

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH PULLIAM and DEPARTMENT OF LABOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS, Jacksonville, FL

*Docket No. 03-1789; Submitted on the Record;
Issued December 17, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation as of January 13, 2003.

On June 23, 1988 appellant, then a 34-year-old claims examiner, filed a notice of traumatic injury alleging that on June 22, 1988 he was getting up from a table and his right foot caught on the table base and caused his right knee to twist. The Office accepted that appellant sustained a severe right knee strain in the performance of duty. Appellant had several operations on his knee and underwent a total knee replacement in 1992 in an attempt to improve mobility.

Appellant filed a claim for a schedule award and the Office awarded appellant a 53 percent permanent impairment for the right leg. Appellant also filed a claim for recurrence of disability on March 17, 1997 and the Office accepted the claim and paid appropriate benefits on May 12, 1997.

In a work capacity evaluation dated January 17, 1997, Dr. Franklin Shih, Board-certified in physical medicine and rehabilitation, stated that appellant could work eight hours per day with restrictions.

On January 5, 1998 appellant was reemployed in a light-duty position as a workers' compensation claims examiner based on Dr. Shih's restrictions. He earned wages of \$992.60 per week. The duties of the position included working eight hours per day, sitting continuously for no more than one hour at a time and standing and walking required only intermittently. Twisting will be limited to 15 minutes per day, pushing and pulling will be limited to 1 hour per day in a seated position. Appellant will be provided assistance in retrieving forms and case files for review so that no bending, stooping or kneeling is required and so that lifting and carrying will be restricted to five pounds. A place to recline will be provided when needed and the work site will be modified for scooter accessibility. Also no local and overnight travel will be required.

By decision dated March 31, 1998, the Office determined that appellant's actual earnings fairly and reasonably represented his wage earning. The Office terminated appellant's compensation benefits since his actual wages met or exceeded the wages of the job held when he was injured and no loss of wages had occurred.

In a report dated February 20, 1998, Dr. Shih indicated that appellant had ongoing right knee pain, low back pain and other musculoskeletal problems and that he was primarily working a desk job. He stated that appellant could occasionally increase his work hours to 9 to 10 hours per day and recommended that he work a maximum of 50 hours per week on an intermittent basis.

On August 11, 1998 the Office awarded appellant an additional 22 percent permanent impairment for the right lower extremity, totaling a 75 percent permanent disability of the right leg.

On May 4, 2000 appellant filed a claim for compensation (Form CA-7) claiming that he was temporarily totally disabled beginning April 3, 2000. The form indicated that appellant retired from his employing establishment in July 1998. Based on the medical evidence the Office determined that appellant was totally disabled due to his knee condition. The Office began paying compensation benefits on July 1, 2000 and placed appellant on the periodic rolls on July 16, 2000.

In a work capacity evaluation dated August 22, 2000, Dr. David P. Mulica, Board-certified in physical medicine and rehabilitation, indicated that appellant could do limited-duty work for eight hours per day and could operate a motor vehicle to and from work.

In a report dated September 29, 2000, appellant's attending physician and Board-certified orthopedic surgeon, Dr. Robert J. Grube, Jr., indicated that appellant's problem was painful ambulation and limited mobility secondary to joint replacement which was done secondary to a failed knee operation, which had some degree of infection. He also noted that he did not know how long appellant's knee implant would last.

In Office notes dated January 5, 2001, Dr. Grube stated that appellant was experiencing discomfort in his right knee due to a loosening of his prosthesis, which may need to be revisited. He noted that appellant used a full knee immobilizer and crutches to ambulate.

By letter dated June 12, 2001, the Office requested that Dr. Grube determine whether appellant was still totally disabled for work and whether he could return to the January 5, 1998 modified claims examiner position.

In a report dated June 14, 2001, Dr. Grube indicated that appellant had a probable loose prosthesis relative to his joint knee arthroplasty. He stated: "After reading the job description sent to me, I feel that yes he can return to work" and "Yes, he can return back to his January 5, 1998 modified claims examiner job description as I noted from the paperwork you sent me." He added: "Essentially he could return and perform these duties for more than 60 days. The only reason that I would specify as negating this would be that he is seen by Dr. [Pete] Gearen and Dr. Gearen elects to proceed with revision surgery." In a work capacity evaluation dated the same day, he indicated that appellant could work eight hours per day with restrictions.

On August 31, 2001 the Office issued a notice of proposed termination of wage-loss compensation on the grounds that the medical evidence of record established that he was no longer totally disabled for work as a result of the June 22, 1988 injury.¹

In a report dated August 22, 2001, Dr. Grube stated that appellant had not obtained a proper surgical opinion relative to replacing his knee arthroplasty. He recommended that appellant be placed back on temporary total disability until an examination and a revision arthroplasty could be performed by Board-certified orthopedic surgeon, Dr. William G. Pujadas.

In an August 29, 2001 report, Dr. Pujadas recommended that appellant undergo a bone scan of the right knee before proceeding further. In an October 3, 2001 follow-up visit report, he stated that appellant was temporarily totally disabled but that his bone scan looked good and that he would see him back in two weeks. In an October 24, 2001 report, he indicated that appellant was still disabled.

A September 19, 2001 nuclear medicine bone scan indicated that, due to mildly increased activity, there may be a loosening of the components in appellant's right knee, that there were degenerative changes in the axial and appendicular skeleton, but that otherwise the study was negative.

In a letter dated September 27, 2002, Dr. Grube stated: "[Appellant] was seen by Dr. Pujadas concerning revision surgery. Apparently there was agreement that surgery was not necessary. For that reason, [appellant] may return to eight-hour workdays with restrictions."

Dr. Grube reviewed the December 16, 1997 position description of modified claims examiner and on December 3, 2002 stated that appellant was capable of returning to the same duties he returned to on January 15, 1998 and performed for over 60 days.

On December 11, 2002 the Office issued a notice of proposed termination of compensation benefits on the grounds that appellant's attending physician opined that appellant could return to the January 15, 1998 modified claims examiner position he worked for more than 60 days. The Office afforded appellant 30 days to submit additional medical evidence.

By decision dated January 13, 2003, the Office terminated appellant's compensation benefits effective January 13, 2003 on the grounds that the weight of the medical evidence established that appellant was no longer totally disabled from performing the duties of the January 5, 1998 modified claims examiner position.²

Appellant disagreed with the decision and requested a review of the written record. He alleged that the Office did not meet its burden to terminate his compensation benefits since Dr. Grube had not been his physician for several years and was no longer familiar with his condition and the termination was only based on Dr. Grube checking "yes" that appellant could perform the modified claims examiner position.

¹ The Office did not act on this notice due to further development of the medical evidence.

² Appellant's medical benefits were not terminated.

In support of his request, appellant submitted a January 5, 2003 report from Board-certified internist, Dr. Mary Beard Stegman, who indicated that she had treated appellant three times for pain management and that he was totally and permanently disabled. She diagnosed right knee pain, lower right extremity pain, chronic low back pain, thoracic spine pain, discogenic neck pain and depression and anxiety. Dr. Stegman stated that appellant could not walk because of pain in his right leg and that bending, twisting, standing, sitting and crutch walking caused pain beyond what he could tolerate through the course of a workday. She also noted that when appellant bends his leg he can actually feel the upper stem of the knee implant sliding inside the thigh bone.

Dr. Stegman discussed appellant's work injury on June 22, 1988 and the total knee arthroplasty. She stated that in October 1996 appellant experienced a severe sharp pain in the lower part of the implant and that in 1997 he was told that the implant had loosened, which was confirmed by an x-ray. Dr. Stegman stated that, because of the long extension stems, knee replacement would be difficult or impossible with present technology. She also discussed appellant's back problems and pain in the upper extremities. Dr. Stegman stated:

“[Appellant's] impairments result in right leg pain and instability forces him to walk with crutches with very little weight bearing. His walking is painful and his right leg tends to buckle without warning. Crutch walking causes increased back pain. While sitting, his knee pain increases in his lateral posterior anterior medial knee. Shifting position or shifting weight in chair is painful at multiple sites in his knee. Pain is alleviated by elevation of his leg on a pillow in slightly flexed position for 20 [to] 30 minutes. His spine pain recurs within a few minutes of sitting, he experiences pain in his mid-back up through shoulders. He must shift frequently and support back with arms and this movement aggravates his knee pain. Any activity in an upright position quickly becomes painful and exhausting requiring a period of rest. Cumulatively, over the course of the day, the pain becomes unbearable and his fatigue complete. With regard to the leg there are several areas of pain which are aggravated by pressure of walking and even sitting with his foot on the ground. In the past, sustained sitting has also caused immense swelling in the entire leg from the knee down.”

She continued:

“Getting to and from the workplace would be extremely difficult. It is hard for him to function in the morning until the medication is working. He can drive an automatic transmission but the task is formidable because his right leg must operate the accelerator. Pain affects sitting therefore, working in a cubicle generates a deal of discomfort. He has a computer but he finds he cannot use it for more than a few hours a day. Working at a keyboard and looking at a monitor allows no back support for his spine. His arms working in front of his body without support places more pressure on his mid and upper back. Even with the monitor in the best ergo position, his neck quickly becomes sore and headaches develop. These are only alleviated by periods of reclined rest.

“In the past, he has worked despite all of his pain. He was miserable. Every day, it took an immense act of will to travel to work. After going home every day, he completely collapsed from pain and fatigue. Eventually he was unable to continue. His condition is overall worse when he is tired. He is very grateful for the pain medication, but he does not believe even they could allow him to resume the same sedentary work. He would love to work in some capacity but this is probably possible if he could work in a recline position with his leg elevated and with limited activity.”

By decision dated June 18, 2003, the Office hearing representative affirmed the January 13, 2003 decision on the grounds that the weight of the medical evidence demonstrated that appellant was no longer disabled from performing the duties of his modified claims examiner position and that the disability commencing April 3, 2000 had resolved.

The Board finds that the Office properly terminated appellant’s compensation; however, appellant has submitted sufficient evidence to require further development on the issue of a continuing employment-related disability.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴

In this case, the Office properly terminated appellant’s compensation benefits effective January 13, 2003 as the weight of the medical evidence at the time of the termination demonstrated that appellant was capable of working his limited-duty position.

Dr. Mulica stated in an August 2000 work capacity evaluation that appellant could work limited duty for eight hours per day and could operate a motor vehicle to and from work. He stated that appellant could sit for four hours per day, could reach and reach above the shoulder for six hours per day, and could do repetitive wrist and elbow movements for eight hours per day.

In a June 14, 2001 report, appellant’s treating physician, Dr. Grube, indicated that he reviewed the position description of modified claims examiner, which appellant performed beginning January 5, 1998 and opined that appellant could return to this position. He noted that the only reason appellant could not return would be if Dr. Gearen⁵ elected to proceed with revision surgery. He also filled out a work capacity evaluation dated June 14, 2001 and indicated that appellant could sit for four hours per day, walk and stand for one hour per day, reach, reach above the shoulder and twist (all while sitting) for two hours, one hour and one-half hour per day, respectively, could operate a motor vehicle to and from work and could perform repetitive wrist and elbow movements for eight hours per day. He also stated that appellant could push, pull and lift while sitting for two hours, two hours and one-half hour per day.

³ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁴ *Id.*

⁵ Appellant was seen by Dr. Pujadas.

Dr. Grube referred appellant to Dr. Pujadas who performed further tests. Appellant underwent a nuclear medicine bone scan, which indicated that there may be a loosening of the components of his right knee, but essentially the study was negative. Dr. Pujadas decided against repeat surgery.

By letter dated September 27, 2002, Dr. Grube indicated that appellant was seen by Dr. Pujadas and that they were in agreement that surgery was not necessary and repeated that for this reason appellant may return to work for eight hours per day with restrictions. Dr. Grube again reviewed the position description of modified claims examiner and on December 3, 2002 stated that appellant was capable of returning to those same duties that he returned to on January 15, 1998 and performed for over 60 days.

At the time of the termination of appellant's benefits on January 13, 2003 the weight of the medical evidence demonstrated that appellant was not totally disabled and could perform his limited-duty job that he began on January 15, 1998. At that time there was also no contrary evidence in the record indicating that appellant was totally disabled and could not perform those duties.

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.⁶

After the Office's January 13, 2003 decision terminating his compensation benefits, appellant submitted additional medical evidence from Dr. Stegman which he felt showed that he was disabled and was unable to perform the modified-duty position. The Board finds that, while the medical evidence submitted by appellant is not sufficient to meet his burden of proof, Dr. Stegman does clearly opine that appellant is totally disabled and is unable to perform the limited-duty position and, therefore, further development of the record is warranted.⁷

Dr. Stegman's report is complete in that it discusses the history of appellant's June 22, 1988 work injury and the following occurrences regarding his right knee. She noted appellant's total knee replacement in 1997 and discussed in detail the impairment of appellant's right leg. Dr. Stegman stated that the right leg pain forced appellant to walk with crutches and that his leg sometimes buckled without warning. She also noted that appellant's knee pain increased even while sitting and that shifting his position or his weight also caused pain at multiple sites in the knee. Dr. Stegman also stated that any activity in the upright position quickly became painful and exhausting, requiring a period of rest. She stated that over the course of a day his pain became unbearable and that he was completely fatigued.

Dr. Stegman also discussed in detail why and how getting to and from work for appellant would be extremely difficult. She stated that he could theoretically drive to work but that the

⁶ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁷ *Horace Langhorne*, 29 ECAB 820 (1978).

pain would be great because he would need to use his right leg to operate the accelerator. Dr. Stegman also stated that pain affects his sitting and that he cannot use a computer for more than a few hours a day. She ended her report by stating that appellant was grateful for the pain medication and would like to work in some capacity, but he felt that the medication would not even allow him to resume the same sedentary work.

Even though Dr. Stegman did not specifically address the modified claims examiner position that appellant began on January 15, 1998, she clearly and specifically described work duties, which appellant would not be able to perform due to his knee injury. The Board finds that Dr. Stegman's firm and clear opinion that appellant is totally disabled for work and is unable to perform a sedentary-type position is sufficient to warrant further development by the Office.

Accordingly, the June 18 and January 13, 2003 decisions of the Office of Workers' Compensation Programs are affirmed as to the termination of appellant's benefits effective January 13, 2003, but set aside as to the issue of appellant's continuing disability and remanded for an appropriate decision.

Dated, Washington, DC
December 17, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member