

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

B.G., Appellant

and

**U.S. POSTAL SERVICE, NEW JERSEY
INTERNATIONAL & BULK MAIL CENTER,
Jersey City, NJ, Employer**

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**Docket No. 10-393
Issued: September 14, 2010**

Appearances:
Thomas S. Harkins, 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 November 30, 2009 appellant, through his representative, filed a timely appeal from the July 8, 2009 merit decision of the Office of Workers' Compensation Programs, which denied his recurrence claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant sustained a recurrence of disability on September 17, 2007 causally related to his March 4, 2003 employment injury.

FACTUAL HISTORY

On March 4, 2003 appellant, then a 50-year-old tractor-trailer operator, sustained an injury in the performance of duty when he slipped on ice and grease and twisted his right knee. The Office accepted his claim for right knee sprain. Appellant underwent right knee arthroscopy with partial meniscectomies, abrasion plasty and synovectomy. The Office paid compensation

for temporary total disability on the periodic rolls. In 2005 appellant returned to full-time work in a limited-duty position.

On February 20, 2008 appellant filed a claim for compensation alleging that he sustained a recurrence of disability on September 17, 2007 as a result of his March 4, 2003 employment injury. He alleged a spontaneous increase in symptoms. The employer controverted appellant's claim, stating:

“On 9/17/07 (same date of recurrence) employee complained of chest pain and was taken to the emergency room via ambulance (3956 medical record attached). Employee was working in a limited duty capacity for his accepted knee condition until 9/17/07 when he experienced non-job related chest pains.”

PS Form 3956, dated September 17, 2007, indicated that appellant was taken to the emergency room via emergency medical services with a complaint of chest pain.

Dr. Michael Cushner, a Board-certified orthopedic surgeon, treated appellant since March 2003. On November 19, 2008 he noted that appellant dealt with trucks “and hitch use on these trucks on a slippery surface,” but he did not describe the incident on March 4, 2003. Dr. Cushner explained that the accident exacerbated a previously asymptomatic underlying arthritis and caused damage to the meniscus and loosened cartilage, for which appellant underwent surgery.

Dr. Cushner noted appellant's difficulty returning to work due to multiple medical reasons, but he did not elaborate. He noted that the long commute was very difficult for appellant. “The patient's commute ranges from two and a half to four hours with long periods of sitting in the car with increased stress across the knee, making it swell and causes pain and discomfort.” Dr. Cushner stated that appellant would benefit from a shorter commute.

Dr. Cushner found that appellant had intermittent exacerbations and was limited by his long commute, which put increased stress across the knee requiring him to be out of work since accommodations were not made. “I believe there is a direct causal relationship between the patient's injury on March 4, 2003 and the subsequent condition he has had in his knee. There is an indirect association in that his need for medication as well as his immobility and stress across his body may have affected other organ systems but these have been evaluated by those specialties including his internal medical doctor and cardiologist.”

Appellant's representative submitted Dr. Cushner's report as part of a “Submission in Support of a Recurrence of Federal Employment Related Total Disability.”

On July 8, 2009 the Office issued a final decision denying appellant's recurrence claim. It noted that Dr. Cushner did not mention September 17, 2007 and did not explain why appellant suddenly could no longer work his limited-duty position beginning that date because of the claimed worsening of his accepted right knee sprain. The Office found Dr. Cushner's opinion to

be of diminished probative value. It noted nothing in his notes before or immediately after September 17, 2007 that showed a change in objective findings.¹

The Office also noted that the only medical evidence of appellant's work stoppage on September 17, 2007 indicated that he had chest pains and the first time a subsequent medical note mentioned his right knee was on January 22, 2008, four months after the claimed recurrence. It found no evidence to explain how appellant's sudden onset of chest pain on September 17, 2007 was related to the March 4, 2003 employment injury.

On appeal appellant's representative argues that his submission in support of a recurrence of federal employment-related total disability establishes that appellant's total disability beginning September 17, 2007 was causally related to the injury and conditions sustained as a result of the March 4, 2003 employment injury.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.² "Disability" means 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.³

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 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 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 he 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.⁵

¹ Dr. Cushner's August 28, 2007 note indicated that appellant was evaluated for his right knee internal derangement: "As a result of that evaluation, the patient may return to work August 28, 2007 to October 30, 2007 with restrictions."

² 5 U.S.C. § 8102(a).

³ 20 C.F.R. § 10.5(f).

⁴ *Id.* at § 10.5(x).

⁵ *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

ANALYSIS

Appellant stopped work in his limited-duty position on September 17, 2007 and filed a claim for compensation. He therefore has the burden to establish that his total disability beginning that date was causally related to a change in the nature and extent of his injury-related condition.⁶

To support his claim, appellant submitted the November 19, 2008 report of his orthopedic surgeon, Dr. Cushner, but there are a number of problems with this report. Dr. Cushner never acknowledged appellant's work stoppage on September 17, 2007, which is the crux of appellant's recurrence claim. He noted that appellant worked with trucks and hitches but never specifically described how appellant injured himself on March 4, 2003. Dr. Cushner never explained how appellant's right knee sprain, or residuals of the authorized surgery, spontaneously changed or progressed such that appellant could no longer work his limited-duty job on September 17, 2007. He did not attempt to reconcile the evidence showing that appellant stopped work on September 17, 2007 because he was having chest pain and had to be taken to the hospital emergency room; and he did not show how his evaluations of appellant's right knee prior to September 17, 2007 demonstrated a worsening of the accepted right knee sprain or residuals of the authorized surgery. Therefore, in a number of significant respects, Dr. Cushner's November 19, 2008 report is not supportive of appellant's recurrence claim. It is not directed to the issue raised by appellant's claim. It is not based on a complete factual and medical background⁷ and it is not well rationalized.⁸ The Board finds that this evidence carries little if any probative weight on the issue of recurrence and is insufficient to discharge appellant's burden of proof. The Board will therefore affirm the Office's July 8, 2009 decision denying his recurrence claim.

On appeal, appellant's representative argues that Dr. Cushner's report establishes that appellant's total disability beginning September 17, 2007 was causally related to the injury and conditions sustained as a result of the March 4, 2003 employment injury, but, as the Board has explained, Dr. Cushner did not mention appellant's work stoppage on September 17, 2007. Instead, he indicated that appellant's accident in March 2003 exacerbated an underlying arthritis, which the Office does not accept. Dr. Cushner attributed a worsening of appellant's knee condition to undisclosed intermittent exacerbations and to his long commute, but that is more indicative of an intervening injury than it is any spontaneous change in the accepted medical condition. It may be, as he reported, that there is a direct causal relationship between appellant's March 4, 2003 injury and the subsequent condition of his knee, but there is no evidence that appellant stopped work on September 17, 2007 because of a change in the nature and extent of his injury-related condition. It appears that appellant stopped work because of chest pain.

⁶ Appellant does not argue a change in the nature and extent of the limited-duty job requirements.

⁷ *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

⁸ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954) (medical conclusions unsupported by rationale are of little probative value).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability on September 17, 2007 causally related to his right knee injury on March 4, 2003. The evidence does not support his claim.

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 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