United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 07-299**
	)	**Issued: June 4, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 14, 2006 appellant filed a timely appeal from March 1 and October 17, 2006 merit decisions denying his claim for recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he sustained a recurrence of disability on October 1, 2004 causally related to his accepted injury.

FACTUAL HISTORY

On May 17, 1997 appellant, then a 48-year-old custodian, filed a traumatic injury claim alleging that he injured his left knee when he fell at work as a result of an electric shock. His claim was accepted for left knee sprain. The Office approved surgery for a left quadriceps repair which occurred on July 2, 1997. Appellant filed a recurrence of disability claim as of November 13, 2001 and requested approval for surgery to repair broken patellar wiring in his left

knee. The Office accepted the recurrence claim and approved the requested surgery which was performed on June 18, 2002.

Appellant returned to limited duty on September 6, 2002 and subsequently returned to full-duty status on December 2, 2002. On April 27, 2004 Dr. George L. Rodriguez, a Board-certified physiatrist, recommended that appellant be restricted from squatting, kneeling, crawling, prolonged sitting, standing or from lifting more than 30 pounds. Appellant continued working limited duty until his disability retirement on October 1, 2004.[1]

On November 1, 2005 appellant filed a recurrence of disability as of October 1, 2004, when he allegedly "was forced out" on disability retirement. He stated that his disability retirement was triggered by the inability of the employing establishment to place him in a vacant permanent position. Appellant continued to experience ongoing knee problems that caused him significant limitations as well as depression and post-traumatic stress disorder relating to his military service.

In an undated report, received by the Office on March 18, 2005, Dr. Jonathan P. Garino, a Board-certified orthopedic surgeon, related appellant's complaints of continuing discomfort, dysfunction and weakness in his left knee. Examination of the knee revealed a small defect that was tender and palpable in the quadriceps tendon. Dr. Garino stated that it appeared that appellant had "an incomplete healing of his quadriceps tendon and that at this point in time *not* to be repaired." (Emphasis added.) On March 17, 2005 the Office received a request from Dr. Garino's office for authorization of a "left quad tendon repair." On April 7, 2005 the Office asked Dr. Garino to opine as to the necessity of his recommended surgery. Dr. Garino submitted a copy of the April 7, 2005 letter to the Office bearing an undated response. The letter contained a handwritten note stating that "surgery is indeed necessary." By letter dated April 11, 2005, the Office informed appellant that his request for authorization for surgery could not be approved at that time in that further medical development was necessary.[2]

Appellant submitted numerous reports from Dr. Rodriguez recommending restrictions relating to his left knee condition. In a November 9, 2004 report, Dr. Rodriguez noted that appellant had flexion of 60 degrees, with increased pain along the medial knee joint during compression. Strength was 3/5 in the quadriceps muscle. Transfers required the use of both extremities and heavy reliance on the right lower extremity. The monopedal stance was unstable with the left lower extremity. The gait revealed moderate altalgia of the left lower extremity. Dr. Rodriguez recommended that appellant should refrain from squatting, kneeling, crawling, crouching, prolonged sitting or standing or lifting greater than 30 pounds. On December 7, 2004 he reiterated his recommended restrictions. On June 7, 2005 Dr. Rodriguez noted that appellant had left knee flexion of 30 degrees; moderate T circumferentially along the prepatellar area; and

[1] In the appropriate section of the November 1, 2005 recurrence of disability, supervisor Linda Gregg stated that appellant was working limited duty until his retirement.

[2] The Board notes that the record does not contain a final decision regarding appellant's request for approval of surgery involving left quad tendon repair. Therefore, the Board does not have jurisdiction over the merits of this issue. *See* 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

increased pain along the medial joint with medial compression. He recommended that appellant be restricted from lifting more than 20 pounds, based on a March 1, 2005 functional capacity evaluation. On July 5, 2005 Dr. Rodriguez reiterated his recommended restrictions, noting that appellant had left knee flexion of 20 degrees.

On November 14, 2005 the Office informed appellant that the evidence submitted was insufficient to establish his recurrence claim. The Office advised appellant to submit within 30 days, a physician's report containing an opinion as to how his alleged disability was causally related to his accepted injury. The Office asked appellant whether his work assignment had changed since his return to work and, if so, to describe the nature of the change. On the same date the Office asked the employing establishment whether it had been unable to accommodate appellant's restrictions, thereby, forcing him to retire on disability. The Office also inquired as to whether there had been a change in the nature of appellant's duties that exceeded the scope of his medical restrictions. On January 10, 2006 the Office informed appellant that it had not received a response to its November 14, 2005 letter and questions relating to the alleged recurrence of disability. The Office provided appellant 30 days to submit the requested information.

By letter dated January 30, 2006, the employing establishment responded, noting that appellant was not forced to retire due to any inability to provide reasonable accommodations. Nick Marro, appellant's supervisor, stated that appellant continued on permanent limited duty in one of the employing establishment's credit unions "until he decided to retire." Appellant and Joe Apice, manager of maintenance, were on the executive board. Mr. Marro stated that appellant's position was not modified and he retired "of his own volition."

The Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Robert Franklin Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Draper was asked whether the recommended left quadriceps tendon repair surgery was medically necessary and causally related to the accepted injury. In a report dated February 1, 2006, he related the history of injury and medical treatment as reported by appellant. Appellant informed Dr. Draper that he had retired on disability on October 1, 2004 and had not returned to work since that time. Examination of the left knee revealed full extension and flexion to 80 degrees. Abduction and adduction stress testing revealed no instability. Anterior and posterior Drawer signs were negative. Dr. Draper provided the following diagnoses: status post delayed repair of ruptured left quadriceps tendon; and status post removal of broken wires from the left knee surgery. He opined that appellant continued to have residuals from the accepted injury and some work limitations and that he could work in a job that did not require climbing ladders or extensive standing or walking. Dr. Draper also recommended that appellant be restricted from lifting more than 50 pounds. He recommended against further surgery which he felt would not improve appellant's condition. Dr. Draper reiterated appellant's restrictions in his February 7, 2006 work capacity evaluation.

Appellant submitted copies of reports previously submitted. In a January 31, 2006 report, Dr. Rodriguez repeated his recommended restrictions.

By decision dated March 1, 2006, the Office denied appellant's claim for recurrence of disability on the grounds that the medical evidence was insufficient to 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. The Office found no evidence that appellant's disability retirement was triggered by the employing establishment's inability to place him in a vacant permanent position.

On March 6, 2006 appellant, through his representative, requested an oral hearing. He submitted progress notes from the Philadelphia Veterans' Affairs Medical Center dated March 23, 2004 through August 5, 2005, reflecting his treatment for depression. In notes dated October 6, 2004, Marie E. Schoppet, a licensed clinical social worker, stated that appellant missed "a lot of work due to his depression."

In a letter dated July 19, 2006, appellant, through his representative, withdrew his request for an oral hearing and requested a review of the written record. Counsel alleged that Dr. Draper's report was biased. He also contended that appellant's recurrence of disability was triggered by a certification from the employing establishment that work within appellant's restrictions was not available.

By decision dated October 17, 2006, the hearing representative affirmed the denial of appellant's claim finding that the medical evidence did not establish that he sustained a recurrence of disability causally related to his employment. The representative stated that appellant's request for knee surgery authorization must be submitted to the district Office for consideration.

LEGAL PRECEDENT

Section 10.5(x) of the Office regulation defines "recurrence of disability" as an 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.[3] This term also means 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, (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[4]

When 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 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 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.[5]

[3] 20 C.F.R. § 10.5(x) (2002). *See Carlos A. Marrero*, 50 ECAB 117 (1998).

[4] *Id.*

[5] *Conard Hightower*, 54 ECAB 796 (2003).

The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[6]

ANALYSIS

Appellant has not met his burden of proving that he sustained a recurrence of disability beginning October 1, 2004. He contended that he "was forced out" on disability retirement, due to the inability of the employing establishment to place him in a vacant permanent position within his restrictions. However, appellant failed to submit sufficient evidence to support his allegations. Moreover, he has failed to produce any rationalized medical opinion evidence establishing that he was disabled on or after October 1, 2004 due to residuals of his accepted condition.

The Office accepted appellant's claim for left knee sprain and approved surgery for a left quadriceps repair. Following a recurrence of disability and surgery to repair broken patellar wiring in his left knee, appellant returned to full-duty status on December 2, 2002. In April 2004, when Dr. Rodriguez recommended that appellant be restricted from squatting, kneeling, crawling, prolonged sitting or standing or from lifting more than 30 pounds; appellant was provided with a limited-duty position that accommodated his restrictions.

On November 1, 2005 appellant filed a recurrence of disability claim as of October 1, 2004, stating that he continued to experience ongoing knee problems that caused him significant limitations. He contended that his disability retirement on that date was triggered by the inability of the employing establishment to accommodate his physical restrictions. However, there is no evidence of record supporting appellant's claim that his limited-duty assignment was taken away or modified to exceed his restrictions. On November 14, 2005 and again on January 10, 2006 the Office informed appellant that the evidence submitted was insufficient to establish his recurrence claim. Appellant was advised to submit documentation regarding the nature of any change in his work assignment since his return to work. He failed to submit any evidence in response to the Office's request. The employing establishment denied that appellant was forced to retire due to its inability to provide reasonable accommodations. Appellant's supervisor stated that appellant's position was not modified and that appellant continued on permanent limited duty until he retired of his own volition. None of the many medical reports submitted by appellant establish that his job duties prior to October 1, 2004 exceeded his recommended restrictions or that his limited-duty assignment was withdrawn. The Board finds that appellant has failed to establish that his limited duty was withdrawn or that his work requirements exceeded his established physical limitations.[7]

Appellant did not submit any medical reports from a physician who, on the basis of a complete, accurate factual and medical history, concluded that he was totally disabled as of

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[6] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[7] *Id.*

October 1, 2004 due to residuals of his accepted injury. On the contrary, the medical evidence of record establishes that appellant was capable of working with restrictions. Contemporaneous medical evidence included November 9 and December 7, 2004 reports from Dr. Rodriquez who recommended that appellant refrain from squatting, kneeling, crawling, crouching, prolonged sitting, standing or lifting greater than 30 pounds. Dr. Rodriguez did not find that appellant was unable to perform his limited-duty job. None of Dr. Rodriguez' many reports establish that appellant was disabled during the period in question. In April 2005, Dr. Garino opined that appellant had an incomplete healing of his quadriceps tendon and recommended a left quad tendon repair. He did not address the relevant issue of appellant's disability for work as of October 1, 2004. In a report dated February 1, 2006, Dr. Draper opined that appellant continued to have residuals from the accepted injury and some work limitations, but could work in a job that did not require climbing ladders or extensive standing or walking. He also recommended that appellant be restricted from lifting more than 50 pounds. Dr. Draper did not find that appellant was disabled or address whether appellant was disabled as of October 1, 2004. These reports are of diminished probative value. 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]

Appellant stated that, after his return to work, his ongoing knee problems caused him significant limitations to the point that he was "forced out" on disability retirement. However, his contention, as noted, is not supported by the evidence of record. Appellant has provided no evidence that he was required to work outside of his restrictions or that his condition worsened to the degree that he was unable to perform the duties of the position.

On appeal, it is contended that appellant's recurrence of disability was triggered by the employing establishment's "inability to accommodate his knee;" the worsening of his preexisting medical conditions due to his service-related injury; and the need for further knee surgery. As noted, appellant has not established that the employing establishment withdrew or otherwise failed to provide limited duty that exceeded his medical restrictions. The Board notes that appellant's request for authorization for further knee surgery is not properly before the Board, as the Office has not rendered a final decision in this matter.[9] Appellant's alleged disability pursuant to his depression and post-traumatic stress disorder relating to his military service has not been established as related to his accepted knee condition. Therefore, his claim in that regard does not constitute a recurrence of disability.

Appellant has failed to establish by the weight of the reliable, probative and substantial evidence, a change in the nature and extent of the injury-related condition resulting in his inability to perform the duties of his modified employment. He did not provide rationalized medical opinion evidence establishing that he was disabled as of October 1, 2004 due to residuals of his accepted condition. It is not established that the employing establishment withdrew or was unable to provide him with limited duty within his medical restrictions.

[8] *Amelia S. Jefferson*, 57 ECAB ___ (Docket No. 04-568, issued October 26, 2005); *Fereidoon Kharabi*, *supra* note 6.

[9] *See* 20 C.F.R. § 501.2(c), *supra* note 2.

Appellant has not submitted medical evidence showing that he sustained a recurrence of disability due to his accepted employment injury. The Board finds that he has not met his burden of proof.

CONCLUSION

The Board finds that appellant did not meet his burden of proof in establishing that he sustained a recurrence of disability that was causally related to his accepted injury as of October 1, 2004.

ORDER

IT IS HEREBY ORDERED THAT the October 17 and March 1, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 4, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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