

On appeal, appellant's representative contends that appellant's termination from employment based on misconduct is unrelated to his injury and should not be considered. Also, his work restrictions are not preventative in nature and support his claim for compensation.

FACTUAL HISTORY

On August 18, 2008 appellant, then a 52-year-old motor vehicle operator, filed a traumatic injury claim Form CA-1 alleging that he injured his back while lifting a trailer ramp in the performance of duty on August 4, 2008.

In a September 3, 2008 medical report, Dr. Michael Glover, a treating physician, stated that appellant was "currently on light duty [five] hours a day basically sedentary/clerical work."

On September 8, 2008 OWCP accepted appellant's claim for pathologic fracture of the vertebra at L2.

In a December 10, 2008 report, Dr. Glover advised that appellant was doing clerical work part time and released him to work full time with permanent restrictions on lifting and "no operating of heavy equipment because of risk of bouncing in the cab and risk of new fracture due to his underlying osteoporosis."

On April 9, 2009 appellant was terminated from his employment on the grounds of misconduct for failure to notify his supervisor that his driver's license was suspended.

On May 22, 2009 appellant filed a claim for a recurrence of total disability as of April 10, 2009. He submitted factual and medical evidence to support his claim, including a job description for a motor vehicle operator, two notifications of personnel action (SF-50) and a prescription form dated September 3, 2008

By decision dated July 17, 2009, OWCP denied appellant's claim for a recurrence of disability commencing April 10, 2009. It found that the evidence of record was not sufficient to establish that his disability was caused by his accepted condition.

Appellant requested an oral hearing which was held on December 8, 2009. His representative stated that appellant's driver's license was suspended for 90 days from October to December 2008 and that he notified his supervisor of the suspension in November 2008. OWCP's hearing representative held the record open for 30 days for appellant to submit additional evidence.

Appellant submitted medical reports from Dr. Glover, documentation of his suspended license and reinstatement of his license on December 11, 2008.

In a March 25, 2009 report, Dr. Glover stated that appellant's L2 compression fracture was healed. He imposed a restriction on "driving on rough forest service roads." Dr. Glover noted that appellant was on clerical duty and could return back to his work without any new restrictions.

By decision dated February 24, 2010, OWCP denied appellant's claim for a recurrence of disability. It found that the factual and medical evidence submitted was insufficient to establish that his disability commencing on April 10, 2009 was causally related to the August 4, 2008 employment injury.

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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³ 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 his or her established physical limitations.⁴

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

On September 8, 2008 OWCP accepted appellant's claim for pathologic fracture of the vertebra at L2. Appellant was assigned full-time limited-duty work with restrictions. The issue is whether he sustained a recurrence of disability commencing on April 10, 2009 as a result of his August 4, 2008 employment injury. Appellant has the burden of proof to 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.

The record reflects that, following the acceptance of his claim, appellant was released to return to work at modified duty by Dr. Glover as of September 3, 2008. On April 9, 2009 the employing establishment issued a notice of removal for unacceptable conduct, the failure to notify his supervisor of his suspended driver's license, reasons unrelated to residuals of his accepted injury or physical condition. The Board finds that appellant's inability to continue in

³ 20 C.F.R. § 10.5(x). *See T.S.*, Docket No. 09-1256 (issued April 15, 2010).

⁴ *Id.*

⁵ *See A.M.*, Docket No. 09-1895 (issued April 23, 2010). *See also Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

his employment was based on his misconduct. As noted, this is not a basis for finding a recurrence of disability related to residuals of the accepted L2 vertebra fracture.⁶

The Board finds that there is no contemporaneous medical evidence of record to establish that appellant became disabled for work due to his accepted fracture of the L2 vertebra. In a March 25, 2009 medical report, Dr. Glover advised that appellant's L2 compression fracture had healed. He imposed a restriction on driving on rough forest service roads. Dr. Glover noted that appellant could resume his clerical work without any new restrictions. He did not provide any opinion supporting a spontaneous change in the accepted employment-related condition. Prior to appellant's claimed disability of April 10, 2009, his attending physician released him to resume his clerical duties. Dr. Glover did not report any change in the nature and extent of appellant's limited-duty job requirements or support a recurrence of total disability on April 10, 2009 causally related to the accepted employment injury. Therefore, appellant did not meet the burden of proof to establish a recurrence of disability.

The Board finds that appellant's inability to continue in his employment was based on his misconduct. Therefore, appellant did not meet his burden of proof to establish disability as a result of a recurrence.

On appeal, appellant's representative contends that appellant's termination from employment based on misconduct is unrelated to his injury and should not be considered. Also, his work restrictions are not preventative in nature and therefore support his claim for compensation. For reasons stated, the Board finds that appellant's disability as of April 10, 2009 was unrelated to his accepted condition.

CONCLUSION

The Board finds that appellant failed to establish that he sustained a recurrence of disability commencing April 10, 2009 causally related to his August 4, 2008 employment injury.

⁶ See *supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 11, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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