United States Department of Labor
Employees' Compensation Appeals Board

J.N., Appellant	)	
and	)	**Docket No. 06-1851**
	)	**Issued: July 17, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Long Island, NY, Employer	)	

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Oral Argument April 10, 2007

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 2, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated July 27, 2006, which denied modification of the Office's April 7, 2006 decision which denied his claim for a recurrence. 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 is entitled to continued compensation benefits after December 5, 2003.

FACTUAL HISTORY

This case has previously been on appeal before the Board. In a March 16, 2006 decision, the Board found that appellant had not met his burden of proof to establish that he sustained recurrences of disability as of December 5, 2003 and January 14, 2004, causally related to his June 24, 2003 employment injury.[1] Further, the Board found that the Office improperly denied

[1] Docket No. 05-1040 (issued March 16, 2006).

appellant's timely reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. The Board set aside and remanded the case for review under the proper standard. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference. Certain facts germane to the present appeal will be restated.

On June 24, 2003 appellant, then a 56-year-old letter carrier, fell from his postal vehicle and injured his left knee. He stopped work on June 25, 2003. The Office accepted appellant's claim for left knee strain and arthroscopy.[2] The Office also authorized physical therapy. Appellant received appropriate compensation benefits.

In a November 12, 2003 duty status report, appellant's treating physician, Dr. Durant, a Board-certified orthopedic surgeon, advised that he could return to work on November 17, 2003 in a part-time capacity for four hours a day. He provided restrictions which included lifting no more than 20 pounds for 4 hours a day; intermittent sitting, standing and walking for no more 4 hours per day, with 20- to 30-minute rest periods after 1 to 2 hours; climbing no more than 1 hour a day, no kneeling, intermittent bending/stooping, pulling/pushing for no more than 3 hours per day, intermittent twisting, continuous simple grasping, fine manipulation and reaching for no more than 4 hours per day; and intermittent driving of a motor vehicle for 4 hours per day.

The record reflects that, on November 17, 2003, the employing establishment offered appellant a modified assignment for four hours daily. The job was comprised of routing mail as needed for up to four hours and express mail as needed for a half hour. Lifting in the job was limited to 20 pounds for up to 30 minutes.

In a December 17, 2003 duty status report, Dr. Durant updated his restrictions from his November 17, 2003 duty report. In particular, he clarified that appellant needed 20- to 30-minute rest periods after 1 to 2 hours of work and that he was "not allowed to stand while working."

On December 9, 2003 appellant filed a notice of recurrence of disability due to his June 24, 2003 employment injury. He alleged that he returned to light duty for four hours a day and on December 5, 2003 he had a recurrence of his original injury due to standing and twisting and being stuck in his car for three-hours due to a snow storm. Appellant alleged that he had to ice his knee as it became swollen. He stopped work on December 6, 2003 and returned on December 9, 2003.

By letter dated December 17, 2003, the Office requested that appellant submit additional evidence.

On December 17, 2003 the Office received a vocational rehabilitation report dated November 12 to December 7, 2003 from Harold Tischelman, a rehabilitation counselor, who indicated that on November 22, 2003 he visited appellant's work site and noted that appellant was observed standing and twisting at a three-sided case, which hurt his knee. Mr. Tischelman

[2] The arthroscopy was performed on September 12, 2003 by Dr. Christopher Durant, a Board-certified orthopedic surgeon.

also noted that he requested a modified case for appellant, which would allow him to sit, but was informed that, because be worked at three different cases, this would not resolve the problem. In addition to not being able to provide appellant with a modified case, the employing establishment indicated that a stool or high chair were impractical.

In a December 17, 2003 duty status report, Dr. Durant provided similar work restrictions but added that appellant needed 20- to 30-minute rest periods after 1 to 2 hours of work and that appellant was not allowed to stand while working.

In a January 14, 2004 attending physician's report, Dr. Durant noted the history of injury and checked a box "yes" indicating that appellant's condition was caused or aggravated by his employment. He diagnosed a tear of the posterior horn of the left knee and advised that appellant would need periodic reevaluation. Dr. Durant indicated that appellant was advised that he could not return to work. He completed a duty status work of the same date and advised that "appellant was unable to work until further notice." Dr. Durant requested approval for a magnetic resonance imaging (MRI) scan.

On January 21, 2004 appellant filed a notice of recurrence of disability due to his June 24, 2003 employment injury. He alleged that since returning to work his condition had worsened. Appellant alleged that he could not stand for extended periods of time and his doctor assumed that he would be able to sit down. However, he indicated that his employer was not able to accommodate his request and that he had to work four hours a day with standing and twisting, with only a 10-minute break. Appellant indicated that, on January 14, 2004, his physician ordered an MRI scan and he was unable to work while waiting for approval. He stopped work on January 14, 2004.

In a report covering December 8, 2003 to January 15, 2004, Mr. Tischelman stated that appellant informed him on December 11, 2003, that his postmaster Heidi Roberts advised him that if "'she knew he could n[o]t stand for four hours a day' she would have never taken him back." He also noted that on December 17, 2003 appellant was sent home after two and one half hours as there was "no work," and that he was told on December 18, 19, 22 and 23, 2003 and several other days that no work was available for him.

By letter dated February 6, 2004, the Office requested that appellant submit additional evidence.

In a report of a telephone call dated February 21, 2004, the Office verified that the employing establishment did not have work available for appellant, within his medical restrictions, despite his clearance to work four hours a day.

By letter dated February 23, 2004, appellant alleged that his light-duty position did not comply with his physician's requirements. He also alleged that he could not "rack mail" sitting down and that he stood and twisted four hours per day in violation of his physician's restrictions. Appellant alleged that Ms. Roberts advised him that she never agreed to allow him to rack mail while sitting down. He alleged that, despite his doctor indicating that he was not allowed to stand while working and that he rest 20 to 30 minutes after every 1 to 2 hours of work, the employing establishment was not complying with the restrictions imposed by his physician.

By decision dated March 12, 2004, the Office denied appellant's claim for a recurrence of disability on December 5, 2003 and January 14, 2004.

Appellant also filed several CA-7 forms for wage-loss compensation from December 1, 2003 to April 9, 2004.

On April 13, 2004 the Office received appellant's request for reconsideration. Evidence in support of the reconsideration request included numerous physical therapy reports and reports from Dr. Durant. In a February 11, 2004 report, Dr. Durant noted that on November 11, 2003 appellant arrived in his office accompanied by his case manager. He advised that, at that time, he believed that appellant could commence light-duty work on November 17, 2003. Dr. Durant indicated that "[i]t was mentioned by his case manager that the light-duty work could be performed in the sitting down position." He noted that appellant related that, upon his return to work, "he had to stand for four hours a day." Dr. Durant opined that appellant was not able to perform these duties and had to stop work. In a March 26, 2004 report, he alleged that, after appellant returned to work, he reinjured his left knee and had to stop work. Dr. Durant advised that a second left knee arthroscopic surgery was warranted.[3]

By decision dated June 17, 2004, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

By letter dated July 25, 2004, Mr. Tischelman advised that he was assigned appellant's case by the Office on November 13, 2003. He stated that he contacted appellant's postmaster, Ms. Roberts, on that same date and requested a copy of the modified-duty assignment. Ms. Roberts noted that she refused his request and informed him that he would see a copy when appellant returned to work on November 17, 2003. Mr. Tischelman indicated that, on November 17, 2003, appellant reported to work and cased mail for three and one-half hours and delivered express mail for a one-half hour and noted that the entire casing process was performed standing up. He noted that he also observed appellant on November 22, 2003 and advised that appellant was casing mail at a three-sided case while continuously standing. Mr. Tischelman also indicated that appellant had to twist to each side of the case as he placed mail in the appropriate slots and advised that the position was "not consistent with your medical restrictions." He referenced Dr. Durant's duty status report, which advised that appellant could do "intermittent standing" with "rest periods." Mr. Tischelman also indicated that, when he requested that the employing establishment provide appellant with a modified case, which would allow him to sit while working, the request was denied by both appellant's supervisor and the postmaster. He indicated that the job that appellant was assigned to by the employing establishment did not comply with his medical restrictions.

On September 15, 2004 appellant requested reconsideration.

By letter dated October 27, 2004, the Office requested additional information.

[3] Appellant underwent the surgery on May 21, 2004.

On November 19, 2004 the Office received an undated letter in which appellant requested that the Office pay compensation for total disability as he had only been receiving half pay since November 2003. Appellant reiterated that the light-duty position offered by the employing establishment was "never light-duty work." He submitted reports dated October 27, November 5 and December 8, 2004 from Dr. Durant, who continued to advise that appellant was unable to return to work.

On January 29, 2005 the Office determined that appellant was reemployed as a modified letter carrier with wages of $851.20 per week, effective November 17, 2003. Appellant was advised that his compensation was being adjusted as the duties of the new position reflected the work tolerance limitations established by the weight of the medical evidence.

On March 7, 2005 appellant filed an appeal with the Board. He alleged that his light-duty position was "never light" duty. Appellant alleged that this return to "light duty" caused him to reinjure his left knee. He noted that his vocational rehabilitation counselor, Mr. Tischelman, verified that the assignment was not "light duty."

Following the Board's March 16, 2006 decision, noted above, appellant, on April 1, 2006, submitted arguments related to his claims for a recurrence of disability as of December 5, 2003 and January 14, 2004, causally related to his June 24, 2003 employment injury. He alleged that "limited duty consistent with [his] medical restrictions was not made available." In particular, appellant alleged that his physician provided limited-duty restrictions which were based upon the employing establishment's assurances that appellant could work while sitting down. However, he alleged that the employing establishment refused to modify his case or allow him to work sitting down, which violated his restrictions. In support of his argument, appellant alleged that his vocational rehabilitation counselor, Mr. Tischelman, indicated that the position was not consistent with his physician's medical restrictions. Additionally, appellant alleged that his physician provided a new CA-17 form on December 17, 2003, which indicated that he could not stand while working. He noted that thereafter the employing establishment certified that there was no work available and the job offer was withdrawn. Appellant also referred to the procedure manual and alleged that the Office did not consider procedures related to his recurrence. In addition, he referred to a February 11, 2004 report, in which Dr. Durant, a Board-certified orthopedic surgeon, opined that he was not able to perform his duties and had to stop work. Furthermore, appellant alleged that he underwent surgery on May 21, 2004, a shaving of chondral flap tears, micro-fracture drilling of the medial femoral condyle chondral defect and excision of the medial plica. He alleged that this supported that his condition had worsened and he was disabled.

By decision dated April 7, 2006, the Office denied appellant's request for reconsideration as the evidence was insufficient to warrant modification of the Office March 12, 2004 decision.

By letter dated April 26, 2006, appellant requested reconsideration and repeated his previous arguments.

By decision dated July 27, 2006, the Office denied modification of the Office's April 7, 2006 decision.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[4]

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[5] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[6] However, to justify such termination, the Office must show that the work offered was suitable[7] and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[8]

If the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal or failure to work was reasonable or justified.[9] However, a short-lived and unsuccessful attempt to return to duty does not by itself discharge the Office's burden to justify termination of compensation.[10] The Board has never excused the Office from its burden to show that light-duty work was suited to the employee's medical restrictions.[11]

When an employee, returns to a suitable light-duty position and does not subsequently perform the duties of that position, the employee has the burden to establish a recurrence of total disability and to show that he or she cannot perform such light duty. The recurrence must be established by the weight of the reliable, probative and substantial evidence.[12] 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.[13]

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[4] *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

[5] 5 U.S.C. § 8106(c)(2).

[6] *Martha A. McConnell*, 50 ECAB 129, 131 (1998).

[7] *Id*.

[8] *Ronald M. Jones*, 48 ECAB 600, 602 (1997).

[9] 20 C.F.R. § 10.517(a); *Deborah Hancock*, 49 ECAB 606, 608 (1998).

[10] *See Cheryl A. We*aver, 51 ECAB 308, 308-09 (2000); *Janice F. Migut*, 50 ECAB 166, 168-69 (1998).

[11] *Cf. Carl C. Graci*, 50 ECAB 557, 558 (1999) (before the burden of proof shifts to the claimant, there must be a return to work or the medical evidence must establish that light duty can be performed; where appellant returned to work for about two hours, the Office erroneously placed the burden of proof on appellant as the burden remained on the Office and the Office failed to meet its burden of proof).

[12] A recurrence of disability is defined under the Office's implementing federal regulations as the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. 20 C.F.R. § 10.5(x).

[13] *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

ANALYSIS

Appellant's claim was accepted for a left knee sprain in the performance of duty on June 24, 2003. The record reflects that he was on the periodic rolls and on November 17, 2003, he attempted to return to a modified-duty position with the employing establishment for four hours a day. However, after attempting to work the position, appellant alleged that the employing establishment did not comply with the restrictions of November 12, 2003 imposed by his physician, Dr. Durant. While Dr. Durant found that appellant could stand intermittently for up to 4 hours with 20- to 30-minute breaks after 1 to 2 hours, he alleged that the modified position actually required that he stand and twist for 4 hours with only one 10-minute break. The employing establishment refused appellant's request for a modified casing stool, which would allow him to sit while casing and informed him that the position could not be performed while seated. Appellant subsequently filed recurrences of disability on December 5, 2003 and January 14, 2004 and the Office advised him of the medical and factual evidence needed to establish his claim. The Office placed the burden of proof for continuing compensation on appellant noting that a recurrence of disability includes an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[14] The Board finds that this placement of the burden of proof was improper as the light-duty position did not comply with appellant's restrictions.

The work restriction provided by Dr. Durant included: lifting no more than 20 pounds for 4 hours a day; intermittent sitting, standing and walking for no more 4 hours per day, with 20- to 30-minute rest periods after 1 to 2 hours; climbing no more than 1 hour a day, no kneeling, intermittent bending/stooping, pulling/pushing for no more than 3 hours per day, intermittent twisting, continuous simple grasping, fine manipulation and reaching for no more than 4 hours per day; and intermittent driving of a motor vehicle for 4 hours per day. The record reflects that, on November 17, 2003, appellant was provided with a modified assignment which was a four-hour position comprised of routing mail as needed for four hours and express mail as needed for a half hour. The physical requirements indicated that appellant was not to exceed 20 pounds of lifting over 30 minutes and not to exceed 4 hours of work. The position did not include the standing requirement or twisting requirement or the rest period. Upon returning to work, appellant was required to perform the 4-hour position standing without the 30-minute rest periods. He also noted that the casing required him to twist. In a December 17, 2003 duty status report, Dr. Durant updated his restrictions from his November 17, 2003 duty report. In particular, he clarified that appellant needed 20- to 30-minute rest periods after 1 to 2 hours of work and that he was "not allowed to stand while working." In reports dated January 14, 2004, Dr. Durant checked a box "yes" in response to whether the condition was caused or aggravated by the employment injury and advised that appellant could not return to work. In a February 11, 2004 report, Dr. Durant noted that he believed that appellant could commence light-duty work on November 17, 2003. However, in the modified position, appellant "had to stand for four hours a day." Dr. Durant opined that appellant was not able to perform these duties and had to stop

[14] 20 C.F.R. § 10.5(x).

working. In his March 26, 2004 report, Dr. Durant determined that, after appellant returned to work, he reinjured his left knee and had to stop working.

The Office also received reports from appellant's rehabilitation counselor, Mr. Tischelman, who advised him that Ms. Roberts refused him a copy of the modified-duty assignment. Mr. Tischelman indicated that, on November 17, 2003, appellant reported to work and cased mail for three and one-half hours and delivered express mail for half an hour. He also indicated that the casing process was performed standing up. Mr. Tischelman informed the Office that he had conducted an on site visit on November 22, 2003 and observed appellant standing at a three-sided case and twisting. He advised that he requested a modified case for appellant, which would allow him to sit, but his request was denied. Mr. Tischelman explained that the employing establishment was unable to provide appellant with a modified case, a stool or a high chair. He advised that the job that appellant was assigned by the employing establishment did not comply with his medical restrictions. Mr. Tischelman also reported that appellant informed him on December 11, 2003, that his postmaster advised him that if "'she knew he could n[o]t stand for four hours a day' she would have never taken him back." Mr. Tischelman noted that on December 17, 2003 appellant was sent home after two and one-half hours as there was "no work." Subsequently, he was told on December 18, 19, 22 and 23, 2003 and several other days that no work was available for him. On February 21, 2004 the Office verified that the employing establishment did not have work available for appellant within appellant's medical restrictions, despite his clearance to work four hours a day.

The evidence does not establish that appellant's employment-related disability ended on November 17, 2003, the date of his return to the position provided by the employing establishment. As noted above, appellant attempted to perform the modified position; however, the modified position did not conform with Dr. Durant's restrictions. After several attempts by appellant and his vocational rehabilitation counselor to rectify the problem that casing mail required him to stand, appellant was unable to work and became totally disabled after December 5, 2003. The Board finds that the position offered to appellant did not comply with the restrictions imposed by his physician and thus, was not suitable. Appellant made a short-lived and unsuccessful attempt to return to a position which was described by the employing establishment as light duty; however, the position did not comply with his physician's restrictions. Given the circumstances of this case, the Board finds that the burden of proof was not shifted by appellant's unsuccessful attempt to perform the "light-duty" position.[15] The burden of proof remained with the Office, which did not meet its burden of proof to terminate appellant's compensation benefits by showing either that appellant's disability ended or that it was no longer related to his employment injuries.

CONCLUSION

The Board finds that appellant remained entitled to compensation for total disability after December 5, 2003.

[15] *See supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the July 27 and April 7, 2006 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: July 17, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board