

How to Grieve the Withdrawal of Limited Duty

One thing is clear: The Postal Service has both contractual and legal obligations to make every effort to provide limited duty. Historically, the Service recognized and generally complied with those obligations. Virtually all carriers with compensable injuries, who were able to do any work at all, were provided limited duty.

As a result, there are very few regional arbitration decisions on the issue of failure to provide (or withdrawal of) limited duty. Grievances were simply not necessary because the Service took the position that all medical restrictions, short of complete bed rest, could be accommodated. Now, however, the landscape is changing.

Historical Context

Things are changing because of the Postal Service's transformation plan. Part of that plan is to cut workers' compensation costs. To that end, the Service implemented a pilot a few years ago in New York, referred to as "outplacement."

In certain cities within New York, management took limited duty work away from injured employees—forcing them off the clock and onto OWCP's rolls. It was management's hope that OWCP would ultimately provide Vocational Rehabilitation services to these employees—services that can involve training to enable them to find work with another employer and thus reduce Postal Service costs.

Thus, the Postal Service named the pilot "outplacement." This name was misleading because the Postal Service has absolutely no

authority to require or influence OWCP to decide to provide Vocational Rehabilitation services.

The union in New York successfully grieved management's decision to withdraw limited duty. While the grievances were pending, the employees worked for employers outside of the Postal Service as a result of OWCP Vocational Rehabilitation. The grievance settlement (see M-1550 on page 7) returned the employees to work at the Postal Service with full back pay.

The Postal Service must make every effort toward assigning the employee to limited duty.

Irrespective of the grievance settlement, the Postal Service did not discontinue the pilot. The Service merely changed the pilot's name from "outplacement" to the National Reassessment Program (NRP). The new name, though more accurate than "outplacement" was no less sinister because, despite the name change, the Service's plan remains the same.

The Service began implementing the newly renamed NRP in San Diego, CA and in areas of western

New York. Grievances were filed in those areas of the country, which are now pending. It now appears that management is considering going nationwide with their plan to withdraw carriers' limited duty.

It is therefore vital that stewards fully understand the Postal Service's legal and contractual obligations to make every effort to provide limited duty.

Contrary to the Postal Service's plan, management does not have any discretion when it comes to the effort that is required of it to seek and provide limited duty. The Service does not have the right to simply take available work away from injured workers, forcing them off the clock.

Stewards who understand this fact will be better prepared to file successful grievances in the event management begins withdrawing or denying limited duty within their installations.

Contractual and Legal Provisions

The JCAM, of course, is the starting point—in Articles 5 and 13. However, additional support for management's obligation to provide limited duty is located in ELM 546, 5 CFR 353 (Code of Federal Regulations), EL-307 Reasonable Accommodation Handbook, and EL 505 Injury Compensation Handbook. For quick and easy reference, all of these cites are listed on the opposite page.

Note that the language in both the law and the contract is very similar in requiring the Postal

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Service to make “every effort” to find and provide limited duty work.

The law 5 CFR 353.301(d) states “Agencies must make every effort to restore. . . an individual who has partially recovered from a compensable injury and who is able to return to limited duty.

Similarly, the contract (ELM 546.14.a) states “When an employee has partially overcome a compensable disability, the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee’s medically defined work limitation tolerance.”

This is a strong protection. The Postal Service must do more than make some effort. It must do more than make a lot of effort. It must make *every* effort. The steward should vigorously probe and document the Service’s efforts (and lack of efforts) to find limited duty work and argue accordingly.

Limited Duty Evidence

To prove the basic elements of a limited duty grievance, a steward must provide at least the following documents:

- Letter from OWCP accepting the claim
- Copy of the withdrawn Limited Duty Job Offer (LDJO)
- Copies of all prior LDJOs that exist
- Current and prior CA-17 showing physical limitations
- Management’s written notice to the employee that the limited duty is being withdrawn
- All management emails, correspondence, or other documents that refer to the search for a LDJO
- Current and recent Form 50s

- TACs records or other time records showing the actual duties and hours worked (for the entire period of the LDJO)
- A complete copy of the Injury Compensation Control Office (ICCO) file on the injured worker’s claim

Prove the work exists

The core arguments of the grievance should be 1) that the limited duty exists and 2) that the Service did not make every effort to find or provide the limited duty.

In many cases, the Postal Service has withdrawn limited duty from employees who have been performing that work for a long time—years, in some cases.

Therefore, proving that the work exists begins with asking the question, “What work was previously being performed by the injured worker?”

The best source is the current LDJO, which lists the injured worker’s specific duties. But don’t stop there. A statement from the injured worker is also important because there are often additional duties being performed that are not listed on the LDJO.

Further evidence would include signed statements from co-workers detailing the specific duties they have witnessed the injured worker performing.

It would be useful to include some detail in such statements. For instance, a statement saying, “I saw Jim Hart deliver Express Mail,” is not nearly as helpful as, “I have observed Jim Hart deliver approximately 15-20 Express Mail pieces daily for the past four years.”

The steward should also examine the TACs reports for the entire period of the LDJO. For instance, in the above Express Mail exam-

ple, a TACs report would show the actual time spent on the street for the period in question.

The second question to ask is, “Who is performing the work now that it has been taken away from the injured worker?”

The grievance should include signed statements from the employees who are now performing the work as well as from co-workers who have observed the work being performed by others. Once again, it is more useful to have statements with details than not.

Evidence can also include carrier schedules, TACs reports, or other administrative documents. For example, assume there’s an injured worker whose LDJO includes casing a specific auxiliary route on a daily basis. Carrier schedules should prove that this work is now being performed by PTFs instead.

Likewise, because someone other than the injured worker started doing this work, there should be evidence of an increase in work hours. The increase may be in the hours for PTFs, casuals, or ODL carriers depending upon whom it is that is performing the work. The steward should request TACs reports to show the increase in hours.

In some instances, management does not immediately assign anyone specific to perform the work—allowing it instead to remain undone and fall through the cracks. For example, management might ignore the CFS returns building up on a vacant route—the handling of which was formerly part of a LDJO. Carrier statements identifying duties that management has neglected will help prove that limited duty exists. If possible, delayed mail reports or other management reports should also be included to demonstrate duties that are being left undone.

The third question to answer is “What work is available within the injured worker’s restrictions?”

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A good place to find evidence of management's stated ability to accommodate all restrictions except complete bed rest is in letters to the physician or injured worker.

The willingness to accommodate everything short of bed rest is also frequently stamped on official OWCP forms by the Postal Service. Although the alteration of OWCP forms is not permissible, if the Service has stamped the lower left portion of the CA-17 in this manner, the steward should use it as evidence.

Stewards should also determine if management has provided limited duty to other injured workers who have similar restrictions. Reviewing the CA-17s along with the accompanying LDJO would constitute evidence that work was available within those restrictions.

Prove management did not make every effort

There will always be a management official who made the decision to withdraw (or not provide) limited duty. The steward's task is to discover the name and position of that management official.

The steward should begin with the written notice advising the employee of the denied limited duty. If the written notice is not immediately available, ask the immediate supervisor who made the decision. It might mean working the way up the chain of command until the deciding official is identified.

Once identified, the steward should interview him or her. Management's response will constitute a crucial component of the grievance. The steward should fully document the answers to these questions:

- Who made the decision to withdraw (or not provide) limited duty?

- What were the reasons to withdraw (or not provide) limited duty?
- What specific efforts were made to identify available limited duty?
- What data, if any, did the deciding official review prior to making the decision?

Once the deciding official reveals the data that he or she reviewed prior to making the decision, the steward should request copies of it in order to make the applicable arguments.

As an example, the deciding official might claim that limited duty was withdrawn because of "declining mail volume." The deciding official might point to data showing a decline in First Class volume compared to last year. However, the steward may examine the report more closely and be able to show that mail volume for all

classes combined is actually increased over the prior year.

No matter what the deciding official claims is the basis for the decision, the steward should persist in verifying its accuracy.

In recent cases, managers used three reasons in particular for withdrawing limited duty. These three reasons were: the injured worker was unable to do street duties, or there was not enough limited duty work to fill 8 hours per day or 40 hours per week, or the injured worker was unlikely to fully recover from the injury.

The steward should use M-1550 in the event that a manager provides any of these three reasons as a basis for denying limited duty. (See box below.)

In M-1550, management states, "the Postal Service is obli-

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M-1550 Management's National Level Position

"First, the NALC is concerned that "...management appears to assert that it has no duty to provide limited duty to an injured letter carrier if the carrier cannot deliver mail, even though the employee is capable of performing casing and other letter carrier duties in the office." The Postal Service makes no such assertion. The Postal Service may provide casing duty and other city letter carrier duties to city letter carriers suffering a job-related illness or injury. . .

"Second, the NALC is concerned that "...it appears to be management's position that it has no duty to provide limited duty if available work within the employee's limitations is less than 8 hours per day or 40 hours per week." The Postal Service makes no such assertion. The Postal Service may provide work of less than eight hours a day or forty hours a week to city letter carriers suffering a job-related illness or injury. . .

"Third, the NALC is concerned that "...it appears to be management's position that there is no obligation to provide limited duty when the employee's treating physician indicates that the employee is unlikely to fully recover from the injury." The Postal Service makes no such assertion. If an employee reaches maximum medical improvement and can no longer perform the essential functions of the city letter carrier position, the Postal Service is obligated to seek work in compliance with ELM Section 546 and, if applicable, the Rehabilitation Act."

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Rehabilitation Act

Just as management affirmed in M-1550, the Postal Service does have obligations under the Rehabilitation Act. On page 5, refer to 5 CFR 353.301(d), which states that management is required to treat partially recovered workers “the same as other handicapped individuals under the Rehabilitation Act. . .”

There is an important distinction to make at this point. The Rehab Act provides protection for people who have a physical or mental impairment that substantially limits “a major life activity.”

The EL-307, the Reasonable Accommodation Handbook, defines a major life activity as “hearing, seeing, walking, caring for oneself, performing manual tasks, and breathing.”

Clearly, not all injured workers have physical conditions severe enough to significantly interfere with walking, seeing, or caring for themselves. That does not matter; it’s not required under 5 CFR 353.301(d).

This is significant. If 5 CFR 353.301(d) required an injured worker to be impaired that much in order to qualify for protection under the Rehab Act, the Postal Service would have been able to treat some injured workers better than others.

Instead, 5 CFR 353.301(d) merely states that *all* partially recovered workers, no matter what level of impairment they have, will be treated at least as well as those people who happen to be eligible for Rehab Act protection because of

severe limitations on a major life activity.

Treatment Under the Rehab Act

The purpose of the Reasonable Accommodation Handbook, EL-307, was to provide management with procedures for complying with the Rehab Act.

Management’s obligations for limited duty are completely independent of whatever action OWCP might be taking.

The Rehab Act requires the Postal Service to consider changing the way that a given job is performed in order to accommodate employee impairment.

The EL-307 has specific procedures for handling an employee’s accommodation request. Stewards should include, in the limited duty grievance, all evidence of non-compliance with the EL-307.

Section 223.1 requires management to gain the employee’s participation in the process, making it interactive.

According to Section 25, all denials must be in writing. The written denial must provide specific

reasons and also identify the person who issued the decision.

Section 261 requires the Service to document its efforts to provide accommodation on a Reasonable Accommodation Decision Guide form. Stewards should request copies of this form for inclusion in the grievance.

Remedies

It is important that the steward remember to request an appropriate remedy in the event limited duty is improperly withdrawn or denied.

Stewards should request that the grievant immediately be restored to limited duty. He or she should also be made whole for all lost wages, annual leave, sick leave, and TSP benefits.

Continuing Obligation

The Postal Service has contractual and legal obligations to make every effort to provide limited duty. These obligations are continuing and ongoing.

It is especially important for the steward to understand that management’s obligation for limited duty are completely independent of whatever action OWCP might be taking.

No matter what OWCP is or is not doing, in terms of providing Vocational Rehabilitation services, it does not diminish in any way the Postal Service’s obligation to make every effort in continuing to seek limited duty.

This is true even if OWCP has placed an injured worker with another employer. Even then, the Postal Service’s obligation continues. Stewards must ensure that they enforce the injured worker’s contractual and legal rights to the fullest extent.