U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WAYNE Y. LIU and U.S. POSTAL SERVICE, AIRPORT MAIL FACILITY, JFK INTERNATIONAL AIRPORT, Jamaica, NY

Docket No. 03-292; Submitted on the Record;
Issued December 15, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of disability commencing July 31, 2001, causally related to his July 4, 1992 muscle sprain injuries.

The Office of Workers' Compensation Programs accepted that on July 4, 1992 appellant, then a 44-year-old distribution clerk, sustained cervical and lumbar muscle strains and left shoulder and arm sprains while lifting heavy sacks of mail. He stopped work and underwent a C3-7 laminectomy in April 1995. Appellant received appropriate compensation benefits, underwent vocational rehabilitation and was reemployed part time in a limited-duty capacity with the employing establishment on September 9, 1996. He increased his hours from four hours per day to six hours per day on February 3, 1997 and to full time on September 16, 1997.

The activity restrictions that appellant's treating physician, Dr. Gai-Fu William Yang, a Board-certified physiatrist, placed on him in his return to full-time work were:

> "(1) No repetitive arm and elbow movements. Avoid reaching above shoulder level;
>
> "(2) Intermittent activities, such as lifting, carrying, bending, twisting, standing, reaching and pushing should be minimized;
>
> "(3) When working, [appellant] should sit with firm back support and should be free to stand up and walk when needed;
>
> "(4) Must avoid cold and damp climatic areas;
>
> "(5) Day shift only;
>
> "(6) When physically tolerable, [appellant] may work overtime at voluntary bases [*sic*]."

Dr. Yang provided a work restriction evaluation Form OWCP-5 on which he indicated that appellant could sit continuously for eight hours per day, walk for three hours per day intermittently and stand for three hours per day intermittently. He indicated that appellant could lift no more than 10 pounds, could not do pulling, constant fine manipulation or continuous grasping and could not reach above his shoulder.

On September 11, 1997 appellant accepted a September 4, 1997 job offer working for 40 hours per week as a modified distribution clerk. The job description was as follows: "[y]ou will be assigned to the Air Mail Records Unit [AMRU] to perform the following duties: auditing, filing of records, clocking of mail received in the AMRU. Training in the understanding for break-up of BVs [Bulletins of Verification] and use of the MIDAS system to research missing mail as needed." The employing establishment noted that this limited-duty position was within appellant's work activity restrictions as specified by Dr. Yang of "[m]aximum lifting ten pounds, intermittent walking and standing up to three hours per day, can work sitting up to eight hours per day. Should avoid continuous grasping and fine manipulation. No pulling or reaching above the shoulders. Avoid stress in productivity quotas and avoid demands for meeting deadlines. Avoid repetitive arm movements."

On December 15, 1998 Dr. Yang reiterated appellant's work activity restrictions and added no pulling, no continuous fine motor movements of the arms and no stress in productivity quota or demand for meeting deadlines. Dr. Yang, however, reduced the amount of walking allowed to one hour per day.

On July 31, 2001 appellant advised his supervisor that doing matches required the use of his left hand continuously shoveling loads of paper and that after 15 minutes his arm became numb and had increasing pain. He claimed that doing matches was beyond his physical capacity and was against his medical restrictions, which prohibited repetitive use of his arms. Appellant stated that he refused to perform assignments that were against his shoulder physical restrictions and indicated that he had to work slower to reduce the pain. Appellant's supervisor advised appellant to file a claim for recurrence of disability because the only remaining task from his limited-duty position that he continued to perform, auditing, was being taken over by another procedure. The supervisor told appellant that there was no work for him since he could not perform the other duties of his limited-duty position.

On July 31, 2001 appellant filed a Form CA-2a, recurrence of disability, commencing that day, claiming that the employing establishment had changed the nature and extent of his limited-duty job requirements by trying to make him perform the other tasks of his previous limited-duty position as a modified distribution clerk.

In an August 6, 2001 statement, Maureen Mallon noted that appellant returned to work at the AMRU rehabilitation job offer which was performed at a desk where he was able to stand and walk as necessary and with an ergonomic chair and had no productivity or deadline demands. She noted that, in January 1998, appellant requested to work overtime in AMRU and that he performed overtime duties from January through July 1998. Thereafter Ms. Mallon noted that appellant informed her, between January 1999 and October 2000, that he could no longer file or prepare BVs because this caused him pain and he was relieved of these duties. In November 2000, appellant informed Ms. Mallon that matching documents caused left hand pain

and that he needed to rest periodically. Ms. Mallon relieved appellant of matching documents. She noted that, on August 31, 2001 due to program enhancements for data entry record clerks, auditing was no longer necessary and that therefore, there was no task for appellant to perform. Based on this, Ms. Mallon noted that, since appellant advised her that he was not able to perform any of the other AMRU duties as stated in the rehabilitation job offer,[1] there was no job for him.

On August 7, 2001 appellant stated that he refused to perform assignments that were against his restrictions. He indicated that, until a new position was created for him, he would not come into work.

In an August 8, 2001 statement, the employing establishment's human resource specialist, David H. Padilla, noted that appellant initially performed all of the duties under the limited-duty job offer position, even to the extent of requesting overtime. However, over time, appellant began raising issues as to his ability to perform tasks to the point that he stated that he could only do auditing work.[2] Mr. Padilla noted that appellant was physically finding it hard to work for more than 20 minutes in a day without indicating that pain had developed which required him to rest. As appellant claimed that he was physically unable to perform any of the other tasks of the modified distribution clerk position he was advised to file a Form CA-2a.

Appellant submitted an August 9, 2001 work restriction evaluation Form OWCP-5 from his new treating physician, Dr. Shi-Cheng Chiang, a Board-certified physiatrist, who changed activity restrictions to no walking or standing, no pushing or pulling, no simple grasping or manipulation, no using foot controls, no operating a car and no repetitive hand motion. By an accompanying narrative report, Dr. Chiang noted that, on August 7, 2001, appellant complained of neck pain, stiffness and weakness/numbness of his left hand, occasional low back pain radiating to his left hip and leg, weakness in his lower extremities and the inability to stand for any length of time. Dr. Chiang diagnosed recurrent neck pain, status post laminectomy and cervical and lumbar disc herniation and opined that appellant was permanently partially disabled and unfit for left hand motion.

In a letter dated September 25, 2001, the Office requested further factual and medical information in support of appellant's recurrence claim. The Office allotted appellant 30 days within which to submit the requested evidence.

On September 30, 2001 appellant stated that he had a forced work stoppage since July 31, 2001 and was forced to file a recurrence claim because he could not perform duties beyond his physical tolerance. Appellant provided a copy of the September 4, 1997 modified distribution clerk position with portions regarding continuous grasping and fine manipulation highlighted.

[1] These rehabilitation job duties included using a computer, inputting data, shoveling loads of paper, doing matches, filing of records, clocking of mail, writing bulletins of verification, breaking up and filing bulletins of verification and using the MIDAS system to research missing mail.

[2] Appellant's supervisor noted that auditing consisted of underlining certain information in red on forms for the keyers who input the information into the computer system.

In an October 3, 2001 statement, appellant stated that Dr. Chiang told him that he did not have a new injury and that he needed to restrict repetitive wrist and elbow movements, but that there was no need for further diagnostic testing at that time.

By letter dated October 11, 2001, Ms. Mallon refuted appellant's allegations of harassment, verbal abuse and disparate treatment. She noted that appellant had not furnished any updated medical reports to establish a worsening of his disabled condition.

In response to an October 12, 2001 letter from Mr. Padilla, Dr. Chiang indicated that restrictions on wrist and elbow repetitive movement were bilateral, that he could perform repetitive work for 20 minutes per session, 3 sessions per shift, that he could perform 10 minutes of fine manipulation per period, 2 per day, that he could use a computer and perform data entry 20 minutes to 1 hour, 3 to 4 hours per day and that he could do intermittently light filing and sift through sheets of paper for matching for ½ hour per day. Dr. Chaing also noted that appellant should rest 10 to15 minutes per hour.

On October 19, 2001 the employing establishment offered appellant a limited-duty job assignment as a modified distribution clerk where he would verify whether the letters in the trays ready for dispatch were going to the destination labeled on the trays. The employing establishment noted that this was sedentary duty with lifting not to exceed 10 pounds and no repetitive movements of the wrist or elbow and no simple grasping, pushing or pulling, fine manipulation or reaching above the shoulder. Appellant accepted this job offer on October 20, 2001.

By letter dated October 23, 2001, appellant indicated that he had returned to work on October 22, 2001 and requested wage-loss compensation for his period of disability.

By decision dated November 7, 2001, the Office denied appellant's claim for a recurrence of disability, finding that he failed to provide rationalized medical evidence establishing total disability on July 31, 2001 was causally related to his July 4, 1992 employment injury. The Office noted that the medical evidence of record did not establish a change in the nature or extent of either his injury-related disability or his light-duty job requirements.

On November 26, 2001 the Office received an August 8, 2001 Form OWCP-5, work-restriction evaluation, from Dr. Chiang which restricted all duties except for sitting for eight hours per day. Dr. Chiang indicated that appellant had a 10-pound lifting limit and that he should avoid repetitive wrist and elbow movements and noted that appellant was "unable to do repetitive hand motion. In a medical report dated August 7, 2001, Dr. Chiang noted appellant's history of a 1992 neck, shoulder and low back injury, noted that he had undergone a C3-7 laminectomy and noted that, on July 31, 2001, appellant stated that he could not perform the work required. Dr. Chiang noted that on August 7, 2001 appellant was seen complaining of neck pain, stiffness and weakness/numbness of his left hand, the inability to use his left hand for repetitive motion, occasional low back pain and weakness of the lower extremities with the inability to stand for a long period of time. He reported appellant's radiologic evaluation results from 1996 and 1997 and he noted upon examination that appellant's cervical spine range of motion was slightly decreased in all directions, that he had muscle atrophy over the left deltoid and left biceps and that he had minimally decreased left upper extremity sensation. Dr. Chiang

also noted that the strength and sensation of the left lateral thigh/leg/foot was decreased along the L5 nerve distribution. He diagnosed recurrent neck pain, status post laminectomy and cervical and lumbar disc herniation and opined that appellant was permanently partially disabled for the above reasons.

In a letter dated December 3, 2001, appellant requested reconsideration of the November 7, 2001 decision and argued that he was not claiming compensation for disability but for work stoppage. He stated that he was not contending that his medical condition changed but, that the job changed when he was asked to do more limited-duty tasks than just audits which violated his medical restrictions. Appellant repeated Dr. Chiang's work activity restrictions of no repetitive arm and elbow movements and no fine manipulation and he claimed that "matches" and "writing BVs" violated these restrictions because they required repetitive arm and elbow movements and fine manipulation.

By letter dated December 26, 2001, the Office requested that the employing establishment provide comments on appellant's allegations and answer whether "matches" and "writing BVs" were new assignments and whether the amount of BV writing substantially increased as of July 31, 2001.

In a January 8, 2002 response, Ms. Mallon noted that in September 1997 appellant accepted a rehabilitation position involving: auditing, filing of records, clocking of mail received in the AMRU, training in the understanding for break-up of BVs and use of the MIDAS system to research missing mail as needed. Ms. Mallon noted that in July 2001 appellant informed management that he could no longer perform the duties of this position that he had accepted in September 1997. She indicated that appellant was instructed to provide medical documentation specifically stating his physical limitations. Ms. Mallon stated that "management did not adversely change his job description" and that "the elimination of job functions in 1997 was due to [appellant's] claim of incapacity preventing him from performing his duties." She further noted that auditing consisted of gathering relevant documents pertaining to one specific dispatch and foreign origin office which appellant referred to as "matches" and that documents must be visually checked for accuracy with specific data underlined in red ink to assist the employees performing data entry, then filed in appropriate cases. Ms. Mallon noted that, in the event that documents are not received by the AMRU or there is a noted discrepancy, a BV must be issued to the origin office, which included the origin and dispatch data, the date and have an appropriate box checked. She noted that copies could be made by duplicating machines.

In a January 10, 2002 narrative statement, Mr. Padilla provided a more detailed statement of appellant's duties. He noted that the AMRU consisted of 40 employees with varying amounts of employees to handle various functions within the unit and he noted that appellant's workload was distributed between himself and four other employees. Mr. Padilla noted that the "duties in the rehab[ilitation] job offer [appellant] agreed to consists of auditing (which consists of five sub-duties: (1) gathering and (2) organizing loose documents by dispatch numbers and origin [this is the "matching" [appellant] refers to], (3) visually checking the documents for accuracy, (4) writing a "BV" if an inaccuracy is detected and (5) the underlining certain areas of information on the documents to assist the data keyers in ease of locating necessary input information), filling, clocking in of mail on an electronic time/date stamp and the use of a computer based information bank, called the MIDAS System, which requires the use of a

computer keyboard to input/extract information. All these duties are what one employee would be expected to do on a day-to-day basis in order to perform the requirements of the function." Mr. Padilla indicated that, since appellant accepted the rehabilitation assignment on September 11, 1997, he felt that he could perform all the duties listed on the offer. He noted that "[w]hat [appellant] did over the nearly four years he was assigned to the AMRU unit [sic] was to systematically refuse to do one duty after another because he stated it violated his medical restrictions, until he pigeon-holed himself into performing only one duty he stated he could do -- underlining the certain areas on documents to assist the data keyers. When a system enhancement was introduced that eliminated the need for this duty from having to be performed for the data keyers, it created the need for [appellant] to have to perform one of the other duties from his [r]ehab[ilitation] assignment." Mr. Padilla noted that for the years appellant was assigned to the unit, his supervisor, Ms. Mallon, accommodated him with reduction after reduction in his duty requirements and tolerated his increasingly declining productivity and because appellant was a rehabilitation employee she felt that any attempt to speak to him about his work habits could be construed as trying to impose productivity quotas or demands. He noted that appellant's restrictions that he not perform certain tasks repetitively did not preclude him from performing tasks intermittently or taking advantage of alternative methods of completing tasks and that what appellant did was to refuse to do any of his assigned tasks except one.

Mr. Padilla noted that when he discussed appellant with Ms. Mallon it became apparent that his statement that, he could no longer physically perform the duties he agreed to perform when he signed the rehabilitation job offer in 1997, was an indication that his physical condition must have deteriorated and that he needed to be reevaluated by his physician to have new medical restrictions assessed. Mr. Padilla advised that, when appellant provided his new medical restrictions, a new job would be created for him. He noted that appellant's prolonged absence from work was not due to nonaccommodation with a work assignment but due to nonsubmission of an updated medical evaluation. Mr. Padilla noted that appellant's increased restrictions from those originally provided by Dr. Yang suggested a change in his medical condition.

By decision dated February 7, 2002, the Office denied modification of its November 7, 2001 decision. The Office found that appellant had not demonstrated a change in the nature and extent of his light-duty job requirements and had not provided sufficient medical evidence to establish a change in the nature and extent of his injury-related medical condition.

The Board finds that appellant has failed to establish that he sustained a recurrence of disability commencing July 31, 2001, causally related to his July 4, 1992 muscle sprain injuries.

An employee returning to 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 reliable, probative and substantial evidence and to show that he cannot perform the light duty.[3] As part of his burden, the employee must show a change in the nature and extent

[3] *Terry R. Hedman*, 38 ECA 222, 227 (1986).

of the injury-related conditions or a change in the nature and extent of the light-duty requirements.[4]

Appellant alleged that his limited-duty job requirements were changed on July 31, 2001, however, the evidence of record supports that appellant was merely being asked to perform some of the other duties which were part of his limited-duty rehabilitation job assignment that he had accepted on September 11, 1997, which included doing matches, filing of records, clocking of mail received in the unit, data entry and computer use, BV writing, BV verification, breaking up BVs, shoveling loads of paper and use of the MIDAS system. As the need for the one task he had been performing, auditing, was diminished, it was logical that he would be asked to perform some of the other duties within his accepted rehabilitation job assignment and, therefore, nothing was changed in nature or extent of the job position as of July 31, 2001, merely reorganized, with the working requirements being the same in nature and extent in 2001 as they were in 1997. Therefore, appellant has failed to demonstrate a change in the nature and extent of his light-duty job requirements effective July 31, 2001.

Further, appellant has not submitted sufficient medical evidence to substantiate a change in the nature and extent of his injury-related medical condition. Although Dr. Chiang provided more strict work activity limitations than Dr. Yang had provided in 1997, he did not provide any medical explanation, rationalized or otherwise, of why these increased limitations were necessary, other than to avoid appellant's subjective complaints of pain and he did not identify or describe any objective change on or around July 31, 2001 in the nature or extent of appellant's injury-related condition or disability. In fact, Dr. Chiang merely noted losses in range of motion and sensation and the findings of atrophy and did not even provide a detailed narrative description of the objective nature or extent of appellant's present functional physical condition, causally related to his accepted employment injuries, such that appellant's activity limitations could be easily visualized. Therefore, the OWCP-5 form report and the accompanying brief narrative noting historic findings and interventions are insufficient to establish that on or around July 31, 2001 appellant sustained a change in the nature or extent of his injury-related medical condition.

As appellant has not demonstrated that he sustained a change in the nature or extent of either his injury-related condition or in his light-duty job requirements, he has not established his recurrence of disability claim.

[4] *Id.*

Accordingly, the decisions of the Office of Workers Compensation Programs dated February 7, 2002 and November 7, 2001 are hereby affirmed.[5]

Dated, Washington, DC
December 15, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[5] By letter dated January 6, 2000, the Office had advised appellant that compensation for his loss of wage-earning capacity that had been awarded on August 5, 1997 was being suspended effective January 2, 2000 due to his failure to submit a completed Form CA-1032. Appellant was advised that when he completed the required Form CA-1032 his compensation benefits would be retroactively restored. Therefore, the January 6, 2000 determination of the Office regarding appellant's loss of wage-earning capacity remains in an interlocutory posture. On appeal appellant requested reinstatement of his compensation benefits, as he had complied and completed the requested Form CA-1032. Since there is no formal final decision on the issue, it is not before the Board on this appeal. *See* 20 C.F.R. § 501.2(c).