United States Department of Labor
Employees' Compensation Appeals Board

T.G., Appellant	)	
and	)	**Docket No. 10-5**
	)	**Issued: September 8, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Melville, NY, Employer	)	

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 30, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated September 1, 2009, which denied his claim for a recurrence. 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 met his burden of proof to establish a recurrence of disability for the period September 4 to 12, 2008 and from October 6, 2008 and continuing.

FACTUAL HISTORY

On June 21, 2005 appellant, then a 45-year-old driver, sustained injuries to the hand, ankle, head, chest and forearm when he was struck by a truck at work. He stopped work on June 21, 2005. On August 10, 2005 the Office accepted appellant's claim for a left talus fracture and multiple contusions. Appellant was placed on the periodic rolls and received appropriate compensation benefits. The Office authorized a subtalar arthroscopic debridement and talar exostectomy, which he underwent on March 22, 2007.

In a July 24, 2007 duty status report, Dr. John Feder, a Board-certified orthopedic surgeon, advised that appellant could return to regular duty as of October 1, 2007. In an August 28, 2007 narrative report, he also released appellant to full duty as of October 1, 2007. In an August 29, 2007 report, Dr. Feder advised that appellant could return to full duty with restrictions on October 1, 2007. He indicated that appellant could work for 8 hours a day and that he could lift, push or pull no more that 5 to 10 pounds, walk no more than 10 to 15 minutes a day and stand for up to 15 minutes per day. In a report dated November 9, 2007, Dr. Feder noted that appellant had to take the rest of the week off after stepping out of his truck and twisting his ankle that past week. He noted that appellant was going back to work that day. In a January 4, 2008 report, Dr. Feder noted that appellant had been working regular duty.

In a September 11, 2008 report, Dr. David Zaret, a Board-certified orthopedic surgeon and treating physician noted that appellant was off work since September 4, 2008 and was applying for disability. He noted that appellant needed to work modified duty for his diagnosis of osteoarthritis of the left ankle and foot. Dr. Zaret excused appellant from work from September 5 to 12, 2008 and advised returning to light duty.

On September 19, 2008 appellant filed a notice of recurrence of disability. He indicated that he stopped work on September 4, 2008. Appellant alleged that his left ankle "still flares up" and that he had pain in the joint and the left ankle. The employing establishment noted that on September 4, 2008 he left work early on annual leave. It advised that appellant was a no call and no show on September 5, 2008. The employing establishment noted that he took sick leave from September 6 to 12 and that on September 15, 2008, he worked for one hour and left on annual leave. It advised that appellant then dropped off his recurrence form and indicated that he was out until his claim was approved. The employing establishment also noted that he had a "horrible attendance record and has been disciplined for same." It advised that appellant was out from September 5 to 12, 2008 but they did not receive medical documentation until September 11, 2008. The employing establishment noted that his physician returned him to limited duty.[1]

In a letter dated September 23, 2008, the employing establishment noted that appellant was found fit to return to limited duty on September 12, 2008 and had not returned.

In an October 10, 2008 report, Dr. Feder diagnosed left ankle osteoarthritis and pain. He noted that appellant was working but was having a hard time standing. Dr. Feder advised that appellant was permanently disabled from his usual line of work.

In a letter dated October 17, 2008, the employing establishment advised appellant that he was being removed from employment effective November 22, 2008 for his failure to be regular in attendance. The removal notice noted that he had absences from work in June, July, August, September and October.

On December 9, 2008 appellant completed a second notice of recurrence form, in which he noted that he sustained a recurrence of disability on October 6, 2008. He reiterated that he

[1] Both appellant and the employing establishment indicated on the claim form that appellant returned to regular duty after his original injury.

had left ankle pain flare up and his left ankle never healed. Appellant also indicated that it was getting worse with weakness, joint stiffness, numbness and difficulty walking. The employing establishment noted that his accommodations were in accordance with his physician's restrictions and that he was working "limited duty when he reported."

In a letter dated December 10, 2008, the employing establishment noted that appellant filed a recurrence after learning of "his impending removal for attendance issues." It noted that the documentation provided by him did not explain his absences.

By letter dated January 16, 2009, the Office informed appellant of the type of evidence needed to support his claim and requested that he submit such evidence within 30 days.

Dr. Feder continued to treat appellant. He noted appellant's chief complaint of pain in the left foot and ankle.

By decision dated March 13, 2009, the Office denied appellant's claim on the grounds that the factual and medical evidence was insufficient to establish that he sustained a recurrence of disability causally related to the accepted employment injury. It found that the evidence did not establish a change in the nature and extent of appellant's injury-related disability or the nature and extent of his light-duty position.

On March 20, 2009 counsel requested a telephonic hearing, which was held on June 24, 2009. He indicated that appellant's injury was a comminuted fracture and he now had osteoarthritis. Counsel alleged that appellant went back to work for one day and the employer indicated it could not meet his restrictions, as it did not have a job for him. He alleged that the employer withdrew the limited-duty position. Counsel also alleged that the reason for appellant's poor attendance was the ankle injury. He indicated that appellant left his position because the employing establishment did not accommodate him. Appellant testified that, when he returned to work, he was put in the guard shack, for one day, which was sedentary. However, he indicated that the employing establishment made him go back to work on the road as a tractor-trailer driver.

Appellant indicated that he took a physical examination and was advised that he would have to return to full duty because the employer could not accommodate him on light duty. He alleged that he had to climb three to four feet to get in and out of the 18-wheeler truck. Appellant indicated that he had to remove containers which weighed about 150 to 200 pounds from the trailer. He indicated that he had to jump in and out of the trailer on a constant basis. Appellant alleged that, when he told his supervisor that he could not do this type of work due to his ankle, he was told to file a recurrence claim. He also testified that his absences were due to his work injury. Furthermore, appellant indicated that he was out of work from October 6 to 10, 2008. He indicated that he returned on October 11, 2008 for one day. Appellant indicated that, when he returned on October 15, 2008, he was served with a removal notice.

In a letter dated July 23, 2009, Robert Kasten, appellant's transportation manager, noted that appellant's attorney had exaggerated the extent of his injuries. He indicated that he was with appellant at the hospital, when the physician read the diagnosis, which included a possible hairline fracture. Mr. Kasten denied advising appellant that no light duty was available. He

noted that appellant did not inform him that his absences were due to his injury until he received a notice to attend a disciplinary hearing. Mr. Kasten advised that this was when appellant mentioned his doctor told him about light duty. He also indicated that appellant was advised to have his physician complete a duty status form regarding work restrictions; however, he did not submit the requested documentation. Mr. Kasten also noted that appellant provided him with information that he was out because his license was suspended. He asserted that appellant was not forced to work full duty and noted that appellant's physician had indicated that he was fit for duty. Mr. Kasten explained that appellant's vehicle was "automatic" and there were numerous schedules where the trailer was dropped off and loading was not an issue. He reiterated that limited duty was available.

In a letter dated August 10, 2009, the employing establishment reiterated that there were no problems until he stopped coming to work and appellant did not provide any medical documentation until after that date. It noted that the medical documentation provided by appellant did not indicate that appellant was unable to return to his work as a driver.

By decision dated September 1, 2009, the hearing representative affirmed the March 13, 2009 decision.

LEGAL PRECEDENT

The Office's regulations defines 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."[2]

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 substantive 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.[3]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.[4] This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the

[2] *J.F.*, 58 ECAB 124 (2006); *Elaine Sneed*, 56 ECAB 373, 379 (2005); 20 C.F.R. § 10.5(x).

[3] *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Terry R. Hedman*, 38 ECAB 222 (1986).

[4] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

claimant's diagnosed condition and the implicated employment factors.[5] The physician's opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[6]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[7]

ANALYSIS

Appellant's claim was accepted for a left talus fracture and multiple contusions. The Office authorized a subtalar arthroscopic debridement and talar exostecomy in 2007. Appellant filed a recurrence of total disability for the period September 4 to 12, 2008 and for the period October 6, 2008 and continuing. On January 16, 2009 the Office advised appellant of the type of medical and factual evidence needed to establish his claim for a recurrence of disability.

Appellant did not establish that his injury-related conditions spontaneously changed from September 4 to 12, 2008 and beginning October 6, 2008 which prevented him from working. To the extent that he returned to a light-duty position due to his accepted injury, he also has not shown a change in the nature and extent of the light-duty job requirements.

The medical reports with respect to the period September 4 to 12, 2008 and October 6, 2008 and continuing include a September 11, 2008 report from Dr. Zaret who advised that appellant was off work since September 4, 2008 and was applying for disability. Dr. Zaret noted that appellant needed to work modified duty for his diagnosis of osteoarthritis of the left ankle and foot. He excused appellant from work from September 5 to 12, 2008 and advised returning to light duty. The Board notes that osteoarthritis is not an accepted condition.[8] Additionally, Dr. Zaret did not explain how appellant's accepted condition had worsened such that he was no longer able to perform his duties. Furthermore, he did not demonstrate any knowledge of appellant's job requirements or explain how appellant experienced a spontaneous change of his accepted conditions that rendered him disabled. Thus, this report is insufficient to meet appellant's burden of proof.

In an October 10, 2008 report, Dr. Feder diagnosed left ankle osteoarthritis and pain. He noted that appellant was working but was having a hard time standing. Dr. Feder advised that

[5] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[6] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[7] *Walter D. Morehead*, 31 ECAB 188 (1986).

[8] *See T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009) (for conditions not accepted or approved by the Office as due to an employment injury, the claimant bears the burden of proof to establish that such conditions are causally related to the employment injury through the submission of rationalized medical evidence).

appellant was permanently disabled from his usual line of work. As noted, osteoarthritis is not an accepted condition. Dr. Feder did not explain how appellant's accepted condition had worsened such that he was not able to work. He also noted complaints of pain in the left foot and ankle in reports dated November 21, 2008 and January 23, 2009. Dr. Feder did not offer any opinion regarding how appellant's accepted condition had worsened such that he was not able to perform his duties. Thus, these reports are insufficient to meet his burden of proof.

The record in this case does not contain a medical report providing a reasoned medical opinion explaining why appellant's claimed recurrence of disability from September 4 to 12, 2008 and beginning October 6, 2008 was caused by the accepted conditions.[9] Therefore, has not shown a change in the nature and extent of his injury related condition.

The Board notes there is conflicting evidence from Dr. Feder in 2007 regarding whether appellant was released to regular duty. As noted, Dr. Feder issued reports that both released appellant to restricted duty and to full duty as of October 1, 2007. The record indicates that appellant initially returned to limited duty in a guard shack for one day but then began regular duties as a truck driver that he performed for nearly a year. Dr. Zaret, in his September 11, 2008 report, placed appellant on light duty but he did not clearly indicate if the employment injury was the reason that light duty was needed. Appellant asserted that he sustained a recurrence of disability because the employer did not have light duty available for him. The Board finds this argument without merit. Even if appellant had duty restrictions necessitated by his work injury, the evidence does not show that appropriate light duty was not available. In his July 23, 2009 letter, Mr. Kasten, an employing establishment manager, denied advising appellant that no light duty was available and advised that appellant was not forced to work full duty. He indicated that light duty was available and noted that appellant did not mention that he needed light duty until after he received a notice to attend a disciplinary hearing prior to his termination.[10] Mr. Kasten stated that appellant was advised to have his physician complete a duty status form regarding work restrictions but that appellant did not submit the requested documentation. Consequently, the Board finds that appellant not shown a change in the nature and extent of any light-duty job requirements that were necessitated by the accepted work injury.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability for the period September 4 to 12, 2008 and from October 6, 2008 and continuing.

[9] *Cecelia M. Corley*, 56 ECAB 662 (2005).

[10] *See Richard A. Neidert*, 57 ECAB 474 (2006); *John W. Normand*, 39 ECAB 1378 (1988) (a termination for cause, unrelated to a work injury, does not constitute a change in the nature and extent of light work and is not a basis for payment of compensation).

ORDER

IT IS HEREBY ORDERED THAT the September 1, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 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