

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES H. HENDERSON and U.S. POSTAL SERVICE,
LYNDHURST MAYFIELD HEIGHTS BRANCH, Cleveland, OH

*Docket No. 99-2157; Submitted on the Record;
Issued December 28, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, PRISCILLA ANNE SCHWAB,
VALERIE D. EVANS-HARRELL

The issue is whether appellant has established a recurrence of disability beginning April 28, 1998, causally related to his accepted January 22, 1990 employment injury.

The Board has duly reviewed the record in this appeal and finds that the case is not in posture for decision.

On May 28, 1995 appellant, then a 35-year-old modified city carrier, filed a claim for an occupational disease alleging that his radiculopathy and lumbar strain were caused or aggravated by his employment. He stated that he was involved in a car accident on January 22, 1990 and had experienced pain and discomfort in his lower back and left leg since then. He stopped work on December 28, 1994.

The Office of Workers' Compensation Programs accepted appellant's claim for low back strain.

On June 26, 1994 appellant accepted a limited-duty position as a modified city carrier performing administrative duties for four hours a day. On November 26, 1996 appellant accepted another limited-duty position that involved casing mail. On January 30, 1997 the employing establishment offered a permanent reassignment to part-time flexible (modified) distribution clerk, which involved the same casing requirements.¹

¹ By letter dated February 21, 1997, the Office advised the employing establishment that there were some inconsistencies between the two job offers and appellant's restrictions. The Office specifically noted that Dr. Harris stated appellant could work 4 hours per day and lift no more than 5 pounds while the job offers provided that appellant could work 8 hours per day and lift no more than 10 pounds. The Office stated that the job offer should be based on Dr. Harris' work restrictions and advised the employing establishment to amend the job offer and have appellant sign it. The record does not contain a revised job offer signed by appellant.

On May 22, 1998 appellant filed a notice of recurrence of disability, alleging that he sustained a recurrence of disability on April 28, 1998.

By decision dated July 28, 1998, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability. In a July 28, 1998 letter, appellant, through his counsel, requested an oral hearing before an Office representative. By decision dated April 15, 1999 and finalized April 20, 1999, the hearing representative affirmed the Office's decision.

An employee returning to limited or light duty or whose medical evidence shows the ability to perform light duty has the burden of proof to establish a recurrence of temporary total disability by the weight of substantial, reliable and probative evidence, and to show that he or she cannot perform the light duty.² As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.³

In an April 22, 1998 medical report, Dr. Frederick D. Harris, an internist and appellant's treating physician, stated that appellant's employment-related low back strain had recently worsened. Dr. Harris also noted appellant's statement concerning "frequent abuses of the designated restrictions." He provided his findings on physical examination, a diagnosis of nondiscogenic lumbar radiculitis and a plan to have appellant undergo additional testing. Dr. Harris added:

"This is my medical conclusion to a reasonable degree of medical certainty that this [appellant] is at this time fully disabled due to the January 22, 1990, work injury and incapable of working four hours per day especially since he will be requiring potent analgesic medicines and physical therapy and it is felt that frequent abuse of his work limitation has contributed significantly to his current disability."

Dr. Harris stated on June 30, 1998 that appellant "cases mail which involves excessive bending, twisting and constant reaching in spite of prescribed restrictions to the contrary." He added that appellant had been working outside his restrictions which resulted in frequent falls. Dr. Harris opined:

"I believe [appellant's] present symptoms, subjective and objective findings are a recurrence of his January 22, 1990, injury to his lower back with aggravation secondary to falls which were directly contributed by the bending, twisting, and constant reaching, as well as temperature extremes, outside his prescribed restrictions."

Dr. Harris did not fully explain how appellant's employment-related condition had changed so that appellant could not continue to perform the duties of the limited-duty position.

² *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

³ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

Although his reports are insufficiently rationalized, they raise an uncontroverted inference that appellant's condition had deteriorated due to working outside his restrictions.⁴

Further, the record indicates that the nature and extent of the limited-duty position may have changed. The employing establishment's November 22, 1996 and January 30, 1997 job offers were based on Dr. Harris' October 22, 1996 work restriction evaluation (Form OWCP-5). In this evaluation, Dr. Harris indicated that appellant could not bend, squat, climb, kneel or twist. He also could not walk for more than one hour, sit for more than two hours or lift more than five pounds. Dr. Harris further indicated that appellant could work four hours per day. Both job offers indicated that appellant was expected to work full time and be able to lift up to 10 pounds.

The Office's procedure manual states: "If the claim for recurrence of disability for work is based on modification of the claimant's duties, or on the physical requirements of the job, the claimant should be asked to describe such changes and the employing establishment should be asked to comment."⁵ While, the Office asked the employing establishment to amend the job offer, no response was received and the Office did not develop the evidence to determine the validity of appellant's allegation that he was working beyond the physical restrictions imposed by Dr. Harris.

On remand, the Office should prepare a new statement of accepted facts. The Office should then refer appellant, together with the statement of accepted facts, the complete case record and questions, to a Board-certified specialist for a rationalized medical opinion on whether appellant sustained a recurrence of disability beginning April 28, 1998 causally related to his January 22, 1990 employment injury. Further, the Office should contact the employing establishment for a statement addressing appellant's allegation that he was required to work outside his physical restrictions. After such further development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

⁴ See *Gary L. Fowler*, 45 ECAB 365 (1994); *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 821 (1978).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7a(3) (January 1995).

The April 20, 1999 and July 28, 1998 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
December 28, 2000

Michael J. Walsh
Chairman

Priscilla Anne Schwab
Alternate Member

Valerie D. Evans-Harrell
Alternate Member