

FACTUAL HISTORY

Appellant, a 59-year-old former supervisory civil aviation security specialist, injured his right knee in the performance of duty on December 16, 2002.² OWCP initially accepted the claim for right knee avulsion fracture. On March 21, 2003 appellant underwent its authorized right knee arthroscopic debridement.³ He subsequently returned to work.

In October 2008, appellant filed a claim for recurrence of disability beginning October 3, 2008. He was exercising on a recumbent bicycle when he felt a burning sensation in his knee. The next morning, appellant experienced extreme pain and was unable to bend his leg. He explained that, after returning to work following his original injury, he was unable to participate in physical training for approximately three months. This included defensive measures, quarterly fitness assessments (QFA), and firearm-related duties. Appellant further indicated that since the original injury he experienced gout pain primarily after performing gym-related training in preparation for the QFA or when shooting from the kneeling position during the required practical pistol course. He also noted that sitting was painful. Appellant claimed a total of 41 hours of intermittent wage loss between October 6 and November 14, 2008.

In support of his recurrence claim, appellant submitted an October 6, 2008 employing establishment form, "practical exercise performance requirements" (PEPR) which identified various physical activities related to law enforcement tasks. The examining physician was asked to evaluate whether the employee was capable of performing certain activities, including defensive tactics, aircraft tactical training, firearm training, and overall physical conditioning. Appellant's physician, whose signature is illegible, indicated that appellant was unable to satisfy any of the performance requirements with respect to physical conditioning, defensive tactics, and aircraft tactical training. As to firearm training, appellant was able to satisfy most of the requirements except those involving kneeling on one or both knees.

OWCP did not formally adjudicate appellant's October 2008 recurrence claim.

The record includes a September 11, 2009 limited-duty job offer that was retroactive to January 21, 2009. The position title was assistant supervisory air marshal in charge (ASAC). It was a full-time position performing office work "to include using a telephone and a computer, and attending meetings." Also, there was no prolonged standing and no physical training required.

On November 24, 2010 appellant filed a claim (Form CA-7) for a schedule award. In July 2011, OWCP granted an award for 20 percent impairment of the right lower extremity due

² Appellant caught his right foot on a chair/table leg and twisted and hyperextended his knee.

³ Dr. Vaughn A. Frigon, a Board-certified orthopedic surgeon, performed the March 21, 2003 arthroscopy. The postoperative diagnosis was chondromalacia of the right patella.

to medial knee joint arthritis.⁴ Appellant's schedule award covered a period 57.6 weeks from March 18, 2011 through April 24, 2012.

Dr. Elizabeth H. Gannon, a Board-certified family practitioner with a subspecialty in sports medicine, examined appellant on November 28, 2011, and submitted an attending physician's report (Form CA-20). She identified December 16, 2002 as the date of injury and diagnosed chondromalacia, osteoarthritis, and knee pain/arthralgia. Dr. Gannon indicated that appellant was partially disabled as of November 28, 2011. She stated that "[t]he only extent of physical limitations involves the right knee -- unable to kneel on right knee, running."

On March 7, 2012 OWCP received an undated report from Dr. Allen, who previously rated appellant's right lower extremity impairment. Dr. Allen indicated that appellant had been unable to perform the essential elements of his job as an ASAC since March 2011. He explained that appellant suffered from "bilateral knee arthritis" (*sic*), which manifested itself as severe and debilitating pain, instability, diffuse tightness, and lack of normal flexion of the "knees."⁵ Dr. Allen further explained that, although appellant's current job was primarily sedentary, holding a law enforcement position required him to requalify with his issued firearm utilizing specific stances and positions that appellant could no longer tolerate due to arthritis-related pain. He identified other physically demanding aspects of a law enforcement position, including subduing, apprehending and arresting individuals, employing defensive measures, and maintaining control of a firearm, all of which appellant was unable to do because of his knee arthritis, pain and loss of motion. Dr. Allen further noted that appellant was unable to participate in QFA's due to his arthritic knees. Appellant's condition was expected to worsen and require total knee replacement in the near future. In conclusion, Dr. Allen reiterated that appellant was no longer able to perform all the essential elements of his job as an ASAC.

In a March 7, 2012 report (Form CA-20), Dr. Gannon diagnosed osteoarthritis of the knee. She noted that appellant sustained a work-related right knee injury on December 16, 2002, which required surgery. Dr. Gannon indicated that he had been totally disabled since March 2011, but could currently return to work with modifications. She noted that appellant needed frequent breaks to walk. Dr. Gannon also indicated that he was unable to stand, sit and kneel for prolonged periods of time.

In addition to the Form CA-20, Dr. Gannon submitted a March 7, 2013 PEPR report and a March 8, 2013 work capacity evaluation (OWCP-5c). With respect to PEPR training, appellant was unable to satisfy any of the performance requirements with respect to physical condition and defensive tactics, and could meet only one of seven requirements for aircraft tactical training. Regarding firearm training, Dr. Gannon indicated that he was unable to stand for a period of one

⁴ OWCP did not issue a formal decision with respect to appellant's entitlement to a schedule award. The 20 percent right lower extremity award appears to have been based on the March 18, 2011 examination findings of Dr. Harold H. Allen Jr., which the district medical advisor reviewed on April 19, 2011.

⁵ Dr. Allen indicated that he operated on appellant's knee on three occasions over a three-year period. However, he did not specify which knee or when the surgeries were performed.

hour. Also, appellant was unable to participate in handgun maneuvers that involved kneeling on one or both knees.⁶

The March 8, 2012 OWCP-5c indicated that appellant was unable to perform his usual job, but could work an eight-hour day with restrictions. Dr. Gannon noted that he reached maximum medical improvement and she characterized the identified restrictions as permanent. Appellant was limited to 30 minutes sitting, and 15 minutes each for walking and standing. There was to be no squatting, kneeling, climbing, or twisting, and he was limited with respect to bending/stooping. Appellant was also limited to 30 minutes of operating a motor vehicle at work and to/from work. Additionally, Dr. Gannon imposed a 5- to 10-pound lifting restriction. Lastly, appellant required periodic breaks after every 30 minutes of sitting and standing/walking.

On April 26, 2013 appellant filed a claim (Form CA-7) for wage-loss compensation beginning May 4, 2013. In the remarks section (No. 14), the employing establishment indicated that he was being removed from duty due to inability to perform work responsibilities.

Appellant submitted a copy of his résumé, which indicated he currently worked as a supervisory federal air marshal in charge (SAC); a position he held since 2010.⁷ The résumé also identified various other positions he held subsequent to his December 2002 employment injury.

On May 2, 2013 the employing establishment submitted a report of work (OWCP 3) indicating appellant would be removed from service effective May 4, 2013 due to permanent disability.

More than a year prior, the employing establishment informed appellant that the then-current medical evidence showed he was unable to perform the essential duties of his position as SAC. The April 13, 2012 memorandum further explained that appellant did not meet medical standards for his position based on restrictions imposed by his treating physician arising from “bilateral knee arthritis.”⁸ The memorandum also noted that he reached maximum medical improvement and his restrictions were deemed permanent. The employing establishment indicated that based on appellant’s diagnosis and treatment, he was no longer medically qualified to perform the essential functions of his SAC position. Although appellant already filed an application for disability retirement, it advised him of the option of requesting reasonable accommodation(s).⁹ The April 13, 2012 memorandum included instructions on how to apply for reasonable accommodation(s), and the time frame (15 days) within which to submit the request. The employing establishment further advised that if an accommodation request was not received

⁶ Appellant was able to perform at least five of the nine firearm training requirements without modification.

⁷ OWCP also received a February 8, 2013 notification of personnel action Standard Form 50 (SF-50) indicating appellant successfully completed his probationary period as SAC.

⁸ The subject line on the memorandum read: “Inability to Perform Essential Duties of Your Position/Inability to Meet Federal Air Marshal Service Medical Standards.”

⁹ An undated letter from the Office of Personnel Management (OPM) advised that appellant was found disabled due to arthritis and nonunion of patella fracture. OPM determined that the condition disabled him from his position as SAC.

in the allotted time, appropriate nondisciplinary administrative action may be initiated in the form of a notice of proposed removal.¹⁰

On May 2, 2013 OWCP wrote to both appellant and his employing establishment regarding the upcoming removal action and anticipated wage-loss beginning May 4, 2013. It asked the employing establishment to provide additional information regarding the circumstances of appellant's prospective removal, and specifically requested a copy of any limited-duty assignment appellant performed on or about May 4, 2013. OWCP also inquired about the basis for withdrawing a limited- or light-duty assignment.

On May 6, 2013 appellant filed a notice of recurrence (Form CA-2a) for wage-loss beginning May 4, 2013. He noted he was working restricted duty until his doctor indicated it was permanent. Since returning to work following his original injury, appellant reported experiencing knee instability and debilitating pain. He stated that the recurrence was a result of employing establishment removing him from service. Appellant explained that the employing establishment notified him that he was no longer qualified to perform his duties as a result of work-related injury. The employing establishment noted that he had been working restricted duty until "March 2011" when his doctor indicated that his restrictions were permanent.

In a separate statement also dated May 6, 2013, appellant indicated that following receipt of the April 13, 2012 memorandum, the employing establishment allowed him to work in a limited-duty capacity in accordance with Dr. Gannon's March 2012 OWCP-5c. This included teleworking from his residence for three hours a day. However, appellant was still unable to perform the required elements of his position, such as QFA's, firearm qualification, and defensive tactics as previously identified by Dr. Allen. Consequently, the employing establishment notified him that he would be removed effective May 4, 2013.

In its May 14, 2013 response to OWCP, the employing establishment noted that appellant was declared disabled as of May 4, 2013, and was removed due to his inability to perform the duties of his job. It further explained that medical documentation indicated his restrictions were permanent, and the employing establishment was unable to accommodate his permanent restrictions. Additionally, the employing establishment noted that the April 26, 2013 Form CA-7 was submitted in advance of appellant's May 4th removal to ensure that he would be set up properly in OWCP's system by the end of his first official pay cycle out of work.

In a July 18, 2013 decision, OWCP denied appellant's claimed recurrence of disability beginning May 4, 2013. It noted that Dr. Allen found appellant disabled due to bilateral knee arthritis. However, appellant's claim was accepted for "'avulsion fracture of right knee,'" not a bilateral knee condition. OWCP found the medical evidence did not establish a spontaneous change or worsening of his accepted right knee condition. Dr. Allen did not explain how the disability was related to appellant's December 16, 2002 work injury.

Appellant requested a hearing, which was held on December 9, 2013. He testified regarding his current right knee problems and the various positions he held since his December 2002 injury. Appellant also testified that he previously tore his left meniscus, anterior

¹⁰ Appellant signed the above-noted memorandum acknowledging receipt of the document on April 13, 2012.

cruciate ligament, and quadriceps muscle. Dr. Allen operated on his left knee on three occasions between 1994 and 1996, and since then appellant's knee was "perfectly fine." He stated that currently there were "no issues with [appellant's] left knee, none."

In a December 2, 2013 attending physician's report (Form CA-20), Dr. Gannon diagnosed right knee osteoarthritis. She noted that appellant originally injured his knee in 2002. This condition was subsequently aggravated by his employment due to frequent kneeling. Dr. Gannon indicated that appellant was currently totally disabled, which dated back to May 4, 2013.

In a December 20, 2013 narrative report, Dr. Gannon indicated that she had been appellant's primary care physician since February 2009, and he had been a patient in her office practice since 2006. She referenced her December 2, 2013 Form CA-20, and noted that his right knee osteoarthritis was related to his December 16, 2002 injury. Dr. Gannon further noted that appellant tried several prescription medications and physical therapy, but continued to have pain in his right knee, which required further treatment. She also noted having submitted a March 8, 2012 OWCP-5c describing his medical condition and limitations, which she consider to be permanent. With respect to purported left knee arthritis, Dr. Gannon indicated that she had thoroughly reviewed appellant's previous medical records, and based on past and present examinations, he did not currently suffer from left knee osteoarthritis. In fact, appellant had not even complained about his left knee. It was only his right knee that had been documented as having arthritis due to the December 2002 injury. Dr. Gannon explained that the right knee diagnosis was based on multiple orthopedic examinations and x-rays, including her own examination. She reiterated that appellant had no clinical indications of left knee arthritis and he had not complained of any restrictions or pain relating to his left knee. Dr. Gannon stated that his right knee osteoarthritis was directly related to the December 16, 2002 incident and his restrictions were permanent. She further stated that appellant had no known restrictions relating to his left knee.

By decision dated February 7, 2014, the Branch of Hearings and Review affirmed the denial of appellant's recurrence claim. However, the hearing representative recommended that OWCP expand the claim to include right knee osteoarthritis as an accepted condition.

On June 17, 2014 OWCP expanded appellant's claim to include right knee osteoarthritis.

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹¹ Recurrence of disability 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical

¹¹ 20 C.F.R. § 10.5(x).

limitations.¹² Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty.¹³ A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties or other downsizing or where a loss of wage-earning capacity determination is in place.¹⁴

Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light-duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.¹⁵

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing that the recurrence is causally related to the original injury.¹⁶ This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.¹⁷ The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.¹⁸

ANALYSIS

Appellant claimed he was removed from his latest position as SAC because of his injury-related right knee condition. The employing establishment submitted a May 2, 2013 report of work status (OWCP 3) indicating that he would be removed from service effective May 4, 2013 due to permanent disability. On appellant's May 6, 2013 Form CA-2a, it indicated that appellant had been working restricted duty until "March 2011" when his doctor indicated his restrictions were permanent. Also, in a May 14, 2013 letter to OWCP, the employing establishment indicated that he was removed effective May 4, 2013 due to an inability to perform the duties of his job. It further indicated it was unable to accommodate appellant's permanent restrictions.

OWCP expanded the claim to include right knee osteoarthritis as an accepted condition. Both Dr. Allen and Dr. Gannon indicated that appellant's arthritis limited his ability to satisfy certain requirements of his law enforcement position. Although there was some initial confusion regarding whether appellant had arthritis in the left knee, Dr. Gannon clarified that there were no

¹² *Id.*

¹³ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

¹⁴ *Id.* at §§ 10.5(x), 10.104(c) and 10.509; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013).

¹⁵ *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

¹⁶ 20 C.F.R. § 10.104(b); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 and 2.1500.6. (June 2013).

¹⁷ *See S.S.*, 59 ECAB 315, 318-19 (2008).

¹⁸ *Id.* at 319.

clinical indications of left knee arthritis and appellant had not complained of any restrictions or pain relating to his left knee.¹⁹ At the December 9, 2013 hearing, appellant represented that Dr. Allen last operated on his left knee in 1996, and currently there were no issues with that particular knee. Dr. Allen described his left knee as perfectly fine.

On his May 6, 2013 Form CA-2a, appellant claimed to have been working restricted duty until his doctor indicated that his restrictions were permanent. Based on the April 13, 2012 memorandum, he appears to have been removed as SAC based on the March 2012 report(s) of Dr. Allen and/or Dr. Gannon. Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty.²⁰ However, the Board finds that the case is not in posture for decision.

The current record includes scant information regarding the position appellant held immediately prior to his May 4, 2013 removal. Also, it is not entirely clear what transpired over the year-long period between the April 13, 2012 memorandum and his removal on May 4, 2013.²¹ A February 8, 2013 SF-50 identified appellant's position as supervisory federal air marshal, but the specific job duties are not apparent from the record. Also, it is unclear what, if any, accommodations were in place at the time. The only limited-duty assignment of record was from 2009, which predated appellant's latest assignment as SAC.

The employing establishment's May 14, 2013 correspondence was not entirely responsive to OWCP's May 2, 2013 development letter. It neglected to provide a copy of appellant's latest job assignment, including physical requirements and any recognized limitations. Also, the employing establishment failed to provide copies of all documentation regarding the removal action, including a current SF-50. As noted, the April 13, 2012 memorandum was merely a precursor to the removal action, which occurred more than a year later. Appellant represented that, after receiving the April 13, 2012 memorandum, the employing establishment allowed him to work in a limited-duty capacity in accordance with Dr. Gannon's March 2012 OWCP-5c. The accommodation reportedly included teleworking from his residence for three hours a day. Again, this information has not been confirmed by the employing establishment or otherwise substantiated in the record.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to compensation; however, OWCP shares responsibility in the development of the evidence to see that justice is done.²² Accurate information regarding appellant's employment duties is essential to determine whether he

¹⁹ Dr. Allen's March 18, 2011 report did not include any findings with respect to appellant's left lower extremity. His undated report received on March 7, 2012 similarly fails to reference any recent examination findings with respect to either the left or right lower extremity.

²⁰ S.S., 59 ECAB at 319; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

²¹ The hearing representative incorrectly identified the date of the memorandum as "April 13, 2013."

²² *William J. Cantrell*, 34 ECAB 1223 (1983).

suffered a recurrence of disability beginning May 4, 2013. The Board acknowledges OWCP's previous attempt to develop the record regarding appellant's specific employment duties prior to his May 4, 2013 removal. The employing establishment was not entirely responsive, and OWCP's efforts to obtain information from the employing establishment should not have ceased at that point. It is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means.²³ The employing establishment cannot withhold information to its employee's detriment.²⁴

Because the record lacks sufficient evidence for the Board to render an informed decision, the case shall be remanded to OWCP for further development. On remand, OWCP shall apprise the employing establishment of its responsibility for submitting all relevant and probative factual and medical evidence in its possession. After OWCP has developed the record consistent with the above-noted directive, it shall issue a *de novo* decision regarding appellant's claimed recurrence of disability beginning May 4, 2013.

CONCLUSION

The Board finds that this case is not in posture for decision.

²³ 20 C.F.R. § 10.118.

²⁴ As evidence appearing in the employing establishment's files is not generally available to claimants, the employing establishment must assemble and submit such evidence. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4(b) (June 2011).

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: February 27, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board