

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

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**R.F., Appellant**

**and**

**DEPARTMENT OF DEFENSE, GROTON  
COMMISSARY, Groton, CT, Employer**

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**Docket No. 07-509  
Issued: December 21, 2007**

*Appearances:*  
*Appellant, pro se*  
*No appearance, for the Director*

Oral Argument October 2, 2007

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 14, 2006 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated December 1, 2006, which denied his claim for a recurrence of total disability beginning November 30, 2001. 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 established that he sustained a recurrence of total disability on and after November 30, 2001 due to his accepted November 10, 1998 employment injury

**FACTUAL HISTORY**

This is the second appeal before the Board. In the prior appeal, the Board reversed a September 29, 2005 Office decision terminating appellant's compensation.<sup>1</sup> The Office decision terminated appellant's compensation on the grounds that he abandoned suitable work. On

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<sup>1</sup> Docket No. 06-81 (issued May 2, 2006).

March 1, 2001 appellant filed a claim for a recurrence of partial disability due to his November 10, 1998 employment injury, which the Office accepted on January 10, 2002.<sup>2</sup> Prior to the acceptance of his claim for a recurrence of partial disability, appellant resigned his part-time light-duty position effective November 30, 2001.<sup>3</sup> The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.<sup>4</sup>

The facts as relevant to the issue currently before the Board are as follows. Appellant resigned his position effective November 30, 2001. He noted the reason for his resignation was due to his relocating out of the State of Connecticut. On September 24, 2002 Dr. Jeffrey A. Salkin, a physician, reported “no change in his disability status.”

In an August 1, 2003 report, Dr. Salkin indicated that appellant’s “clinical status is unchanged although he has lost some subtalar motion and is wearing out his shoes on the left.”

On April 30, 2004 the Office received a letter from appellant detailing his reasons for resigning from the position. He contended that the job was not suitable as he was required to work outside his restrictions. Appellant stated that the employing establishment did not “have light-duty positions and due to the heavy flow of customers made it impossible to use my scooter.”

On August 1, 2006 appellant filed an election to receive benefits under the Federal Employees’ Compensation Act effective November 30, 2001.

In an August 17, 2006 report, Dr. Eric M. Garver, a second opinion Board-certified orthopedic surgeon, diagnosed status post subtalar synovitis, talonavicular osteophyte formation and sinus tarsi syndrome. Appellant related having constant pain and used his cane and scooter intermittently. He also informed Dr. Garver that “he is now retired or considers himself retired.” A physical examination revealed “marked limited active range of motion in terms of dorsiflexion, flexion, eversion and inversion.” A review of an August 8, 2006 x-ray interpretation revealed “a relatively well-preserved ankle mortise joint” and “hyperostosis present on the distal aspect of the talus in the area of his tenderness.” Dr. Garver opined that appellant currently required no further treatment for his accepted employment injury. With respect to his ability to work, he concluded that appellant was capable of performing sedentary work. In an accompanying work capacity evaluation form dated August 17, 2006, Dr. Garver indicated that appellant was capable of working with restrictions.

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<sup>2</sup> On December 7, 2004 appellant filed a traumatic injury alleging that his right ankle condition was due to his compensating for his left foot and ankle injury. He indicated that he was retired under “Employee’s job title.” As the Office has not issued a final decision on this consequential injury issue, the Board has no jurisdiction to review if for the first time on appeal. 20 C.F.R. §§ 501.2(c) and 501.3(d); *see Annette Louise*, 54 ECAB 783 (2003).

<sup>3</sup> Appellant noted the reason for his resignation was due to his relocating out of the State of Connecticut.

<sup>4</sup> The Office accepted that appellant, then a 33-year-old store worker, sustained a left ankle sprain on November 10, 1998 and authorized left ankle arthroscopic surgery, which was performed on November 11, 1999. Appellant returned to a light-duty job on February 6, 1999 working four hours per day five days a week. On November 9, 2001 the Office authorized the purchase of a ramp to accompany his authorized scooter.

In a supplemental report dated October 11, 2006, Dr. Garver reviewed the part-time job description appellant was performing when he stopped working on November 30, 2001 and the information appellant provided regarding his job duties. He noted the activities appellant described appeared to conflict with the duties noted in the job description. Dr. Garver concluded:

“While I believe there is no question that the patient was at that time able to perform sedentary and light-duty activities, if the patient was required to engage in activities that were outside the scope of the enclosed job description then that would be essentially a violation of his restrictions. Of course, the truth of the basis of exactly what this patient was doing and required to do is [not] known to me and I only have what the patient relates to me, but there is no question that the patient would on that date have been able to perform a selected light duty with no lifting or repetitive bending or excess walking.”

By decision dated December 1, 2006, the Office denied appellant’s claim for a recurrence of total disability.

### **LEGAL PRECEDENT**

Once the Office accepts a claim for a recurrence of partial disability, it has the burden of justifying termination or modification of compensation benefits.<sup>5</sup>

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-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 that he cannot perform the light-duty position. 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 light-duty job requirements.<sup>6</sup>

A recurrence of disability is defined under the Office’s implementing federal regulations as the 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.<sup>7</sup>

### **ANALYSIS**

Initially, the Board notes that on January 12, 2002 the Office accepted appellant’s recurrence claim for partial disability beginning March 1, 2001. Thus, it is the Office’s burden of proof to establish that appellant’s partial disability for four hours had ceased on

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<sup>5</sup> See *T.P.*, 58 ECAB \_\_\_ (Docket No. 07-60, issued May 10, 2007).

<sup>6</sup> *Bryant F. Blackmon*, 57 ECAB \_\_\_ (Docket No. 04-564, issued September 23, 2005); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>7</sup> 20 C.F.R. § 10.5(x).

November 30, 2001. The Board finds that the Office failed to meet its burden of proof. The record is devoid of any medical evidence showing that appellant's condition had improved such that he was capable of working more than four hours. The record contains medical reports from Drs. Salkin and Garver. Dr. Salkin reported "no change in his disability status" in a September 24, 2002 report. Dr. Garver opined that appellant was capable of performing the light-duty position at the time he quit his job. As there is no medical opinion concluding that appellant is capable of working more than four hours per day, the Office has not met its burden to show that his disability had ceased on November 30, 2001.

To be entitled to compensation for an additional four hours per day on and after November 30, 2001, it is appellant's burden of proof to establish entitlement to these additional four hours. He must provide medical evidence establishing that he was totally disabled due to a worsening of his accepted work-related condition, left ankle sprain, or a change in his job duties such that he was unable to perform his light-duty work.

The record reveals that appellant returned to modified light-duty work on February 6, 1999 working four hours per day. Appellant subsequently quit his light-duty position effective November 30, 2001. He 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 light duty changed or were withdrawn. Although appellant alleges that he was required to work outside his restrictions, there is no evidence supporting this allegation. The evidence establishes that appellant resigned from his light-duty job on the grounds that he was moving out of state. The record contains no evidence that the light-duty job requirements were changed or withdrawn.

The record contains reports by Dr. Salkin diagnosing chronic sinus tarsi syndrome. He reported appellant's disability status was unchanged in reports dated September 24, 2002 and August 1, 2003. Dr. Salkin, however, did not address the relevant issue of whether appellant was totally disabled from his position as customer service clerk beginning November 30, 2001. Whether a particular injury causes an employee to be disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of the probative and reliable medical evidence.<sup>8</sup>

The Office referred appellant for a second opinion evaluation with Dr. Garver who provided a report on August 17, 2006. Dr. Garver opined that appellant currently required no further treatment for his accepted employment injury and was capable of performing sedentary work. In a supplemental report, he noted that appellant would have been capable of performing the duties of the light-duty position as written. As Dr. Garver opined that appellant was capable of performing sedentary work, his report is insufficient to support appellant's recurrence claim for an additional four hours per day on and after November 30, 2001.

The Board finds that appellant has submitted insufficient evidence to show a change in the nature and extent of his physical condition, arising from the employment injury which prevented him from performing his light-duty position. There is no evidence showing that appellant experienced a change in the nature and extent of the light-duty requirements or was

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<sup>8</sup> *Amelia S. Jefferson*, 57 ECAB \_\_\_\_ (Docket No. 04-568, issued October 26, 2005).

required to perform duties which exceeded his medical restrictions. Therefore, he failed to meet his burden of proof and the Office properly denied his claim for a recurrence of total disability, which would entitle him to an additional four hours per day of wage-loss compensation.

**CONCLUSION**

The Board finds that the Office failed to establish that appellant was not entitled to compensation for partial disability due to his accepted November 10, 1998 injury. The Board further finds that appellant failed to establish that he was entitled to an additional four hours per day of wage-loss compensation on and after November 30, 2001.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 1, 2006 decision of the Office of Workers' Compensation Programs is set aside in part, affirmed in part and the case remanded for further proceedings in accordance with the above decision.

Issued: December 21, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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