

**United States Department of Labor
Employees' Compensation Appeals Board**

JOHN T. DOUGHTY, JR., Appellant)
and) Docket No. 04-1453
DEPARTMENT OF HOMELAND SECURITY,) Issued: October 28, 2004
TRANSPORTATION SECURITY)
ADMINISTRATION, Sea Tac, WA, Employer)

)

Appearances:
John T. Doughty, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 11, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 20, 2004 finding that he had not established any period of total disability after September 7, 2003 causally related to his August 8, 2003 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof in establishing that he sustained a period of total disability on or after September 7, 2003 due to his August 8, 2003 employment injury.

FACTUAL HISTORY

On August 8, 2003 appellant, then a 37-year-old screener, filed a traumatic injury claim alleging that on that date he injured his left knee lifting in the performance of duty.

In support of his claim, appellant submitted medical reports from his attending physician, Dr. Kenneth Kirkwood, a Board-certified family practitioner. On August 19, 2003 Dr. Kirkwood described appellant's April 20, 2003 employment injury and stated that he released appellant to return to full-duty work on August 2, 2003.¹ In an addendum to this report, dated August 25, 2003, Dr. Kirkwood stated, "Patient returns today complaining of worsened/aggravated left knee pain. Recommend [that he] arrange independent medical examination." In a form report dated August 24, 2003, Dr. Kirkwood stated that appellant aggravated his left knee at work on August 8, 2003 and that appellant wanted light duty. He listed his physical findings as tenderness of the medial joint line and diagnosed left knee strain. Dr. Kirkwood completed a separate form report on August 25, 2003 and diagnosed left knee contusion and strain. He recommended that appellant return to light-duty work on August 28, 2003 with no kneeling or squatting and limited lifting, pulling and pushing of 20 pounds. Dr. Kirkwood indicated that these restrictions were applicable for 20 to 30 days.

Appellant completed a claim for compensation and requested wage-loss compensation for total disability from September 21 to October 4, 2003.² He completed additional claims for compensation covering the period September 25, 2003 to February 25, 2004. Appellant received continuation of pay from August 8 to September 22, 2003. The employing establishment stated that no light duty was available. Appellant returned to work on February 26, 2004 as a passenger screener.

The Office noted in the record that appellant had a previously accepted left knee strain resulting from an April 20, 2003 employment injury. In a letter dated October 16, 2003, the Office requested additional factual and medical evidence from appellant regarding his alleged August 8, 2003 employment injury. Appellant responded on November 3, 2003 and stated that on August 8, 2003 his left knee began to hurt after lifting a bag weighing 50 to 60 pounds.

By decision dated November 18, 2003, the Office denied appellant's claim on the grounds that he failed to submit sufficient medical evidence to establish an injury in the performance of duty on August 8, 2003 as alleged. Appellant requested an oral hearing on December 29, 2003.

Dr. Gregory A. Popich, a Board-certified orthopedic surgeon, completed a form report on January 20, 2004 and diagnosed knee strain on August 8, 2004.³ He stated that appellant could return to work with restrictions on January 20, 2004 with no squatting, kneeling, or climbing and no lifting over 25 pounds.

¹ The Board notes that in Office file number 142021396, the Office accepted a left knee strain sustained on April 20, 2003. Appellant stopped work on April 21, 2003 and returned on August 4, 2003.

² Appellant completed a claim for compensation for the period September 7 to 25, 2003 on September 25, 2003. This form seems to implicate both the April 20 and August 8, 2003 employment injuries. The employing establishment indicated that appellant stopped work on April 20, 2003, that he received continuation of pay from April 20 to June 4, 2003 and that he received leave without pay from September 7 to 20, 2003.

³ The Board notes that, although Dr. Popich which mentioned August 8, 2004 as the date, he diagnosed the knee strain, it is evident from the record that he meant August 8, 2003, as the date of his report is January 20, 2004 and appellant's injury was August 8, 2003.

In a note dated January 23, 2004, appellant requested that his “hearing be sent back to ... be looked over by a different claims examiner.... I do not want the hearing I just want any claims examiner to look over my claim.”

Dr. Popich completed an additional form report on January 20, 2004 and stated that appellant’s knee popped lifting a bag at the employing establishment, noted that appellant had a prior injury on April 20, 2003 and diagnosed rule out meniscus tear. He indicated with a checkmark “yes” that he believed that appellant’s condition was caused or aggravated by an employment activity. Dr. Popich first examined appellant on January 20, 2004 and indicated that appellant could perform light-duty work on that date with no squatting, kneeling, crawling or lifting over 25 pounds.

Appellant underwent a magnetic resonance imaging (MRI) scan on January 27, 2004 which revealed a small joint effusion, intact cruciate and collateral ligaments as well as no evidence of a meniscal tear. The MRI scan also showed slight intrameniscal degeneration of the posterior horn of the medial meniscus. Dr. Popich reviewed this report on January 30, 2004 and stated:

“At this point, I think he is improved to the point that it would be reasonable to have him return to full duty. I have, however, recommended continuing light duty for a three-week period; no squatting, kneeling or climbing. I will advance his lifting capabilities to 45 pounds for the next three weeks, from February 2, 2004 to February 23, 2004, and release him for work without restrictions on February 23, 2004. At this point, I think that there is no evidence of any permanent partial disability, and I would expect that he can return to work without difficulties at that time.”

The Office’s Branch of Hearings and Review accepted appellant’s request to withdraw his oral hearing on January 29, 2004.

Dr. Kirkwood completed a form report on December 12, 2003, which the Office received on February 24, 2004, and stated that he last examined appellant on August 25, 2003 and that he placed appellant on a lifting restriction of 20 pounds at that time.

Appellant submitted an application for reconsideration on February 11, 2004. Dr. Popich completed a report on February 24, 2004 and indicated that appellant could return to work on February 23, 2004.

By decision dated March 3, 2004, the Office vacated the November 8, 2003 decision and accepted appellant’s claim for left knee strain resulting from the August 8, 2003 employment injury. In a letter dated March 12, 2004, the Office noted receiving appellant’s claims for compensation covering the period September 7 to November 1, 2003. The Office informed appellant that there was no medical evidence supporting his total disability for work due to his accepted employment injuries for this time period. The Office allowed appellant 30 days to submit the necessary medical evidence to establish the claimed period of disability.

Appellant submitted a statement received by the Office on March 17, 2004 noting that he sought medical treatment on December 12, 2003.

In a letter dated March 21, 2004, the Office stated that Dr. Kirkwood's August 25, 2003 form reports were sufficient to establish appellant's light-duty restrictions for 30 days from August 25, 2003, although appellant had already received continuation of pay for this period. The Office informed appellant of the deficiencies it found in the remainder of his medical evidence.

Appellant submitted a narrative report from Dr. Popich dated January 20, 2004 describing the history of both employment injuries and stating that appellant continued to work on a regular basis. He diagnosed rule out meniscal tear, left knee "occurring between the time of the first and second injury or at the time of the second injury." Dr. Popich stated that appellant should remain on light duty with no squatting, kneeling, climbing or lifting over 25 pounds. Dr. Popich also added an addendum to his January 30, 2004 report diagnosing knee strain.

By decision dated April 20, 2004, the Office denied appellant's claim for compensation for the period September 7, 2003 to March 22, 2004 on the grounds that the medical evidence failed to support his claim for disability.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,⁴ the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁵ Disability is thus not synonymous with physical impairment, which may or may not result in 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 in the Act.⁶ Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁷

ANALYSIS

In this case, the Office accepted that appellant sustained a left knee strain as a result of his August 8, 2003 employment injury. However, the Office found that appellant had not submitted sufficient medical evidence to establish total disability from September 7, 2003 to February 25, 2004 as alleged. The Board notes that appellant received continuation of pay from

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.5(f).

⁶ *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

⁷ *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

August 8 to September 22, 2003⁸ and that the employing establishment stated that light-duty work was not available during the period claimed.

In support of his claim, appellant submitted form reports dated August 24 and 25, 2003 from Dr. Kirkwood, a Board-certified family practitioner, diagnosing left knee strain, noting the August 8, 2003 employment injury and finding tenderness in the medial joint line. Dr. Kirkwood recommended that appellant return to light-duty work on August 28, 2003 for up to 30 days. As the Office noted in its March 21, 2004 letter, these reports from Dr. Kirkwood in conjunction with the statements of the employing establishment are sufficient to establish that appellant was unable to perform full duty until approximately September 22, 2003 due to his August 8, 2003 employment injury, and that there was no light-duty work available for appellant during this period. Therefore, appellant has established that he was entitled to either continuation of pay or wage-loss compensation benefits until September 27, 2003.

Regarding any period of total disability after September 27, 2003, appellant submitted additional medical evidence. Dr. Kirkwood completed a form report on December 12, 2003 and stated that he last examined appellant on August 25, 2003. He noted that he had restricted appellant's lifting at that time. This form report does not establish any additional period of disability due to appellant's August 8, 2003 employment injury of knee strain. Dr. Kirkwood did not examine appellant and therefore could not provide any reasoned medical opinion regarding the nature and extent of his injury-related condition on or after December 12, 2003 and whether appellant had any disability for work resulting from the accepted left knee strain for any additional period. This report is not sufficient to meet appellant's burden of proof in establishing his entitlement to continuing compensation benefits due to disability for work.

In three reports dated January 20, 2004, Dr. Popich, a Board-certified orthopedic surgeon, noted he first examined appellant on that date, described appellant's history of injury, diagnosed knee strain as well as rule out meniscal tear, and indicated with a checkmark "yes" that appellant's condition was due to his employment activity. He found that appellant was partially disabled through January 20, 2004. Dr. Popich did not provide any physical findings in support of his finding of partial disability. Furthermore, the Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such a report is insufficient to establish causal relationship.⁹ Dr. Popich's reports also failed to provide any evidence bridging the gap in time between Dr. Kirkwood's examination on August 25, 2003 and the January 20, 2004 examination by Dr. Popich. He did not explain why appellant did not need to seek medical treatment for his knee strain for more than four months from August 2003 until January 2004.¹⁰

⁸ Continuation of pay and compensation for wage loss cannot concurrently be paid for the same period of disability. *Robert T. Leonard*, 34 ECAB 1687, 1689-90 (1983). Therefore, appellant is not entitled to both continuation of pay and wage-loss compensation from the Office during the period of August 8 to September 22, 2003.

⁹ *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

¹⁰ For the importance of bridging evidence in establishing a claim of continuing disability see *Robert H. St. Onge*, 43 ECAB 1169, 1175 (1992).

Finally in his January 20, 2004 narrative report, Dr. Popich indicated that he believed that appellant might have sustained a meniscal tear due to either one of his accepted employment injuries, or during the time period between the two injuries. As this was the only physical finding in his report, this suggests that Dr. Popich felt that appellant's disability was due to an unestablished and unaccepted meniscal tear rather than to his accepted employment injury of left knee strain. Due to these deficiencies, Dr. Popich's January 20, 2004 reports are not sufficient, probative and substantial medical evidence to establish appellant's disability for work on or after January 20, 2004 due to his accepted employment injury of August 8, 2003.

Dr. Popich also completed a report dated January 30, 2004 finding that it would be reasonable for appellant to return to full duty. However, without providing any medical reasoning, he opted to continue appellant's light-duty restrictions until February 23, 2004. As Dr. Popich did not provide any physical findings in support of his decision, and in fact suggested that a return to full work would be appropriate, this report cannot provide the necessary probative and substantial medical evidence to establish appellant's disability for work until February 23, 2004.

CONCLUSION

The Board finds that appellant has failed to submit the necessary probative, substantial medical evidence to establish any period of disability after September 22, 2003, the date that his continuation of pay ended.¹¹

¹¹ See *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2004 decision of the Office of Workers' Compensation Programs is affirmed as modified to reflect that appellant has established that he was totally disabled only until September 22, 2003, the date that his continuation of pay ended.

Issued: October 28, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member