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

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| **J.M., Appellant** | ) | |
| **and** | ) | **Docket No. 13-601** |
| | ) | **Issued: September 13, 2013** |
| **U.S. POSTAL SERVICE, POST OFFICE, Concord, NC, Employer** | ) | |

*Appearances:*
*Daniel F. Read, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On January 22, 2013 appellant, through counsel, filed a timely appeal of an October 1, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying a recurrence claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant established that he is entitled to wage-loss compensation for intermittent disability for the period June 30 to July 28, 2012.

On appeal appellant's counsel contends that the modified position was not suitable.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

Appellant, then a 33-year-old city carrier filed an occupational disease claim alleging that on June 10, 1988 he first realized that his left knee condition was employment related. OWCP accepted the conditions of left chondromalacia patellae and left medial meniscus derangement of the posterior horn. Appellant was given a permanent light-duty job in February 1990 as he was physically unable to perform his date-of-injury position. OWCP accepted his recurrence claims of September 27 to October 10, 2008 and October 9 to 22, 2010.

On April 22, 2009 appellant accepted a permanent modified clerk position. The restrictions of the position included up to four hours of intermittent lifting/carrying up to 50 pounds; up to four hours of intermittent standing/walking; up to two hours of intermittent bending, stooping and twisting; up to three hours of intermitting pushing/pulling up to 50 pounds and up to one hour intermittent kneeling/climbing. The hours of the position were 4:00 a.m. to 12:30 p.m. at the Concord Main Post Office. The duties of the position included manual distribution of letter, nixie clerk work, manual parcel distribution as needed and post office box distribution with use of a cart.

On August 17, 2010 appellant accepted an August 17, 2010 modified job offer by the employing establishment. The duties of the new modified job offer included driving hub mail between delivery unit and Charlotte general mail facility; delivering missent parcels and other items under 40 pounds; picking up outgoing parcels under 40 pounds from customers and collecting mail from blue boxes. In addition the title of the modified position was changed to modified carrier from modified clerk.

In a September 15, 2010 report, Julie Abney, a physician's assistant, advised that appellant was unable to perform the driving portion of his modified position. She stated that he was being treated for a history of severe obstructive sleep apnea and hypertension. Ms. Abney recommended that appellant not drive at work due to an increased risk of falling asleep while driving.

In a December 2, 2011 letter, the employing establishment noted that appellant's nonemployment-related sleep apnea prevented him from performing his four hours of city carrier work.

In a January 11, 2012 report, Dr. Robert Beaver, an attending Board-certified orthopedic surgeon, diagnosed a chronic history of depression, hypertension, sleep apnea, high cholesterol and severe left knee osteoarthritis. He reported no change in appellant's work restrictions from May 2010. Dr. Beaver found that appellant was capable of working an eight-hour day with restrictions. The restrictions include no lifting more than 40 pounds; up to four hours of intermittent sitting; up to two hours of intermittent standing and walking; no climbing or kneeling; up to two hours of intermittent bending, twisting and stooping; up to two hours of intermittent pushing/pulling; and up to six hours of simple grasping.

On August 13, 2012 appellant filed a claim for intermittent disability for the period June 30 to July 28, 2012.

In a letter dated August 24, 2012, OWCP informed appellant that the evidence was insufficient to establish that his wage loss was due to his accepted employment injury. It noted that he currently was working intermittent hours due to a nonaccepted sleep apnea condition. Appellant was advised as to the definition of a recurrence and the evidence required to support his claim.

By decision dated October 1, 2012, OWCP denied appellant's claim for a recurrence of disability from June 30 to July 28, 2012. It found the partial disability was due to his nonwork-related accepted sleep apnea and not to his accepted left knee conditions.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[2] has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[3] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[4] Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[5] To meet his or her burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.[6]

Under FECA the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[7] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[8] An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.[9] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

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[2] *Id.*

[3] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

[4] *See Amelia S. Jefferson*, *supra* note 3; *see also David H. Goss*, 32 ECAB 24 (1980).

[5] *See Edward H. Horton*, 41 ECAB 301 (1989).

[6] *A.D.*, 58 ECAB 166 (2006); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[7] *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

[8] *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

[9] *Merle J. Marceau*, 53 ECAB 197 (2001).

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 establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish a recurrence of total disability and that he or she cannot perform such limited-duty work.[10] 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]

OWCP's implementing regulations define a recurrence of disability as 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.[12] The term also means the inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn, except for when such withdrawal occurs for reasons of misconduct, nonperformance of the job duties, or a reduction-in-force (RIF).[13] The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA.[14]

The Board has held that whether a particular injury causes an employee to be disabled for work is a medical question that must be resolved by competent and probative medical evidence.[15] The weight of medical opinion is determined on the report of a physician, who provides a complete and accurate factual and medical history, explains how the claimed disability is related to the employee's work and supports that conclusion with sound medical reasoning.[16]

## ***ANALYSIS***

OWCP accepted appellant's claim for left chondromalacia patellae and left medial meniscus derangement of the posterior horn. Appellant was unable to return to his date-of-injury position and was provided modified positions. He filed a claim for intermittent disability for the period June 30 to July 28, 2012 due to his inability to perform all the duties of an August 17,

[10] *J.F.*, 58 ECAB 124 (2006); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

[11] *S.F.*, 59 ECAB 525 (2008); *Terry R. Hedman*, 38 ECAB 222 (1986).

[12] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). *See also Phillip L. Barnes*, 55 ECAB 426 (2004).

[13] 20 C.F.R. § 10.5(x).

[14] *John I. Echols*, 53 ECAB 481 (2002); *John W. Normand*, 39 ECAB 1378 (1988). Disability is defined to mean 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. *See* 20 C.F.R. § 10.5(f).

[15] *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[16] *See T.E.*, Docket No. 09-2040 (issued July 27, 2010); *Sedi L. Graham*, 57 ECAB 494 (2006).

2010 modified job offer. By decision dated October 1, 2012, OWCP denied appellant's claim for wage-loss compensation. The Board finds that he failed to meet his burden of proof to establish that his disability and resulting wage loss was due to his accepted left leg conditions.

In his claim for wage-loss compensation from June 30 to July 28, 2012, appellant did not allege a change in the nature or extent of his employment-related condition. Rather, he alleged that his intermittent periods of disability were the result of a change in the nature and extent of his light-duty assignment, such that he was unable to perform all the duties of the job. The issue is whether the duties of the August 17, 2010 modified job offer constituted a change in the nature and extent of appellant's light-duty job assignment.

Appellant worked in a light-duty position since February 1990. It was the driving responsibilities in the August 17, 2010 job offer that triggered the present claim for partial wage loss. Appellant accepted the position, but subsequently claimed that he was unable to perform the driving duties due to his sleep apnea. The employing establishment confirmed that his nonemployment-related sleep apnea prevented him from performing his four hours of city carrier work in the August 17, 2010 job offer. Although the original modified job position in February 1990 did not include driving hub mail between delivery unit and Charlotte general mail facility, the evidence does not establish that such duties violated his current medical restrictions due to his accepted left leg conditions. Moreover, a review of the record demonstrates that the August 17, 2010 modified job was within the restrictions set by Dr. Beaver, who did not include any restriction on driving. In a January 11, 2012 report, Dr. Beaver noted appellant's medical history, including sleep apnea, but stated that the work restrictions provided in May 2010 were unchanged. Appellant did not contend that his sleep apnea was related to his accepted injury.

In support of his contention that the August 17, 2010 modified job violated his work restriction appellant submitted a report from Ms. Abney, a physician's assistant, who advised that appellant was precluded from driving due to a nonemployment-related condition of sleep apnea. It is well established that a physician's assistant is not a "physician" as defined under FECA. Thus, Ms. Abney's work restriction has no probative medical value as to his claim for disability.[17]

Appellant has not alleged that his claimed intermittent disability was a result of a change in the nature and extent of his employment-related condition. The Board has reviewed the record and finds the medical evidence is insufficient to establish any worsening of his employment-related left chondromalacia patellae or left medial meniscus derangement of the posterior horn. Rather, the evidence shows that appellant's inability to perform all duties of the August 17, 2010 modified job offer were due to the nonemployment condition of sleep apnea. It is his burden of proof to provide evidence from a qualified physician supporting any disability for any period of time was due to his accepted conditions.

Appellant's counsel argued that the May 17, 2010 modified job was not suitable because appellant was disabled from performing the carrier job because of his sleep apnea. He also contends that OWCP was required to consider all conditions, work related and nonwork related

[17] 5 U.S.C. § 8101(2). *See E.H.*, Docket No. 08-1862 (issued July 8, 2009); *Roy L. Humphrey*, 57 ECAB 238 (2005).

in determining whether a position is suitable. In addition, counsel argues that the position was not suitable as it involved cross craft work. As noted, when a claimant returns to a modified job and then stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA. Appellant's work stoppage was unrelated to his accepted left leg injury. He is not entitled to wage-loss compensation for his intermittent disability.

Appellant may submit new evidence or argument with a 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 has not established that he is entitled to wage-loss compensation for intermittent disability for the period June 30 to July 28, 2012.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 1, 2012 is affirmed.

Issued: September 13, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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