

FACTUAL HISTORY

On December 21, 2011 appellant, then a 41-year-old federal air marshal, filed a traumatic injury claim alleging that, on that date, while conducting room clearing training, he twisted his right knee. On February 21, 2012 OWCP accepted his claim for unspecified internal derangement of right knee. On February 21, 2012 it made appellant a limited-duty part-time job offer, which he accepted on the same date. Appellant continued to receive disability compensation for the hours that he did not work.

On April 9, 2012 appellant filed a notice alleging a recurrence of the December 21, 2011 accepted injury commencing on March 23, 2012. He noted that it was the same injury but that it was just getting worse and that his right knee was unstable and “gave out” causing falls. Appellant claimed compensation for total disability beginning March 25, 2012.

In an attending physician’s report dated March 19, 2012, Dr. Nitin Banwar, appellant’s treating Board-certified orthopedic surgeon, noted that while in training appellant was ascending stairs and he slipped on a wet landing and twisted his right knee. He diagnosed right knee medial meniscus tear with arthritic changes. Dr. Banwar opined that appellant was partially disabled from December 28, 2011 until the present time. In a note dated March 23, 2012, he assessed appellant with dislocation of right knee, tear of medial cartilage or meniscus and osteoarthritis localized primarily lower leg. Dr. Banwar noted that they had not yet received authorization for his arthroscopic medial meniscectomy and chondroplasty. He indicated that, at this point, with appellant’s instability, he is not considered safe for any sort of work and will be taken out of work for two months beginning today. In April 2 and May 18, 2012 work capacity evaluations, Dr. Banwar noted that appellant was taken out of work due to his instability and that he is not considered safe for any sort of work. In a May 18, 2012 report, he indicated that appellant was scheduled for right knee arthroscopy on June 15, 2012 and that he was disabled from May 3, 2012 through present. Dr. Banwar noted that appellant’s disability was caused by the employment incident.

On April 20, 2012 OWCP authorized appellant’s arthroscopic surgery.

By decision dated June 11, 2012, OWCP denied appellant’s claim for compensation for the period March 25 through June 2, 2012.

On June 15, 2012 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. On this date he also underwent a diagnostic arthroscopy, arthroscopic partial medial meniscectomy with chondroplasty of the patellofemoral joint and the medial femoral condyle.

In a note countersigned by Dr. Banwar and dated August 14, 2012, a nurse practitioner asked that appellant be excused from work from March 23 to July 30, 2012 due to illness/injury. The note indicated that, due to increased instability in his right knee, appellant had been taken out of work fully for the listed dates.

At the hearing held on October 1, 2012, appellant testified that, in February or March 2012, he was having problems with his knee because the surgery had not been authorized

yet and the condition was worsening, so his physician took him out of work on March 23, 2012. He noted that he had surgery on June 15, 2012 and that between March 23 and June 15, 2012 he stayed home with his knee “up.” Appellant testified that when he returned to work after the initial injury in December 2011, he only performed light duty and that he was not able to tolerate that job.

By decision dated November 28, 2012, the hearing representative affirmed the June 11, 2012 decision.

LEGAL PRECEDENT

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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.² 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 (except when such withdrawal occurs for reason of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.³ A person who claims a recurrence of disability has the burden to establish by the weight of the substantial, reliable and probative evidence that the disability for which he claims compensation is causally related to the accepted employment injury.⁴

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she 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 or she 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

ANALYSIS

OWCP accepted appellant’s claim for unspecified internal derangement of the right knee and paid compensation and medical benefits. Appellant returned to part-time limited-duty work on February 21, 2012. However, he alleged that, as of March 23, 2012, he was unable to do any work and, accordingly, he filed a claim for total disability compensation beginning that date. Appellant underwent approved arthroscopic surgery on June 15, 2002 and total disability compensation benefits were reinstated. Accordingly, the issue is whether he is entitled to

²20 C.F.R. § 10.5(x).

³*Id.*

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

⁵*See also C.M.*, Docket No. 12-1730 (issued April 3, 2013); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

compensation for total disability for the period March 25 through June 2, 2012, the period for which OWCP denied total disability compensation.

In support of his claim for compensation for that period appellant submitted reports by his treating Board-certified orthopedic surgeon, Dr. Banwar, who noted that appellant had dislocation knee, tear of medial cartilage of meniscus and osteoarthritis in lower leg. Dr. Banwar indicated that, at that point, with the instability in appellant's knee, he was not considered safe for any sort of work and he took appellant "out of work" effective that date. In an August 14, 2012 note countersigned by Dr. Banwar, the nurse practitioner indicated that appellant was to be excused from work from March 23 to July 30, 2012 due to increased instability in his right knee. However, appellant was working limited-duty part-time work prior to March 23, 2012. Dr. Banwar did not provide a satisfactory rationalized opinion explaining why appellant was no longer able to continue in his limited-duty job. Furthermore, it appears that his opinion on disability is mostly based on appellant's own subjective complaints and a fear-of-future injury. It is well established that the possibility of future injury constitutes no basis for the payment of compensation.⁶

The Board finds that appellant failed to establish a recurrence of disability from March 25 through June 2, 2012. The medical evidence fails to establish a change in the nature and extent of the injury-related condition resulting in his inability to perform the duties of his modified employment.⁷ Furthermore, there is no evidence that the employing establishment withdrew the offer of employment or changed the duties of the modified position. As appellant has not submitted any probative medical evidence showing that he sustained a recurrence of disability due to his accepted employment injury, the Board finds that he has not met his burden of proof.

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

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a recurrence of total disability from March 23 through June 2, 2012 causally related to the December 21, 2011 accepted employment injury.

⁶*T.F.*, Docket No. 11-763 (issued November 7, 2011); *see also Gaeten F. Valenza*, 39 ECAB 1349, 1356 (1988).

⁷*See Terry R. Hedman*, *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 28, 2012 is affirmed.

Issued: June 25, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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