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

| | | |
|---|---|---|
| **H.H., Appellant** | ) | |
| **and** | ) | **Docket No. 11-109** |
| | ) | **Issued: July 22, 2011** |
| **U.S. POSTAL SERVICE, POST OFFICE, Portland, OR, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On October 19, 2010 appellant filed an appeal from a September 8, 2010 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 is entitled to the compensation, based on his earnings as a supervisor, for the period commencing January 17, 2009.

On appeal, appellant asserts that OWCP did not request evidence regarding his claim against the employing establishment.

[1] 5 U.S.C. §§ 8101-8193.

## ***FACTUAL HISTORY***

On June 12, 2008 appellant, then a 46-year-old customer service supervisor, filed a traumatic injury claim alleging that he injured his left knee on June 5, 2008 when he performed a carrier inspection in a cramped postal vehicle that aggravated a prior knee injury. He stopped work that day and returned on June 7, 2008.

By report dated June 19, 2008, Dr. James R. Loch, a Board-certified orthopedic surgeon, advised that appellant was having retropatellar knee pain and sciatica in the same leg and for the next three months should avoid prolonged sitting, especially with the knee flexed more than 75 degrees, and should avoid deep steps of more than eight inches and excessive stair climbing and should not ride in trucks. Walking was fine.

OWCP accepted that he sustained employment-related contracture of tendon (sheath) of the left knee.

On November 3, 2008 Dr. Loch noted that appellant experienced episodic popping and catching of the knee. He noted that appellant continued in physical therapy. A November 11, 2008 magnetic resonance imaging (MRI) scan of the left knee demonstrated postsurgical changes related to quadriceps tendon repair, degeneration of the posterior horn of the medial meniscus with no evidence of meniscal tear, moderate osteoarthritis with evidence of chondromalacia patellae, subchondral cystic changes and a small ganglion cyst.

On April 16, 2010 appellant filed a claim for compensation beginning January 17, 2009, stating that he was downgraded at that time. The employer advised that appellant voluntarily requested to return to craft on January 9, 2009. It submitted a January 9, 2009 e-mail from appellant to the postmaster in which he stated that he was renewing his request to return to craft as of that day because he had received a craft offer. Appellant stated, "This was not an easy decision to make on my part. The events of the past few months have made it very clear that supervisor/management with the U.S. Postal Service is not a career path for me to pursue." He stated that a return to craft would allow him time to undergo the "extensive treatments necessary to lead and healthy and productive life for me and my family." A notification of personnel action dated January 21, 2009 noted that appellant requested to return to craft as soon as possible. Appellant's return to craft was more than two years after promotion, and the effective date was January 17, 2009.

On January 20, 2009 Dr. David P. Ushman, Board-certified in emergency and occupational medicine, noted that appellant's left knee problems began in 2005 when he was playing basketball and sustained a rupture of the patella tendon. He provided findings on physical examination and advised that appellant was medically stationary and released to regular work with no restrictions. In reports dated February 11, 2010, Dr. Ushman noted that appellant was now working as a postal clerk. He diagnosed left knee patellar tendinitis and redirected that appellant was released to regular work without restrictions. On February 4 and March 25, 2010 Dr. Loch noted that appellant had complaints of pain and sensitivity around the knee. He provided findings and advised that appellant continue with strengthening exercises and return in August.

By letter dated April 27, 2010, OWCP informed appellant of the evidence needed to support his claim for partial wage loss. Appellant was asked to submit a detailed medical report and evidence to show that his employer removed him from regular work because of the employment-related condition. On May 24, 2010 he responded that he requested to be reassigned to a station with all walking routes. Appellant had a pending federal trial based on his allegation that the employing establishment violated postal policy regarding injured workers because he was not allowed time off beginning in June 2008 to attend medical appointments for his wife and his approved condition.

In a May 20, 2010 report, Dr. Loch noted that appellant had been his patient since he sustained a left patellar tendon rupture on May 29, 2006 that was surgically repaired on June 1, 2006. This resulted in keloid formation and appellant had significant difficulty regaining full flexion of the knee following the injury with episodic retropatellar pain, including in May and June 2008 when he sat in a mail delivery vehicle with his knees fully flexed. Dr. Loch stated that appellant had physical therapy following the 2008 episode, when he developed a complex pain syndrome when his knee became sensitive to light touch with painful simple range of motion. He stated that appellant continued to have pain secondary to patellar tendinitis with limited knee flexion and would continue to have episodic flares. Dr. Loch stated that appellant had not fully recovered from the 2008 episode and diagnosed patellofemoral arthritis, chronic nonmalignant pain, keloid and contracture of knee. He advised that from the time of injury in 2008 appellant had restrictions of avoidance of repetitive stair activity, squatting, prolonged sitting (preferably with ability to extend the knee while sitting) and stepping down deep steps.[2]

By decision dated September 8, 2010, OWCP denied appellant's claim for wage-loss compensation due to reduced pay based on his transfer to the craft position beginning on January 17, 2009. It found that the medical evidence did not establish that he was placed in lower paying work due to the June 5, 2008 employment injury.

## ***LEGAL PRECEDENT***

Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[3] Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.[4] Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[5]

[2] Appellant also submitted medical evidence regarding lumbar disc disease and other medical conditions not employment related.

[3] *C.S.*, 59 ECAB 686 (2008).

[4] *See* 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[5] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[6]

## ***ANALYSIS***

The Board finds that appellant is not entitled to wage-loss compensation based on his date-of-injury pay rate as a supervisor because he voluntarily returned to a craft position. There is no evidence of record to establish that, beginning on January 17, 2009, he did not have the capacity to earn the wages he was receiving as a supervisor at the time of the June 5, 2008 employment injury. On January 9, 2009 appellant requested to return to craft on that day, stating that he had been offered a craft position. He returned to a craft position effective January 17, 2009. The employing establishment stated that appellant would have continued to occupy his position as supervisor of customer services had he not requested to return to craft.

The medical evidence does not establish that appellant could not perform the duties of his supervisory position as of January 17, 2009, due to residuals of his accepted left knee condition. Dr. Ushman returned appellant to full duty without restrictions on January 20, 2009 and February 11, 2010. While Dr. Loch provided restrictions to appellant's physical activity, stating that he should avoid repetitive stair activity, squatting, prolonged sitting, and stepping down deep steps, appellant presented no evidence to show that these restrictions violated the physical requirement of either the supervisory position he held until January 17, 2009 or the clerk position he has since held. Moreover, there is no evidence that he was not granted time off to attend medical appointments beginning in June 2008. While appellant alluded to a claim against the employing establishment, he presented no evidence regarding the action. For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[7]

The record supports that appellant changed to the craft position at his own volition and not due to the accepted injury. When a claimant stops working or changes to a lower paying position for reasons unrelated to his employment-related physical condition, he has no disability within the meaning of FECA.[8]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

[6] *Paul E. Thams*, 56 ECAB 503 (2005).

[7] *Amelia S. Jefferson*, 57 ECAB 183 (2005).

[8] *See Richard A. Neidert*, 57 ECAB 474 (2006).

## ***CONCLUSION***

The Board finds that appellant did not establish that he is entitled to the wages he earned as a supervisor for the period from January 17, 2009 and continuing.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 8, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 22, 2011
Washington, DC

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

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

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