

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

O.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Los Angeles, CA, Employer**

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**Docket No. 09-2352
Issued: June 11, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 28, 2009 appellant filed a timely appeal from an August 26, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established a recurrence of disability on or after April 14, 2006.

FACTUAL HISTORY

On June 30, 2003 appellant, then a 46-year-old housekeeping aide, filed an occupational disease or illness claim (Form CA-2) alleging that he sustained stress, osteoarthritis, bilateral hip dysplasia and depression. He stated that on the claim form his job involved bending, stooping, lifting, pushing, pulling and twisting. The claim was initially denied by decisions dated April 27 and September 10, 2004. The Office then found a conflict under 5 U.S.C. § 8123(a) regarding an

employment-related hip condition, and appellant was referred to Dr. John Kaufman, an orthopedic surgeon, for a referee examination. In a report dated January 3, 2006, Dr. Kaufman found appellant's work duties had caused a permanent aggravation of hip osteoarthritis and the need for a pelvic osteotomy. He indicated that appellant should continue with work restrictions of standing and walking no more than four hours per day. On January 27, 2006 the Office accepted the claim for permanent aggravation of bilateral hip osteoarthritis and right hip pelvic osteotomy.

In a report dated July 6, 2006, attending physician, Dr. Taha Ahmad, indicated that appellant was seen on May 1, 2006. He provided a history and results on examination, opining appellant had 19 percent whole person impairment. Dr. Ahmad indicated that as of March 2, 2006 he recommended permanent restrictions of no lifting, pushing or pulling more than 10 pounds, no continuous walking, no climbing and no standing more than 15 to 20 minutes per hour or 2 to 3 hours per day. He stated that appellant could not work as a housekeeping aide and recommended a modified sedentary job.

By decision dated August 10, 2006, the Office issued a schedule award for 23 percent right leg impairment and 20 percent left leg permanent impairment. The period of the award was 123.84 weeks of compensation, from March 2, 2006 to July 15, 2008.

In a memorandum of telephone call (Form CA-110) dated August 20, 2008, the Office reported that according to the employing establishment appellant's employment was terminated effective June 3, 2007 for inappropriate conduct and failure to follow leave policy. The employing establishment indicated that appellant had been working in a light-duty position, stopped working on April 3, 2006 and did not return to work.

On November 18, 2008 appellant filed a recurrence of disability claim (Form CA-2a) commencing April 14, 2006. He indicated that he had stopped working on April 13, 2006. In a narrative statement, appellant asserted that he had never recovered from the original injury. He stated that he worked in a light-duty job folding gowns, but had to stand more than one hour per day and perform tasks contrary to his work restrictions. Appellant submitted a March 2, 2006 work capacity evaluation (OWCP-5c) from Dr. Ahmad outlining work restrictions as described in the July 6, 2006 report. In a May 11, 2006 form report, Dr. Ahmad diagnosed bilateral hip osteoarthritis, found appellant was permanently disabled from housekeeping aide but noted appellant was not incapacitated for light duty. In a May 18, 2006 report, he stated that the examination results were unchanged.

By decision dated January 27, 2009, the Office denied the claim for recurrence of disability. Appellant requested a telephonic hearing with an Office hearing representative, which was held on May 15, 2009. At the hearing appellant stated that his light-duty job required folding gowns and towels, which required him to stand for long periods and he had to perform "certain types of duties that were not really assigned to me...." He stated that folding sheets required two people and both people had to stand. According to appellant his hip condition was aggravated and he had to stop working in April 2006.

In a January 29, 2009 statement, the employing establishment stated that appellant's light-duty job of folding towels, gowns and sheets were to be performed in a sitting position,

with no lifting over 10 pounds and limited intermittent standing, walking, kneeling, bending and twisting. The position allowed a change from sitting to standing as needed for comfort. According to the employing establishment, appellant was removed from employment on June 3, 2007 on charges of inappropriate conduct, violation of transit benefit program policy, absence without leave and failure to follow leave request procedures. The employing establishment also indicated that the Merit Systems Protection Board had upheld the employing establishment's action.

By decision dated August 26, 2009, the hearing representative affirmed the January 27, 2009 decision.

LEGAL PRECEDENT

The Office's regulations define the term recurrence of disability as follows:

"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 to the work environment that caused the illness. This 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 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 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

ANALYSIS

Appellant was performing a light-duty position that involved folding gowns, towels and linens. He stopped working on or about April 13, 2006 and filed a claim for a recurrence of

¹ 20 C.F.R. § 10.5(x).

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).

disability. It is, as noted above, his burden of proof to establish the claim. The Board also notes that appellant received a schedule award from March 2, 2006 through July 15, 2008. Appellant would not be entitled to additional compensation for wage loss during this period even if a recurrence of disability was established. An employee cannot concurrently receive compensation under a schedule award and compensation for disability for work.⁴

With respect to a change in the nature and extent of the injury-related condition, the medical evidence does not establish a recurrence of disability on or after April 14, 2006. Appellant received treatment on May 1, 2006 from Dr. Ahmad, but he kept the same work restrictions as he had offered on March 2, 2006. Dr. Ahmad does not discuss a change in the employment injury as of April 14, 2006. None of the medical evidence of record provides a medical opinion with supporting medical rationale that establishes a change in the employment-related condition such that appellant could not perform the light-duty job.

Appellant has alleged that there was a change in the light-duty job, as he was required to exceed his work restrictions. There is no probative evidence of record supporting his contention. Appellant referred to “certain types of duties” that were not assigned to him, without further explanation. He stated that he had to stand to fold the items as it was a two person job, but it is not clear why the job would require more than the one to two hours of standing reported by Dr. Ahmad on May 1, 2006. The employing establishment indicated that the duties were intended to be performed while sitting and appellant could stand as needed. No probative evidence to the contrary was provided. There is no pertinent evidence that the employing establishment withdrew the position or that appellant was required to work outside his physical restrictions on or after April 14, 2006.

The Board accordingly finds appellant did not meet his burden of proof in this case. Appellant did not establish a change in the nature and extent of the injury-related condition or the light-duty job, and the Office properly denied the claim.

CONCLUSION

The Board finds appellant did not meet his burden of proof to establish a recurrence of disability on or after April 14, 2006.

⁴ *James A. Earle*, 51 ECAB 567 (2000); *Andrew B. Poe*, 27 ECAB 510 (1976).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 26, 2009 is affirmed.

Issued: June 11, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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