

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

T.H., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Toledo, OH, Employer**

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**Docket No. 10-140
Issued: August 4, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2009 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 30, 2009, which affirmed the denial of his recurrence of disability claim. Pursuant to 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 met his burden of proof to establish a recurrence of disability on January 14, 2009 causally related to his November 28, 2005 employment injury.

FACTUAL HISTORY

On November 28, 2005 appellant, then a 29-year-old corrections officer was securing utensils in the kitchen at work when he slipped on chicken grease and injured his right knee. He stopped work on November 28, 2005.

In a December 16, 2005 report, Dr. Harvey R. Manes, a Board-certified orthopedic surgeon, determined that appellant had a torn lateral meniscus and diagnosed right knee derangement. He recommended an arthroscopy.

The Office accepted the claim for “derangement of the posterior horn” and “torn medial meniscus of the right knee.” Appellant received wage-loss compensation benefits. The Office authorized arthroscopic surgery on both January 4, 2007 and October 31, 2008. However, appellant did not proceed with the authorized surgery.

On June 3, 2006 appellant began a part-time, four-hour, limited-duty job. He received compensation for the four hours daily that he did not work. In a June 7, 2006 duty status report, Dr. James L. Marzec, a Board-certified orthopedic surgeon, advised that appellant was partially disabled and could continue light duty for no more than four hours a day. The restrictions included that he perform desk duty with no lifting or standing. Dr. Marzec continued to restrict appellant to desk work for four hours daily.

After development of the claim and finding a conflict of medical opinion between appellant’s treating physician, who allowed him to work four hours a day and the Office’s referral physician, who found appellant could return to his full work duties, appellant was seen by Dr. William A. Healy, III, a Board-certified orthopedic surgeon and impartial medical examiner. In a report dated June 4, 2007, Dr. Healy noted appellant’s history of injury and medical treatment. He diagnosed preexisting osteoarthritis with medial and lateral meniscal tear. Dr. Healy determined that appellant had not recovered from the accepted conditions of derangement of the right posterior horn lateral meniscus and torn right meniscus. He explained that appellant had preexisting osteoarthritis, which was aggravated by the fact that appellant did not undergo the arthroscopic intervention as recommended by his attending physician. Without the recommended treatment, appellant’s meniscal tears and preexisting arthritic processes would progress. Dr. Healy also noted the delay in appellant’s recovery was due to other factors which were unrelated to the injury at work and included: appellant’s unwillingness to proceed with the arthroscopic intervention; his preexisting degenerative process that was aggravated by the fall; and the fact that at 5 feet, 10 inches and 322 pounds, he was obese and subjected his knees to significant pressures. He opined that appellant should undergo the arthroscopic intervention that was recommended by his physician. Dr. Healy advised that appellant could not return to full duty.

The record reflects that appellant did not undergo surgery, but continued to work in his limited-duty position.

On January 20, 2009 appellant filed a recurrence of total disability claim commencing January 14, 2009. He had been performing light-duty work for a year and a half. Appellant advised that he was preparing for surgery and his right knee was locking up again. He stopped work on January 14, 2009. The employing establishment noted that appellant had been working at a limited-duty position for four days since October 3, 2006.

By letters dated February 20 and March 6, 2009, the Office informed appellant of the evidence needed to support his claim for a recurrence of disability. It requested that he submit such evidence within 30 days.

Appellant submitted a statement on February 25, 2009. He noted that in the weeks prior to 2009 while at work, his right knee began locking up when he walked from one building to another. The locking became constant and his knee painful during extended periods of walking, sitting and even while sleeping.

The Office received treatment reports from Dr. Marzec dated March 2006 to October 14, 2008. Dr. Marzec noted that appellant's physical examination and complaints remained unchanged in the right knee. Dr. Marzec advised that appellant was currently working four hours a day and did not feel that he could tolerate more than that. Dr. Marzec found that appellant could continue working four hours a day. He requested authorization for an arthroscopic partial medial meniscectomy of the right knee.

In January 14, 2009 disability report, Dr. Marzec advised that appellant was totally disabled and requested authorization for surgery, which would be in February. He advised that x-rays of the bilateral knees showed very mild medial arthritis, with the right equal to the left. Dr. Marzec noted that appellant's physical examination remained unchanged in the right knee and advised that an arthroscopic partial medial meniscectomy was planned for February 4, 2009. Appellant was found totally disabled and would be in physical therapy three times a week. Dr. Marzec noted that he was out of work because his right knee was locking up and to prepare for surgery.

In an April 17, 2009 decision, the Office denied appellant's claim for a recurrence of disability on January 14, 2009. It found that his claim was accepted for a torn medial meniscus and derangement of the posterior horn of the right knee. The Office noted that appellant was working a limited-duty position within his medical restrictions and that there was insufficient evidence to establish that appellant was working outside his restrictions. It also noted that the requested surgical intervention had been approved on more than one occasion.

On April 20, 2009 appellant requested a hearing, which was held on August 17, 2009. He noted that he did not undergo surgery in February 2009. Appellant alleged that he was made to work outside his restrictions because he had to walk back and forth between two buildings.

In a July 2, 2009 treatment note, Dr. Marzec advised that appellant was last seen on January 14, 2009. He noted that surgery was denied on February 4, 2009. Dr. Marzec examined appellant and noted that there was no change. He advised that appellant had continued complaints of locking and pain. Dr. Marzec indicated that appellant was totally disabled; however, he could perform desk duty for four hours a day.

In a decision dated September 30, 2009, an Office hearing representative affirmed the April 17, 2009 decision.

LEGAL PRECEDENT

The Office's regulations define the term recurrence of disability as follows: "Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.

This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."¹

When an employee, who is disabled from the job he or she held when injured on account of employment related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantive evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury related condition or a change in the nature and extent of the light-duty job requirements.²

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.³ This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.⁴ The physician's opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁵

An award of compensation may not be based on surmise, conjecture or speculation. Neither, the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.⁶

ANALYSIS

Appellant's claim was accepted for derangement of the posterior horn and torn medial meniscus of the right knee. The Office authorized arthroscopic surgery for the right knee on January 4, 2007 and October 31, 2008. Appellant did not proceed to surgery. He subsequently alleged a recurrence of total disability on January 14, 2009. On February 20 and March 6, 2009 the Office advised appellant of the medical and factual evidence needed to establish his claim for a recurrence of disability. Appellant did not submit sufficient medical evidence providing a rationalized opinion from a physician, on the basis of a complete and accurate factual and

¹ *J.F.*, 58 ECAB 124 (2006); *Elaine Sneed*, 56 ECAB 373, 379 (2005); 20 C.F.R. § 10.5(x).

² *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Terry R. Hedman*, 38 ECAB 222 (1986).

³ *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

⁴ *Duane B. Harris*, 49 ECAB 170, 173 (1997).

⁵ *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

⁶ *Walter D. Morehead*, 31 ECAB 188 (1986).

medical history, concluded that his disability beginning January 14, 2009 was causally related to a spontaneous change in the accepted injury.⁷

On January 14, 2009 Dr. Marzec advised that appellant was totally disabled and requested authorization for surgery. Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.⁸ In this case, Dr. Marzec noted that appellant's physical examination and complaints remained unchanged in the right knee. He did not explain how appellant's employment-related condition had worsened such that he was no longer able to perform his limited-duty work during this time frame. However, it appears Dr. Marzec found disability based on the fact that appellant would soon undergo surgery in February 2009. This does not establish that his disability was due to a spontaneous change in the employment-related condition.⁹ These reports are of limited probative value.

On July 2, 2009 Dr. Marzec examined appellant and noted that there was no change in his findings and that he had continued complaints of locking and pain. He indicated that appellant was totally disabled, but also found that he could perform desk duty for four hours a day. The record reflects that surgery was not performed as anticipated. This report does not establish that appellant was disabled such that he could not perform his light-duty position.

The record also contains reports that either predated or postdated appellant's alleged recurrence on January 14, 2009 and do not render any opinion on causal relationship. These reports do not establish appellant's claim for a recurrence of disability.

During his hearing and on appeal, appellant alleged that the requirements of his light-duty position changed as he had to walk back and forth between two buildings. The Board notes that the light-duty position was based on Dr. Marzec's restrictions of desk work for no more than four hours per day with no lifting or standing. Dr. Marzec's restrictions did not specifically address walking. The employing establishment noted that it had provided appellant four hours of limited duty daily since October 3, 2006 and on his January 20, 2009 recurrence of disability claim, he indicated that he had been working desk duty for four hours daily. There is insufficient evidence to establish that he was required to work outside of his physical restrictions. Consequently, he has not established a change in the nature and extent of the light duty job.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability on January 14, 2009 causally related to his accepted November 28, 2005 employment injury.

⁷ See *Helen K. Holt*, 50 ECAB 279 (1999).

⁸ See *Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

⁹ See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

ORDER

IT IS HEREBY ORDERD THAT the decision of the Office of Workers' Compensation Programs dated September 30, 2009 is affirmed.

Issued: August 4, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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