

FACTUAL HISTORY

On May 12, 2005 appellant, then a 45-year-old aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that on May 9, 2005 he sustained injury after falling out of a helicopter onto his back and hand while inserting a rigger pin in the hanger. By letter dated February 25, 2010, OWCP accepted appellant's claim for a herniated disc at L4-5 and lumbar disc disease.

On June 28, 2010 appellant filed a claim for wage-loss compensation (Form CA-7) for the period March 2, 2009 through June 25, 2010.² He had separated from the employing establishment. By letter dated August 2, 2010, OWCP advised appellant to submit a Form CA-1 if a new work incident had caused a condition to recur. Appellant was also advised to submit an occupational disease claim (Form CA-2) if work activities or factors occurring over more than one day caused a condition to recur. He was advised to submit a recurrence claim (Form CA-2a) if he was claiming a recurrence of disability due to his employment-related injuries without an intervening incident. OWCP stated that the current evidence of record was insufficient to proceed with further development of appellant's claim.

In an August 30, 2010 letter, appellant, through his attorney, contended that he stopped work because he was removed from the employing establishment on the grounds that his May 9, 2005 employment injuries disqualified him from membership in the Army National Guard. Counsel stated that appellant did not file any claim for wage-loss compensation following his accepted injuries. He contended that there was no need to file a Form CA-2a or Form CA-2 because appellant had filed a CA-7 form following his removal on February 27, 2009. Counsel requested payment of compensation and placement on the periodic rolls by OWCP for future payments.

On November 5, 2010 appellant filed a Form CA-2a alleging that he sustained a recurrence of disability on March 2, 2009. He stated that, following his accepted injuries, he performed his usual work duties with no limitations. Appellant reiterated his prior contention that he was removed from the employing establishment because his accepted injuries disqualified him from membership in the Army National Guard.

An employing establishment health unit physical profile dated May 22, 2008 rated appellant's ability to serve as a soldier in the Army National Guard. Appellant was restricted from carrying an assigned weapon, moving a fighting load at least eight miles and constructing an individual fighting position. He could not perform push-ups or sit-ups. Appellant could not engage in unlimited walking or running and lower or upper body weight training. He had restricted motion, disc disease and recurrent shoulder dislocation. The employing establishment determined that appellant did not meet retention standards.

On May 22, 2008 an employing establishment health unit surgeon reviewed the medical reports of Dr. Roy M. Shannon, an attending Board-certified internist. Appellant had a herniated nucleus pulposus at L4-5 and L5-S1, moderate stenosis at L1-2 and L5-S1 and disc disease. The employing establishment reiterated that he was restricted from carrying a weapon or engaging in

² On August 3, 2010 OWCP issued a decision denying appellant's claim for a schedule award.

lower or upper body weight training. Appellant was also restricted from wearing body armor, lifting more than 10 pounds, engaging in combat and being deployed. A medical retirement was recommended on the grounds that he was physically unable to perform the minimum duties of a soldier, which included firing an individual weapon, wearing a ballistic helmet and engaging in aerobic activities such as, a two-mile run. The employing establishment noted that appellant did not deploy with a unit on a previous assignment.

By letter dated June 27, 2008, the employing establishment advised appellant that he no longer met its medical standards for retention in accordance with Chapter 3, AR 40-501. Appellant was provided with several options which included separation from the Army National Guard, an appeal to an active component nonduty physical evaluation board for reevaluation or referral to the physical disability evaluation system for disqualifying service-connected conditions. Appellant was advised about the penalty provisions if he failed to select one of the above options by his suspense date of August 27, 2008.

By letter dated December 7, 2010, OWCP requested that appellant submit additional factual and medical evidence in support of his recurrence claim. It asked for a rationalized medical report from an attending physician which described a history of medical examinations, treatment and the alleged recurrence of disability, medical findings, a firm diagnosis, periods of total and partial disability with restrictions and an opinion with medical reasons on whether and how his current condition was caused by his May 9, 2005 employment injuries. OWCP also requested that the employing establishment submit factual evidence regarding appellant's claim.

In a January 3, 2011 letter, the employing establishment controverted appellant's claim. It contended that he was a full-duty employee prior to his alleged recurrence of disability. Appellant was never assigned light-duty work. The employing establishment asserted that he received retirement benefits at the time of his alleged recurrence of disability. It submitted personnel records which included appellant's December 10, 2004 application for employment and a SF-50 form which indicated that his disability retirement was effective February 28, 2009. A description of his aircraft mechanic position stated that the position required military membership.

In a February 3, 2011 decision, OWCP denied appellant's recurrence of disability claim. The medical evidence was found insufficient to establish that his disability on March 2, 2009 was due to his May 9, 2005 employment injuries.

LEGAL PRECEDENT

A recurrence of disability is the 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, which caused the illness.³

A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which he claims

³ 20 C.F.R. § 10.5(x); R.S., 58 ECAB 362 (2007).

compensation is causally related to the accepted employment injury.⁴ Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and his employment injury.⁵ This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury.⁶ Moreover, the physician's conclusion must be supported by sound medical reasoning.⁷

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.⁸ In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship.⁹ While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.¹⁰

ANALYSIS

Appellant claimed that he sustained a recurrence of disability on March 2, 2009 when his regular-duty aircraft mechanic position was withdrawn on the grounds that he was no longer physically able to serve as a soldier in the Army National Guard. He retired as of February 28, 2009. Appellant did not contend that the accepted lumbar conditions had worsened such that he was unable to perform the duties of his regular-duty position. The Board finds that he sustained an employment-related recurrence of total disability when his civilian position was withdrawn by the employing establishment effective February 28, 2009, the date of his retirement.

The Board notes that appellant's aircraft mechanic position required membership in the Army National Guard. The May 22, 2008 employing establishment health unit physical profile found that he did not meet its retention standards for a soldier in the Army National Guard. It found that appellant had restricted motion, disc disease and recurrent shoulder dislocation. The employing establishment also found that he could not carry an assigned weapon, move a fighting load at least eight miles or construct an individual fighting position. In addition, appellant could

⁴ *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

⁵ *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139 (1993).

⁶ *Ricky S. Storms*, 52 ECAB 349 (2001); *see also* 20 C.F.R. § 10.104(a)-(b).

⁷ *Alfredo Rodriguez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

⁸ *See Ricky S. Storms*, *supra* note 6; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

⁹ For the importance of bridging information in establishing a claim for a recurrence of disability, *see Richard McBride*, 37 ECAB 748 at 753 (1986).

¹⁰ *See Ricky S. Storms*, *supra* note 6; *Morris Scanlon*, 11 ECAB 384, 385 (1960).

not perform push-ups or sit-ups and engage in unlimited walking or running and lower or upper body weight training. The May 22, 2008 employing establishment health unit state surgeon's case review recommended medical retirement on the grounds that he was physically unable to perform the minimum duties of a soldier. These duties included firing an individual weapon, wearing a ballistic helmet and engaging in aerobic activities such as, a two-mile run. The employing establishment reviewed the reports of Dr. Shannon, an attending physician, which provided a diagnosis of herniated nucleus pulposus at L4-5 and L5-S1, moderate stenosis at L1-2 and L5-S1 and disc disease. It noted that, in addition to appellant's restrictions related to carrying a weapon and engaging in lower or upper body weight training, he could not wear body armor, lift more than 10 pounds, engage in combat or be deployed. The employing establishment noted that he did not deploy with a unit on a previous assignment.

On June 27, 2010 the employing establishment medically disqualified appellant for military membership based on the noted profile and review. It stated that he no longer met its medical standards for retention and advised him to select from several options which included separation from the Army National Guard by August 27, 2008.

The Board finds that the evidence establishes that appellant's civilian aircraft position was withdrawn on the grounds that he was physically unable to perform his required military duties as of February 28, 2009 due to the accepted employment conditions. Appellant has established that he sustained an employment-related recurrence of total disability when his aircraft position work was withdrawn by the employing establishment effective February 28, 2009.

The instant case can be distinguished from the Board's line of cases dealing with claims arising from individuals employed in a dual capacity who were injured while on active military duty. In *Patrick O'Hara*,¹¹ the claimant fractured his right wrist while on annual active duty in the Army Reserve. The Board noted that he was not injured while in the performance of duty under FECA, as his injury while on active duty had an insufficient relation to the performance of his federal civilian duties. In *Jerry C. Gilliam*,¹² the claimant filed a claim for an emotional condition after being discharged by the Army National Guard for exceeding weight standards. The Board denied the claim, noting that the weight requirement was solely imposed by his military employment such that his resulting emotional condition did not have a sufficient relationship to the performance of his civilian duties.¹³ In *Evelyn Kay Cavness (Jimmy L. Cavness)*,¹⁴ the Board denied a widow's claim for death benefits. It found that the employee's death on February 25, 1986 was causally related to a June 22, 1984 myocardial infarction which arose while he was in the line of duty on an active-duty training mission.

¹¹ 34 ECAB 493 (1982).

¹² 39 ECAB 1003 (1988).

¹³ *Id.* The Board also found against the claimant's allegations that he was harassed by his civilian supervisors and coworkers.

¹⁴ 40 ECAB 1016 (1989).

Appellant's accepted herniated disc at L4-5 and lumbar disc disease arose from his civilian employment as an aircraft mechanic and not from active military duty. As noted, the aircraft mechanic position description stated that military membership was required. The Board has not precluded coverage where the injury results from civilian duties and disqualifies the employee for a military status that is required for civilian employment.¹⁵ As the employing establishment's disqualification of appellant from the Army National Guard due to the accepted conditions precluded him from membership in the military which was required by his civilian aircraft mechanic position, the Board finds that he sustained a recurrence of disability and is entitled to compensation for the claimed period. Therefore, the Board will reverse OWCP's March 3, 2011 decision.

CONCLUSION

The Board finds that appellant established that he sustained a recurrence of disability causally related to the May 9, 2005 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 4, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

¹⁵ *Michael A. Vestuto*, n.3, Docket No. 00-184 (issued January 29, 2001).