United States Department of Labor
Employees' Compensation Appeals Board

K.B., Appellant **and** **DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Laguna Niguel, CA, Employer**	)	**Docket No. 10-1155** **Issued: September 6, 2011**

Appearances:
Tim Egbuchunam, for the appellant
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 March 24, 2010 appellant, through his representative, filed a timely appeal of the February 1, 2010 merit decision of the Office of Workers' Compensation Programs denying 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 sustained a recurrence of total disability commencing June 30, 2008 causally related to his accepted employment injuries.

On appeal, appellant's representative contends that the Office's denial of appellant's recurrence of disability claim is moot as it failed to make a suitable determination regarding his modified-duty mission support specialist position. He contends that appellant was not qualified to perform the duties of the modified position due to his physical restrictions. Further, it was a makeshift position and could not be used by the Office to make a loss of wage-earning capacity

determination. Appellant contended that he was not provided an opportunity by the employing establishment to formally accept or reject an offer of suitable work.

FACTUAL HISTORY

On February 15, 2005 appellant, then a 43-year-old safety manager, filed an occupational disease claim assigned File No. xxxxxx420 alleging that his right foot plantar fasciitis and left foot bone spurs were caused by prolonged standing and walking in his new work assignment.[1] On March 7, 2005 the Office accepted his claim for bilateral plantar fasciitis. It paid wage-loss compensation from February 16 through August 17, 2005.

On April 18, 2005 appellant returned to full-time modified work based on the restrictions set forth by Dr. Sylvia A. Gisi, an attending family practitioner.[2]

In a November 1, 2005 decision, the Office accepted that appellant sustained a recurrence of disability from August 22, 2005 through March 2, 2008 as the employer withdrew his modified-duty position and reassigned him to a safety and occupational manager position in San Pedro, California which exceeded his two-hour driving restriction.

By letter dated October 25, 2007, the employing establishment requested that the Office review a description of a modified mission support specialist position and determine whether it was suitable for appellant.[3] On March 3, 2008 appellant returned to work in this modified position as a result of a February 14, 2008 MSPB settlement agreement with the employing establishment and a February 19, 2008 work release from Dr. Gisi.

A notification of personnel action (Form SF-50) dated July 7, 2008 from the employing establishment indicated that, effective June 30, 2008, appellant resigned due to extreme duress. He alleged management's actions included being required to work beyond his physical restrictions.

On January 28, 2009 the Office advised appellant that, since he had returned to work for 90 days, he had to submit evidence establishing that he sustained a recurrence of disability. Appellant responded that he was not qualified to perform the duties of a mission support specialist. He stated that his work duties continuously changed and were not within his physical restrictions. Appellant contended that the employing establishment's Form SF-50 acknowledged that he was not qualified for the position.

---

[1] On February 15, 2005 appellant filed a claim under File No. xxxxxx418 which was accepted by the Office for lumbar strain. The Office combined both files into a master claim assigned File No. xxxxxx420.

[2] In an April 13, 2005 work capacity evaluation, Dr. Gisi advised that appellant could return to modified-duty work on April 18, 2005 with restrictions which included walking and standing with 20-minute breaks and no driving more than 2 hours continuously, pushing, pulling and lifting more than 20 pounds 6 hours a day and climbing 4 hours a day.

[3] The mission support specialist position was primarily sedentary in nature and typically performed in an adequate lighted, well-ventilated and climate-controlled office.

By letter dated February 11, 2009, the Office advised appellant that at the time he received a wage-loss compensation payment for the period December 28, 2007 through January 17, 2009 and was placed on the automatic payroll effective January 18, 2009,[4] it did not know that he had returned to work as a mission support specialist on March 3, 2008 and stopped work on June 30, 2008. It addressed the factual and medical evidence he needed to establish that he sustained a recurrence of disability as of June 30, 2008, including a rationalized medical report from an attending physician which described a history of medical examinations, treatment and the alleged recurrence of disability, medical findings, a firm diagnosis, periods of total and partial disability with restrictions and an opinion with medical reasons on what duties and/or physical requirements of the job he was unable to perform. Appellant was allowed 30 days to submit the requested evidence.

In a February 16, 2009 letter, appellant contended that in February 2008 he advised the Office about his return to work in the modified mission support specialist position. He did not wish to file a recurrence of disability claim. Appellant contended that the Office did not make a suitable determination regarding his modified position following his June 2008 resignation.

In a June 12, 2009 decision, the Office found that appellant did not sustain a recurrence of disability commencing June 30, 2008 causally related to his accepted employment-related injuries. The evidence failed to establish that his light-duty job requirements had changed and contributed to his claimed recurrence of disability. The medical evidence did not establish that appellant was totally disabled due to a change in the nature or extent of his accepted employment injuries. Citing Board precedent, the Office found that it was not required to make a suitable determination on the modified mission support specialist position. As appellant had accepted the modified position and worked in it for nearly four months, his actual earnings represented his wage-earning capacity.

On June 18, 2009 appellant requested an oral hearing before an Office hearing representative.[5]

In a February 1, 2010 decision, an Office hearing representative affirmed the June 12, 2009 decision. The evidence was insufficient to establish that appellant sustained a recurrence of disability at the time of his resignation on June 30, 2008 causally related to his employment-related injuries.

---

[4] Appellant received the stated compensation based on an Office hearing representative's November 17, 2008 decision which reversed the Office's December 28, 2007 termination of his compensation on the grounds that he refused an offer of suitable work as a manager and program analyst.

[5] On August 11, 2009 appellant requested that the Office issue subpoenas to witnesses and for the production of records, correspondence and other documents regarding his contention that Office employees acted with malice intending to commit an unlawful act or cause harm without legal justification or excuse in handling his claim. In a September 17, 2009 decision, an Office hearing representative denied his request for the issuance of subpoenas on the grounds that he did not have jurisdiction over the alleged matter. The Office's September 17, 2009 decision is not within the Board's jurisdiction. For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

LEGAL PRECEDENT

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 which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6] 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 (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[7]

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. 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 limited-duty job requirements.[8]

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.[9]

ANALYSIS

The Office accepted that appellant sustained a lumbar strain and bilateral plantar fasciitis while in the performance of duty. Following these injuries, appellant returned to limited light-duty work. He claimed that he sustained a recurrence of disability commencing June 30, 2008, the date he resigned from the employing establishment. Appellant must demonstrate either that his condition has changed such that he could not perform the activities required by his modified job or that the requirements of the limited light-duty job changed.

Appellant claimed that he sustained a recurrence of disability on June 30, 2008 because he was not qualified to perform the duties of a modified mission support specialist and his work duties changed which required him to work outside his physical restrictions. He did not submit any evidence to establish that there was a change in his work assignments or that the limited-duty

---

[6] 20 C.F.R. § 10.5(x).

[7] *Id.*

[8] *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Barry C. Petterson,* 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[9] *James H. Botts*, 50 ECAB 265 (1999).

position involved duties in excess of his physical restrictions.[10] The Board finds that the modified position of mission support specialist was within appellant's work restrictions. The evidence of record shows that when he stopped work on June 30, 2008 he had limited-duty work within his work restrictions available to him. Therefore, appellant did not show that he sustained a recurrence of total disability commencing June 30, 2008 due to a change in the nature and extent of his limited-duty requirements.

Appellant did not submit any medical evidence to establish that he sustained a recurrence of total disability commencing June 30, 2008 due to his accepted employment injuries. The Office's February 11, 2009 developmental letter specifically requested that he submit a rationalized medical opinion from an attending physician as to whether he was either partially or totally disabled from performing his assigned work duties. Appellant did not submit any medical evidence in response to the Office's request. The Board finds that he failed to show that he sustained a recurrence of total disability due to a change in the nature and extent of his accepted conditions.

On appeal, appellant's representative primarily contended that the Office's denial of appellant's recurrence of total disability claim is moot because the Office failed to first make a suitable determination regarding his modified mission support specialist position. He argued that the position was not suitable because it exceeded appellant's physical restrictions and was a makeshift position and the employer did not give him an opportunity to formally accept or reject the position. After his injury, appellant returned to light-duty work March 3 through June 30, 2008. He accepted the position without contending that the light-duty requirements were outside his work restrictions and worked for nearly four months before stopping. Appellant did not present any evidence that the light-duty position was not suitable or outside his work restrictions. He had the burden of proof to establish that he was totally disabled from working in his light-duty position after June 30, 2008.[11] The Board finds that appellant's argument on appeal is inapplicable to the instant issue.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability commencing June 30, 2008 due to his accepted employment injuries.

[10] *See Kim Kilts*, 51 ECAB 349 (2000) (finding that only changes that cause the light-duty assignment to exceed the employee's work tolerance limitation result in a compensable recurrence of disability).

[11] *Albert C. Brown*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 2011
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