

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MAURICE D. MARCURE and U.S. POSTAL SERVICE,  
POST OFFICE, Fresno, CA

*Docket No. 98-1344; Submitted on the Record;  
Issued January 14, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether appellant has established that he was disabled after October 25, 1992 due to his accepted employment injury.

On April 3, 1986 appellant, then a 37-year-old clerk, filed an occupational disease claim alleging that he sustained osteoarthritis of the right knee due to factors of his federal employment. The Office of Workers' Compensation Programs accepted appellant's claim for a temporary aggravation and permanent exacerbation of right knee osteoarthritis.

Appellant returned to limited-duty employment following his injury. On March 30, 1989 the employing establishment offered appellant a light-duty position beginning April 8, 1989, which the Office informed him was suitable. On June 22, 1990 appellant accepted a position as a modified manual distribution clerk.

The employing establishment terminated appellant effective January 14, 1992 for making threatening comments to coworkers. By letter dated February 21, 1992, the employing establishment informed the Office that appellant's limited-duty position would have remained available had he not been terminated for cause.

On February 18, 1992 appellant underwent a right knee arthroscopy. By decision dated March 5, 1992, the Office found that appellant was not entitled to wage-loss compensation from January 14 to February 17, 1992 because he was not disabled due to his employment injury. The Office found that appellant was entitled to compensation beginning February 18, 1992 because he was disabled due to surgery resulting from his employment injury. In a decision dated August 5, 1992, the Office denied modification of its prior decision.

By decision dated October 26, 1992, the Office terminated appellant's compensation effective October 25, 1992 on the grounds that he was capable of resuming his limited-duty

employment with no loss of wage-earning capacity. In a decision dated April 1, 1993, the Office denied modification of its October 26, 1992 decision.

By letter dated May 20, 1993, appellant again requested reconsideration. In a decision dated August 13, 1993, the Office denied appellant's request for reconsideration. The Office found that it had terminated appellant's compensation under 5 U.S.C. § 8106(c) for refusing suitable work and that, therefore, he could not establish that he sustained either a recurrence of disability or qualify for a schedule award. By decision dated November 19, 1993, the Office denied modification of its prior decision and, in a nonmerit decision dated March 29, 1994, denied review of its prior decision.

Appellant appealed to the Board. In a motion to remand dated March 25, 1995, the Director requested that the Board set aside its November 19, 1993 and March 29, 1994 decisions on the grounds that it had incorrectly found that appellant's compensation had been terminated under section 8106(c). The Director stated that on remand it would adjudicate appellant's claim for wage-loss benefits after October 25, 1992 in accordance with the principles in *John W. Normand*.<sup>1</sup> The Director indicated that the Office would determine whether appellant had met his burden of proof to establish that he was entitled to wage-loss compensation for periods after October 25, 1992 and/or a schedule award.

By order dated November 8, 1995, the Board granted the Director's motion to remand.<sup>2</sup>

In a decision dated January 5, 1996, the Office denied appellant's claim for wage-loss compensation after October 25, 1992 on the grounds that he "was terminated for cause and would otherwise have been physically able to perform the limited[-]duty job that he was performing before his termination for cause in January of 1992."<sup>3</sup>

By decision dated February 23, 1996, the Office granted appellant a schedule award for a 37 percent permanent impairment of his right leg.

In a decision dated August 22, 1997, a hearing representative affirmed the Office's January 5, 1996 decision after finding that appellant was not entitled to wage-loss compensation after October 25, 1992 as the evidence established that he was capable of performing his limited-duty employment.

The Board has duly reviewed the case record in the present appeal and finds that appellant has not established that he was disabled after October 25, 1992 due to his accepted employment injury.

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<sup>1</sup> 39 ECAB 1378 (1988).

<sup>2</sup> Docket No. 95-741, issued November 8, 1995.

<sup>3</sup> The Office again noted that appellant was not entitled to compensation from January 14 to February 17, 1992.

Under the Federal Employees' Compensation Act,<sup>4</sup> when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.<sup>5</sup> However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.<sup>6</sup> Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>7</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>8</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>9</sup> After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.<sup>10</sup>

In the present case, the Office accepted that appellant sustained a permanent exacerbation of his right knee osteoarthritis due to factors of his federal employment. Appellant returned to a limited-duty position with the employing establishment until January 14, 1992, when he was terminated for cause. On February 18, 1992 Dr. Edward A. Lembert, a Board-certified orthopedic surgeon and appellant's attending physician, performed a right knee arthroscopy on appellant and found that he was totally disabled as a result of the surgery. The Office paid appellant compensation for temporary total disability until October 25, 1992, the date it terminated his compensation. The Office based its termination of compensation on the August 10, 1992 report of Dr. Lembert. In his August 10, 1992 report, Dr. Lembert stated that appellant: "was released for light work with no standing for more than 2 hours at a time, [and] no walking for more than 30 minutes." The Board notes that the Office met its burden of proof to terminate appellant's compensation effective October 25, 1992 as the evidence from appellant's attending physician established that he could perform work within the restrictions of his limited-duty position.

After the Office's October 26, 1992 decision terminating his compensation benefits, appellant submitted additional medical evidence in support of his contention that he was disabled after October 25, 1992 due to residuals of his accepted employment injury. Given that the Board has found that the Office properly terminated appellant's compensation effective October 25,

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Richard T. DeVito*, 39 ECAB 668, 673 (1988); *Leroy R. Rupp*, 34 ECAB 427, 430 (1982).

<sup>6</sup> *Ann E. Kernander*, 37 ECAB 305, 310 (1986); *James L. Hearn*, 29 ECAB 278, 287 (1978).

<sup>7</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>8</sup> *Id.*

<sup>9</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>10</sup> *Wentworth M. Murray*, 7 ECAB 570 (1955).

1992, the burden shifts to appellant to establish that he is entitled to compensation after that date due to employment-related disability.

The term disability under the Act is defined as “the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.”<sup>11</sup> The Office procedure manual states that a recurrence of disability includes a work stoppage caused by, *inter alia*, the withdrawal of a light-duty assignment “for reasons other than misconduct or nonperformance of job duties.”<sup>12</sup> In the instant case, the employing establishment specifically stated that appellant’s limited-duty employment would have remained available had he not been terminated for cause. Therefore, the issue is whether the medical evidence establishes that appellant was unable to perform his limited-duty employment after October 25, 1992.

In support of his claim, appellant submitted office visit notes from Dr. Lembert. In an office visit note dated December 8, 1992, Dr. Lembert diagnosed “severe osteoarthritis involving the tibiofemoral joint” and opined that appellant was “able to walk only about two hours a day.” He further stated that appellant was disabled. Dr. Lembert, however, did not address the cause of appellant’s disability or find that he was unable to perform his limited-duty employment and thus his report is insufficient to meet appellant’s burden of proof.<sup>13</sup>

In a treatment note dated February 16, 1993, Dr. Lembert listed findings on examination and noted that appellant had the “option of a total knee arthroplasty.” He did not discuss appellant’s physical limitations and consequently his report is of little probative value.

In a treatment note dated April 26, 1993, Dr. Lembert found that appellant’s “symptoms are not bad enough for a total knee arthroplasty at this time and he needs work which can accommodate his disability, which will mean no standing for more than a few minutes at a time, no prolonged walking and primarily a sit-down job.” In a report dated September 27, 1993, Dr. Lembert stated, “[Appellant’s] right knee seems to be worse since the surgery we performed. This is due to progression of his osteoarthritis. [Appellant] needs a sedentary type job because of severe osteoarthritis of the right knee. His work should entail less than five minutes of walking at a time.” Dr. Lembert, however, did not discuss whether the progression of appellant’s osteoarthritis was due to his accepted employment injury or the natural progression of the underlying condition. Further, Dr. Lembert provided no rationale supporting his finding that appellant had increased disability.<sup>14</sup>

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<sup>11</sup> 20 C.F.R. § 10.5(17).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(1)(c) (May 1997).

<sup>13</sup> Dr. Joseph T. Capell evaluated appellant on July 10, 1993 to determine whether he was entitled to a schedule award. Dr. Capell found that appellant should limit standing more than 5 to 10 minutes at a time, walking over 50 yards and lifting more than 10 pounds. He further found that appellant could not climb, kneel or crawl and stated, “Prolonged sitting does not appear to be a problem unless he inadvertently twists and abducts the right knee, in which case a flare-up pain is likely to occur.” Dr. Capell declined to comment on whether appellant could perform the duties of his limited-duty employment because he did not have a position description.

<sup>14</sup> *Carolyn A. Allen*, 47 ECAB 240 (1995).

In a report dated May 12, 1995, Dr. Lemberg stated that he had “no objective criteria [why] [appellant’s] subjective complaints have increased with regards to his knee. He does have osteoarthritis of his knee, which is a naturally progressive disease, but I cannot go beyond that statement to explain why his condition is worse. The only aspect of his condition that is worse is pain.” Dr. Lemberg indicated that his findings were based on appellant’s subjective complaints of pain unsupported by objective findings, which diminishes the probative value of his findings.<sup>15</sup> Further, he did not attribute the progression of appellant’s osteoarthritis to his employment but instead to a natural progression of the condition.

In a report dated February 10, 1997, Dr. Richard Neff, a Board-certified orthopedic surgeon, noted that appellant initially injured his knee wrestling in the service from 1968 to 1972. Dr. Neff found that appellant currently had “very advanced degenerative changes involving the right knee” and suggested a possible total knee replacement. He noted that appellant was “very obese and has very limited use of the right knee.” Dr. Neff did not attribute appellant’s condition or limitations to his accepted employment injury and thus his report is not sufficient to meet appellant’s burden of proof.

In a report dated July 11, 1997, Dr. G.B. Ha’Eri, a Board-certified orthopedic surgeon, diagnosed severe osteoarthritis of the right knee and morbid obesity. Dr. Ha’Eri found that appellant “was unable to fulfill the requirements of the job position of manual distribution clerk (modified) at the [employing establishment].” However, he did not address the cause of appellant’s disability and thus his opinion is of little probative value.

As appellant has not submitted rationalized medical evidence establishing that he was unable to perform his assigned duties after October 25, 1992 due to his accepted employment injury, he has not established that he was disabled within the meaning of the Act.<sup>16</sup>

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<sup>15</sup> See *John L. Clark*, 32 ECAB 618 (1981).

<sup>16</sup> See *John W. Norman*, *supra* note 1.

The decision of the Office of Workers' Compensation Programs dated August 22, 1997 is hereby affirmed.

Dated, Washington, D.C.  
January 14, 2000

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member