

indicated that appellant could work with restrictions of 15 minutes of standing or walking and no carrying upstairs. He noted that appellant was cane and rail dependent. On May 24, 2007 Dr. Plomaritis indicated that appellant could increase to 30 minutes of standing and walking per hour, but could not carry a 20-pound computer bag until he completed physical therapy.

Appellant filed a claim for wage-loss compensation from April 14, 2007 through May 28, 2007. The employing establishment terminated appellant during his probationary period on May 29, 2007. In a letter dated June 7, 2007, the employing establishment stated that appellant was terminated due to work performance issues during his probationary period of employment. He submitted a copy of his mid-year-evaluation dated January 19, 2007, which indicated that he met the requirements of his position.

Appellant filed a claim for compensation on June 29, 2007 requesting wage-loss compensation from May 30 through June 29, 2007. He filed a recurrence of disability claim on June 29, 2007 and alleged that he was terminated by the employing establishment while still under medical restrictions. On July 5, 2007 Dr. Plomaritis listed appellant's restrictions as no carrying up and down stairs, 15 minutes of standing or walking per hour and no uneven, slippery or steep surfaces. In a letter dated July 24, 2007, the Office accepted appellant's May 29, 2007 recurrence. In a letter dated July 25, 2007, it vacated the July 24, 2007 acceptance of appellant's claim and denied his claim for recurrence. On September 14, 2007 the Office authorized compensation from April 16 through June 25, 2007 for 34 hours of leave without pay for doctor's visits and physical therapy.

By decision dated September 17, 2007, the Office denied appellant's claim for recurrence of disability beginning May 29, 2007. It found that the factual and medical evidence did not support that his recurrence of disability on May 29, 2007 was due to his accepted January 25, 2007 employment injury.

Appellant, through his attorney, requested a telephone hearing on September 19, 2007. He testified at the January 10, 2008 hearing that he returned to work on March 12, 2007 following his injury. Appellant began work at the employing establishment on May 30, 2006 and that his probationary period ended on May 29, 2007. He noted that his light-duty position did not involve field work during March and April. Upon appellant's return from work, appellant's supervisor stated that he had reconsidered appellant's performance evaluation and did not think that appellant would be able to improve and alleviate concerns regarding his performance. He received a formal appraisal letter reclassifying his mid-year review as unacceptable. Following the oral hearing, appellant submitted copies of his evaluation signed March 27, 2007 which indicated that appellant received an unacceptable performance rating. He disagreed with this assessment on April 9, 2007 and noted that his mid-year review had been successful on January 19, 2007. Appellant sustained his injury on January 25, 2007 and that following this injury his performance was deemed unsatisfactory. He received an additional review on May 17, 2007, which again found that he failed to meet his standards.

By decision dated May 6, 2008, the hearing representative denied appellant's claim. He noted that appellant's attorney argued that the employing establishment had withdrawn appellant's light-duty position for reasons other than misconduct and nonperformance, as while his performance may not have been satisfactory, it did not rise to the level of nonperformance.

The hearing representative found that appellant was terminated for cause, rather than due to his inability to perform his job duties as a result of his injury. He also found that appellant was not entitled to compensation for periods following his removal from the employing establishment during which he attended work hardening as he did not experience any actual wage loss.

LEGAL PRECEDENT

A recurrence of disability is 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 which caused the illness. The 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.¹ 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 of record establishes that he can perform the limited-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 to show that she cannot perform such limited-duty work. 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 limited-duty job requirements.²

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.³ 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.

ANALYSIS

Appellant sustained a work-related ankle fracture on January 25, 2007. He returned to light-duty work on March 12, 2007. On May 29, 2007 the employing establishment terminated appellant's employment for cause. He alleged that he had sustained a recurrence of disability as the employing establishment removed his light-duty position. Appellant has not alleged a change in the nature and extent of his injury-related condition or a change in the nature and extent of the limited-duty job requirements. Rather, his basis for alleging a recurrence of disability was his removal from his light-duty position.

Appellant contended that following his employment injury, his supervisor reevaluated his work and informed appellant that he did not believe that appellant would be able to adequately

¹ 20 C.F.R. § 10.5(x).

² *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

³ *See Richard A. Neidert*, 57 ECAB 474 (2006); *John W. Normand*, 39 ECAB 1378 (1988).

address areas of concern. While he has alleged that the employing establishment did not accurately assess his work, and penalized him for his employment injury, he has submitted no corroborative evidence establishing that the employing establishment's assessment of his performance was not accurate. Appellant has not established that his work stoppage was due to reasons related to his employment-related physical condition. Instead the evidence of record supports that the employing establishment withdrew appellant's light-duty position due to non-performance of this position.

CONCLUSION

Appellant has failed to meet his burden of proof in establishing that he sustained a recurrence of disability on or after May 29, 2007 entitling him to further compensation benefits after that date.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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