

FACTUAL HISTORY

On March 8, 1988 appellant, then a 37-year-old firefighter, filed a traumatic injury claim alleging that on March 5, 1988, while stepping out of the truck to test pump operations, he slipped and fell on ice. He twisted on his right knee. On October 20, 1989 OWCP accepted appellant's claim for torn right medial meniscus and torn right anterior cruciate ligament. On April 19, 1988 appellant had a diagnostic and operative arthroscopy with partial medial meniscectomy. On August 28, 1991 he underwent a right knee anterior cruciate ligament reconstruction using Hamstring autograft.

Appellant was treated by Dr. Megan Wright, a Board-certified family practitioner. In an October 2, 2006 report, Dr. Wright noted that appellant had chronic knee pain and was totally disabled. In an October 10, 2008 report, she noted that appellant would be an appropriate candidate for orthopedic referral to consider repeat knee replacement.

OWCP referred appellant to Dr. Jonathan Black, a Board-certified orthopedic surgeon, for a second opinion. In a February 2, 2009 report, Dr. Black opined that appellant was not capable for performing full-time duty as a firefighter but was capable of performing sedentary duties of an alarm room operator full time. He advised that appellant has no other condition than his right total knee arthroplasty that prevented appellant from returning to work in his preinjury capacity. Dr. Black noted that as appellant had not worked for 18 years he would benefit from a functional capacity evaluation and a work-hardening program. He opined that appellant suffered from a permanent aggravation of the preexisting condition of arthritis of the right knee as well as an acute anterior cruciate ligament tear following his injury.

On August 5, 2009 the employing establishment offered appellant a position as an office aide.

In an August 12, 2009 letter, Dr. John J. Carthy, a treating Board-certified family practitioner, stated that appellant informed him that he received a letter from the employing establishment to resume work and, if he did not return to work as an office aide, he would lose his disability benefits. He noted that appellant had been disabled for 20 years secondary to an injury that occurred when he fell off a fire truck in 1988 and injured his left knee, which resulted in a knee replacement in 1998. Dr. Carthy noted that appellant's arthritis and chronic pain increased over the years and he continued to be totally disabled from any significant gainful employment because of his symptoms. He stated that appellant was able to sit without pain for 10 minutes to an hour at which time he must stand up and move about. Dr. Carthy noted an essentially normal physical examination of the right knee which was severely painful at times. He noted markedly limited range of motion and flexion and pain with weight bearing. Due to instability of the knee, appellant's comfort level was unpredictable and flare ups of the knee would probably limit his attendance at work fairly frequently. Dr. Carthy opined that appellant resuming work was not possible.

By letter dated October 27, 2009, OWCP indicated that it had reviewed the proposed job offer of employment and found it to be suitable. Appellant was informed that, if he failed to accept the offered position and did not report for work, reasons in justification of this failure would be considered by OWCP prior to termination of benefits.

In a November 5, 2009 report, Dr. Carthy stated that appellant had been his patient since March 2009. He noted that there were three elements which prevented appellant from gainful employment, whether active or sedentary activity. Dr. Carthy noted that appellant has severe degenerative joint disease which would flare up periodically requiring him to miss work and would increase his stress level due to his high work ethic. He noted that appellant's hearing loss was a handicap even from office work as communicating with fellow workers as well as attempting to use the telephone will be difficult if not impossible. Finally, Dr. Carthy noted that appellant's anxiety, depression and panic disorder precluded his working effectively in any environment. He opined that denial of appellant's total disability after 18 years was unreasonable and outrageous.

By decision dated December 23, 2009, OWCP terminated appellant's compensation benefits effective that date because it found that the evidence established that he refused to accept suitable work.

On January 10, 2010 appellant requested reconsideration of the December 23, 2009 decision.

In a statement received by OWCP on January 11, 2010, appellant noted that on December 21, 2009 he reported to work and sat through a video. During this period, he became sick to his stomach because of stress, anxiety and pain from this right knee and back. Appellant went to his vehicle and leaned and his knee gave out on the slippery ground and he fell on to his back thereby injuring himself.

On February 10, 2010 appellant filed a notice of recurrence of the March 5, 1988 injury. He listed the date and hour of recurrence as May 9, 1988 and listed the time his pay stopped as December 23, 2009. Appellant stated that after his right knee injury he was put on a light-duty job in the alarm room that the job was stressful because of his lack of hearing and inability to move around properly, that he was making mistakes that could injure or cause death to fellow firefighters. On February 11, 2012 the employing establishment controverted the recurrence claim, noting that he returned to work for less than 2.5 hours and then went absent without leave (AWOL) and was still AWOL.

On March 30, 2010 OWCP vacated the December 23, 2009 decision, finding that there was no basis for finding that appellant refused to perform suitable work when offered. However, it found that compensation could not be reinstated as there was a pending claim for recurrence of disability. OWCP stated that, after a decision was rendered on the claim for recurrence of disability, a determination concerning entitlement to compensation for wage loss could be made.

On May 25, 2010 OWCP denied appellant's claim for a recurrence as the evidence was not sufficient to establish a current medical condition due to the accepted work injury.

On June 2, 2010 OWCP received appellant's request for an oral hearing before an OWCP hearing representative. At the hearing held on September 16, 2010, the hearing representative stated that the issue was whether appellant sustained a recurrence of disability effective December 23, 2009. Appellant testified that the job offered was not suitable because he was having a lot of problems with anxiety, stress and depression, problems being around people and

that his hearing was extremely difficult. He stated that when he was around people this caused anxiety and resulting sickness. Appellant noted that, while attending a safety hearing in an enclosed area, he had trouble being in the enclosed area and on a break he went outside because he felt sick. He discussed ongoing problems with anxiety, hearing and his knee. Appellant testified that Dr. Black did not ask him questions or look at his knee.

By decision dated November 24, 2010, an OWCP hearing representative affirmed the May 25, 2010 decision as the evidence failed to establish a recurrence of disability.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his federal employment, OWCP may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.² Generally, OWCP can meet this burden by showing that the employee returned to work, even if that work is light duty rather than the date-of-injury position, if thereafter the employee earns no less than he had before the employment injury.³ A short-lived and unsuccessful attempt to return to duty, however, does not automatically discharge OWCP's burden to justify termination of compensation.⁴

ANALYSIS

OWCP accepted that appellant suffered from a torn right medial meniscus and a torn right anterior cruciate ligament as a result of an employment-related injury on March 5, 1988. It paid total disability compensation.

Based on the opinion of the second opinion physician, Dr. Black, OWCP determined that the position offered to appellant by the employing establishment as an office aide was suitable. This determination was opposed by appellant's treating physician, Dr. Carthy. Nevertheless, OWCP terminated appellant's compensation benefits in a decision dated December 23, 2009 as it found that appellant refused to accept suitable work. OWCP vacated this decision by a March 30, 2010 decision. However, it determined that compensation could not be reinstated as there was a pending claim for recurrence.

However, the record reveals that appellant attempted to return to work on December 21, 2009. Appellant only worked two and one-half hours on this date. He alleged that, after watching a video, he felt ill and went to the parking lot because he thought he would have to vomit. Appellant stated that he went to his vehicle and leaned and that his knee gave out on the slippery ground and he fell on his back and sustained an injury. OWCP treated his claim as a claim for a recurrence.

² *I.J.*, 59 ECAB 524 (2008); *D.S.*, Docket No. 10-2076 (issued August 10, 2011).

³ *Billy Sinor*, 35 ECAB 419 (1983).

⁴ *L.H.*, Docket No. 10-1209 (issued April 3, 2011).

However, in treating appellant's claim as a claim for recurrence, OWCP erroneously placed the burden of proof on appellant to establish continuing compensation. A short-lived return to work does not shift the burden of proof regarding employment-related disability.⁵ The Board has held that such a shift in burden of proof is not appropriate when there is a brief return to work and the medical evidence does not establish that the claimant could continue to perform the light-duty job.⁶

The medical evidence does not clearly establish that appellant's employment-rated disability had ceased by December 21, 2009. There is no medical evidence which shows that appellant no longer had residuals of his March 5, 1988 employment injury on or after December 21, 2009. All of the medical evidence of record indicates that appellant was either partially or totally disabled due, in part, to his employment-related knee injury. Appellant's treating physicians, Dr. Wright and Dr. Carthy, both opined that appellant remained totally disabled due to his employment injury. Dr. Black, the second opinion physician, opined that appellant suffered from a permanent aggravation of his preexisting condition of arthritis of the right knee as well as an acute anterior cruciate ligament tear following his injury. Dr. Black, however, found that appellant was capable of working within specific restrictions.

The Board finds no probative medical evidence establishing that appellant's employment-related condition had ceased on or after December 21, 2009. Although in its November 24, 2010 decision OWCP indicates that it was denying appellant's claim for a recurrence, in effect it impermissibly terminated appellant's compensation benefits,⁷ which it failed to reinstate following the December 23, 2009 termination decision was vacated. It remains OWCP's burden of proof to terminate compensation, and the Board finds that OWCP has not met its burden in this case.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation effective December 21, 2009 and that appellant is entitled to continuing compensation.

⁵ *Cheryl A. Weaver*, 51 ECAB 308 (2000).

⁶ *Fred Reese*, 56 ECAB 568, 571-572 (2005).

⁷ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 24, 2010 is reversed.

Issued: December 14, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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