United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant **and** **DEPARTMENT OF VETERANS AFFAIRS, EDWARDS HINES, JR. HOSPITAL, Hines, IL, Employer**	)	**Docket No. 05-1824** **Issued: August 11, 2006**

Appearances:
T.M., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 31, 2005 appellant filed an appeal of an August 16, 2005 decision of the Office of Workers' Compensation Programs affirming a November 3, 2004 denial of his claim for a recurrence of disability and affirming a June 9, 2004 decision denying his request for subpoenas. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has established that he sustained a recurrence of disability from March 27, 2000 onward related to accepted occupational knee injuries; and (2) whether the Office abused its discretion in denying appellant's request for subpoenas.

FACTUAL HISTORY

This is the fifth appeal in this case. By decision dated November 29, 2001,[1] the Board found that the Office properly rescinded its acceptance of degenerative osteoarthritis of both

[1] Docket No. 99-2006.

knees and properly denied his request to subpoena a second opinion physician to attend a September 23, 1998 oral hearing. The Board remanded the case for further development regarding whether appellant sustained greater than a 20 percent impairment of the left lower extremity and a 15 percent impairment of the right lower extremity, for which he received schedule awards. The Board also remanded the case for further development regarding whether he was totally disabled for work on and after January 17, 1992 due to residuals of the accepted conditions. The law and the facts of the case as set forth in the November 29, 2001 decision are hereby incorporated by reference.

On remand, the Office conducted further development regarding the percentage of impairment appellant sustained to his lower extremities. By decision dated February 8, 2002, the Office granted appellant a schedule award for an additional 13 percent impairment of the right lower extremity and 30 percent impairment of the left lower extremity. This resulted in a total award for a 50 percent impairment of the left lower extremity and a 28 percent impairment of the right lower extremity. The period of the award ran from November 12, 1997 to March 27, 2000.

On April 16, 2003 appellant filed a claim for compensation (Form CA-7) beginning March 27, 2000, following expiration of the schedule award. He asserted that the January 25, 2002 schedule award determination established his total disability for work.

In a May 12, 2003 letter, the Office advised appellant of the type of additional evidence needed to establish his claim for a period of disability. The Office requested that he provide a history of condition and employment since retiring from Federal employment on November 21, 1989, treatment records and a rationalized report from his attending physician explaining why appellant was unable to work after March 27, 2000 due to the accepted conditions. The Office emphasized that the opinion of appellant's physician was "critical to the claim."

Appellant responded by May 21, 2003 letter, noting that he worked intermittently as a chaplain in several hospitals from 1989 to 1993. He received disability retirement benefits through the Office of Personnel Management (OPM) beginning on November 22, 1989.

Appellant also submitted reports from Dr. Michael S. Lewis, an attending Board-certified orthopedic surgeon. In a May 18, 1999 report, he related appellant's account of increasing difficulty walking, noting that he used a cane. On examination, Dr. Lewis noted a "bilateral varus deformity of both knees and pronation of both feet," a bilateral 10 degree flexion contracture and "diffuse parapatellar tenderness and some medial jointline tenderness bilaterally." He diagnosed severe degenerative arthritis of both knees and administered an injection to the left knee. Dr. Lewis opined that appellant was not yet a candidate for a knee replacement. In June 3 and 5, 2003 reports, he noted an accepted February 7, 1977 knee injury with pain since that time. Dr. Lewis obtained x-rays showing "severe degenerative arthritis with marked narrowing of the medial compartment and patellofemoral compartments bilaterally. He opined that appellant "injured himself while at work and has findings as noted above." Dr. Lewis stated that he was unable to perform his regular job due to severe degenerative arthritis of both knees and could only perform sedentary work.

By decision dated October 10, 2003, the Office denied appellant's claim for wage-loss compensation commencing March 27, 2000 on the grounds that he "voluntarily retired on

November 11, 1989 while working a light-duty position" and was not entitled to continued compensation for wage loss. The Office found that the medical evidence noted appellant's continuing bilateral knee pain due to osteoarthritis but did "not establish that [he was] unable to work the sedentary position that [he] voluntarily left."

Appellant then requested an oral hearing. In a December 16, 2003 letter, he requested that the Office issue subpoenas to compel the attendance of the employing establishment Chief of Chaplain Service and Chief of Personnel Service. Appellant asserted that these individuals would "attest to the disputed items of whether [he] was in a light-duty position before [his] disability retirement and whether a sedentary position was available at that time or later for a chaplain." He also requested that these individuals "bring all documents to this effect."

By decision dated June 9, 2004, the Office hearing representative denied appellant's request for subpoenas as he did not specify any individuals by name or explain why a subpoena was the best or only method to obtain such evidence.

At the oral hearing, held July 20, 2004, appellant reiterated his history of injury and asserted that extended walking and prolonged standing at work caused his degenerative arthritis. He alleged that he stopped work in January 1989 and retired in November 1989, as his supervisor rescinded his light-duty assignment. Appellant asserted that he wished to claim compensation for any periods after he stopped work other than the schedule award period. He asserted that the Office improperly denied his requests to subpoena employing establishment personnel as this was the only reliable way to establish that he was given onerous duties that caused his condition to deteriorate. The hearing representative left the record open for 30 days to afford appellant the opportunity to submit additional evidence, advising him as to the type of evidence relevant to his claim.

In a July 31, 2004 letter, appellant asserted that he did not know the names of the employing establishment officials he wished to subpoena but that "subpoenas were the only practical way to obtain the information required since [his] previous requests to look at files were not granted." In August 6 and 13, 2004 letters, appellant asserted that the Office wrongly denied his medical bills. He submitted copies of timekeeping and personnel records, physical therapy bills and notes dated from 1977 to 1990.[2]

By decision dated and finalized November 3, 2004, the Office affirmed the October 10, 2003 decision, finding that appellant had not established that he was disabled for work following expiration of the schedule award. The hearing representative found that Dr. Lewis did not provide sufficient rationale regarding appellant's disability for work on and after March 27, 2000 as a result of the accepted condition, especially as the Board affirmed that he did not establish a work-related disability on and after January 1992, eight years prior to the alleged recurrence. The hearing representative affirmed the June 9, 2004 decision denying appellant's request for subpoenas, finding that he did not identify the individuals by name or explain why a subpoena was the best method to obtain evidence from these individuals.

[2] Appellant also submitted copies of documents previously of record.

In a January 6, 2005 letter, appellant requested reconsideration. He submitted comments on the November 3, 2004 decision, generally asserting that his duties caused osteoarthritis of both knees. Appellant accused the Office of sabotaging his request for a subpoena and mishandling other aspects of his claims. In a November 22, 2004 report, Dr. Alexander Gordon, an attending orthopedic surgeon, noted first evaluating appellant in September 2004. He provided a history of a 1977 occupational injury with ongoing pain complaints. Dr. Gordon obtained x-rays and performed an examination showing advanced osteoarthritis changes of both knees. He noted that appellant underwent a total right knee arthroplasty on November 2, 2004 and would soon undergo a total left knee arthroplasty.

By decision dated August 15, 2005, the Office denied modification on the grounds that the medical evidence did not address or support a work-related disability from March 27, 2000 through November 2, 2004. The Office found that Dr. Gordon opined that the right knee arthroplasty was necessitated by degenerative osteoarthritis, a condition for which the Office rescinded acceptance. The Office further found appellant's argument's to be repetitive or irrelevant.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[3] Under the Act, the term "disability" is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.[4] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[5] Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[6] The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[7] The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his disability and entitlement to compensation.[8]

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[5] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[6] *Gary J. Watling*, 52 ECAB 278 (2001).

[7] *Manuel Garcia*, 37 ECAB 767 (1986).

[8] *Amelia S. Jefferson*, 57 ECAB ___ (issued October 26, 2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained several knee strains beginning in 1977 and an aggravation of bilateral degenerative osteoarthritis of the knees. He received appropriate wage-loss compensation prior to retiring from the employing establishment in November 1989, medical benefits and a schedule award for permanent impairment of both knees ending March 27, 2000. Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his claimed disability as of March 27, 2000 and the accepted conditions.[9]

Appellant submitted reports from Dr. Lewis, an attending Board-certified orthopedic surgeon, and Dr. Gordon, an attending orthopedic surgeon. In a May 18, 1999 report, Dr. Lewis related his increasing difficulty walking and diagnosed severe degenerative arthritis of both knees. In June 3 and 5, 2003 reports, he noted that he "injured himself while at work" on February 7, 1977 and had degenerative arthritis of both knees limiting him to sedentary work. In a November 22, 2004 report, Dr. Gordon noted a 1977 occupational knee injury and diagnosed advanced osteoarthritis of both knees with a total right knee arthroplasty on November 2, 2004 and an anticipated left knee arthroplasty. Both physicians noted an accepted 1977 knee injury and that appellant had severe bilateral osteoarthritis of the knees. However, neither physician provided medical rationale explaining how or why the 1977 injury or the accepted aggravation of osteoarthritis caused disability commencing on March 27, 2000 or necessitate the November 2, 2004 right knee arthroplasty. Appellant's physicians did not specifically find him totally disabled for work due to the accepted conditions for any period on or after March 27, 2000. Therefore, their reports are of diminished probative value in establishing the claimed disability in this case.[10]

The Board notes that the Office explained to appellant in its May 12, 2003 letter of the critical importance of submitting his physician's rationalized report explaining how and why the accepted conditions would cause the claimed total disability for work on and after March 27, 2000. However, appellant did not submit such evidence. He has failed to meet his burden of proof in establishing the claimed periods of total disability.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[11] The implementing regulation provides that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained

[9] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

[10] *Tammy L. Medley*, 55 ECAB ___ (Docket No. 03-1861, issued December 19, 2003).

[11] 5 U.S.C. § 8126(1).

by other means and for witnesses only where oral testimony is the best way to ascertain the facts.[12] In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[13] Section 10.619(a)(1) of the implementing regulations provides that a claimant may request a subpoena only as part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[14] The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[15] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.[16]

ANALYSIS -- ISSUE 2

Appellant requested that subpoenas be issued to unnamed employing establishment officials holding particular management positions. He did not clearly explain why a subpoena was the best method to obtain evidence concerning his job duties and the availability of light duty at the time of his retirement, as opposed to securing relevant personnel records or a deposition. The hearing representative found that there was no evidence submitted as to why the unnamed officials should be present at an oral hearing. As noted above, the Board reviews the hearing representative's decision to determine if there was an abuse of discretion. The Board finds that the record does not establish an abuse of discretion in this case.

CONCLUSION

The Board finds that appellant has not established that he was totally disabled for work on and after March 27, 2000 due to the accepted conditions. The Board further finds no abuse of discretion in the denial of appellant's subpoena request.

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[12] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[13] *Id.*

[14] 20 C.F.R. § 10.619(a)(1).

[15] *See Gregorio E. Conde*, *supra* note 12.

[16] *Claudio Vazquez*, 52 ECAB 496 (2001); *Martha A. McConnell*, 50 ECAB 128 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 16, 2005 and November 3, 2004 are affirmed.

Issued: August 11, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board