



## **FACTUAL HISTORY**

Appellant, a 49-year-old former Federal air marshal, has an accepted claim for left knee sprain and torn medial meniscus, which occurred on February 7, 2006. He underwent three partial medial meniscectomies; most recently on October 2, 2007, which OWCP approved. Appellant received wage-loss compensation, as well as a schedule award for left lower extremity impairment. He had been working in a limited-duty capacity due to his employment-related left knee condition.<sup>2</sup> Effective January 30, 2009, appellant resigned his position. According to the notification of personnel action (OPM Standard Form 50), he resigned because of a “pending termination for personal conduct.”<sup>3</sup> However, appellant’s January 30, 2009 letter of resignation stated that he resigned because he was unable to perform the essential duties of an air marshal and the employer had recently denied a request for a reasonable accommodation under the Rehabilitation Act.<sup>4</sup> He stated that the denial of the reasonable accommodation request left him “no choice but to resign effective immediately.” The same day he resigned, appellant filed a claim for wage-loss compensation (Form CA-7) beginning January 30, 2009.

Prior to appellant’s resignation, OWCP had pursued a permanent limited-duty job offer from the employer. While a permanent limited-duty job offer had not been extended, the employer had expressed a willingness to continue providing appellant limited-duty work on a temporary basis. On March 16, 2009 OWCP contacted the employing establishment and was advised that, had appellant not resigned, his limited-duty assignment would have remained available to him. Although the employer denied appellant’s request for a permanent limited-duty position, it did not rescind his limited-duty assignment.

In a decision dated June 17, 2009, OWCP denied appellant’s claim for wage-loss compensation beginning January 30, 2009. It found that he had successfully worked in a modified position until he resigned on January 30, 2009. But for his resignation, the modified position would have remained available. OWCP further found that appellant had not established a change in his injury-related condition such that he could no longer perform modified duties nor had there been a change in the nature and extent of the light-duty job requirements.

By decision dated December 23, 2009, the Branch of Hearings and Review affirmed the June 17, 2009 decision.

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<sup>2</sup> Appellant’s most recent limited-duty job offer was dated November 12, 2008. His duties included: answering the telephone while in a seated position (four hours); using a computer while in a seated position (two hours); greeting visitors and signing for light deliveries (one hour); and performing other light duties within his limitations (one hour). The physical requirements for the position were walking and sitting. The position was based on the July 23, 2008 restrictions imposed by appellant’s physician, Dr. Antonio Rosario, a Board-certified orthopedic surgeon, and endorsed by Dr. Alan H. Wilde, a Board-certified orthopedic surgeon and OWCP referral physician.

<sup>3</sup> The employing establishment issued a notice of proposed removal on January 14, 2009 for off-duty misconduct involving a February 27, 2008 motor vehicle accident. Appellant was immediately placed on administrative leave pending written notification of a final decision.

<sup>4</sup> The employing establishment denied appellant’s reasonable accommodation request on January 23, 2009. The notice advised him that he had the right to request reconsideration within 10 days or he could file an Equal Employment Opportunity complaint within 45 days if he believed he had been discriminated against.

Appellant requested reconsideration on October 27, 2010. He claimed he had been denied due process, and that the job offers he had previously received were technically deficient. Appellant argued that as a full-time employee, he should not have been offered a temporary position. He also argued that OWCP failed to make a suitability determination, and it had not properly verified that his position remained available.

OWCP reviewed the merits of the recurrence claim and denied modification by decision dated February 11, 2011.

### **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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>5</sup> This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his 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 established physical limitations.<sup>6</sup> Moreover, when the claimed recurrence of disability follows a return to light-duty work, the employee may satisfy his burden of proof by showing a change in the nature and extent of the injury-related condition such that he was no longer able to perform the light-duty assignment.<sup>7</sup>

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing that the recurrence of disability is causally related to the original injury.<sup>8</sup> This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury.<sup>9</sup> The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.<sup>10</sup>

### **ANALYSIS**

Appellant has not alleged nor demonstrated that his injury-related condition changed such that he could no longer perform his limited-duty position. Additionally, he has not alleged, nor

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<sup>5</sup> 20 C.F.R. § 10.5(x).

<sup>6</sup> *Id.*

<sup>7</sup> *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

<sup>8</sup> 20 C.F.R. § 10.104(b); *Carmen Gould*, 50 ECAB 504 (1999); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

<sup>9</sup> See *Helen K. Holt*, *supra* note 8.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

does the record establish that the employing establishment altered the physical requirements of his limited-duty assignment such that it exceeded his established physical limitations.

Appellant argued that the January 23, 2009 denial of his request to convert his temporary limited-duty position into a permanent limited-duty position was a *de facto* withdrawal of his limited-duty assignment. According to him, once the employer denied his request, he had no alternative but to resign or suffer removal. The record does not demonstrate that the employing establishment either explicitly or implicitly withdrew appellant's limited-duty assignment. The January 23, 2009 decision did not reference appellant's limited-duty assignment. Moreover, appellant had appeal rights which had yet to expire when he voluntarily resigned on January 30, 2009. This was not a forced resignation, at least not as of January 30, 2009. Lastly, the employing establishment advised OWCP on March 16, 2009 that but for appellant's resignation; his limited-duty assignment would have remained available. While this statement does not reference that there was a conduct-related removal action pending at the time of appellant's resignation, he nonetheless has not demonstrated that the employing establishment withdrew his limited-duty assignment by January 30, 2009.<sup>11</sup> Accordingly, OWCP properly denied appellant's claim for wage-loss compensation beginning January 30, 2009.

### **CONCLUSION**

Appellant failed to establish a recurrence of disability on January 30, 2009, causally related to his February 7, 2006 employment injury.

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<sup>11</sup> Had the employing establishment removed appellant for misconduct, that action would not justify payment of wage-loss compensation. See 20 C.F.R. § 10.5(x).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 1, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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