U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY B. CONNER and U.S. POSTAL SERVICE,
POST OFFICE, Huntington, WV

Docket No. 03-1069; Submitted on the Record;
Issued January 2, 2004

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained recurrences of disability on January 3 to 5, February 8 and 9 and April 26, 2001 onward related to an accepted April 21, 2000 right knee injury.

The Office of Workers' Compensation Programs accepted that, on April 21, 2000 appellant, then a 49-year-old mail handler, sustained a right knee and leg sprain, dislocation of the right knee and a meniscal tear when he pushed a hamper of mail.[1] The Office also approved an August 25, 2000 arthroscopy with partial medial and lateral meniscectomy and chondroplasty of the right knee.[2]

On September 27, 2000 the employing establishment offered appellant a postage-due processing position within the work limitations prescribed by Dr. Brian Hecht, an attending Board-certified orthopedic surgeon. The job required standing for 2 hours intermittently, walking 1 and 1/2 hours intermittently, sitting up to 8 hours, lifting, carrying, pushing and pulling up to 20 pounds infrequently and no climbing, stooping, kneeling or twisting. The tour of duty was from 2:00 p.m. to 10:50 p.m., with Saturdays and Sundays off. Appellant accepted

[1] A May 18, 2000 magnetic resonance imaging (MRI) scan of the right knee showed "extensive degenerative change with tear of the anterior cruciate ligament and posterior horn of the lateral meniscus and associated joint effusion."

[2] On September 6, 2000 appellant's case was referred to a field nurse for telephonic case management. He received nurse services through December 8, 2000. Appellant underwent physical therapy from September 15 to November 1, 2000.

the position and returned to limited duty on approximately October 2, 2000, had intermittent absences through February 9, 2002, stopped work on May 7, 2001 and did not return.[3]

Dr. Hecht submitted periodic reports from October 10, 2000 to April 24, 2001, noting that appellant was working in the light-duty job and experiencing some stiffness and swelling of the right knee.[4] He observed mild effusion of the knee without redness or warmth, facet tenderness, some loss of flexion and extension and diagnosed "severe arthritis of the right knee."[5] Dr. Hecht opined that appellant might require a total right knee arthroplasty to obtain symptomatic relief and recommended continued light duty. In an April 24, 2001 slip, he found that appellant had reached maximum medical improvement.

On April 25, 2001 appellant filed a claim for recurrence of disability for January 3 to 5 and February 8 and 9, 2001 absences to attend physical therapy, alleging that the employing establishment would not accommodate his appointments.[6] In an associated statement, the employing establishment asserted that appellant's physical therapy appointments were accommodated, but that he refused to work as he was unhappy with the change in schedule and wished to retire.

On April 26, 2001 the employing establishment offered appellant a limited-duty position with identical physical requirements as his current work, but with a change in duty shift to 6:00 p.m. to 2:30 a.m. He declined the offer on May 8, 2001 due to "medical reasons … heavier work cutting flats."[7]

On May 10, 2001 appellant filed a claim for a recurrence of disability commencing April 26, 2001. He alleged that he stopped work on an unspecified date as he was required to perform heavier work because of the change in his work schedule. Appellant stated that "management's new job [was] heavier work and because of medical condition [he was] unable to bear the pain and strain." Under item 15, "[d]ate and [h]our returned to work," appellant wrote "sent home." Below this, an employing establishment official wrote "refused limited-duty job

[3] On March 22, 2001 appellant filed a claim for a schedule award. In an April 4, 2001 letter, the Office advised him of the type of evidence needed to perfect his claim. In a June 25, 2001 letter, the Office stated that further development regarding the schedule award claim until appellant reached maximum medical improvement. As there is no final decision of record regarding the schedule award claim, this issue is not before the Board on the present appeal.

[4] A November 8, 2000 functional capacity evaluation demonstrated that appellant was fit for "medium" physical demand duties, but could not perform floor-to-waist lifting, carry over 50 pounds, squat, kneel, crawl, balance or climb ladders. He was not thought to be at maximum medical improvement.

[5] January 3, 2001 x-rays demonstrated "severe lateral compartment joint space narrowing with patellofemoral spurring and osteophyte formation."

[6] On July 13, 2001 appellant filed a claim for compensation (Form CA-7) for the period April 21 to July 13, 2001.

[7] On May 7, 2001 appellant telephoned the Office alleging that the employing establishment was preparing to offer him a new position that was outside his physical limitations as it required more bending. He also alleged that the job offer did not consider limitations regarding a nonoccupational digestive condition which required daily home treatment and eight hours rest. The Office advised appellant to accept the offered position and continue working and discuss any medical concerns with Dr. Hecht.

offer." In an attached statement, the employing establishment stated that, when appellant's start time was adjusted to 6:00 p.m., he "was very upset … and refused the work and the schedule. Upon his refusal to take the assignment he was sent home by management." The employing establishment asserted that appellant's allegation that the limited-duty position was heavier work was not accurate, explaining that the "only change made on the limited-duty job offer was the tour begin time and tour ending time. The work restrictions and duties have been performed by [appellant] since his return to work.… [T]he later start time made [him] unhappy and he decided he would not work at all." The employing establishment also noted that it approved sick leave for appellant's work absences from January 3 to 5, 2001, but that he did not provide documentation for his February 8 and 9, 2001 absences, which were charged to leave without pay.

Appellant was placed in a leave without pay status effective April 21, 2001. He claimed compensation for the period April 21 to July 13, 2001. The employing establishment noted that appellant submitted "no medical documentation … to support" the claimed recurrence of disability.

The record contains a May 14, 2001 report of telephone call (Form CA-110), which states that appellant called that day and "advised that he tried out the new job and his knee couldn't take it. [The employing establishment] sent him home. He completed a CA-2a, advised that it would be reviewed when rec[eive]d."

In a June 25, 2001 letter, the Office advised appellant of the type of additional evidence needed to establish his claim. The Office requested that he submit a detailed explanation as to how the April 6, 2001 job offer no longer met his medical restrictions and to corroborate this account with witness statements. The Office also requested that appellant submit a report from his attending physician setting forth the objective findings for absences in January and February 2001 and from May 7, 2001 onward and to explain how these findings indicated a material worsening of his accepted condition such that he was no longer able to perform the limited-duty job.

In response to the Office's June 25, 2001 letter, appellant submitted a July 13, 2001 statement, asserting that manager Debbie Morris would not accommodate his physical therapy appointments. He alleged that on April 25, 2001 he gave Ms. Morris Dr. Hecht's statement of maximum medical improvement. The following day, Ms. Morris "changed [appellant's] duty assignment, which was heavier work causing knee problems."[8]

In a June 6, 2001 narrative report, Dr. Hecht related appellant's account that he did well at work "until required to perform heavier activities. He states that he experienced increasing pain in his knees" and was "unable to perform the activities required in his job with his current knee condition." Dr. Hecht continued to recommend arthroplasty due to appellant's "current knee complaints and his inability to perform his job…." He found appellant totally disabled for

[8] Appellant also submitted June 2001 statements from coworkers David Connell, Roger Waugh and Charlie Bacon, praising his abilities as a mail handler, discussing his duties prior to the schedule change and asserting there was no reason to change appellant's duty shift. Mr. Waugh alleged that clerks were assigned to set up, hang bags, cut flats, sort color tags and operate dump machines in violation of a national labor agreement.

work from April 21, 2001 onward and held him off work through July 18, 2001. Dr. Hecht submitted reports from July 5 to August 17, 2001 noting continued right knee symptoms.

In a July 13, 2001 letter, appellant stated that on April 26, 2001 the day after providing his physician's findings of maximum medical improvement, Ms. Morris "changed [his] duty assignment, which was heavier work causing knee problems."

By decision dated August 22, 2001, the Office denied appellant's claims for recurrences of disability for the periods February 8 and 9 and May 8, 2001 and continuing. The Office found that appellant had not established a spontaneous worsening of his accepted condition or that his limited-duty job requirements had changed such that he was no longer able to perform them. The Office found that the employing establishment submitted sufficient evidence to establish that appellant's job duties would not change as a result of the later shift time. The Office also found that Dr. Hecht's statements that appellant could not perform the offered position were predicated only on appellant's assumptions that he would have heavier work and not on an assessment of the actual job duties. The Office noted that although appellant "reported in [his] May 14, 2001 [tele]phone call to the Office, that [he] tried to do the new work schedule, the [employing establishment] advised that [he] never actually worked after rejecting the offer on May 8, 2001. Therefore, as [appellant] did not actually work the new schedule, [he could not] support that [he was] required to perform duties outside of [his] restrictions and [he could not] provide valid witness statements supporting that [he] had to perform these duties."

Appellant disagreed with this decision and, in a March 18, 2002 letter, requested reconsideration and submitted new reports from Dr. Hecht dated August 21 to November 20, 2001. He found that appellant was "temporary totally disabled" for an indefinite period due to "pain and disability" related to severe arthritis of the right knee. November 20, 2001 x-rays showed "severe lateral compartment joint space narrowing, valgus deformity and patellofemoral spurring." In a February 20, 2002 form report, Dr. Hecht noted that appellant "may have difficulty" standing and walking for two hours." He newly opined that appellant's "preexisting arthritis … was aggravated by [his] April 21, 2000 on-the-job injury."

By decision dated May 21, 2002, the Office denied modification of its prior decision on the grounds that the evidence submitted was insufficient to warrant such modification. The Office found that the objective findings cited by Dr. Hecht were insufficient to establish that appellant was totally disabled for work for any period in January and February 2001; or on and after May 8, 2001. The Office further found that Dr. Hecht did not explain why appellant was no longer able to perform the two hours of standing and walking that his position entailed, although he had done so without incident from October 2, 2000 to May 7, 2001. The Office also found that appellant had not established that the later work shift would entail a heavier workload. Additionally, the Office accepted that the April 21, 2000 injury caused an aggravation of appellant's preexisting severe arthritis of the right knee. The Office noted that appellant would be referred "for a second opinion evaluation to determine the nature and extent of the aggravation of the arthritis of the right knee and whether surgery should be authorized."[9]

[9] In a second decision dated May 21, 2002, the Office accepted an "aggravation of severe arthritis of the right knee."

Appellant filed his appeal with the Board on March 19, 2003.[10]

The Board finds that the case is not in posture for a decision regarding the claim for recurrence of disability appellant filed on May 10, 2001.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[11] This includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[12] An award of compensation may not be made on the basis of surmise, conjecture, speculation or on appellant's unsupported belief of causal relation.[13]

The May 10, 2001 claim alleges that appellant sustained a recurrence of disability commencing April 26, 2001 due to a change in his light-duty position, which in turn caused a worsening of his accepted right-knee condition. The Board finds that there is sufficient evidence of record to require further development regarding whether appellant attempted to perform the duties of the offered position on April 26, 2001 and thereby sustained the claimed recurrence of disability.

The employing establishment asserts that its April 26, 2001 limited-duty job offer contained the same physical requirements as the position offered on September 27, 2000, which appellant performed successfully from October 2, 2000 onward. The only difference between the two positions was that the duty shift was changed from 2:00 p.m. to 10:50 p.m., to 6:00 p.m. to 2:30 a.m. However, the employing establishment has not supported this assertion with empirical data regarding what type of work appellant would perform, such as cutting flats or that the job he had been performing did not require him to "cut flats." Thus, the case requires further development regarding whether there was a change in the nature and extent of his light-duty job requirements.

[10] Accompanying his request for appeal, appellant submitted new medical evidence. The Board may not review evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). He may submit this new evidence to the Office accompanying a valid request for reconsideration.

[11] *Albert C. Brown*, 52 ECAB 152 (2000); *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Stuart K. Stanton*, 40 ECAB 864 (1989); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[12] *Ronald A. Eldridge*, 53 ECAB ___ (Docket No. 01-67, issued November 14, 2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[13] *Patricia J. Glenn*, 53 ECAB ___ (Docket No. 01-65, issued October 12, 2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

Also, the record demonstrates that appellant attempted to perform the offered position on May 8, 2001 at the new shift time. In refusing the offered position, he asserted that he was medically unable to perform "heavier work cutting flats," insinuating that he had directly experienced these duties. Two days later, on May 10, 2001 appellant filed a claim for a recurrence of disability commencing April 26, 2001, the date the employing establishment offered him the position at the new shift time. He alleged that he was "unable to bear the pain and strain," again indicating that he worked at the new shift time. Under item 15, "[d]ate and [h]our returned to work," appellant stated that he was "sent home," to which an employing establishment official added the words "refused limited-duty job offer." Thus, he could have begun work for a short period of time, experienced a recurrence of disability, stopped work and refused to continue. In the May 14, 2001 telephone memorandum, the Office states that appellant called that day and "advised that he tried out the new job and his knee couldn't take it." This memorandum directly supports that appellant performed the duties at the new shift time.

Appellant also submitted a July 13, 2001 letter, stating that on April 26, 2001 the day after providing his physician's findings of maximum medical improvement, Ms. Morris, an employing establishment official, "changed [his] duty assignment, which was heavier work causing knee problems." This indicates that he may have performed the new position as he stated that the "heavier work caus[e]d knee problems."

As appellant's claim for a recurrence of disability commencing April 26, 2001 is predicated on the assumption that appellant performed work on that date, the case must be remanded for further development on this issue. On remand of the case, the Office shall obtain a detailed descriptions of appellant's job duties prior to April 26, 2001 and any changes in his duties caused by the new shift time. The employing establishment shall explain the physical requirements of "cutting flats" and appellant's other assigned duties. The Office shall also obtain a statement from the employing establishment clearly setting forth exactly what tasks appellant performed on April 26, 2001, including whether he worked at the new shift time. Following this and any other development that the Office deems necessary, the Office shall issue an appropriate decision in the case.

Regarding appellant's April 25, 2001 claim for a recurrence of disability on January 3 to 5 and February 8 and 9, 2001, the employing establishment asserted that it approved sick leave for his work absences from January 3 to 5, 2001, although the timekeeping forms for the approval and use of leave are not of record. However, there is insufficient documentation of record regarding the cause of appellant's absence from January 3 to 5, 2001. In particular, Dr. Hecht's January 3, 2001 report does not directly address appellant's disability for work on that date or on January 4 and 5, 2001. The record should be further developed for this time period and a *de nova* decision rendered as to whether appellant sustained a recurrence of disability on the above dates.

The employing establishment explained that appellant was charged leave without pay for the February 8 and 9, 2001 absences, as he did not provide documentation. Similarly, the record should be further developed for the dates February 8 and 9, 2001 and determination made as to whether appellant sustained a reccurrence of disability in that time period.

The decision of the Office of Workers' Compensation Programs dated May 21, 2002 is hereby set aside and the case remanded to the Office for further development consistent with this decision and order.

Dated, Washington, DC
January 2, 2004

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member