

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, MD

*Docket No. 00-145; Submitted on the Record;
Issued December 22, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained a recurrence of disability on July 9, 1991 causally related to his October 9, 1987 employment injury; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's authorization for medical treatment.

The Office accepted that appellant, then a 45-year-old distribution expeditor, his right ankle sprain while in the performance of duty on October 9, 1987.¹ Upon returning to work, appellant had a limited-duty position on a mail distribution case. He performed those duties until July 8, 1991, when the employing establishment dismissed him for filing a false compensation claim.²

On September 20, 1994 appellant filed a notice of recurrence of disability (Form CA-2a), alleging that he sustained a recurrence of disability on July 9, 1991. Appellant stated that he had a permanent disability as a result of his October 9, 1987 employment injury and that the circumstances of his unjust termination in July 1991 entitled him to disability compensation.

By decision dated May 3, 1996, the Office denied appellant's claim on the grounds that appellant was terminated for disciplinary reasons he was not entitled to compensation. The Office also terminated authorization for further medical treatment. In a decision dated February 28, 1997, an Office hearing representative affirmed both the denial of appellant's claim for and the termination of medical treatment.

¹ Appellant had previously fractured his right ankle in 1965.

² Appellant claimed that he sustained an injury to his lower back on February 28, 1991 when a cart holding approximately 30 trays of mail struck the back of his chair and pushed him into his distribution case. Three individuals, one of whom was appellant's then-supervisor, witnessed the incident and disputed appellant's account that the cart struck his chair.

On February 26, 1998 appellant requested reconsideration and submitted additional medical evidence. In a merit decision dated April 20, 1998, the Office denied modification of its decision.

Under letter dated April 19, 1999, appellant submitted additional medical evidence and requested reconsideration. By decision dated June 9, 1999, the Office reviewed appellant's claim on the merits and denied modification.

The Board finds that appellant failed to establish that he sustained a recurrence of disability on July 9, 1991, causally related to his October 9, 1987 employment injury.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a limited or light-duty position, or the medical evidence of record establishes that he can perform the requirements of such a position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and showing that he cannot perform such duty. As part of this burden, the employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the limited light-duty job requirements.³

Appellant has not alleged a change in the nature and extent of his light-duty job requirements, argues that he is entitled to disability compensation because that the position was no longer available to him after July 8, 1991. While the Office's definition of a "recurrence of disability" includes a work stoppage caused by a withdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury, the withdrawal of the assignment "must have occurred for reasons other than misconduct..."⁴

In the instant case, the employing establishment effectively withdrew appellant's light-duty assignment for misconduct unrelated to his October 9, 1987 employment injury.⁵ The Board has held that, when a claimant stops work for reasons unrelated to his accepted employment injury, he has no disability within the meaning of the Federal Employees' Compensation Act.⁶

Appellant argues, however that his removal was erroneous notwithstanding the fact that an arbitrator upheld the employing establishment's basis for termination. He contends that, because the alleged misconduct involved the filing of a compensation claim, the Office was obligated to determine the validity of his allegedly false claim before accepting the employing establishment's characterization of the incident as fraudulent. Appellant, however, failed to cite

³ *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(1)(c) (May 1997).

⁵ The employing establishment's decision to terminate appellant's employment was reviewed and upheld by an arbitrator.

⁶ 5 U.S.C. § 8101 *et. seq.*; *John W. Normand*, 39 ECAB 1378 (1988) (claimant was removed from his light-duty position for disciplinary reasons and the Board found no evidence of disability within the meaning of the Act.). The implementing regulations of the Act define disability as "the incapacity, because of employment injury, to earn the wages the employee was receiving at the time of injury." 20 C.F.R. § 10.5(a)(17).

any relevant authority to support this argument. Furthermore, although appellant disagreed with the employing establishment's characterization of his actions as misconduct, he has not alleged, nor does the record establish, that he was dismissed for reasons other than the perceived misconduct. Inasmuch as the withdrawal of appellant's limited-duty assignment was premised on his purported misconduct, the loss of his position under these circumstances does not establish a recurrence of disability.⁷

Appellant may also establish a recurrence of disability by demonstrating a change in the nature and extent of his employment-related condition.⁸ In order to be entitled to compensation, the medical evidence would have to show that the accepted employment injury caused disability for the light-duty position appellant held at the time the employing establishment released him from service.⁹ Appellant, however, has not submitted any medical evidence indicating that he is physically unable to perform the limited-duty assignment that had been available to him prior to July 9, 1991.

In support of his claimed recurrence of disability, appellant submitted several reports from his treating physician, Dr. Robert E. Zadek, a Board-certified orthopedic surgeon. His reports dated June 23, 1994, December 9, 1996 and November 25, 1997 do not specifically address whether appellant is capable of performing his prior limited-duty assignment. The record also includes a July 8, 1994 report from Dr. Robert E. Means, Jr., an orthopedic surgeon, who diagnosed right ankle pain and swelling attributable to appellant's October 9, 1987 employment injury. Although Dr. Means provided physical limitations of "[n]o prolonged standing or walking," he did not state that appellant was incapable of performing his prior light-duty assignment. In a report dated April 7, 1999, Dr. Richard H. Mack, a Board-certified orthopedic surgeon, noted that appellant was currently working as a security guard with limited standing and walking. He further indicated that appellant was capable of employment, but with physical restrictions of "limited standing and walking, no climbing, squatting, jumping or running." Other than noting that appellant was previously employed with the postal service, Dr. Mack did not indicate any awareness of appellant's prior limited-duty assignment and he did not express an opinion regarding appellant's ability to resume his prior duties.

The record does not establish that appellant is unable to perform the limited-duty assignment he held prior to his termination on July 8, 1991. Furthermore, the recent medical evidence show that appellant is capable of performing some type of sedentary employment. Consequently, appellant failed to show a change in the nature and extent of his employment-related condition. Therefore, the Office properly denied appellant's claim for recurrence of disability.

The Board also finds that the Office improperly terminated authorization for further medical treatment.

⁷ See *Lester Covington*, 47 ECAB 539, 542 (1996); *Major W. Jefferson, III*, 47 ECAB 295, 298 (1996).

⁸ *Mary A. Howard*, *supra* note 3.

⁹ *Lester Covington*, *supra* note 7.

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.¹⁰ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹¹

In this case, the Office has not affirmatively established that appellant has no residuals of his October 9, 1987 employment injury. The Office hearing representative in a February 28, 1997 decision, incorrectly placed the burden on appellant to justify the need for continued medical treatment of his accepted condition.¹² Consequently, the Office failed to meet its burden of proof in terminating authorization for medical treatment. The Office's finding with respect to appellant's entitlement to further medical treatment for his October 9, 1987 employment injury is accordingly reversed.

The June 9, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed in part and reversed in part.

Dated, Washington, DC
December 18, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹⁰ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

¹¹ *Furman G. Peake*, *supra* note 10; *Calvin S. Mays*, 39 ECAB 993 (1988).

¹² The hearing representative specifically noted that the medical evidence of record "fails to establish that the claimant had a right ankle condition on and after May 3, 1996 causally related to his October 9, 1987 work injury." Although the evidence reviewed by the hearing representative attributed appellant's condition to his accepted employment injury, the hearing representative found the evidence lacked probative value. She did not, however, identify any medical evidence affirmatively demonstrating that appellant no longer suffered from residuals of his accepted employment injury.