

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

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**M.S., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
East Orange, NJ, Employer**

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**Docket No. 07-1915  
Issued: December 28, 2007**

*Appearances:*  
*James Muirhead, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 11, 2007 appellant timely filed an appeal from the Office of Workers' Compensation Programs' May 10, 2007 merit decision which denied her recurrence claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

**ISSUE**

The issue is whether appellant established that she sustained a recurrence of disability on or after October 18, 2002 causally related to her accepted employment injury.

## **FACTUAL HISTORY**

On November 20, 2002 appellant, then a 57-year-old food service worker, filed an occupational disease claim alleging that she developed aggravated chronic venous insufficiency in both her right and left legs starting on January 19, 2002.<sup>1</sup>

In a June 11, 2002 note, Dr. Garth Samuels recommended that appellant be off her legs for three hours out of an eight-hour shift. In a July 16, 2002 note, Dr. Samuels stated that appellant needed to sit for one hour after standing for two hours. As a result of appellant's treating physician's restrictions appellant was placed in a limited-duty sedentary position.

On December 23, 2002 the Office accepted appellant's claim for chronic venous insufficiency of the lower limbs.

On August 23, 2004 appellant filed a notice of recurrence of disability alleging that beginning on October 18, 2002 her employer could not accommodate her as her limited-duty job was no longer available.

In a December 4, 2002 supervisor's report, Margaret Gering stated that appellant went on disability retirement on October 21, 2002, that she had been working in a limited duty, sedentary position per her physician's orders and that this position was still available to her.

In a January 23, 2003 physician's report, Dr. Samuels stated that prolonged standing aggravated appellant's chronic venous insufficiency. Additionally, he stated that he was unaware that appellant was not working as he did not authorize her to stop.<sup>2</sup>

In a February 20, 2003 report, Dr. Trudy Hall diagnosed lumbar radiculopathy and low back pain, stated that appellant was unable to sit for greater than 30 minutes and that her pain was exacerbated by bending and lifting. Dr. Hall also stated that appellant's period of total disability was from October 18, 2002 to present.

In an August 20, 2004 letter, Vivian Henry, supervisory dietician, stated that when appellant was employed as a food service worker "she was not able to perform the tasks of the position because of her disability."

In a December 28, 2004 supervisor's report, Norma Holmes stated that appellant was placed on light duty and that "she was not told to retire. When she was told she could not be accommodated for light duty forever and could not be forced elsewhere by OWCP specialist because of her extremely limited activities, she was given options to consider."

In a September 26, 2005 letter, the Office requested additional information from appellant to support her recurrence of disability claim. On September 26, 2005 the employing

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<sup>1</sup> Appellant noted she was previously accepted for chronic venous insufficiency in her left leg.

<sup>2</sup> On February 26, 2003 the Office received a notice of recurrence of disability dated June 17, 2002 for the period from April 28 through May 20, 2002. This period of disability is not the subject of this appeal.

establishment noted that there was nothing in appellant's file to support that her limited-duty position was withdrawn and that it accommodate any restrictions identified.

In a December 6, 2005 decision, the Office denied appellant's recurrence claim on the grounds that the evidence did not support that the limited-duty position was withdrawn and that the medical evidence did not support a change or worsening of her condition.

On December 20, 2005 appellant requested an oral hearing. The hearing was held on April 19, 2006.

By decision dated June 20, 2006, an Office hearing representative affirmed the December 6, 2005 decision denying appellant's claim on the grounds that the evidence was insufficient to support that she was totally disabled from work subsequent to October 21, 2002. It found that appellant was capable of continuing to work within the restrictions provided by her physician.

On July 27, 2006 appellant requested reconsideration and submitted two April 20, 2006 statements from appellant's coworkers stating that appellant worked her regular duties the week of and up to her last day on October 18, 2002.

On November 6, 2006 the Office denied modification of the June 20, 2006 decision.

On November 28, 2006 appellant requested reconsideration. On May 10, 2007 the Office issued a merit decision which again denied modification.

### **LEGAL PRECEDENT**

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. 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>3</sup>

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 of record establishes that he or she can perform the light-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 show that he or she cannot perform such light duty. As part of this burden, 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.<sup>4</sup> The issue of whether an

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<sup>3</sup> 20 C.F.R. § 10.5(x).

<sup>4</sup> *J.F.*, 58 ECAB \_\_\_ (Docket No. 06-186, issued October 17, 2006); *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

employee has disability from performing a modified position is primarily a medical question and must be resolved by probative medical evidence.<sup>5</sup>

### ANALYSIS

Appellant's claim was accepted for chronic venous insufficiency of the lower limbs. She claims that due to her condition she was totally disabled and incapable of performing her light-duty position from October 18, 2002 to the present.

Appellant has the burden to show a change in the nature of her condition or a change in the nature of her light-duty requirements in order to establish a recurrence of total disability. She has not shown a change in her condition. None of the medical evidence demonstrates a change in her accepted condition of venous insufficiency rendering her disabled as of October 18, 2002. The report from Dr. Hall diagnosed lumbar radiculopathy and stated that appellant was totally disabled on October 18, 2002. However appellant's claim has not been accepted for lumbar radiculopathy nor does the report demonstrate by medical evidence that the lumbar radiculopathy is causally related to her chronic venous insufficiency. Therefore the report has little probative value to establish that appellant was totally disabled during the claimed time period due to her accepted condition. None of the other medical reports address the issue of appellant's total disability on October 18, 2002.

Appellant claims that her light-duty position was withdrawn. However there is no evidence to support her allegation. The report from Ms. Gering stated that appellant had been working in a limited-duty position when she went on disability retirement and that her position was still available. The report from Ms. Holmes stated that appellant was not forced to retire and was given options to consider because of her extremely limited activities. In the conference memorandum with the Office, the employing establishment stated that they would accommodate any restrictions identified and that there was no record of the limited-duty position being withdrawn. The statements from appellant's coworkers do not establish that appellant's light-duty position was withdrawn.

There is no evidence to support appellant's claim that a light-duty position was not available or that her restrictions were not being accommodated. As such the Board finds that appellant has failed to meet her burden to establish that she sustained a recurrence due to a change in the nature of her condition or a withdrawal of her light-duty position.

### CONCLUSION

Appellant has failed to establish that she was totally disabled from October 18, 2002 to the present.

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<sup>5</sup> *Cecelia M. Corley*, 56 ECAB \_\_\_\_ (Docket No. 05-324, issued August 16, 2005); *Bryant F. Blackmon*, 56 ECAB \_\_\_\_ (Docket No. 04-564, issued September 23, 2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 10, 2007 and November 6, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 28, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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