

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of JANICE F. MIGUT and U.S. POSTAL SERVICE,  
BULK MAIL CENTER, Eagan, Minn.

*Docket No. 96-1861; Submitted on the Record;  
Issued December 1, 1998*

---

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant was disabled for her light-duty position from September 10, 1994 to January 29, 1995.

Appellant sustained injuries to her hands and wrists on October 21, 1974, November 21, 1980 and July 14 and October 21, 1984. The Office of Workers' Compensation Programs accepted that, in these injuries, appellant sustained a fracture of the right long finger, right and left carpal tunnel syndrome, a sprain of the right hand, tendinitis and synovitis and tenosynovitis of the right thumb. The Office issued appellant a schedule award for a five percent permanent loss of use of the right hand on July 6, 1979, and authorized surgeries on appellant's hands and wrists. Repair of the volar plate of appellant's right long finger proximal interphalangeal joint was performed on June 18, 1986, carpal tunnel surgery was performed on the right hand on June 29, 1987 and on the left hand on August 10, 1987, and a right trigger thumb release was performed on April 18, 1990.

Associated with her injuries, appellant periodically was disabled from work for prolonged periods during which the Office paid her compensation for temporary total disability, including from May 23, 1993 through September 5, 1994. On August 25, 1994 the employing establishment offered appellant a light-duty position with the following duties: "Answer phones in mail processing office. Do interoffice mail runs (consistent with lifting restrictions), update rolodex, intermittent filing of leave slips." It listed restrictions of lifting up to four hours per shift not to exceed two to three pounds, no reaching above the shoulder, and limited simple grasping, fine manipulation, and pushing/pulling. Appellant's attending physician, Dr. Edward C. McElfresh, a Board-certified orthopedic surgeon, was asked by the employing establishment whether appellant could perform the duties of this position, and in an August 19, 1994 report stated, "I would have no objection to her trying this light-duty work with the previous limitations as stated in my note of March 9, 1994; no lifting of more than two or three pounds." Appellant accepted this position on August 30, 1994 and returned to work in this position on September 6, 1994.

Appellant worked two days, September 6 and 7, 1994 in this position, and thereafter claimed compensation from September 10, 1994 until she again returned to work on January 29, 1995. On September 9, 1994, two days after appellant stopped work, she was seen by Dr. McElfresh, who stated that she had continued multiple areas of pain and tenderness in the upper extremities, and that “she is back working doing a lot of writing and having some difficulty tolerating this.” In a report dated September 19, 1994, Dr. McElfresh stated that appellant had “increasing pain throughout both of her extremities into her neck, shoulders and elbows as well as continuation of problems with the hand.” Dr. McElfresh stated that he “will keep her off work until she is evaluated by the rheumatologist.” Appellant was then seen by Dr. David J. Ridley, a Board-certified rheumatologist, on September 26, 1994; Dr. Ridley diagnosed tendinitis in the wrists.

In a report dated December 9, 1994, Dr. McElfresh stated that appellant was having continued problems with her hands, with “multiple areas of tenderness and triggering over the proximal pulleys of the right long and ring finger and the left index finger. ... She is not working presently, since there is no other working other than writing and she is unable to do this.” In a report dated January 23, 1995, Dr. McElfresh stated, “Her irritation is settling down. I would allow her to return to work, but would restrict her as to no use of the rolodex or SPR’s [spiral parcel runouts] with no writing and would keep on previous restrictions as noted before.” On January 29, 1995 the Office offered appellant a light-duty position answering the phone with no use of the rolodex, no SPR’s and no writing. Appellant accepted this offer on January 29, 1995.

The Office rejected appellant’s claim for compensation from September 10, 1994 to January 29, 1995 by decision dated January 4, 1995.

In a report dated March 13, 1995, Dr. McElfresh stated:

“Patient has had persistent problems. When I saw her on September 19th [1994] she was having a marked flare up at which point I took her off work and referred her to her rheumatologist for further testing and evaluation. Patient’s symptoms finally settled down in January. I allowed her to return to work as long as she did not use the [r]olodex, SPR’s and still stayed within the previous limitations. I feel this is a persistent problem for which she was previously under the care of [sic] and I do not agree with the claims examiner’s report of January 4, 1995 in which her claim was rejected. I feel this is not based on medical fact. ... Patient has had persistent problems and irritation from her work over an extended period of time. I feel this has been continuing. I do not agree with the claims examiner. There is constant reference to there being no objective findings. I feel that if one would look through and read the medical records, it is noted that she had areas of tendinitis throughout her arm and described several places, especially along the flexor carpi radialis and flexor carpi ulnaris tendons, as well as tenderness of the IP [interphalangeal] joints of her right thumb with some triggering of the proximal pulleys of the right long and ring finger, and left index finger. She also has had a positive Tinel’s sign along the ulnar nerve. I, therefore, do not believe that the disallowance of the patient’s medical problems is warranted or justified.”

In a report dated December 18, 1995, Dr. McElfresh stated:

“She has been seen and treated and has had multiple areas of flare [up] that seem to increase with increased amount of use.... When I saw her in September she attempted to return to work but she was unable to handle this.... She presently is working full time in a position where she does not have to use her arms and hands for strenuous activity. She seems to tolerate this fairly well.”

By decision dated February 21, 1996 and finalized February 22, 1996, an Office hearing representative found that appellant had not met her burden of proving a recurrence of total disability after her return to light duty on September 6, 1994.

The Board finds that appellant was totally disabled from September 10, 1994 to January 29, 1995.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>1</sup> Generally, the Office can meet this burden by showing that the employee returned to work, even if that work is light duty rather than the job the employee held when injured, if thereafter the employee earns no less than he or she had before the employment injury.<sup>2</sup> However, a short-lived and unsuccessful attempt to return to duty does not automatically discharge the Office’s burden to justify termination of compensation.<sup>3</sup>

In the present case, the evidence does not establish that appellant’s employment-related disability ended by September 10, 1994. Appellant’s attending physician, Dr. McElfresh, a Board-certified orthopedic surgeon, stated on August 19, 1994 that he had no objection to appellant trying the offered position. Appellant did try it for two days, and Dr. McElfresh later stated that “she attempted to return to work but she was unable to handle this.” Dr. McElfresh enumerated the specific function -- writing -- that appellant was unable to handle, and stated that she would be able to perform a position not involving writing in January 1995. The employing establishment offered appellant such a position on January 29, 1995, and Dr. McElfresh noted in a December 18, 1995 report that she was tolerating this position fairly well. The evidence does

---

<sup>1</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>2</sup> *Billy G. Sinor*, 35 ECAB 419 (1983).

<sup>3</sup> *Maggie Makaleka Sodergren*, Docket No. 87-1203 (issued June 13, 1988); see *Theresa M. Dwonch*, 29 ECAB 828 (1978) (The Board found that the burden of proof remained with the Office, despite appellant’s return to light-duty work on a part-time basis. This is consistent with the Office’s procedure manual, which states that actual earnings can be used to determine an employee’s wage-earning capacity only after the employee has been working for 60 days.) Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

not show that appellant's inability to perform the light-duty position she attempted on September 6 and 7, 1994 was due to any factor other than her employment-related condition.<sup>4</sup>

Given the circumstances of this case, the burden of proof was not shifted by appellant's unsuccessful attempt to perform the position her physician stated she could try. The burden of proof to terminate appellant's compensation remained with the Office, which did not meet its burden by showing either that appellant's disability ended or that it was no longer related to her employment injuries.

The decision of the Office of Workers' Compensation Programs dated February 21, 1996 and finalized February 22, 1996, is reversed.

Dated, Washington, D.C.  
December 1, 1998

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

---

<sup>4</sup> In a report dated September 23, 1994, Dr. Thomas C. Jetzer, who is Board-certified in preventive medicine, suggested that conditions that "may not be necessarily work related" might be contributing to her inability to work, but this report is speculative and unrationalized.