

FACTUAL HISTORY

This case has previously been before the Board. Appellant has multiple upper and lower extremity accepted conditions, adjudicated under multiple file numbers by OWCP.² In an order dated November 15, 2004, the Board dismissed his application for review at his request.³ In a November 30, 2007 order, the Board remanded the case for OWCP to combine files.⁴ By decision dated December 24, 2008, in regard to OWCP file number xxxxxx166, the Board found that OWCP met its burden of proof to terminate appellant's compensation benefits on February 23, 2003 and that he failed to meet his burden of proof to establish that he had any disability after February 23, 2003 causally related to his accepted right shoulder condition.⁵ In a second December 24, 2008 decision, in regard to OWCP file number xxxxxx790, the Board found the case not in posture for decision regarding whether appellant established that he was totally disabled beginning on February 23, 2003 due to his accepted bilateral lower extremity conditions. On remand OWCP was to prepare an updated statement of accepted facts that included a description of all accepted injuries and a description of the modified duty appellant was performing on July 15, 1999. Appellant was then to be referred to an appropriate Board-certified specialist for an examination, diagnosis and a rationalized opinion as to whether he had any disability for work on or after February 23, 2003 causally related to his accepted bilateral lower extremity conditions and whether the recommended total knee replacement (TKR) surgery should be authorized. After this and such further development deemed necessary, OWCP was to issue an appropriate decision.⁶ The laws and the facts of the previous Board decisions and orders are incorporated herein by reference.

Subsequent to the December 24, 2008 Board decisions, OWCP prepared an updated statement of accepted facts, and in October 13, 2009 referred to Dr. Aldo D. Iulo, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 26, 2009 report, Dr. Iulo reported appellant's complaint of intermittent pain in both knees and that he had bilateral TKR surgery.⁷ He described physical examination findings, and advised that appellant could not perform letter carrier duties due to bilateral TKR procedures and spinal fractures. Dr. Iulo advised that, while the meniscectomies were minor contributors to appellant's bilateral

² On January 28, 1977 appellant, a letter carrier, sustained an employment-related torn left medial meniscus when he fell at work. He sustained a second employment injury, accepted for sprain of the right wrist and contusion of the left knee, on November 14, 1978. On September 16, 1998 appellant fractured his left ankle when he fell from a curb, and on July 15, 1999 sustained a right shoulder injury when he fell from his postal vehicle. He stopped work at that time and was placed on the periodic rolls. All claims were combined. On July 6, 2000 appellant fractured a thoracic vertebra while cleaning his gutters at home.

³ Docket No. 05-29 (issued November 15, 2004). The order was in reference to the July 15, 1999 right shoulder injury.

⁴ Docket No. 07-1397 (issued November 30, 2007). The order was in reference to the September 16, 1998 left ankle injury.

⁵ Docket No. 08-532 (issued December 24, 2008).

⁶ Docket No. 08-1926 (issued December 24, 2008).

⁷ Right TKR surgery was authorized on June 3, 2006, and the surgery was performed on February 20, 2007. Left knee TKR surgery was denied on December 7, 2006. The surgery was performed on January 15, 2008.

osteoarthritis, this was no longer relevant since appellant had bilateral TKR procedures and, therefore, no longer had degenerative changes in the knees. He indicated that appellant's current disability was not work related and was due to preexisting conditions and obesity. In a supplemental report dated December 23, 2009, Dr. Iulo indicated that appellant was not disabled on or after February 2003 due to employment-related injuries, stating that his disability was due to bilateral osteoarthritis of the knees.

By decision dated December 30, 2009, OWCP found that the weight of the evidence rested with the opinion of Dr. Iulo and denied appellant's recurrence claim.⁸ Appellant, through counsel, timely requested a hearing. In a February 23, 2010 decision, an OWCP hearing representative found the case not in posture for decision because the statement of accepted facts provided to Dr. Iulo was deficient in that it did not include a description of appellant's modified duty at the time of his July 15, 1999 employment injury. He further found that Dr. Iulo's report was not well rationalized, noting that, while he advised that appellant was disabled due to preexisting knee arthritis, he also advised that authorized surgery was a minor contributor to the arthritis. The hearing representative explained that an injury is compensable under FECA if an employment injury contributed to a medical condition. He remanded the case to OWCP to amend the statement of accepted facts and obtain a supplemental report from Dr. Iulo.

In correspondence dated March 3 and April 5, 2010, OWCP requested that the employing establishment provide a description of appellant's modified duties on July 15, 1999. In a reply received on April 19, 2010, the employing establishment indicated that it was unable to complete the request. By letter dated August 20, 2010, OWCP asked appellant to provide a copy of the position description for the modified job.

On November 28, 2011 appellant stated that, prior to the July 15, 1999 accident, he was already on light duty, recovering from ankle surgery and awaiting knee surgery. He indicated that on July 15, 1999 his supervisor ordered him to walk a full eight hours. Appellant indicated that he worked five days a week and described his daily job duties of two to three hours of sitting, casing mail, delivering parcel post for one to three hours, delivering relays for two to three hours, delivering regular mail for one to three hours, collecting mail at 5:00 p.m. for one hour, and an express mail run for two hours. He also indicated that when working Sundays he would delivery express mail to six towns, averaging five to six hours.

On February 6, 2012 OWCP asked appellant to clarify these duties, to include whether he was walking or driving a vehicle while delivering mail, and if he walked, how many hours. On February 23, 2012 appellant responded that regarding Sunday and daily express mail and parcel post, bulk mail, and collecting, he would drive to homes and businesses, get out of vehicle and deliver or collect. When delivering relays, he would drive to relay box, walk to box, deposit sacks of mail and return. Appellant stated that, when delivering regular mail, it was mainly to rural boxes with little walking, and he would also deliver park and loop when he would park his vehicle and walk to deliver a block's mail. He indicated that he was cleared to deliver "in the street" for three hours per day.

⁸ In the December 30, 2009 decision, OWCP noted that Dr. Iulo indicated that appellant had bilateral TKR procedures.

OWCP prepared an updated statement of accepted facts that included appellant's description of the modified duties he was performing on July 15, 1999. On May 4, 2012 it asked Dr. Iulo to submit an additional report. Dr. Iulo did not respond, and in January 2013, OWCP referred appellant, the updated statement of accepted facts, and a set of questions, to Dr. Kenneth P. Heist, a Board-certified osteopath specializing in orthopedic surgeon.

In a January 16, 2013 report, Dr. Heist noted appellant's employment and medical history and his review of the medical record. He stated that appellant reported marked improvement following his bilateral TKR surgeries. Dr. Heist described physical examination findings, noting that the knees revealed bilateral well-healed surgical incisions and no evidence of effusion or internal derangement with satisfactory knee motion. He diagnosed status postoperative bilateral TKR surgeries, done on February 20, 2007 on the right and on January 15, 2008 on the left. Dr. Heist indicated that appellant would have been capable of working light duty and that he was permanently restricted to one hour of walking, standing, bending, stooping, pushing, pulling and lifting, with no squatting, kneeling or climbing, and a weight restriction of 10 pounds. He noted that appellant had been retired for 10 years and was 71 years old and concluded that the limitations would also be age related.

In a July 12, 2013 supplemental report, received by OWCP on July 18, 2013, Dr. Heist indicated that appellant's knee osteoarthritis was accelerated by job injuries and/or surgery, that he was not capable of performing his job duties as described in the statement of accepted facts but could perform modified duty. He advised that appellant had a work-related residual of decreased knee range of motion and reiterated his diagnoses, stating the knee replacement procedures accelerated a preexisting condition. When asked to specifically address the nature and extent of any injury-related disability due to employment-related knee osteoarthritis from February 23, 2003 forward, Dr. Heist responded that, since all knee surgeries, excluding the TKR procedures, were performed prior to February 23, 2003, these accelerated the condition.

On October 22, 2013 OWCP expanded the accepted conditions to include bilateral knee osteoarthritis. In a decision dated October 23, 2013, it denied appellant's recurrence claim, finding that the weight of the medical evidence rested with Dr. Heist who advised that appellant was capable of performing light duty with restrictions.

Appellant, through counsel, timely requested a hearing, that was held on April 28, 2014. At the hearing appellant described his employment injuries. He described the limited duties he was performing in July 1999 when he injured his right shoulder, stating that he cased mail indoors and walked for approximately three hours. Appellant stated that in 2003 his knees were swelling, that he was falling down, and that he filed a recurrence claim. Counsel argued that Dr. Heist indicated that appellant could not carry out the modified duties he was performing in July 1999 and, therefore, the medical evidence established that he sustained a recurrence of disability.

By decision dated July 15, 2014, an OWCP hearing representative found that Dr. Heist advised that appellant could perform light duty with restrictions and affirmed the October 23, 2013 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.⁹ This term also means an inability to work 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 his or her established physical limitations.¹⁰

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.¹¹

ANALYSIS

The Board finds that this case is not in posture for decision. The accepted conditions in this case include a left torn medial meniscus with secondary arthritis, a left ankle fracture, and a meniscus tear of the right knee, and bilateral knee osteoarthritis. Following a July 1999 right shoulder rotator cuff injury, appellant received wage-loss compensation for his shoulder injury to February 23, 2003 at which time OWCP terminated his compensation on the grounds that the shoulder condition had resolved with no residuals. Appellant underwent an authorized right TKR arthroplasty on February 20, 2007. He underwent a left knee TKR on January 15, 2008 that had not been authorized.¹² On December 24, 2008 the Board affirmed the February 23, 2003 decision that terminated appellant's wage-loss compensation.¹³ Appellant subsequently filed a recurrence claim.

In the July 15, 2014 decision, which is now on appeal before the Board, the hearing representative found that, as Dr. Heist advised that appellant could perform light duty with restrictions, appellant had not established a recurrence of disability.

⁹ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

¹⁰ *Id.*

¹¹ *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹² *Supra* note 7.

¹³ *Supra* note 5.

As noted above, however, appellant must establish that he could not perform the requirements of the light-duty position due to employment-related residuals at the time of the recurrence of disability.¹⁴ He claimed disability after his wage-loss compensation for an accepted right shoulder injury was terminated on February 23, 2008. Appellant had stopped work on July 15, 1999.¹⁵

In a report dated January 16, 2013, and in a July 12, 2013 supplemental report received on July 18, 2013, Dr. Heist advised that appellant would have been capable of working light duty and indicated that he was permanently restricted to one hour of walking, standing, bending, stooping, pushing, pulling and lifting, with no squatting, kneeling, or climbing, and a weight restriction of 10 pounds. He specifically stated that appellant was not capable of performing the job duties described in the statement of accepted facts. The Board also notes that Dr. Iulo advised on December 23, 2009 that appellant was disabled due to bilateral knee osteoarthritis, which was accepted by OWCP on October 22, 2013. Appellant therefore established a recurrence of disability on or after February 23, 2003.

The case therefore must be remanded to OWCP to determine the extent of appellant's disability. On remand OWCP should ask Dr. Heist to furnish a supplemental report or, if necessary, refer appellant to another appropriate physician for an opinion on the extent of appellant's disability. It should ask the physician when, on or after February 23, 2003, appellant became totally disabled to perform the modified duties of July 15, 1999.

On remand OWCP should determine if the left knee TKR surgery should be authorized. After this and such further development as it deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that appellant established that he sustained a recurrence of disability due to his accepted bilateral knee conditions. The case is remanded to OWCP to determine the extent of appellant's disability.

¹⁴ *Supra* note 11.

¹⁵ *Supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 15, 2014 is set aside and the case is remanded to OWCP for proceedings consistent with the opinion of the Board.

Issued: July 1, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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