

returned to a light-duty job in May 2005, with restrictions that included a three-pound lifting restriction.

By decision dated May 31, 2005, the Office denied the claim for compensation on the grounds that the medical evidence was insufficient to establish the claim. Appellant continued to work in a modified position. In a report dated April 5, 2006, Dr. Kenneth Jarolem, an attending orthopedic surgeon, limited appellant to three pounds lifting, no excessive sitting, standing or walking, no stooping, bending, twisting, crouching, crawling or working on ladders.

In a report dated April 20, 2006, Dr. Jarolem stated that he expected appellant to return to full duty within 45 days. By an April 21, 2006 report, he diagnosed left shoulder tendinitis and cervical disc herniations with myelopathy, caused by the February 21, 2005 incident. Dr. Jarolem reported that appellant was unable to work from February 22 to May 3, 2005 and indicated that appellant's light-duty restrictions were permanent.

On May 25, 2006 the Office vacated the May 31, 2005 decision and accepted the claim for left shoulder tendinitis and cervical herniated discs at C4-5 and C5-6.¹ The record indicates that appellant continued to work in a modified position. A May 2, 2006 light-duty job assignment provided work restrictions in accord with Dr. Jarolem's April 5, 2006 report.

On June 14, 2006 appellant completed a time analysis (Form CA-7a) indicating that he was off work on August 16, October 27 and November 12, 2005. He also reported that he was off work December 8 to 10, 2005, March 18 and June 4 to 6, 2006. Appellant filed a claim for compensation (Form CA-7) for the intermittent dates of disability.

The employing establishment issued a notice of proposed removal dated July 12, 2006. The reasons reported were failure to follow instructions, unauthorized absences and careless and negligent performance. By letter dated July 13, 2006, the employing establishment stated that appellant had been working light-duty assignments since his injury and a light-duty job within his restrictions continued to be available. The employing establishment indicated that the proposed removal was based on conduct issues, not appellant's medical condition.

Effective September 7, 2006, appellant's federal employment was terminated. On June 9, 2007 he filed a claim for compensation commencing September 26, 2006. With respect to medical evidence, appellant submitted a September 19, 2006 report from Dr. Scott Tannenbaum, a physiatrist, diagnosing left shoulder adhesive capsulitis, multiple cervical disc disorder and radiculitis, who completed a work restriction evaluation (OWCP-5c) indicating that appellant could lift up to 20 pounds with limitations on reaching above the shoulder. In an OWCP-5c (work capacity evaluation) dated January 25, 2007, Dr. Tannenbaum indicated that appellant was disabled for work. His narrative report of that date diagnosed lumbar radiculitis and cervical myofascial pain, stating the pain was about the same.

¹ A separate May 25, 2006 letter advised appellant that the claim was accepted for cervical disc disorder with myelopathy and left shoulder adhesive capsulitis.

By decision dated August 9, 2007, the Office denied compensation for wage loss for August 16, October 27 and November 12, 2005. It found that the medical evidence was insufficient to establish an employment-related disability for the dates claimed. In a decision dated October 5, 2007, the Office denied a claim for compensation as of September 7, 2006. It found that the evidence did not establish an employment-related disability for the period claimed.

Appellant requested a hearing before an Office hearing representative, which was held on November 26, 2007. He testified that he worked various light-duty jobs and sometimes had to lift more than three pounds and to crouch or bend. Appellant also stated that he thought he was terminated because he was injured and the employing establishment could not find a job for him.

By decision dated January 9, 2008, the hearing representative affirmed the August 9 and October 5, 2007 decisions.

LEGAL PRECEDENT

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she 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 or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.² To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.³

When a claimant stops working at the employing establishment for reasons unrelated to his employment-related physical condition, he has no disability within the meaning of the Federal Employees' Compensation Act.⁴ Office regulations state that there is a recurrence of disability when a light-duty job is withdrawn "except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force."⁵

² *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

³ *Maurissa Mack* 50 ECAB 498 (1999).

⁴ See *Richard A. Neidert*, 57 RCAB 474 (2006); *John W. Normand*, 39 ECAB 1378 (1988) (the claimant's employment was terminated due to misconduct and the Board found no employment-related disability was established).

⁵ 20 C.F.R. § 10.5(x).

ANALYSIS

The Office accepted the claim for left shoulder and neck injuries and appellant returned to a light-duty position. With respect to the specific dates of August 16, October 27 and November 12, 2005, it is appellant's burden of proof to submitted medical evidence establishing an employment-related disability for the dates claimed. In this case, none of the medical evidence discusses disability for work on August 16, October 27 or November 12, 2005. Dr. Jarolem submitted brief reports dated September 22 and December 6, 2005 continuing appellant's work restrictions without discussing disability on the relevant dates. Appellant therefore did not meet his burden of proof.

With respect to the claim for compensation commencing September 26, 2006,⁶ the record indicated that appellant's light-duty job had been withdrawn as his employment had been terminated effective September 7, 2006. As noted above, the withdrawal of the light-duty position may result in an employment-related disability, unless it occurs for misconduct, nonperformance of job duties or a reduction-in-force. Although appellant indicated that he felt his termination was due to his employment injury, the evidence of record supports a finding that the termination was based on misconduct. The decision on the proposed removal noted failure to follow instructions and failure to notify a supervisor of absences, as well as careless and negligent performance on May 13, 2006. The employing establishment specifically stated that a light-duty job remained available to appellant and his removal was not based on a failure to have a job within his employment-related work restrictions. Based on the evidence of record, therefore, the Board finds the light-duty job in this case was withdrawn due to misconduct.

In addition, there was no medical evidence presented of a change in the nature and extent of the injury-related condition. Dr. Tannenbaum treated appellant on September 19, 2006, without indicating a change in the employment-related condition resulting in disability. The OWCP-5c form he completed on September 19, 2006 showed increased work capacity from the previous work restrictions of Dr. Jarolem. On January 25, 2007 Dr. Tannenbaum appeared to find appellant totally disabled, without providing additional explanation as to how appellant's employment-related condition had changed such that he was unable to perform the duties of the light-duty job as of that date.

Appellant has also raised the issue of working outside his work restrictions. A recurrence of disability may be established "when the physical requirements of such [light-duty job] are altered so that they exceed his or her established physical limitations."⁷ In this case, it appeared that appellant generally alleged that at various times since his return to work in May 2005 he had to exceed his stated work restrictions. Appellant has claimed compensation commencing at or about the time his employment was terminated. He did not stop work and provide evidence that his job was altered so that it exceeded his work restrictions. The record indicated that appellant was offered a light-duty job with limitations in accord with the existing work restrictions, he

⁶ The claim for compensation filed on June 9, 2007 was for compensation commencing September 26, 2006. The Office decisions apparently determined that appellant was claiming compensation as of September 7, 2006, when his employment was terminated.

⁷ *Id.*

continued to work in the position until he was removed from employment and the light-duty job would have remained available to appellant.

The Board accordingly finds that appellant has not established an employment-related disability commencing on or after September 7, 2006. The medical evidence does not establish a change in the nature and extent of the employment-related condition resulting in disability for the light-duty job. The factual evidence indicated that the withdrawal of the light-duty position was for reasons unrelated to his employment-related physical condition.

CONCLUSION

The evidence of record does not establish that appellant is entitled to compensation for wage loss on August 16, October 27 or November 12, 2005 or commencing on or after September 7, 2006.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 9, 2008, October 5 and August 9, 2007 are affirmed.

Issued: August 21, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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