

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

C.S., Appellant)

and)

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**)

**Docket No. 08-2218
Issued: August 7, 2009**

Appearances:

John E. Goodwin, Esq., for the appellant

No Appearance: for the Director

Oral Argument May 19, 2009

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 12, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 21, 2008 merit decision denying his claim for wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant is entitled to wage-loss benefits for total disability beginning August 10, 2007.

On appeal, appellant's representative contends that the employing establishment withdrew his light-duty position (terminated him) for medical reasons related to his accepted carpal tunnel syndrome. He argues that, therefore, appellant was disabled due to the accepted injury and is entitled to compensation for lost wages effective August 10, 2007.

FACTUAL HISTORY

On May 16, 2005 appellant, then a 50-year-old marine machinery mechanic, filed an occupational disease claim alleging that he had developed carpal tunnel syndrome as a result of employment activities.¹ The Office accepted his claim for right carpal tunnel syndrome. Appellant underwent right carpal tunnel syndrome release surgery in February 2006 and returned to light duty as a traffic controller on April 26, 2006.²

On March 22, 2007 Dr. David M. Gent, a podiatrist, recommended permanent restrictions limiting appellant's exposure to cold to less than 10 percent of his time, due to "questionable vascular complications when exposed to cold." On April 2, 2007 a physician at the employing establishment health clinic reiterated permanent restrictions limiting appellant's exposure to cold to less than 10 percent of his time.

On June 15, 2007 the employing establishment notified appellant of its intent to terminate his employment due to his inability to perform his assigned duties for medical reasons. It stated that the duties of appellant's position, which included exposure to extreme temperatures, did not comply with the April 2, 2007 permanent restrictions, which limited him to "seldom exposure" to cold. The employing establishment further stated that his duties as a marine machinery mechanic could not be restructured to enable him to perform the duties of his permanent position without undue hardship for the employing establishment, and that the injured workers' program (IWP) was not able to locate a vacant, funded position for which he was qualified and able to perform. He was informed of his right to respond to the proposed termination within 10 days.

On June 26, 2007 the employing establishment informed appellant that he was being terminated due to his inability to perform the duties of his modified position and the establishment's inability to accommodate his new restrictions. It noted that appellant had failed to submit a verbal or written response to its June 15, 2007 letter.

The record reflects that the Office accepted the conditions of left carpal tunnel syndrome and left medial epicondylitis under File No. xxxxxx287. On June 27, 2007 appellant underwent approved left carpal tunnel release surgery under that claim, and the Office began paying compensation for temporary disability at that time. Appellant's physician, Dr. Bruce Wheeler, a Board-certified orthopedic surgeon, released him to work as of July 30, 2007, with no

¹ This case was previously before the Board. By decision dated August 6, 2007, the Board reversed the Office's August 30, 2006 decision denying wage-loss claims from March 24 through April 21, 2006. Docket No. 06-2033 (issued August 6, 2007). In a March 19, 2008 decision, the Board reversed the Office's August 24, 2007 decision, which terminated appellant's entitlement to compensation benefits on the grounds that he refused suitable employment. Docket No. 07-2233 (issued March 19, 2008).

² On April 24, 2006 Dr. Brian Wicks, a Board-certified orthopedic surgeon, released appellant to work full time with restrictions, which precluded the use of vibrating or impact tools; the use of his hands on a repetitive basis; twisting or gripping motions, climbing vertical ladders, squatting, kneeling or reaching overhead. The record contains a March 13, 2006 light-duty job offer for the traffic controller position, which involved monitoring traffic on a pier while industrial work was accomplished nearby and was in compliance with Dr. Wick's job restrictions. On April 24, 2006 Dr. Wicks opined that the traffic control position was "appropriate."

restrictions on the left hand and permanent restrictions on the right as previously delineated. The Office paid compensation from June 27 through August 4, 2007.

Appellant filed a claim for total disability beginning August 10, 2007. On May 2, 2008 Barbara Yoshino of the employing establishment informed the claims examiner that appellant was terminated because the employing establishment could not accommodate his “restrictions on a nonoccupational condition,” and that the traffic controller position was still available at the time he was removed.

Appellant submitted a May 28, 2007 report of lower extremity arterial testing, which showed no evidence of significant peripheral arterial disease at rest in either leg. He also submitted a June 23, 2008 report from Dr. Gent, who stated that appellant had no significant peripheral artery disease.

By decision dated July 21, 2008, the Office denied appellant’s claim for compensation beginning August 10, 2007 on the grounds that his disability (removal from employment) was not related to his accepted condition.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees’ Compensation Act has the burden of proof to establish the essential elements of his claim by the weight of the evidence.³ For each period of disability claimed, the employee has the burden of establishing that he was disabled for work as a result of the accepted employment injury.⁴ 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.⁵ To meet his burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.⁶

Under the Act, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁸ An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time

³ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁴ See *Amelia S. Jefferson*, *supra* note 3; see also *David H. Goss*, 32 ECAB 24 (1980).

⁵ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁶ *A.D.*, 58 ECAB ____ (Docket No. 06-1183, issued November 14, 2006).

⁷ *S.M.*, 58 ECAB ____ (Docket No. 06-536, issued November 24, 2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

⁸ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.⁹ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.¹⁰

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence establishes that he can perform the limited-duty position, the employee has the burden of proof to establish a recurrence of total disability and that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.¹¹

The Office's definition of 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 had resulted from a previous injury or illness without an intervening injury or new exposure. The term also means the 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 for when such withdrawal occurs for reasons of misconduct, nonperformance of the job duties, or a reduction-in-force (RIF).¹² The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of the Act.¹³

When a light-duty position is withdrawn, it is appellant's burden to establish that any increase in disability for work is due to the accepted injury, rather than another cause.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he was totally disabled beginning August 10, 2007. Appellant returned to work in a light-duty assignment made specifically to accommodate his physical limitations due to his work-related injury. He has not alleged a change in the nature or extent of the injury-related condition.¹⁵ Rather, appellant alleges that his light-duty position was improperly withdrawn, and that he, therefore, is entitled to compensation benefits for total disability.

⁹ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹⁰ *Id.*

¹¹ *See John I. Echols*, 53 ECAB 481 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹² *See* 20 C.F.R. § 10.5(x).

¹³ *See John I. Echols*, *supra* note 11; *John W. Normand*, 39 ECAB 1378 (1988). Disability is defined to mean the incapacity because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total. *See* 20 C.F.R. § 10.5(f).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7.a(1) (May 1997).

¹⁵ *See John I. Echols*, *supra* note 11; *Terry R. Hedman*, *supra* note 11.

Office regulations provide that a claimant sustains a recurrence of disability 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 the job duties, or a RIF.¹⁶ The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of the Act.¹⁷ In this case, the evidence establishes that appellant's light-duty position as a traffic control person was withdrawn by the employing establishment. Therefore, appellant has the burden to establish that the withdrawal was due to the accepted injury, rather than to another cause.¹⁸

The Office accepted appellant's claim for right carpal tunnel syndrome and right carpal tunnel syndrome release surgery. Appellant returned to light-duty status on April 26, 2006 as a modified traffic controller. The light-duty position accommodated his physician's restrictions, which precluded the use of vibrating or impact tools, the use of his hands on a repetitive basis, twisting or gripping motions, climbing vertical ladders, squatting, kneeling or reaching overhead. The job involved monitoring traffic on a pier while industrial work was accomplished nearby. On March 22, 2007 Dr. Gent provided new permanent restrictions, which limited appellant's exposure to cold to "less than 10 percent of his time," due to "questionable vascular complications when exposed to cold." On April 2, 2007 a physician at the employing establishment health clinic reiterated the permanent restrictions limiting appellant's exposure to cold to "less than 10 percent of his time." On June 15, 2007 the employing establishment notified appellant of its intent to terminate his employment, due to his inability to perform his assigned duties for medical reasons. On appeal, appellant's representative argues that because appellant was terminated for medical reasons, rather than for fault, his position was improperly withdrawn and he, therefore, is entitled to compensation benefit. This contention is without merit.

There is no dispute that appellant was terminated for medical reasons. However, the evidence reflects that the termination was for reasons unrelated to the accepted conditions, namely, his inability to withstand exposure to cold temperatures. Shortly after receiving the new restrictions, the employing establishment informed appellant on June 15, 2007 that the duties of his position, which included exposure to extreme temperatures, did not comply with the April 2, 2007 permanent restrictions, which limited him to "seldom exposure" to cold. Appellant was further informed that, given his updated restrictions, his duties as a marine machinery mechanic could not be restructured to enable him to perform the duties of his permanent position without undue hardship for the employing establishment, and that the IWP was not able to locate a vacant, funded position for which he was qualified and able to perform. In its June 26, 2007 final termination letter, the employing establishment reiterated that appellant was being

¹⁶ See 20 C.F.R. § 10.5(x).

¹⁷ See *John I. Echols*, *supra* note 11; *John W. Normand*, *supra* note 13. Disability is defined to mean the incapacity because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total. See 20 C.F.R. § 10.5(f).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7.a(1) (May 1997). (appellant's burden when a light-duty position is withdrawn is to establish that any increase in disability for work is due to the accepted injury, rather than another cause).

terminated due to his inability to perform the duties of his modified position, and the employing establishment's inability to accommodate his new restrictions. On May 2, 2008 the employing establishment indicated that appellant was terminated because the employing establishment could not accommodate his "restrictions on a nonoccupational condition," and that the traffic controller position was still available at the time he was removed. There is no evidence of record that contradicts the employing establishment's stated reasons for terminating appellant.

Appellant's representative argues that a May 28, 2007 report of lower extremity arterial tests and Dr. Gent's June 23, 2008 statement reflecting that appellant had no significant peripheral artery disease was evidence that the employing establishment terminated him for medical reasons related to his accepted conditions. However, these documents do not provide evidence necessary to establish such intent. Although Dr. Gent stated that lower extremity arterial testing revealed no significant peripheral artery disease, he did not modify or eliminate his previous restriction limiting appellant's exposure to cold. The Board notes that appellant had an opportunity to respond to the employing establishment's June 15, 2007 letter. Appellant could have provided the employing establishment with a copy of Dr. Gent's report, together with updated restrictions. However, as he did not respond to the June 15, 2007 letter within the prescribed period, there is no evidence that the employing establishment had any information regarding his vascular condition, other than that contained in the March 22 and April 2, 2007 work reports, which restricted him from working in cold temperatures. Therefore, the employing establishment's reliance on Dr. Gent's April 2, 2007 permanent restrictions was reasonable. The Board notes that the issue is not whether it properly determined that appellant was unable to work in cold conditions. The issue is whether the employing establishment withdrew the light-duty position for reasons related to his accepted condition, or for some other reason.

Appellant's representative argues on appeal that the employing establishment has unclean hands due to its actions involving the "back-dating" of a previous job offer. He contends that it was "looking around for a reason to fire [appellant] that was not work related." However, the representative's allegations, without an evidentiary basis, are insufficient to establish that the termination was due to appellant's accepted injury, rather than to his documented vascular condition.¹⁹

Appellant's representative contends that the Office inappropriately relied on the case of *Major W. Jefferson, III*,²⁰ where a claimant was terminated by the employing establishment for improper conduct. He argues that because appellant was terminated for medical reasons, rather than for fault, his position was improperly withdrawn. Appellant's representative's argument is ill-conceived. Misconduct, which was the basis for claimant's termination in *Jefferson*, is merely an example of an acceptable, unrelated reason for withdrawing a light-duty position. The issue in this case is whether appellant was terminated for reasons causally related to the accepted

¹⁹ *Id.*

²⁰ 47 ECAB 295 (1996).

injury. The preponderance of the evidence establishes that appellant was terminated for reasons that were not related to his accepted condition.²¹

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, or to provide rationalized opinion evidence establishing that he was physically disabled as of August 10, 2007. He has also failed to establish that his light-duty job was withdrawn for reasons related to his accepted condition. Accordingly, the Board finds that he has not met his burden of proof.

CONCLUSION

The Board finds that appellant has not established entitlement to wage-loss benefits commencing August 10, 2007.

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 7, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²¹ Appellant's representative also contends that appellant should have been returned to the "*status quo ante*" when the Board reversed the Office's August 24, 2007 decision, which terminated his compensation benefits for refusal of suitable employment. However, as the issue raised by the representative is not before the Board, it will not be addressed in this decision.