

1998 while delivering his route. He indicated that he first became aware of his condition on April 11, 1998. Appellant returned to work in a light-duty capacity due to a nonwork-related injury.¹ He was granted disability retirement from Office of Personnel Management (OPM) effective November 9, 1999.² On September 7, 2000 the Office accepted appellant's claim for a right knee contusion and a left knee patellar fracture.³

In a fitness-for-duty medical report dated July 26, 1999, a physician indicated that appellant was not medically able to perform his regular job and wrote, "Condition is chronic, recurrent or possibly permanent despite treatment. Accommodations of no lifting more than five pounds, no squatting, no standing, no steps, no repetitive use of hands." The physician did not provide a medical history, physical findings on examination or a diagnosis and did not indicate that appellant's partial disability was due to a work-related employment injury.

By letter dated August 20, 1999, the employing establishment advised appellant that his fitness-for-duty examination and other medical reports indicated that he could not perform his regular job and he had 14 days in which to select one of four options available: request a reassignment, apply for disability retirement, apply for regular retirement or resign his position.

On September 25, 2000 appellant filed a claim for lost wages while he was in leave without pay (LWOP) status from April 11, 1998 to November 9, 1999 due to his work-related disability and subsequent to November 9, 1999 due to limited-duty work being unavailable.

There are several medical reports of record for dates between April 11, 1998 and November 9, 1999. However, these reports do not indicate that appellant was totally disabled on the dates referenced. The only medical reports which indicate that appellant was totally disabled are a disability certificate dated April 13, 1998 in which Dr. Mohamed I. Al-Massalkhi, a Board-certified internist, stated that appellant should be "off work until cleared by ortho," referring to his orthopedic surgeon, due to his patella fracture and a May 12, 1998 disability certificate in which Dr. Joseph G. Thometz, a Board-certified orthopedic surgeon, indicated that appellant could not work but did not indicate the cause of the disability. A disability certificate from Dr. Thometz dated April 14, 1998 indicates total disability but the cause of the disability is a left ankle condition, a medical condition that has not been accepted by the Office.

On March 23, 2001 the employing establishment advised the Office that limited duty was available on and after November 9, 1999 but appellant did not provide medical documentation to support a need for such duty.

¹ Appellant indicated at the November 18, 2003 hearing held in this case that limited duty was provided for work-related injuries and light duty was for nonwork-related injuries.

² Although some documents of record indicate that appellant retired effective September 9, 1999, an absence analysis from the employing establishment, showing dates and hours worked and leave taken, reflects that appellant worked through October 14, 1999. Other documents of record also indicate that appellant's effective retirement date is November 9, 1999.

³ The Office had previously denied appellant's claim in decisions dated March 31, July 26 and October 20, 1999.

In a letter dated April 18, 2001, the Office advised appellant that he was not due any compensation for the period commencing April 11, 1998 because he used sick and annual leave during that time and he was not entitled to buy back this leave because he had retired from the employing establishment. The Office stated that appellant was not entitled to receive compensation from the Office after November 9, 1999 because he retired from the employing establishment when limited duty was available and he was not totally disabled.

By letter dated June 19, 2001, the employing establishment advised the Office that there was no record of a limited-duty job offer having been made to appellant.⁴ The employing establishment provided an absence analysis for appellant for the period April 11, 1998 through October 22, 1999.⁵

By letter dated June 27, 2001 to appellant, the employing establishment stated that appellant retired effective November 9, 1999 but he did not file a claim for lost wages for disability during the period April 11, 1998 to November 9, 1999 until September 25, 2000.

In a September 4, 2001 letter, the employing establishment indicated that it was not aware that appellant had sustained a work-related disability until he submitted his claim for compensation on September 25, 2000. It indicated that, if it had been aware of a work-related disability caused by the April 11, 1998 employment injury, it would have provided limited duty within appellant's medical restrictions.

By letter dated July 13, 2002, appellant, through his representative, asserted that the employing establishment was aware as early as January 1999 that he sustained an injury at work. He requested that he be allowed to return to a limited-duty job within his medical restrictions or be paid the difference between his disability retirement compensation and the benefits he would have received from the Office had his claim been accepted by the Office before his "force[d] election to retire."

By decision dated February 25, 2003, the Office denied appellant's claim for lost wages for LWOP for the period April 11, 1998 to November 9, 1999 because he used sick and annual leave for that period and leave buy back was not possible because appellant had retired. It noted that appellant also wanted compensation for lost wages after November 9, 1999 but he was not entitled to such compensation because he retired from the employing establishment when limited-duty work would have been available and there was no medical evidence of record showing that he was totally disabled at the time of his retirement.

On March 21, 2003 appellant requested an oral hearing before an Office hearing representative. Appellant testified at the hearing which was held on November 18, 2003.

⁴ As noted above, the Office indicated that it was not aware until September 25, 2000, when appellant filed his compensation claim, that he believed he was entitled to limited-duty work due to an employment injury.

⁵ The Board notes that there are discrepancies between appellant's earnings and leave statements and the employing establishment's absence analysis records as to the number of hours of LWOP charged to appellant in 1998 and 1999. Based on the record before it on appeal, the Board is unable to determine the correct number of LWOP hours for the period April 11, 1998 through November 9, 1999.

By decision dated February 3, 2004, an Office hearing representative affirmed the Office's February 25, 2003 decision.

LEGAL PRECEDENT

Where an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he 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 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.⁶

The Board notes that the term "disability," as used in the Federal Employees' Compensation Act⁷ means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁸ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁹ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.¹⁰

ANALYSIS

Appellant alleged that he was entitled to compensation for lost wages for intermittent dates between April 11, 1998 and November 9, 1999 because he was in LWOP status. As noted above, to be entitled to compensation for dates that he was charged with LWOP, appellant would have to provide medical evidence establishing that he was totally disabled due to his accepted work-related injury during these periods.

There are several medical reports of record for dates between April 11, 1998 and November 9, 1999. The only medical report indicating that appellant was totally disabled due to his work-related patella fracture is a disability certificate dated April 13, 1998 which stated that appellant should be off work until cleared by his orthopedic surgeon. However, the record shows that appellant was not scheduled to work on April 13, 1998 and that he used annual and sick leave on the subsequent days before he saw an orthopedist, not LWOP. As there are no medical reports showing that appellant was disabled on the dates that he was in LWOP status between April 11, 1998 and November 9, 1999, the Office properly denied his claim.

⁶ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Patricia A. Keller*, 45 ECAB 278 (1993).

⁹ *See Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

¹⁰ *Clement Jay After Buffalo*, 45 ECAB 707 (1994).

The Board further finds that appellant is not entitled to disability compensation on and after November 9, 1999.

Appellant contends that he is entitled to compensation after November 9, 1999, the date he retired, because limited-duty work was not available from the employing establishment. However, the employing establishment indicated that limited-duty work would have been available up to and after November 9, 1999, the date of appellant's voluntary retirement, if he had provided medical evidence establishing that he was partially disabled and in need of limited duty due to his April 11, 1998 employment injury. As noted above, the record shows that he did not provide such medical evidence.

CONCLUSION

The Board finds that appellant failed to provide rationalized medical evidence establishing that he was totally disabled on any dates between April 11, 1998 and November 9, 1999 due to his accepted injury. The Board further finds that appellant is not entitled to disability compensation after November 9, 1999, the date of his retirement.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 2, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member