United States Department of Labor
Employees' Compensation Appeals Board

ABRAHAM J. STERN, Appellant	)	
and	)	**Docket No. 03-1624**
	)	**Issued: April 8, 2004**
DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, New York, NY, Employer	)	

Appearances:
Abraham J. Stern, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 9, 2003 appellant filed for review of a March 21, 2003 decision of the Office of Workers' Compensation Programs which terminated payment of his transportation expenses. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the termination issue.

ISSUE

The issue is whether the Office properly terminated the payment of appellant's transportation expenses to and from work.

FACTUAL HISTORY

On January 30, 2002 appellant, then a 54-year-old senior claims examiner, filed a traumatic injury claim alleging that he sustained injury to his right knee on January 28, 2002 while in the performance of duty. Appellant did not stop work. He underwent a magnetic resonance imaging (MRI) scan of the right knee on February 4, 2002, which revealed a

horizontal cleavage tear or a possible Grade II degenerative abnormality in the posterior horn and body of the medial meniscus.[1] Appellant stopped work on March 10, 2002 and, on March 26, 2002, underwent arthroscopic surgery of the right knee for repair of a medial meniscus tear.[2] His claim was accepted by the Office and appellant received appropriate compensation benefits.

Appellant was treated by Dr. Joel R. Bonamo, an orthopedic surgeon. In a July 17, 2002 report, Dr. Bonamo advised that appellant could return to his duties as a senior claims examiner "with the *caveat* that car service be provided." In a July 22, 2002 work restriction evaluation, the physician found that appellant could work for eight hours a day subject to specified limitations. Dr. Bonamo noted that appellant could not use public transportation.[3] Appellant returned to his regular work on August 5, 2002, with transportation being the only required accommodation.

On September 24, 2002 the Office requested Dr. Bonamo to further explain his recommendation that appellant could return to his regular work duties provided that he use a car service and not use public transportation. The physician was requested to explain the current restrictions and a specific activity of using public transportation that appellant was unable to do. He was also requested to advise the extent and length of time he recommended a car service in place of public transportation.

On October 7, 2002 Dr. Bonamo reported that appellant was seen in a follow-up visit and was doing well with exercise training and could bench press 200 pounds. Appellant noted that he had trouble with stairs, but otherwise was doing reasonably well. Physical examination revealed a slight loss of extension of about three degrees, and full extension with no swelling or effusion. He noted that appellant reported some patella-femoral pain and stated that stair climbing, squatting, kneeling and prolonged sitting activities should be avoided. Dr. Bonamo stated that "because of his inability to do stairs he should try to avoid public transportation as much as possible…."

On November 1, 2002 Dr. Bonamo responded to the Office's inquiry, noting that appellant maintained that he could not climb stairs due to knee pain. He stated:

> "I found it only reasonable to suggest that he would be able to return to work but that because he could not do stairs, that public transportation should be excluded from his day. He informed me that public transportation for him included an excessive amount of stair climbing, which he finds almost impossible and he fears for his safety on crowded subway stairs…. Therefore, at least at this point in time I would recommend the continuation of his car service with the suggestion, however, that the condition will remain permanent."

[1] The record reflects appellant's clinical history of his left knee giving way in 1973 and right knee pain since 1974. MRI scans obtained of the right and left knee on May 31, 2001 revealed no significant ligamentous or meniscal tear.

[2] The record reveals that appellant has diabetes and, following surgery, was treated for cellulitis which was attributed to the March 26, 2002 surgical procedure.

[3] In a July 25, 2002 letter, the Office authorized payment for transportation to and from work.

On December 9, 2002 the Office notified appellant that it proposed to terminate payment of his transportation fees to and from work. It noted that under the Federal Employees' Compensation Act there was no provision for the payment of transportation fees for daily commuting to and from work in situations in which the employee has returned to regular full duty. The Office found that appellant's physical limitations were within the physical requirements of his regular duty job as a full-time senior claims examiner and that the Regional Director had confirmed that appellant was working his regular duty position.

On December 20, 2002 appellant responded, contending that residuals of his accepted condition prevented him from traveling to his job without use of a car service. He stated that he had returned to work and performed the full duties of his position, but that residuals of his accepted condition had not ceased. Appellant contended that payment of transportation to and from work was provided under the procedure manual at Chapter 2.814.5(a)(5)[4] and under section 8103(a) of the Act.

By decision dated March 21, 2003, the Office terminated payment of appellant's transportation fees. The Office found that since appellant was performing the full duties of his regular position as a senior claims examiner, he was not partially disabled. The Office noted that the procedure manual section cited by appellant addressed job offer refusals in suitable work situations and that appellant was not in a rehabilitation program. The Office found that section 8103(a) was not applicable as appellant was not partially disabled for work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] After it is determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation benefits without establishing that the disability has ceased or that it is no longer related to the employment.[6]

Under the Act, the term "disability" means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of the injury.[7] The term "disability" is not synonymous with physical impairment, which may or may not result in

[4] Federal (FECA) Procedure Manual, Part 2 – Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997) (notes that special travel arrangements may be reimbursed as a vocational rehabilitation expense).

[5] *See Manuel Gill*, 52 ECAB 282 (2001); *Henry P. Eanes*, 43 ECAB 510 (1992).

[6] *See Michael Hughes*, 52 ECAB 387 (2001).

[7] *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Nathaniel G. Williams*, 27 ECAB 110 (1975); *Elden H. Tietze*, 2 ECAB 38 (1948).

incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under the Act.[8]

ANALYSIS

The Office authorized payment for appellant's transportation expenses to and from work for the period commencing upon his return to work on August 5, 2002. The record establishes that appellant returned to his date-of-injury full-time employment as a senior claims examiner. Although the record indicates that appellant has physical impairment of his right knee, the limitations as set forth by Dr. Bonamo were within the physical requirements of appellant's regular duty job description. The employing establishment verified that at the time the Office proposed to terminate the payment of transportation expenses, appellant was working his full-duty position and earning his regular salary. Upon his return to work, appellant was not in a rehabilitation program and not eligible for reimbursement of travel expenses as part of vocational rehabilitation.

The basis for the payment of continued transportation expenses for appellant's daily commute to and from work is not readily apparent under the Act. Appellant has returned to his regular date-of-injury position as a senior claims examiner and is earning the wages equal to those earned prior to his accepted injury. Therefore, he is not disabled as that term is generally defined under the Act.[9] This is not a situation in which the transportation costs incurred are being made in connection with medical treatment for travel to or from a hospital or physician's office,[10] or as an expense under an approved vocational rehabilitation program.[11] As a senior claims examiner with fixed hours and place of work, it cannot be said that appellant's transportation expenses were being incurred as a requirement of his employment with the federal government.[12] Although appellant related to his physician a fear of climbing subway stairways, such apprehension is considered self-generated and arising from the ordinary hazards of the daily commute shared by all travelers.[13] In *Louis Cruz*,[14] the Board addressed a very similar factual situation in which a supervisory claims examiner was provided with car service to and from work based on an accepted left knee injury. Having returned to his regular full-time

[8] *See Lyle E. Dayberry*, 49 ECAB 369 (1998); *Pedro Beltran*, 44 ECAB 222 (1992); *Thomas S. Ryder*, 32 ECAB 1141 (1981).

[9] *See Charles P. Mulholland, Jr.*, 48 ECAB 604 (1997).

[10] 5 U.S.C. § 8103. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.10 (April 1992).

[11] 5 U.S.C. § 8104. *See generally* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.8 (September 1995).

[12] *See, e.g., Kathryn A. Tuel-Gillem*, 52 ECAB 451 (2001) (a rural letter carrier required to furnish her car for use during the workday).

[13] *See Adele Garafolo*, 43 ECAB 169 (1991).

[14] 55 ECAB ___ (Docket No. 03-1631, issued November 14, 2003).

employment, the Board found that there was no basis under the Act for payment of the employee's continuing transportation expenses.[15]

The Board has generally recognized that the Office has broad discretion in approving medical services or vocational rehabilitation as provided under section 8103 and 8104 of the Act, with the only limitation on the Office's authority being that of reasonableness.[16] However, the terms of the Act are specific as to the methods and payment of compensation. Unless a claimant's contentions are in keeping with the scope or intent of the Act, *i.e.*, unless the statute authorizes payment of the kind demanded, the Office's termination must be affirmed.[17] Neither the Office nor the Board has the authority to enlarge the terms of the Act.[18]

CONCLUSION

The Board finds that the Office properly terminated appellant's transportation fees for travel to and from work.

[15] Appellant argued that he relied upon the payment of a car service when he returned to work on August 5, 2002. Even if appellant detrimentally relied on erroneous information, such reliance does not give rise to equitable estoppel against the Office or entitle appellant to a monetary benefit otherwise not permitted under the Act or implementing federal regulations. *See Robert P. Mitchell*, 52 ECAB 116 (2000); *Norman W. Hanson*, 45 ECAB 430 (1994).

[16] *See James R. Bell*, 52 ECAB 414 (2001); *Daniel J. Perea*, 42 ECAB 214 (1990).

[17] *See Edward Schoening*, 48 ECAB 326 (1997).

[18] *See James R. Bell, supra* note 15; *Raymond H. Chandler*, 49 ECAB 480 (1998); *Alonzo R. Witherspoon*, 43 ECAB 1120 (1992).

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member