

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision and order issued March 10, 2000,¹ the Board reversed an August 21, 1997 decision of the Office denying appellant's claim for intermittent periods of disability. The law and the facts of the case as set forth in the Board's prior decision are incorporated by reference.

The Office accepted that on July 25, 1978, appellant, then a 28-year-old forestry technician, sustained a right knee strain. It subsequently accepted a strain of the right Achilles tendon, right knee instability, a possible torn right medial meniscus, post-traumatic osteoarthritis and septic arthritis of the right knee. Appellant developed chronic thrombophlebitis with deep venous thrombosis of both legs on or before May 8, 2002.²

Appellant underwent February 1984 and May 1994 right knee arthroscopies. Dr. Kenneth T. Heaton, an attending osteopathic physician, Board-certified in orthopedic surgery, performed a total right knee replacement on November 8, 2002, authorized by the Office. Appellant returned to part-time light-duty work in April 2003 as a modified forestry technician, performing sedentary clerical duties. Dr. C. Scott Graham, an attending osteopathic physician, Board-certified in family practice, restricted him to working four hours a day, keeping his legs elevated. Appellant increased his schedule to eight hours a day as of September 2003.

In a July 7, 2004 report, Dr. Graham noted that prescription anticoagulants to treat chronic deep venous thrombosis made it unsafe for appellant to take most anti-inflammatory drugs needed to treat his severe right knee arthritis. Appellant had good results with Bextra, a prescription anti-inflammatory. In a January 25, 2005 report, Dr. Graham stated that he was finding it increasingly difficult to work because his chronic vascular disease and osteoarthritis had "caught up to him."

In a March 18, 2005 report, Dr. Heaton stated that appellant's thrombophlebitis, lower extremity edema and right knee osteoarthritis and knee replacement made it "very difficult for him to meet the physical demands required." Appellant cooperated with two years of treatment to try to rehabilitate his right knee, but his condition did not improve. Dr. Heaton opined that he was a "candidate for medical disability."

In an April 25, 2005 report, Dr. Graham explained that appellant could not sit or stand for prolonged periods due to chronic deep venous thrombosis in both legs. Also, appellant had difficulty walking outdoors over uneven surfaces.

Appellant retired from the employing establishment effective June 24, 2005.³

¹ 51 ECAB 355 (2000).

² In July 2002, the Office doubled appellant's five accepted lower extremity claims under File No. xxxxxx852.

³ In a November 22, 2005 decision, the Office awarded appellant a 13 percent schedule award for permanent impairment of the right lower extremity. Appellant received a previous schedule award under another claim for a 30 percent impairment of the right lower extremity, for a total 43 percent impairment.

On February 6, 2006 appellant claimed a recurrence of disability commencing June 24, 2005. He asserted that the accepted thrombophlebitis and knee arthritis worsened such that he was no longer able to perform his light-duty position. Appellant submitted chart notes from Dr. Graham dated from November 2005 to May 2006, noting continuing edema in both legs with skin changes.

By decision dated November 16, 2006, the Office denied the claim for recurrence of disability on the grounds that causal relationship was not established. It found that appellant's physicians did not support a worsening of the accepted conditions as alleged.

Appellant requested a telephonic oral hearing, held on March 12, 2007. At the hearing, he contended that Drs. Graham and Heaton both supported a worsening of the accepted conditions.

In an April 9, 2007 report, Dr. Graham stated that appellant was no longer able to work as of June 2005 due to worsening right knee arthritis caused by the arthroplasty. The knee had deteriorated because Bextra was withdrawn from the market and that appellant could not tolerate other anti-inflammatories because of prescribed anticoagulants.

By decision dated and finalized May 29, 2007, an Office hearing representative set aside the November 16, 2006 decision and directed referral to a second opinion examiner. The Office referred appellant, the medial record and a statement of accepted facts to Dr. Thomas for a second opinion examination.

In an August 9, 2007 report, Dr. Thomas reviewed the medical record and a statement of accepted facts provided to him by the Office. On examination, he observed edema of both lower extremities, a right knee effusion and limited-right knee flexion. Dr. Thomas noted a right-sided limp and that appellant could not heel walk. He diagnosed right knee osteoarthritis postarthroplasty and bilateral chronic thrombophlebitis. Dr. Thomas explained that it was "difficult, if not impossible" for appellant to work as he must elevate his legs four to six hours a day due to thrombophlebitis. He opined that appellant's condition had continued but not worsened.

The Office requested that Dr. Thomas clarify his opinion regarding whether appellant sustained a recurrence of disability. In a November 13, 2007 supplemental report, Dr. Thomas stated that appellant had no objective findings on examination and had not experienced an objective change in his condition. Appellant had increased pain in 2005 after Bextra was no longer available.

By decision dated February 25, 2008, the Office denied appellant's claim for recurrence of disability on the grounds that he had not established a worsening of the accepted conditions as of June 24, 2005. It found the opinion of Dr. Thomas to be the weight of the medical evidence.

Appellant requested a telephonic hearing, held on June 5, 2008. At the hearing, he asserted that his accepted osteoarthritis and thrombophlebitis had worsened by later June 2005 such that he was no longer able to perform his assigned light duties. Appellant found it very difficult to keep his legs elevated for four to six hours each day while at work. He asserted that the medical evidence of record supported a total disability for work beginning in June 2005.

Counsel noted that Dr. Thomas contradicted himself by stating both that appellant had swelling in both legs and that there were no objective clinical findings.

By decision dated and finalized July 29, 2008, an Office hearing representative affirmed the February 25, 2008 decision, finding that appellant had not established that he sustained a recurrence of disability commencing June 24, 2005, based on Dr. Thomas' opinion as the weight of the medical evidence.

LEGAL PRECEDENT

The Office's implementing regulations define a 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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."⁴ 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 establishes that the employee 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 to show that he or she 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 An award of compensation may not be based on surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.⁶

ANALYSIS

The Office accepted that appellant sustained a right knee strain, right Achilles tendon strain, right knee instability, a possible torn right medial meniscus, post-traumatic osteoarthritis and septic arthritis of the right knee and chronic thrombophlebitis of both. Appellant underwent two right knee surgeries, followed by total arthroplasty in November 2002. Following surgery, he returned to light-duty work. On February 6, 2006 appellant claimed a recurrence of disability commencing June 24, 2005. He asserted that the accepted right knee arthritis and bilateral thrombophlebitis had worsened such that he could no longer perform his light-duty job. Appellant must establish either a spontaneous change in the accepted lower extremity conditions or in his assigned light duties such that he could no longer perform his job requirements.⁷ He has the burden of providing rationalized medical evidence to establish the causal relationship asserted.⁸

⁴ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

⁵ *Carl C. Graci*, 50 ECAB 557 (1999); *Mary G. Allen*, 50 ECAB 103 (1998); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

⁷ *Carl G. Graci*, *supra* note 5.

⁸ *Ricky S. Storms*, 52 ECAB 349 (2001).

Appellant submitted several reports regarding a worsening of the accepted conditions. Dr. Graham, an attending osteopathic physician, Board-certified in family practice, stated on January 25, 2005 that appellant's thrombophlebitis and osteoarthritis "caught up to him," making it difficult for him to work. Dr. Heaton, an attending Board-certified orthopedic surgeon, recommended on March 18, 2005 report that appellant pursue disability retirement as the thrombophlebitis, edema, right knee osteoarthritis and status postarthroplasty made it "very difficult" for him to work. On April 25, 2005 Dr. Graham found that appellant could not sit or stand for prolonged periods. In an April 9, 2007 report, he explained that after Bextra was no longer available, his right knee arthritis worsened such that he could no longer work as of June 2005.

The Office obtained a second opinion from Dr. Thomas, a Board-certified orthopedic surgeon. In August 9 and November 13, 2007 reports, Dr. Thomas opined that appellant did not sustain a recurrence of disability as his condition had not worsened. Although he observed right knee abnormalities, an altered gait and bilateral lower extremity edema, Dr. Thomas stated that appellant had no objective findings on examination. The Office denied appellant's claim for recurrence of disability by July 29, 2008 decision, based on Dr. Thomas' opinion as the weight of the medical evidence.

The Board finds that there is a conflict of medical opinion between Dr. Graham, for appellant, and Dr. Thomas, for the government, regarding whether appellant's accepted conditions worsened such that he became totally disabled for work on June 24, 2005. Section 8123 of the Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.⁹ The case will be remanded to the Office to refer appellant, a statement of accepted facts and the medical record to an appropriate specialist or specialists to resolve the conflict of opinion. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the case is not in posture for a decision due to a conflict of medical evidence. The case will be remanded to the Office for appropriate further development.

⁹ 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 29, 2008 is set aside and the case remanded for further development consistent with this decision and order.

Issued: September 21, 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