

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BRENDA J. BENSING and DEPARTMENT OF THE NAVY,  
NAVAL ORDNANCE STATION, Louisville, Ky.

*Docket No. 96-1667; Submitted on the Record;  
Issued June 11, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability on or after November 9, 1995 due to her November 4, 1993 employment-related injury.

The Office of Workers' Compensation Programs accepted that appellant sustained an employment-related low back strain and recurrent herniated nucleus pulposus on November 4, 1993 and a recurrence of disability on July 1, 1994. The employee was totally disabled for work from November 5, 1993 to January 14, 1994; from February 26 to May 27, 1994 and from July 1 to September 30, 1994.

In a medical report dated September 26, 1994, Dr. Jorge E. Lsaza, appellant's treating physician and an orthopedic surgeon, stated that she could return to work on October 3, 1994 for up to 20 hours a week.

By decision dated December 22, 1994, the Office found that appellant had been reemployed at the employing establishment on October 1, 1994 in the position of light-duty electrical technician for four hours a day with permanent restrictions and adjusted appellant's compensation award accordingly.

On October 26, 1995 appellant filed a claim for lost wages from November 9, 1995. On that same day appellant filed a claim for recurrence of disability alleging that the employing establishment intended to remove her from her position effective November 9, 1995 because it could not accommodate her work-related restrictions.

On October 27, 1995 the employing establishment notified the Office that it was "downsizing and is to be closed in 1996," and further stated that because it could not accommodate appellant's part-time schedule she would be removed from the rolls effective November 9, 1995.

On November 8, 1995 the employing establishment notified the Office that the Office of Personnel Management (OPM) approved appellant's application for disability retirement effective November 3, 1995.

On November 20, 1995 the Office notified appellant that she remained on the periodic rolls based on her November 4, 1993 employment-related injury but that she would need to elect either her disability retirement or compensation benefits, but not both.

On that same day the Office issued a decision denying appellant's claim for recurrence of disability after November 9, 1995 on the grounds that she failed to present evidence that would support her claim. In an attached memorandum the Office stated that appellant's "removal or termination is due to a general reduction-in-force which affects full-duty and light-duty workers alike." The Office also found that its determination regarding appellant's wage-earning capacity should not be modified.

On November 30, 1995 appellant filed a petition for reconsideration asserting essentially that her termination was not conducted pursuant to a reduction-in-force action as the Office stated in its November 20, 1995 decision. In support of her petition, appellant submitted a November 30, 1995 letter from the employing establishment clarifying its October 27, 1995 letter by stating that it had intended to remove appellant because it could not accommodate her work restrictions but that OPM had approved her claim for disability retirement on November 3, 1995, prior to the date of appellant's proposed termination. The letter stated:

"Enclosed please find CA-2a, CA-7, and CA-8 forms submitted for [appellant]. [Appellant] returned to duty on October 3, 1994 in a restrictive duty capacity working 20 hours per week. She was issued a formal wage-earning capacity decision from OWCP on December 22, 1994. This agency is downsizing and is to be closed in 1996. At this time, we cannot accommodate [appellant's] part-time schedule and are removing her from the rolls of this station effective November 9, 1995."

The employing establishment attached a copy of appellant's November 6, 1995 disability retirement form indicating an approval date for disability retirement benefits of November 3, 1995. Under remarks, the form noted: "No other job offered as there was none for which employee could qualify. Reason for retirement: Disability retirement."

On February 23, 1996 the Office denied appellant's petition for reconsideration of its November 20, 1995 decision denying appellant's claim for recurrence of disability on the grounds that appellant had failed to submit evidence that would support her claim. The Office stated that the November 6, 1995 OPM notice had been considered by the Office previously and that the November 30, 1995 letter contained information that the Office had also considered previously.

The Board finds that appellant has met her burden of proof in establishing a recurrence of total disability causally related to federal employment commencing November 9, 1995, the date the employing establishment stated it could no longer accommodate her light-duty restrictions.

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

establishes that the employee 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 to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.<sup>1</sup>

In the present case, the record indicates that appellant was working in a light-duty capacity for 20 hours per week following a July 1, 1994 recurrence of disability due to her November 4, 1993 employment injury. The employing establishment indicated on October 27 and November 30, 1995 that it intended to remove appellant because it could not accommodate her work restrictions. Appellant was advised that after November 9, 1995 there would be no positions available within her physical limitations. The uncontroverted evidence therefore establishes a change in the nature and extent of appellant's light-duty job requirements.<sup>2</sup> As no light duty was available, appellant has met the change in the nature and extent of the light-duty job requirements.<sup>3</sup>

The decisions of the Office of Workers' Compensation Programs dated February 23, 1996 and November 30, 1995 are reversed.

Dated, Washington, D.C.  
June 11, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>1</sup> *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>2</sup> See *Jackie B. Wilson*, 39 ECAB 915 (1988) (Appellant met his burden in establishing a change in the nature and extent of his light-duty requirements when the employing establishment terminated his employment on the grounds that it could no longer provide a light-duty job within his restrictions).

<sup>3</sup> *Supra* note 1.