

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

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K.C., Appellant)	
)	
and)	Docket No. 14-1561
)	Issued: December 3, 2015
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION FEDERAL AIR)	
MARSHAL SERVICE, West Orange, NJ,)	
Employer)	
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Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 29, 2014 appellant, through counsel, filed a timely appeal from the June 24, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant met his burden of proof to establish a recurrence of total disability beginning June 6, 2010 causally related to his September 13, 2007 employment injuries.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 13, 2007 appellant, then a 46-year-old Federal Air Marshal, filed a traumatic injury claim (Form CA-1) alleging that he had a misstep and twisted his right leg at the groin area while running on a treadmill. OWCP accepted his claim for an unspecified right hip sprain and paid benefits including a January 23, 2008 right hip arthroscopy with labral debridement, chondroplasty right acetabulum and femoral head, synovectomy, loose body removal x2, and osteochondroplasty femoral head/neck junction. Appellant stopped work on January 23, 2008 and returned to limited-duty work with restrictions on February 21, 2008. He was paid disability compensation benefits.

On August 6, 2008 Dr. Stephen A. Hunt, appellant's treating Board-certified orthopedic surgeon, noted that appellant was six and a half months out from his right hip arthroscopy with labral debridement and removal of loose bodies and that his postoperative course was complicated by some metatarsalgia in the left foot secondary to favoring his right hip. He opined that appellant was clear to resume all activities without restrictions, which included running for training purposes only. OWCP subsequently accepted that appellant sustained consequential plantar capsulitis metatarsalgia on the left. A restrictions note on August 8, 2008, documents that appellant was released to perform all functions of his Federal Air Marshal position.

On September 24, 2008 appellant injured his left calf while running for training at work. Under file number xxxxxx335, OWCP allowed payment of medical bills not to exceed \$1,500.00 as it was an uncontroverted traumatic injury claim for a minor injury with little or no time lost from work. The claim was administratively closed.² Appellant continued to work limited duty.

In a May 6, 2009 report, Dr. Hunt provided an impression of progressive right hip arthritis. He opined that appellant's job requirements would be difficult to perform and that appellant's next option was hip resurfacing or replacement of the right hip. Follow-up would be on an as needed basis. On a copy of appellant's Practical Exercise Performance Requirements, Dr. Hunt indicated, with checkmarks, some of the training tasks required of the Federal Air Marshal position which appellant was unable to perform due to right hip osteoarthritis.³

In a July 6, 2009 report, Dr. Daniel Schneider, a Board-certified neurologist, and Dr. Steven Frucht, a Board-certified neurologist, reviewed the history of appellant's left foot condition and impaired gait. They noted a history of significant head injury in 1981 resulting in encephalomalacia, right hip labrum injury from an accident on a treadmill with resulting hip surgery, and a left calf muscle injury in September 2008 during some advanced training for his

² It is noted that in its February 12, 2014 decision, an OWCP hearing representative noted that it could consider doubling the instant case with file number xxxxxx335, if deemed appropriate. The record does not indicate that OWCP doubled the cases. Therefore, that claim is not before the Board on this appeal.

³ Dr. Hunt opined that appellant was restricted in his physical abilities to perform his assigned duties including the following deficiencies: have joint structures that are completely flexible and free from abnormalities; participate fully, both offensively and defensively, in all course requirements (*i.e.*, throws, being thrown, takedowns, and restraint applications; strike repeatedly a hand-held bag using feet, knees, hands, and elbows for 20 seconds; move swiftly from a seated position to a position of cover and then strategically maneuver inside commercial single and wide-body aircraft; and have joint structures that are completely flexible and free from any abnormalities.

law enforcement job. In relevant part, they opined: “this is a 48-year-old gentleman with a history of a significant head injury in 1981 resulting in encephalomalacia on the right and some milder contrecoup injury of the left. By appearance on the magnetic resonance imaging (MRI) scan, we suspect that he may have had a hemorrhage at the time of injury that has since resolved. Currently he has symptoms involving his left side that are subtle (*i.e.*, his mild weakness and proprioceptive difficulties) that are likely old. What is new is his complaints of difficulty with gait and we believe this to be a post-traumatic delayed-onset hemi-dystonia. It is common for this condition to first appear many years after the accident and the fact that his symptoms improve with walking backwards or running makes this diagnosis more likely.”

On June 5, 2010 appellant was removed, in a nondisciplinary action, from the employing establishment because he did not meet medical standards for his position and continued to have multiple restrictions with no expectation that the restrictions would change in the foreseeable future. His restrictions from medical documentation establishes that for the foreseeable future he is unable to perform essential functions of his position including defensive tactics, firearm training, and tactical training. In a May 24, 2010 decision pertaining to appellant’s removal from the employing establishment, Brian Wilkes, Assistant Special Agent in Charge, indicated that appellant was unable to perform his essential duties as a Federal Air Marshal as available medical documentation provided by his physicians indicated that he was unable to perform essential functions of his position due to the restrictions on his level of function. He noted that the medical documentation showed left ataxic gait of unclear etiology; left calf muscle sprain, resolving; right hip surgery (torn labrum right hip); and left hip pain/early arthritic changes. Special Agent Wilkes noted that appellant’s unsteady gait interfered with his ability to complete training and the essential functions required of a Federal Air Marshal to include impairing his ability to perform arduous tasks that involve lifting, pushing, and pulling objects, subduing and handcuffing individuals, as well as bending/stooping to inspect underneath aircraft seats. Special Agent Wilkes further noted that appellant received a notice of proposed removal on March 29, 2010 and through his representative, submitted a written response, but did not provide an oral response.

In the April 19, 2010 written response, appellant’s representative, Mr. Bell, stated that appellant agreed that he was medically unable to perform the essential functions of his position and was in the process of applying for disability retirement. He asked if appellant could be allowed to remain on the employing establishment rolls pending a decision on his disability retirement application. Mr. Wilkes noted that on June 12, 2009 appellant had received a letter outlining his employment status and related opinions, including the option of applying for disability retirement and the opinion of requesting a reasonable accommodation. Appellant applied for a reasonable accommodation on June 25, 2009, which was approved, and on January 29, 2010, he was offered a Program Specialist position in the ATS Logistics Operations Division in Egg Harbor Township, NJ. However, on February 11, 2010, he declined that position and his reasonable accommodation case was closed. Mr. Wilkes concluded that appellant’s nondisciplinary removal was necessary for the efficiency of the federal service.

On May 25, 2011 appellant filed a claim for schedule award (Form CA-7) claiming permanent impairment of his bilateral lower extremities.

By decision dated April 16, 2012, appellant received a schedule award for 2 percent impairment of his left lower extremity and 26 percent impairment of his right lower extremity for the period June 10, 2010 through December 27, 2011.

On August 18, 2012 appellant filed a claim for a recurrence of disability (Form CA-2a) commencing June 6, 2010. He also filed a series of claims for compensation (Form CA-7) for the period December 11, 2008 through April 6, 2013. Appellant stated that he returned to full duty on September 3, 2008 to attend training, but was put on unspecified light duty by Federal Air Marshals on October 2, 2008, which accommodated his medical conditions. He indicated that on June 6, 2010 he was forced to involuntarily retire on disability due to permanent work restrictions caused by his September 13, 2007 injury.

By decision dated September 21, 2012, OWCP accepted appellant's claim for a recurrence of disability on June 6, 2010 limited to medical care based on an August 8, 2011 medical report of Dr. David Weiss, a Board-certified psychiatrist. Appellant had elected Office Personal Management (OPM) retirement benefits and then elected OWCP benefits effective October 8, 2011. He also filed additional claims for compensation (Form CA-7) requesting total disability compensation benefits for the period June 6, 2010 and continuing. The decision dated September 21, 2012 informed appellant that he could not be paid OPM and FECA benefits concurrently.

In a January 4, 2013 letter, OWCP informed appellant of the definition of a recurrence of disability and that the evidence of record was insufficient to establish his claim for a recurrence of disability. It noted that the factual basis of his recurrence of disability was unclear. OWCP noted that the employing establishment had approved his request for reasonable accommodation and he was offered a Program Specialist position on January 9, 2010, which he declined on February 11, 2010. However, appellant had not provided a detailed statement to explain why he rejected the accommodated position. OWCP further noted that his physician had not provided clear restrictions due to the September 13, 2007 work injury. Appellant was requested to provide additional factual and medical information, including a well-rationalized report from his physician which contained a description of the work duties he could not perform as of the date of his recurrence of disability and the objective medical findings that formed the basis of his renewed disability for work, as well as the physician's opinion regarding the relationship between the increased disability and the work injury. He was afforded 30 days to submit the requested information. In a letter also dated January 4, 2013, OWCP requested additional evidence from the employing establishment.

In a January 16, 2013 statement, appellant indicated that he worked in a limited-duty position until the job was abolished. He followed the employing establishment's instructions and requested a reasonable accommodation and filed for disability retirement. The job offer however was 115 miles from appellant's home and approximately 110 miles from his current work location. Appellant alleged that the employing establishment separated him onto an involuntary disability retirement. A copy of the program specialist job offer was attached.

In an undated report, Dr. Frucht noted that appellant has delayed-onset dystonia, which occurred in patients months or years after sustaining an injury to the brain. In appellant's case, his initial brain injury was substantial, with radiologic evidence of structural brain injury in the

right hemisphere. Dr. Frucht subsequently developed dystonia in the left leg, in delayed fashion. He opined that, while appellant has responded partially to treatment with a drug, his residual deficits prevent him from returning to his work in law enforcement.

In a July 10, 2012 report, Dr. Hunt noted x-ray evidence demonstrated progression of the arthritis in appellant's hip. He also noted that it was to be expected given the progressive nature of the disease and was a consequence of the September 2007 injury, for which he underwent surgery. Dr. Hunt opined that appellant has continued limitation secondary to this underlying arthritic process.

In a February 13, 2013 report, Dr. Hunt reiterated that appellant had natural progression from his September 13, 2007 injury, for which he underwent arthroscopic procedure. He advised that appellant would continue to have significant limitations due to the underlying arthritic process and would need either hip resurfacing or total hip replacement. Appellant deferred surgical intervention as he was not limited in the quality of life yet.

By decision dated April 8, 2013, OWCP accepted an additional condition of enthesopathy of the right hip region. The previously accepted conditions include unspecified sprain of the right hip and thigh and unspecified enthesopathy of the left ankle and tarsus.

By decision dated July 18, 2013, OWCP denied appellant's claim for a recurrence of disability beginning June 6, 2010. In a July 24, 2013 letter, appellant's counsel requested an oral telephonic hearing, which was held on December 13, 2013. Appellant testified that he was released to full-duty work and was in training to return to his full-duty job when he sustained the September 24, 2008 injury. He worked in a light-duty capacity doing desk work after the September 24, 2008 injury. Appellant did not accept the job that his employer offered him before he retired because it was far from where he lived and paid less than what he was being paid. Counsel indicated that appellant was unable to work due to all of his injuries.

By decision dated February 12, 2014, an OWCP hearing representative affirmed the denial of appellant's recurrence claim. He found that appellant presented no evidence to indicate that his light-duty job was intended to accommodate any work restrictions due to his injuries in the instant claim. The hearing representative further found that there is no rationalized medical evidence in the record which opines that appellant sustained a recurrence of disability beginning on June 6, 2010. It was noted that, while Dr. Hunt opined that appellant had work limitations due to the natural progression of his hip arthritis, there was no opinion that appellant was unable to work in his full-duty position beginning June 6, 2010 and continuing due to his September 13, 2007 injury. Lastly, the hearing representative noted that Dr. Frucht expressly opined that based on radiological evidence of brain injury that appellant was disabled from his job as a direct result of his delayed-onset dystonia.

On April 29, 2014 appellant's counsel requested reconsideration. In a March 30, 2014 report, Dr. Hunt noted that after appellant's hip surgery he was released to resume training in September 2008, but he was unable to complete training due to a work-related left ankle injury and the residual impairment from his right hip injury. Additionally, on December 18, 2008 he had diagnoses of left planatar fasciitis and metatarsalgia as well as right knee chondromalacia that were considered work related. On June 6, 2010 appellant was placed on limited duty,

performing desk work until he was involuntarily removed due to his inability to perform the duties of a Federal Air Marshal secondary to the documented medical problems. Dr. Hunt noted that appellant received a schedule award on March 8, 2012 due to right hip arthritis and left foot metatarsalgia. He also noted that appellant had dystonia secondary to a head injury that affected his left upper and lower extremities that was unrelated to his federal employment. Dr. Hunt outlined appellant's medical course and the progression of hip arthritis. He opined that based on appellant's work injuries of his right hip and thigh sprain, enthesopathy of the left ankle and tarsus, and enthesopathy of the left hip region, appellant was unable to perform his job as a Federal Air Marshal due to his restrictions.

By decision dated June 24, 2014, OWCP denied modification of the February 12, 2014 decision following a merit review.

LEGAL PRECEDENT

FECA pays compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ 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.⁵

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. 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 reasons 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 her established physical limitations.⁶

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.⁷

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to limited duty or the medical evidence of record establishes that he or she can perform limited duty, the employee has the burden of establishing

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f).

⁶ *Id.* at § 10.5(x).

⁷ *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956).

by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that he cannot perform such limited duty. As part of his burden, the employee must show a change in the nature and extent of his injury-related condition or a change in the nature and extent of his limited-duty job requirements.⁸ However, when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA.⁹

ANALYSIS

OWCP accepted that as a result of his September 13, 2007 injury, appellant sustained a right hip strain, consequential plantar capsulitis metatarsalgia on the left and enthesopathy of the right hip region and paid benefits, including a schedule award for the left and right lower extremities. After Dr. Hunt released appellant to full duty and training, he sustained an injury to his left calf while running on October 21, 2008. Under claim file number xxxxxx335, OWCP allowed payment of medical bills not to exceed \$1,500.00, but did not formally consider the merits of the claim. This claim was administratively closed. Appellant returned to his limited/light-duty desk job and on March 29, 2010 and was given a proposed removal notice due to his work-related right and left lower extremity limitations and preexisting conditions which the employing establishment determined rendered him medically unfit to perform the regular duties of a Federal Air Marshal. On May 24, 2010 that proposal was finalized and he was removed effective June 6, 2010.

Appellant claims a recurrence of disability beginning June 6, 2010. He claimed that his employing establishment had withdrawn his limited/light-duty position and that he was involuntarily removed due to his work-related right and left lower extremity limitations and preexisting conditions that rendered him medically unfit to perform the regular duties of a Federal Air Marshal. Although a withdrawal of light duty can form the basis of a recurrence claim, the assignment withdrawn must have been made specifically to accommodate the employee's physical limitations due to his work-related injury or illness.¹⁰ Here, the record does not show that appellant's limited/light-duty desk job was intended to accommodate any work restrictions/limitations due to his injuries in the instant claim. The medical opinion evidence from Dr. Hunt establishes that appellant was released to a full-duty capacity, which included training, until he sustained a separate traumatic injury on September 24, 2008. Dr. Hunt then worked in a limited-duty desk job until that job was removed effective June 6, 2010 based on his employer's determination that he was medically unable to work in a full-duty capacity.¹¹ As there is no evidence that the light-duty assignment was given to accommodate appellant's work injuries, the withdrawal of such position cannot form the basis of a recurrence, as that term is defined. Furthermore, the record indicates that the employing establishment offered him the

⁸ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁹ Docket No. 09-1895 (issued April 23, 2010).

¹⁰ *D.L.*, Docket No. 11-294 (issued September 8, 2011).

¹¹ *See John I. Echols*, 53 ECAB 481 (2002) (record did not show that the employing establishment withdrew the claimant's light-duty assigned and forced him to retire, nor did the record clearly establish that the claimant's retirement was involuntary or precipitated by his employment-related left knee condition).

right to a reasonable accommodation or to medically retire. Appellant investigated both options and decided to medically retire as the reasonable accommodation position offered was unacceptable to him. Thus, there is nothing in the record clearly establishing that his retirement was involuntary.

The Board further finds that appellant has not established that the nature and extent of his injury-related condition changed on June 6, 2010 such that he could no longer perform his full-duty position. Several reports were received from Dr. Hunt. In his May 6, 2009 report, Dr. Hunt indicated that appellant would be unable to perform some of the training task requirements of the Federal Air Marshal position due to right hip osteoarthritis. However, he did not indicate that appellant was totally disabled from his position or provide any rationale for his findings. Furthermore, this report predates the claimed recurrence of June 6, 2010.

In a July 10, 2012 report, Dr. Hunt noted x-ray evidence showed progression of the arthritis in appellant's hip, which was expected given the progressive nature of the disease and was a consequence of the September 2007 injury, for which he underwent surgery. In his February 13, 2013 report, he advised that appellant would continue to have significant limitations due to the underlying arthritic process and that he would eventually require hip resurfacing or total hip replacement. In his March 30, 2014 report, Dr. Hunt again indicated that appellant had work limitations due to the natural progression of his hip arthritis, which was a consequence of the September 2007 injury. He opined that based on appellant's work injuries of his right hip and thigh sprain, enthesopathy of the left ankle and tarsus, and enthesopathy of the left hip region, appellant was unable to perform his job as a Federal Air Marshal due to his restrictions. While Dr. Hunt opined that appellant has continued limitation secondary to this underlying arthritic process, he did not detail what the exact limitations were or provide an opinion as to disability on or after June 6, 2010. Additionally, he did not provide any rationale or explain why appellant was unable to work in his full-duty position beginning June 6, 2010 and continuing as a direct result of his September 14, 2007 injury. Consequently, Dr. Hunt's opinion is insufficient to meet appellant's burden of proof.¹²

On July 6, 2009 Drs. Schneider and Frucht opined that appellant's difficulty with left leg gait was a post-traumatic delayed-onset hemi-dystonia due to a preexisting and nonwork-related brain injury. In a subsequent undated report, Dr. Frucht opined that the residual deficits from the delayed-onset dystonia in the left leg prevented appellant from returning to his work in law enforcement. As this condition is nonwork related, it has no relevance on the recurrence claim.

The Board finds that appellant has not submitted medical evidence that is sufficient to establish a recurrence of disability related to his accepted injuries of September 13, 2007. There is also no evidence which indicates that his light-duty job was intended to accommodate any work restrictions due to his work-related injuries of September 13, 2007 or that any additional conditions are causally related to the accepted work-related injury of September 13, 2007.

¹² See *Albert C. Brown*, 52 ECAB 152 (2000). (Medical conclusions unsupported by rationale are of diminished probative value and insufficient to establish causal relationship).

Therefore, OWCP's June 24, 2014 decision denying the claimed recurrence of disability is proper under the facts and law of the case.¹³

On appeal, counsel asserts that the recurrence is premised from the withdrawal of work when appellant was involuntarily separated onto disability retirement. He argued that appellant was approved for medical care in a September 21, 2012 decision, but has been unable to receive workers' compensation wage-loss benefits despite his election to switch from his FERS pension to FECA rolls. As noted, there is no evidence that appellant's light-duty assignment was made specifically to accommodate the employee's physical limitations due to his work-related injury. While counsel further contended that the medical evidence of record explains why appellant became unable to perform his limited-duty job that he was involuntarily separated from onto disability retirement, the Board notes that the question is not whether appellant was able to perform the limited-duty job, but whether he was able to perform his full-duty position on and after June 6, 2010. As noted above, there is no rationalized medical evidence which establishes that appellant sustained a recurrence of disability beginning June 6, 2010. Counsel also requests that the statement of accepted facts be corrected to reflect that appellant did not retire solely due to delayed-onset dystonia. However, this is an administrative function of OWCP, not the Board.

Appellant may submit new evidence or argument as part of a formal 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.

CONCLUSION

The Board finds that appellant failed to establish a recurrence of disability causally related to his September 13, 2007 employment injury.

¹³ While appellant subsequently received a schedule award, the Board notes that the issue of how appellant's work-related injuries caused permanent impairment to both of his lower extremities is not before the Board on this appeal, so the Board will not review the merits of his schedule award.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated June 24, 2014 is affirmed.¹⁴

Issued: December 3, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

¹⁴ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.