

Appellant returned to light-duty work on March 23, 1998. Appellant was not able to perform any of the duties assigned on that date as he was in pain and lay down at the employing establishment. The employing establishment sent him home. Appellant did not return to work after that date.

Dr. Dwight A. Cashier, a Board-certified family practitioner, submitted a report on March 27, 1998 and stated that appellant had been totally disabled since January 9, 1998 due to a herniated cervical disc.

The Office entered appellant on the periodic rolls on March 30, 1998. The Office referred appellant for vocational rehabilitation services on August 28, 1998. The Office interrupted these services due to appellant's decision to seek invasive medical treatment. The Office undertook development of the medical issue of whether appellant required surgery and approved surgery on November 23, 1999. On December 22, 1999 Dr. Robert M. Beatty, a Board-certified neurosurgeon, performed an anterior cervical discectomy with interbody allograft fusion and metal plate. The Office accepted that this surgery was due to appellant's employment injury.

The Office of Personnel Management (OPM) approved appellant's request for disability retirement on May 20, 1999. Appellant retired on June 5, 1999. He elected disability retirement benefits effective March 10, 2000.

Dr. Beatty completed a report on February 10, 2000 and indicated that appellant could work four hours a day with restrictions. The Office requested additional medical evidence on April 20, 2000. The Office paid appellant's medical bills through October 2, 2000.

Dr. Beatty opined that appellant had 15 percent disability on November 2, 2000. On December 19, 2000 he noted that appellant was experiencing tingling in both arms and his right leg. On January 8, 2001 he opined that appellant had a 15 percent "permanent ... disability" in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The Office requested additional information on December 11, 2001. On December 18, 2001 Dr. Beatty reiterated that appellant had a 15 percent whole person impairment and had reached maximum medical improvement on October 2, 2000.

Appellant requested a schedule award on March 21, 2002. The Office medical adviser reviewed Dr. Beatty's report on May 26, 2002 and found that appellant should be examined for schedule award purposes.

Based on a July 2, 2002 report by Dr. George Varghesse, an internist, by decision dated August 5, 2002, the Office, granted appellant a schedule award for 9 percent of the right upper extremity, 11 percent of the left upper extremity and 3 percent of the right lower extremity.¹

On January 12, 2004 the Office received a letter from appellant stating that he had elected OPM benefits under duress and that he wished to have his compensation benefits reinstated as

¹ As the Office issued this decision on August 5, 2002 more than one year before appellant's appeal to the Board on May 4, 2004, the Board lacks jurisdiction to review this decision on appeal. 20 C.F.R. § 501.3(d)(2).

soon as possible. He stated: "I am filing [F]orm CA-2A to reinstate that income according to the direction given to me by the benefits division of the [employing establishment]."

Appellant filed a recurrence of disability claim on January 7, 2004. He stated that his condition had been continuous since 1998.

The Office requested additional medical evidence from Dr. Beatty on January 21, 2004. The Office also requested that appellant provide evidence that he stopped work because either his light-duty assignment changed or his employment-related condition worsened.

On February 2, 2004 the Office received an unsigned copy of the letter sent to Dr. Beatty providing answers to some of the questions posed.²

Dr. Cashier completed a report on February 11, 2004 and opined that appellant was totally disabled due to his accepted January 1998 employment injury as well as an August 12, 1993 back injury and a December 25, 1994 ankle injury. He also diagnosed post-traumatic stress disorder and attributed all conditions to appellant's former federal employment.

In a February 6, 2004 letter, the employing establishment confirmed that appellant attempted to return to light-duty work on March 23, 1998 and that he did not work after that date at the employing establishment. The employing establishment stated:

"Please be advised that [appellant] retired under disability provisions with the Office of Personal Management on June 5, 1999. At that time his injury was so severe that he cannot be considered for reemployment with this agency. All operational employees of this agency are required to meet medical standards and due to the severity of his condition, [appellant] would not be able to meet these medical standards."

In a September 8, 1998 letter, the employing establishment had informed appellant that he was permanently restricted from the physical activities required in his date-of-injury position.

Appellant responded to the Office's request on February 12, 2004. He stated that he worked for his father's business from May 2000 to January 2002, performing light work for 10 to 20 hours a week. Appellant alleged that he developed extensive muscle spasm and headaches in this position requiring him to stop work during the day, lie down and take medication. Appellant requested that his compensation benefits be reinstated.

By decision dated March 18, 2004, the Office reviewed the evidence and found:

"Your claim for compensation does not demonstrate that you have a diagnosis of a current medical condition that demonstrates that you are totally disabled, or that the claimed medical condition(s) are related to the previous accepted condition...."

² As this document was not signed by a physician, it is not medical evidence and cannot constitute probative evidence regarding the extent of appellant's disability. *Merton J. Sills*, 39 ECAB 572 (1988).

The medical evidence does not establish that you are 100 percent disabled for all employment due to the accepted condition(s).”

The Office denied appellant’s claim as the medical evidence did not establish total disability causally related to his accepted employment injury.

LEGAL PRECEDENT

The Federal Employees Compensation Act provides in section 8116(a) that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.³ The beneficiary must elect the benefit that he or she wishes to receive and the election, once made, is revocable.⁴ When a claimant has requested an election of benefits, he is entitled to a merit decision on that issue.⁵

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.⁶ Generally, the Office can meet this burden by showing that the employee returned to work, event if that work is light duty rather than the date-of-injury position, if thereafter the employee earns no less than he had before the employment injury.⁷

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-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 cannot perform such limited-duty work. 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 limited-duty job requirements.⁸ A short lived and unsuccessful attempt to return to duty, however, does not discharge the Office’s burden to justify termination of compensation.⁹

³ 5 U.S.C. §§ 8101-8193, 8116(a).

⁴ 20 C.F.R. § 10.421(a).

⁵ *Sandra Williams*, Docket No. 00-1307 (issued July 27, 2001).

⁶ *Cheryl A. Weaver*, 51 ECAB 308 (2000).

⁷ *Id.*

⁸ *Joseph D. Duncan*, 54 ECAB ____ (Docket No. 02-1115, issued March 4, 2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁹ *Cheryl A. Weaver*, *supra* note 6; *Carl C. Graci*, 50 ECAB 557, 558 (1999); *Janice R. Migut*, 50 ECAB 166, 169 (1998).

ANALYSIS

The Office accepted appellant's claim for cervical strain. Appellant returned to light-duty work for one day on March 23, 1998 but was unable to complete his assigned duties and the employing establishment sent him home. The Office entered appellant on the periodic rolls and authorized surgical treatment for a herniated cervical disc. The Office did not issue any further decision regarding appellant's entitlement to compensation benefits. Appellant elected OPM benefits effective March 10, 2000. On January 12, 2004 he asked to be reinstated on the periodic rolls. The Office, in its March 18, 2004 decision, placed the burden of proof for continuing compensation benefits on appellant, citing *Terry. R. Hedman*.¹⁰

The Board has held that *Hedman* is not applicable when there is a brief return to work and the medical evidence does not establish that appellant's employment-related disability has ceased. Appellant returned to work for only one day and did not perform any of the duties of the light-duty position. Instead he became ill and subsequently stopped work. The Board finds that there is no medical evidence in the record establishing that appellant's employment-related disability had ceased on or after March 23, 1998 or that he could return to his date-of-injury position. In this regard, Dr. Cashier, a Board-certified family practitioner, submitted a report on March 27, 1998 stating that appellant had been totally disabled since January 9, 1998 due to a herniated cervical disc. Dr. Beatty, a Board-certified neurosurgeon, performed surgery accepted by the Office on December 14, 1999 and on February 10, 2000 opined that appellant could work only four hours a day with restrictions.

The Board finds there is no probative medical evidence establishing that appellant's employment-related condition ceased by March 18, 2004, or that his inability to perform the light-duty job was not related to his employment injury. It remains the Office's burden of proof to terminate compensation. The Office has not met this burden of proof nor issued an appropriate decision regarding appellant's request to revoke his election of OPM benefits and elect compensation benefits.

CONCLUSION

The Board finds that burden of proof was not shifted by appellant's short-lived and unsuccessful attempt to perform light duty. The burden of proof to terminate appellant's compensation benefits remained with the Office, which did not meet its burden by showing either that appellant's disability ended or that it was no longer related to his employment injuries.

¹⁰ *Terry A. Hedman, supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 13, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member