

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

L.C., claiming as widow of J.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
New York, NY, Employer)

**Docket No. 07-2367
Issued: April 15, 2008**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 3, 2007 the employee timely appealed the April 3, 2007 merit decision of the Office of Workers' Compensation Programs, which denied his claim for recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the employee sustained a recurrence of disability on December 12, 2005 causally related to his December 28, 1985 employment injury.

FACTUAL HISTORY

On December 28, 1985 the employee, then a 32-year-old letter carrier, slipped on ice while walking down a step and twisted his left knee. The Office accepted his claim for internal derangement of the left knee in 1986.

On January 21, 1986 the employee returned to work on limited duty due to his job-related injury. The Office noted that prior to his December 28, 1985 injury he was on light duty for a

nonemployment-related preexisting right and left knee osteoarthritis. On August 8, 1986 the employee underwent left knee arthroscopic debridement.

On July 31, 2001 the employee filed a claim for a schedule award for his left knee. In a December 24, 1998 report, Dr. David Weiss, an osteopath, examined the employee and provided a permanent impairment rating for his left knee. He opined that the employee had a 48 percent permanent impairment of the left knee. Dr. Weiss explained that the employee's left knee condition had been permanently aggravated by the work injury. The Office referred the employee for a second opinion examination on September 12, 2002 with Dr. Kenneth Falvo, a Board-certified orthopedic surgeon. On September 23, 2002 Dr. Falvo examined the employee and opined that he was entitled to a schedule award for five percent permanent impairment of his left knee. On September 22, 2005 the employee filed a request for a schedule award. On March 2, 2006 the employee, through his representative, withdrew his schedule award claim. On March 16, 2006 the Office noted the withdrawal and informed the employee that the schedule award would not be processed.¹

On November 15, 2003 the employee filed a recurrence of disability claiming that on October 30, 2003 he suffered a recurrence of his condition when he was told to leave the building as there was no work available for him that fit within his restrictions.² He also stated that he was on permanent restrictions for stair-climbing, standing, bending, kneeling, stooping or carrying heavy loads after returning to work.

On January 4, 2006 the employee filed a recurrence of disability claiming that on December 12, 2005 he was told that there was no work for him within his restrictions. He stated that he was on permanent restrictions for stair-climbing, kneeling and prolonged standing.

On June 30, 2006 the employee's representative informed the Office that the employee had passed away on June 25, 2006.

On September 21, 2006 the Office denied the employee's claim finding that he had not established that the claimed recurrence was causally related to the employment injury and that although he was working in a light-duty position with restrictions the light duty was at his own request due to a preexisting condition. In the September 21, 2006 decision, the Office noted that "in response to our request" the employing establishment completed the reverse side of the CA-2a form on which F. Nagle, a supervisor, stated that "[the employee] was on light duty at his request.... On the date the employee states that he was sent home there was no work available within the restrictions imposed by his physician."

On September 26, 2006 appellant requested a hearing. The hearing was conducted on February 7, 2007. At the hearing appellant's representative submitted three letters. The April 15, 2004 duty status report restricted the employee to standing, walking and kneeling only

¹ As the schedule award claim was withdrawn and no decision was issued the Board cannot review the merits of the claim.

² A decision addressing the October 30, 2003 recurrence claim was never issued by the Office therefore the Board does not have jurisdiction to review the merits of the claim.

intermittently. The report stated that the diagnosis due to injury was lumbar radiculopathy but noted knee arthritis as well as lumbar surgery and left knee surgery. The March 28, 2005 medical justification for light duty stated that the employee was restricted in intermittent walking, squatting, climbing, kneeling and twisting. It also noted that his arthritis was affected by the weather and that he would eventually need total knee replacement and therapy. The December 24, 2005 letter from the union representative to the employing establishment was a memorializing of the action taken against the employee by the employing establishment specifically that on December 12, 2005 the employee was told to go home as there was no work available for him and that he would be called to report if work became available.

On April 3, 2007 the Office denied the employee's December 12, 2005 recurrence claim on the grounds that he did not establish that his left knee condition on December 12, 2005 was causally related to the December 28, 1985 employment injury.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which 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 when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his 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 established physical limitations.⁴ Moreover, when the claimed recurrence of disability follows a return to light-duty work, the employee may satisfy his burden of proof by showing a change in the nature and extent of the injury-related condition such that he was no longer able to perform the light-duty assignment.⁵

ANALYSIS

The Board finds that the case is not in posture for a decision. The record establishes that the employee was placed on light duty due to his employment injury when he returned to work on January 21, 1986. The record does not indicate whether he ever ceased being on light duty for his work-related left knee condition. The Board notes that the record does not indicate that the Office ever terminated wage-loss or medical benefits for the accepted condition. Rather, the record indicates that the claim was developed in 2001 and 2002 for payment of a schedule award. The April 15, 2004 duty status report evidences that the employee was on light duty for a lumbar condition as well as for his knee conditions. The March 28, 2005 light-duty report further evidences that the employee was on light duty at that time but does not identify the reason for the light duty.

³ 20 C.F.R. § 10.5(x).

⁴ *Id.*

⁵ *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

In the September 21, 2006 decision, the Office stated that the employing establishment submitted information regarding the employee's light-duty status on a Form CA-2a in response to their request, however, neither the completed CA-2a nor the Office's request are part of the record. The record is therefore unclear as to whether the employee was on light duty due to his accepted employment incident at the time of his recurrence. As such the Board finds that this case is not in posture for a decision and will be remanded for further development to determine whether the employee was on light duty due to his employment injury on December 12, 2005. Following such further development as may be necessary the Office shall issue an appropriate final decision on this issue.

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2007 decision of the Office of Workers' Compensation Programs is set aside and case is remanded to the Office for further development consistent with this decision.

Issued: April 15, 2008
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