board-certified orthopedic surgeon, diagnosed disc disorder at three levels with L4-5 spinal stenosis. She noted that appellant related that his “back is flared to the extent that he really cannot go on calls and has been off of work for about six weeks because of this. Dr. Smith stated, “At this point I think [appellant] will have difficulty working on a full[-]time basis, especially doing fire[-]related activities because of the requirements for lifting.”

By decision dated December 12, 2007, the Office denied appellant’s claim after finding that the medical evidence was insufficient to establish a back condition due to work factors.

On January 31, 2008 a hearing representative vacated the December 12, 2007 decision and remanded the case for further development of the medical evidence. She determined that Dr. Smith’s August 14, 2007 report was sufficient to warrant further development and instructed the Office to obtain an opinion from Dr. Smith regarding the cause of appellant’s back condition.

In a report dated October 16, 2007, received by the Office on August 11, 2008, Dr. Smith diagnosed low back pain at L4-5 with minor disc protrusion. She noted that appellant had not worked since July 2007. Dr. Smith related, “I think it will be difficult at this point to mobilize him to the extent that he can return to work as a firefighter, especially as he needs to climb ladders and carry things.”

On February 5, 2008 the Office requested that Dr. Smith address the cause of appellant’s degenerative disc disease and spinal stenosis. In a report dated January 24, 2008, received by the Office on February 19, 2008, Dr. Smith opined that appellant’s employment permanently aggravated preexisting lumbar disc disease.² She questioned his ability to move people who were incapacitated and to perform his usual firefighting activities. Dr. Smith concluded, “I do not think he can return to firefighting on a long-term basis on a more likely than not basis.”

The Office accepted the claim for a permanent aggravation of degenerative disc disease at L3-4, L4-5 and L5-S1 and a disc protrusion at L4-5.³

On November 12, 2008 appellant requested workers’ compensation benefits. By letter dated December 31, 2008, the Office requested information from the employing establishment regarding his work restrictions at the time of retirement and whether he stopped because his light duty changed or he could no longer perform his position. On March 4, 2009 the employing establishment advised that appellant had no work restrictions prior to or at the time of his

² The January 24, 2008 date on the report may be a typographical error, as it appears to respond to the Office’s February 5, 2008 request for information.

³ By decision dated December 12, 2007, the Office denied appellant’s claim after finding that the medical evidence was insufficient to establish a back condition due to work factors. On January 31, 2008 a hearing representative vacated the December 12, 2007 decision and remanded the case for further development of the medical evidence.

retirement and did not seek limited-duty work. It noted that he filed his occupational disease claim after his retirement.

By letter dated March 13, 2009, the Office informed appellant that he was not entitled to workers' compensation as he voluntarily retired and was not working with restrictions at the time of his retirement.

On April 30, 2009 appellant filed a claim for compensation (Form CA-7) beginning October 30, 2007. On May 19, 2009 his attorney noted that Part E of appellant's SF-50 indicated that he was retiring because of a work-related physical condition. Counsel requested that the Office formally adjudicate his claim for wage loss based on the medical evidence. He submitted part of a form dated October 29, 2007 signed by appellant which provided that he was resigning due to his employment injury.

By letter dated June 25, 2009, the Office advised appellant that the medical evidence was insufficient to support that he sustained any disability from employment.⁴ It requested medical evidence showing that he was disabled from his employment beginning October 30, 2007 and that the employing establishment could not accommodate medical restrictions.

On July 3, 2009 counsel asserted that Dr. Smith's 2007 reports were sufficient to establish that he was disabled from working as a firefighter. He further noted that appellant was unable to perform his usual employment due to narcotic use due to his employment injury.

By decision dated October 14, 2009, the Office denied appellant's claim for wage-loss compensation beginning October 15, 2008. It found that he was not working with restrictions at the time of his voluntary retirement. The Office additionally noted that the medical evidence did not show that he was totally disabled prior to his voluntary retirement.

On November 3, 2009 appellant requested a review of the written record. By decision dated February 22, 2010, the Office hearing representative affirmed the October 14, 2009 decision. She found that appellant did not request limited-duty employment prior to voluntarily retiring. The hearing representative determined that the medical evidence did not show total disability and that he had not requested limited duty.

On appeal counsel describes appellant's duties as a firefighter and argues that Dr. Smith's August 14 and October 16, 2007 and January 24, 2008 reports are sufficient to establish that he could not work as a firefighter. He questions the Office's finding that appellant was not disabled as he had voluntarily retired from employment, noting that its procedures provide for an election between retirement benefits and workers' compensation benefits. Counsel argues that the Office did not weigh the medical evidence but instead acted as a physician in determining that he had no work restrictions.

⁴ By decision dated June 26, 2009, the Office denied appellant's schedule award claim on the grounds that the medical evidence did not establish that he sustained a permanent impairment to a scheduled member or function.

LEGAL PRECEDENT

The term disability as used in the Act⁵ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁶ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁷ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁸ The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employee's to self-certify their disability and entitlement to compensation.⁹

ANALYSIS

The Office accepted that appellant sustained a permanent aggravation of degenerative disc disease at L3-4, L4-5 and L5-S1 and a disc protrusion at L4-5 due to factors of his federal employment. Appellant voluntarily retired from the employing establishment effective October 29, 2007. On November 12, 2008 he requested workers' compensation benefits. In a Form CA-7 dated April 30, 2009, appellant requested compensation beginning October 30, 2007.

Initially, the Board notes that the Office adjudicated whether appellant established that he was disabled beginning October 15, 2008; however, he filed a claim requesting compensation beginning October 30, 2007. The Board further denied his claim primarily based on its finding that he was precluded from receiving benefits because he voluntarily retired instead of based on an analysis of the medical evidence. Office regulations, however, provide that compensation for wage loss due to disability is available for any period during which an employees' work-related medical condition prevents him or her from earning the wages earned before the work-related injury.¹⁰ The disability may be partial or total.¹¹ Further, as noted by appellant's attorney, the Office's procedure manual provides that an employee has the right to elect either workers'

⁵ 5 U.S.C. §§ 8101-8193; 20 C.F.R. § 10.5(f).

⁶ *Paul E. Thams*, 56 ECAB 503 (2005).

⁷ *Id.*

⁸ *Id.*

⁹ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ *Judith A. Cardiddo*, 55 ECAB 348 (2004).

¹¹ *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

compensation benefits under the Act or retirement benefits from the Office of Personnel Management.¹²

Appellant submitted medical reports from Dr. Smith in support of his claim. The Office generally concluded that the medical evidence was insufficient to show total disability without specifically addressing any of the medical reports of record. In a report dated October 16, 2007, Dr. Smith found that it would be difficult for appellant to perform his duties as a firefighter, given the requirement that he be able to climb and carry. In response to the Office's request for additional information regarding causation, on January 24, 2008 she asserted that appellant's work duties permanently aggravated his lumbar disc disease and found that he was not able to perform his regular duties as a firefighter. The Office did not specifically review Dr. Smith's reports in its decisions to determine whether they were sufficient to establish disability for employment or to warrant further development of the medical evidence. Consequently the decisions do not meet the requirements of the Act or the Office's procedures.¹³

For the reasons outlined above, the Office's stated justification for denying appellant's claim is insufficient. On remand, it should consider whether Dr. Smith's reports are sufficient to establish that he was disabled from his employment beginning October 30, 2007 or to require further development of the evidence.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹² Federal (FECA) Procedure Manual, Part 2 -- Dual Benefits, *Annuity Benefits Paid by Office of Personnel Management*, Chapter 2.1000.4 (January 1997).

¹³ 5 U.S.C. § 8124(a) provides: "The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of the Office shall contain findings of fact and a statement of reasons.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2010 merit decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: March 24, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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