United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 07-1772**
	)	**Issued: December 21, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Glendale, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2007 appellant filed a timely appeal from the March 28 and May 31, 2007 merit decisions of the Office of Workers' Compensation Programs, which, respectively, denied authorization for a change of physicians and denied compensation for partial disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of appellant's case.

ISSUES

The issues are: (1) whether the Office properly denied authorization for a change of physicians; and (2) whether appellant is entitled to compensation for partial disability beginning March 21, 2007.

FACTUAL HISTORY

On December 14, 2004 appellant, then a 51-year-old registry clerk, filed a claim alleging that she developed a cumulative knee injury in the performance of duty: "Because of the extended amount of standing, stooping and the weight and amount of heavy lifting during my

career, it has exacerbated the condition of my knees to the point where I need knee replacement at an early age evidenced by an accelerated advance of the loss of cartilage and mobility."

On December 13, 2004 Dr. John A. Osterkamp, the attending orthopedic surgeon, reported that the frequent bending and stooping in appellant's employment had exacerbated her bilateral knee arthritis. He restricted her from any bending, stooping or kneeling and advised that she could work at the front desk as long as she had a stool to sit on. On March 15, 2005 appellant stated that she was unable to get a job at the front desk because of her knees and inability to walk well.

On August 16, 2005 Dr. Osterkamp reported that appellant wanted to go ahead with total right knee replacement X-rays on September 13, 2005 showed close to complete loss of joint space. On November 16, 2005 Dr. William C. Boeck, Jr., an orthopedic surgeon and Office referral physician, agreed that appellant's employment had permanently aggravated the severe degenerative arthritis in both knees. He stated that her prognosis without further medical treatment was poor and that symptoms were expected to improve only with a successful outcome of total knee joint replacement arthroplasties. Dr. Boeck found that a right total knee replacement was a reasonable and proper management of the knee problem and felt that the left knee should be similarly operated on after a suitable period of time for recovery on the right.

On April 4, 2006 the Office accepted appellant's claim for permanent aggravation of bilateral degenerative knee arthritis. On August 22, 2006 Dr. Osterkamp reported that appellant was incapable of performing her usual job and was unable to work eight hours a day with restrictions. He stated that this restriction applied "till surgery."

On September 29, 2006 the Office approved a right total knee arthroplasty. On October 26, 2006 Dr. Osterkamp advised that appellant would be disabled for six months following surgery. Appellant filed a claim for wage loss for the period November 9, 2006 to April 9, 2007. On November 9, 2006 she underwent a total knee replacement on the right. The Office paid compensation for temporary total disability on the daily compensation rolls.

On February 20, 2007 Dr. Osterkamp projected a return to work:

> "[Appellant] is here for follow-up. She continues to have pain in her knee. [Appellant] says it is feeling better, but the therapist worked on her yesterday and she said that it was hurting so badly last night she had to take Vicodin and was still drowsy from the Vicodin this morning. She still needs another two weeks of therapy."
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> * * *
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> "I do not believe that she can go to work as long as she is still taking the Vicodin and I think she will need that for another two weeks. [Appellant] is upset with the physical therapist because she tried to flex her so hard yesterday, so she refuses to go back to this therapist again. I think she still needs another two weeks, so I am going to leave it up to her adjuster to find a physical therapist that will take her. I am putting her return to work date as March 19, 2007 because of her continued need for narcotic medication, which is against [employing establishment] rules.

> [Appellant] is going to return to see me in one month. When she does return to work her restrictions will consist of no walking more than two hours per day, no standing more than one hour per day, no bending or stooping and no squatting or kneeling."

Appellant returned to full-time limited duty on March 19 and 20, 2007. However, on March 21, 2007, Dr. Osterkamp advised that she was able to work only four hours a day. Appellant filed a claim for wage loss beginning March 21, 2007.[1]

On April 18, 2007 the Office gave appellant 30 days to provide additional information to support her claim:

> "In order for this Office to pay four hours of compensation per day from March 21 to April 2, 2007, you must provide contemporaneous medical evidence of an increase in disability as demonstrated by objective findings and/or evidence of your employing agency's inability to provide work within the physical limitations related to the accepted work-related condition in your case."

On March 20, 2007 Dr. Osterkamp reported that appellant had not been to physical therapy (PT) for the last several days because she went back to work on March 19, 2007. He noted that she was improving slowly but had quite a bit of soreness after working. Dr. Osterkamp stated: "I believe that her work should be limited to four hours per day for the next month. [Appellant] is to return to see me in one month."

In a decision dated March 28, 2007, the Office denied appellant's request to change physicians. The Office noted appellant's reasons: the time it took Dr. Osterkamp's nurse to obtain surgery authorization; she did not want to be treated by the assistant surgeon, Dr. Kenneth Head; she was not automatically prescribed pain medication after surgery; she was asked to put weight on her leg while in the hospital and experienced pain when she did so; she was placed on a diet and lost 11 pounds in 10 days; and she was not given an order concerning PT until her follow-up appointment after surgery. The Office stated that, in the interest of sound medical practice, it was not the policy of the Office to transfer medical supervision unless there was some compelling reason to do so. "Even when viewed in the most favorable light," the Office explained: "the reasons why you wish to switch treating physicians cannot be considered 'compelling.' There is no evidence to indicate that the treatment you are receiving at present is other than proper and adequate."

On April 2, 2007 Dr. Osterkamp explained that appellant could not work eight hours a day:

> "I only want her working four hours a day. I think that she needs further [PT]. [Appellant] has only had therapy for two weeks. I would like her to continue PT twice a week for another month. For that reason, I would like [her] only to work

[1] Appellant also filed a claim alleging that she sustained a right arm injury in the performance of duty on or about April 3, 2007: "Injury caused by casing continuously for a longer period of time than on registry job." That claim is not before the Board on this appeal.

four hours a day. [Appellant] is restricted from standing to one hour per day and walking to one hour per day. She is not to do any climbing and no kneeling. [Appellant] is not to do any pushing or pulling more than 100 pounds intermittently.

"She is going to continue the PT and see me on April 17th as scheduled."

Appellant sought the opinion of another orthopedic surgeon, Dr. Jacob E. Tauber. On May 8, 2007 Dr. Tauber related appellant's history and his findings on examination. He offered the following:

"This patient underwent total knee replacement by Dr. Osterkamp. The patient attempted to return to work and was unable to tolerate this. This is most reasonable given the fact that the patient does have slight laxity at her knee and is still limping. It was appropriate to return the patient to employment, but this should have been done on a trial basis. In fact, the patient has been unable to tolerate eight hours of work per day due to her knee and, therefore, she should have been returned to a four-hour-per-day schedule when this was attempted and was unsuccessful. The patient has a continuing limp and should only be working four hour per day for her knee."

In a decision dated May 31, 2007, the Office denied compensation for partial disability beginning March 21, 2007. The Office found that the medical evidence failed to establish that she experienced an increase in objective findings that prevented her from working the light-duty position. The Office also found no evidence that the employing establishment was unable to provide limited duty full time. The Office noted Dr. Tauber's May 8, 2007 report, but did not review it because it was not contemporaneous to the period of disability claimed. The Office found that none of the contemporaneous medical reports indicated an increase in objective findings that would prevent appellant from working eight hours a day "as you had been before you went to see Dr. Osterkamp after working eight hours on March 20, 2007." Soreness, the Office explained and her doctor's recommendation that she work only four hours because she had to attend PT, were insufficient reasons to support payment.

LEGAL PRECEDENT -- ISSUE 1

The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree of the period of any disability or aid in lessening the amount of any monthly compensation.[2]

The 1974 amendment to the Federal Employees' Compensation Act adopted the recommendation of the National Commission on State Workmen's Compensation Laws that "the worker be permitted the initial selection of his physician, either from all the licensed physicians in the state or from a panel of physicians selected or approved by the workmen's compensation agency." But Congress did not restrict the Office's power to approve appropriate medical care

[2] 5 U.S.C. § 8103(a).

after the initial choice of a physician. The Office still has the general objective of ensuring that an employee recovers from the injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing means to achieve this goal within the limitation of allowing an employee the initial choice of a doctor.[3]

Section 10.316 of Title 20 of the Code of Federal Regulations is an appropriate exercise of that discretion that does not conflict with 5 U.S.C. § 8103(a).[4] This section provides:

> "(a) When the physician originally selected to provide treatment for a work-related injury refers the employee to a specialist for further medical care, the employee need not consult [the Office] for approval. In all other instances, however, the employee must submit a written request to [the Office] with his or her reasons for the desired change of physician.
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> "(b) [The Office] will approve the request if it determines that the reasons submitted are sufficient. Requests that are often approved include those for transfer of care from a general practitioner to a physician who specializes in treating condition like the work related one or the need for a new physician when an employee has moved. The employer may not authorize a change of physicians."[5]

ANALYSIS -- ISSUE 1

The Office gave due consideration to appellant's reasons for requesting a change of physicians. However, there is no evidence that the treatment she was receiving from her orthopedic surgeon, Dr. Osterkamp, was other than proper and adequate, notwithstanding her complaints prior to or following surgery. The Office found no compelling reason to authorize such a change. The Board finds that the Office properly exercised its discretion in the matter and will affirm the March 28, 2007 decision denying authorization. This does not mean appellant may not seek medical care elsewhere, only that the Office will not be financially responsible for unauthorized services, appliances or supplies.

[3] *Wayne D. Kramp*, 32 ECAB 1115, 1118 (1981).

[4] *See id*. (holding the same with respect to the section 10.400(b), the current section's predecessor).

[5] 20 C.F.R. § 10.316 (1999).

LEGAL PRECEDENT -- ISSUE 2

The Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[6] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[7]

ANALYSIS -- ISSUE 2

The Office denied compensation for partial disability on the grounds that appellant had returned to full-time limited duty and, therefore, had a burden to show either an increase in objective findings or the employing establishment's inability to provide limited duty full time. The Office thus adjudicated the matter as one of recurrence.[8] The Board finds this analysis flawed. It mischaracterizes the essential facts of the case. It cannot reasonably be argued that appellant had successfully demonstrated her capacity to work limited duty on a full-time basis. Appellant underwent a total knee replacement on November 9, 2006, surgery that disabled her for six months as her surgeon Dr. Osterkamp estimated. After a prolonged period of total disability and still well short of the six-month estimate, appellant attempted a return to limited duty but was unable to tolerate full-time work more than two days. Such a short-lived and unsuccessful attempt to return to duty does not place a burden on appellant to establish a recurrence of disability.[9] Instead, the case is analogous to one in which a totally disabled claimant is medically cleared to return to part-time duty.

Dr. Osterkamp supported that appellant was incapable of working eight hours a day. The explanation, he reported, was that she needed further PT due to limitations following surgery. Appellant had only two weeks of therapy and needed more. Dr. Tauber, another orthopedic surgeon, agreed that appellant should be working only four hours a day. He examined her and explained that her inability to tolerate an eight-hour workday was "most reasonable," given the fact that she had slight laxity at her knee and was still limping. While it was appropriate to return her to work on a trial basis, Dr. Tauber reported that she should have been returned to a four-hour schedule when that proved unsuccessful.

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[6] 5 U.S.C. § 8102(a).

[7] 20 C.F.R. § 10.5(f) (1999).

[8] 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 to show that he cannot perform such light-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. *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[9] *Fred Reese*, 56 ECAB ___ (Docket No. 05-586, issued June 9, 2005); *Janice F. Migut*, 50 ECAB 166 (1998) (claimant attempted to return to work for two days and then claimed compensation for total disability); *see also Cheryl A. Weaver*, 51 ECAB 308 (2000) (claimant stopped work after only one day); *Carl C. Graci*, 50 ECAB 557 (1999) (claimant stopped work after only two hours).

The weight of the medical evidence establishes that appellant was capable of working limited duty only four hours a day beginning March 21, 2007. There is no medical opinion to the contrary and no indication that appellant's inability to work full time was due to any factor other than her employment-related condition.[10] The Board will reverse the Office's May 31, 2007 decision denying compensation for partial disability.

CONCLUSION

The Board finds that the Office properly denied authorization for a change of physicians. The Board also finds that appellant is entitled to compensation for partial disability beginning March 21, 2007.

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2007 decision of the Office of Workers' Compensation Programs is reversed and the case remanded of further action consistent with this opinion. The Office's March 28, 2007 decision is affirmed.

Issued: December 21, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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

[10] *Janice F. Migut, supra* note 9.