

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

D.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Atlanta, GA, Employer**

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**Docket No. 07-587
Issued: October 18, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 27, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 21, 2006 merit decision denying her claim for recurrence of total disability. Pursuant to 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 met her burden of proof to establish that she sustained a recurrence of total disability on or after March 20, 2006 due to her November 9, 1988 employment injury.

FACTUAL HISTORY

On November 10, 1988 appellant, then a 29-year-old markup clerk, filed a traumatic injury claim alleging that she sustained injury on November 9, 1988 when a gate fell down and hit her left knee. Appellant stopped work on November 9, 1988 and later returned to limited-duty work for the employing establishment. The Office accepted that appellant sustained a neck

sprain/strain, left foot and left lower limb contusions, left shoulder and upper arm strains, and medial meniscus tear of the left knee and paid her appropriate compensation.¹

On September 20, 1994 appellant began working for four hours per day at the employing establishment as a modified clerk. The position did not require twisting, kneeling, climbing, squatting, bending or overhead lifting and restricted lifting to 10 pounds. Appellant could intermittently alternate between sitting, walking, standing and lifting and was not required to drive more than 20 minutes or type on a computer for more than an hour. The duties of the position were in accordance with work restrictions provided on September 16, 1994 by Dr. Yee Chen, an attending Board-certified orthopedic surgeon. In a November 22, 1994 decision, the Office adjusted appellant's compensation effective November 13, 1994 to reflect that her actual wages as a modified clerk fairly and reasonably reflected her wage-earning capacity.

In June 2003, appellant started working for four hours per day (between 2:00 and 6:00 p.m.) at the employing establishment as a modified automated markup clerk. The position did not require twisting, kneeling, climbing, pulling, pushing, squatting or reaching above shoulder height and restricted lifting to 10 pounds. Appellant could intermittently alternate between sitting, walking, standing and engaging in repetitive elbow motion.² On June 22, 2004, Dr. Joseph I. Hoffman, a Board-certified orthopedic surgeon serving as an Office referral physician, indicated that appellant could work for four hours per day and could sit, walk, stand, lift, push, pull and engage in repetitive wrist and elbow motions for four hours per day. He stated that appellant could lift, push or pull up to 10 pounds, drive to and from work for four hours per day, reach for two hours per day and twist, bend or stoop for one hour per day. He noted that appellant could not squat, kneel or climb.

Appellant stopped work on March 20, 2006 and went into leave without pay status. In April and May 2006, she filed Forms CA-7 alleging that she sustained total disability beginning March 20, 2006 and continuing. On May 23, 2006 the Office requested that appellant submit additional evidence in support of her claim for total disability.

In a May 23, 2006 letter, Vivian Robinson, an employing establishment official stated that limited-duty work remained available to appellant. The official stated: "[that] the job offer was made because she was reassigned to another area to work. The new area is within her driving restriction and duties meet her physical limitations." The record contains a description of the modified monitor position which involved working four hours per day between 11:00 a.m. and 3:00 p.m. The position allowed appellant to intermittently alternate between sitting, walking, standing and lifting up to 10 pounds. The position did not require reaching above the shoulders, twisting, pulling, pushing, squatting, kneeling, bending or climbing.³

¹ In February 1989 appellant underwent a left meniscectomy which was authorized by the Office. On January 13, 1993 she received a schedule award for a 15 percent permanent impairment of her left leg.

² The job site was located at the Hub and Spoke Facility on Tradeport Drive in Atlanta.

³ The job site was located at the General Mail Facility on Crown Road in Atlanta.

The record contains a memorandum from Doreen Ortiz, an Office claims examiner, of a June 2, 2006 telephone conference she held with Ms. Robinson and Bonnie Herron, another employing establishment official. Ms. Ortiz indicated that appellant had made an accusation that the employing establishment was not giving her work that was within her work restrictions and had asked her to leave the Hub and Spoke Facility located on Tradeport Drive in Atlanta. She indicated that Ms. Herron had stated that headquarters had mandated that almost all limited-duty employees be moved to the General Mail Facility, which was not far from the Hub and Spoke Facility, in order to allow them to continue their limited-duty work. Ms. Robinson indicated that the new job description was sent by overnight mail to appellant and stated that, after appellant indicated on March 20, 2006 that the work hours were inconvenient, the hours were changed to allow her to work from 11:00 a.m. and 3:00 p.m.⁴

In a June 19, 2006 letter, appellant stated that on March 19, 2006 her supervisor, J.B. Gibbons, told her that it was her last day at the Hub and Spoke Facility and directed her to call Ms. Robinson for further instructions about her new work arrangements. She asserted that she spoke to Ms. Robinson on March 20, 2006 and told her that she could only work a “desk job” and could only work on the dayshift. Appellant indicated that she also spoke to Ms. Herron who told her that the new job was “not a desk job.” She claimed that she was “pulled off” her regular limited-duty work and that her new workplace was “moved out of my driving limitation range.” Appellant asserted that Ms. Robinson and Ms. Herron did not respond to her further attempts to contact them.

In a September 21, 2006 decision, the Office denied appellant’s claim that she sustained a recurrence of total disability on March 20, 2006 due to her November 9, 1988 employment injury. The Office indicated that appellant had appropriate limited-duty work available to her on or after March 20, 2006 and that she had not shown that she was unable to perform this work such that she became totally disabled due to her employment-related conditions on or after March 20, 2006.⁵

LEGAL PRECEDENT

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that 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 she cannot perform such light duty. As part of this burden the employee must

⁴ The record contains a July 6, 2006 letter, in which Ms. Robinson indicated that appellant was sent the new job offer on March 13, 2006 by overnight mail. She indicated that the job offer was amended to allow appellant to work from 11:00 a.m. to 3:00 p.m. and that the job remains available to her.

⁵ The Office cited precedent regarding the standards for modifying a loss of wage-earning capacity determination, but it did not conduct an evaluation of whether appellant’s September 1994 loss of wage-earning capacity determination should be modified. The Office noted that once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous. *See George W. Coleman*, 38 ECAB 782, 788 (1987).

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.⁶

ANALYSIS

The Office accepted that appellant sustained a neck sprain/strain, left foot and left lower limb contusions, left shoulder and upper arm strains and medial meniscus tear of the left knee on November 9, 1988. Through March 19, 2006, appellant was working for four hours per day, between 2:00 and 6:00 p.m., in a limited-duty position as a modified automated markup clerk. The position did not require twisting, kneeling, climbing, pulling, pushing, squatting, or reaching above shoulder height and restricted lifting to 10 pounds. Appellant could intermittently alternate between sitting, walking, standing and engaging in repetitive elbow motion.⁷ She stopped work on March 20, 2006 and claimed that she sustained a recurrence of total disability due to her employment-related conditions. Appellant asserted that she was “pulled off” her regular limited-duty work in that the job she was asked to report to on March 20, 2006 was beyond her work restrictions. She also asserted that her new workplace was “moved out of my driving limitation range.”

The Board finds that appellant did not meet her burden of proof to show that there was a change in the nature and extent of her limited-duty job requirements such that she sustained a recurrence of total disabled for any period on or after March 20, 2006. The Board notes that appellant has not made any allegation that her claimed recurrence of total disability was due to a change in the nature and extent of her injury-related condition.⁸

Although appellant claimed that appropriate limited duty was not available after March 20, 2006 she did not submit sufficient evidence to establish this claim. The evidence of record, including numerous statements from employing establishment officials, shows that appropriate limited-duty work remained available to appellant on and after March 20, 2006. Effective March 20, 2006, appellant was to start a new limited position as a modified monitor position which involved working four hours per day between 11:00 a.m. and 3:00 p.m. She was sent a job offer for this position by overnight mail on March 13, 2006. The position allowed appellant to intermittently alternate between sitting, walking, standing and lifting up to 10 pounds. The position did not require reaching above the shoulders, twisting, pulling, pushing,

⁶ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁷ The job site was located at the Hub and Spoke Facility on Tradeport Drive in Atlanta.

⁸ Appellant did not submit any medical evidence concerning her employment-related medical condition on or after March 20, 2006. In fact, the last medical evidence of record is a June 22, 2004 report of Dr. Hoffman, a Board-certified orthopedic surgeon serving as an Office referral physician. Dr. Hoffman indicated that appellant could work for four hours per day and could sit, walk, stand, lift, push, pull and engage in repetitive wrist and elbow motions for four hours per day. He stated that appellant could lift, push or pull up to 10 pounds, drive to and from work four hours per day, reach for two hours per day and twist, bend or stoop for one hour per day. Dr. Hoffman noted that appellant could not squat, kneel or climb.

squatting, kneeling, bending or climbing.⁹ The Board finds that these job duties are essentially the same as the job duties of the limited duty she performed through March 19, 2006.¹⁰

Appellant claimed that her new workplace was “moved out of my driving limitation range,” but the record reveals that both the old and the new work sites were located in Atlanta and there is no indication in the record that her employment-related conditions prevented her from driving to the new worksite.¹¹ She claimed that an employing establishment official told her that her new job was not a “desk job” but she did not explain how the duties of the new job changed such that she was rendered totally disabled.

For these reasons, appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after March 20, 2006 due to her November 9, 1988 employment injury. The Office properly denied her claim for an employment-related recurrence of total disability.¹²

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after March 20, 2006 due to her November 9, 1988 employment injury.

⁹ The job site was located at the General Mail Facility on Crown Road in Atlanta.

¹⁰ Moreover, the duties of this job were within the work restrictions recommended by Dr. Hoffman.

¹¹ Dr. Hoffman indicated that appellant could drive to and from work for four hours per day. Appellant has not submitted any medical evidence regarding her ability to drive.

¹² The Board notes that it was not necessary for the Office to conduct an evaluation of whether appellant’s September 1994 loss of wage-earning capacity determination should be modified because she had not claimed a material change in the nature and extent of her injury-related condition. *See supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 21, 2006 decision is affirmed.

Issued: October 18, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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