

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT KIRBY and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

*Docket No. 98-2428; Submitted on the Record;
Issued April 13, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established a recurrence of disability commencing in November 1990 causally related to a June 21, 1987 employment injury.

The case has been before the Board on a prior appeal. In a decision dated October 30, 1990, the Board found that the Office of Workers' Compensation Programs had not met its burden of proof in terminating appellant's compensation on June 5, 1989.¹ The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

In a decision dated August 15, 1997, the Office determined that appellant had not established a recurrence of disability as of May 1989, November 1990 or November 1994. By decision dated May 7, 1998, an Office hearing representative affirmed the denial of a recurrence of disability.

The Board has reviewed the record and finds that the record requires additional development of the evidence.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, 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.²

¹ Docket No. 89-1928 (issued October 30, 1990).

² *Terry R. Hedman*, 38 ECAB 222 (1986).

The Board notes that the Office has referred to several different periods with respect to a claim for a recurrence of disability. The record indicates that appellant did stop working in May 1989, when the employing establishment advised him that his employment was terminated, and then returned to a light-duty position in February 1990. He again stopped working in June 1990, apparently due to a nonemployment-related condition, then resumed working light duty in October 1990 and again stopped working in November 1990. The record indicates that appellant was paid compensation for the periods May 1989 to February 1990 and June 1990 to October 1990. Therefore the relevant period of time with respect to the claim for a recurrence of disability is the period commencing November 1990, as appellant stopped working at that time and did not return to work.³

The Board also notes that there had been some confusion as to whether a continuing conflict in the medical evidence existed. The Office had declared a conflict in the medical evidence in 1988 with respect to whether appellant's employment-related disability had ceased. As the Board found, the Office did not meet its burden of proof in terminating compensation since the report of the impartial medical specialist was not of sufficient probative value. In a May 17, 1997 decision, an Office hearing representative asserted that the conflict remained and had never been resolved. The relevant issue was no longer a termination of compensation; however, the issue is whether there was a recurrence of disability commencing in November 1990 and on this issue there was no probative evidence of record and therefore no conflict under 5 U.S.C § 8123(a).

When the Office referred appellant to Dr. Maxwell Stepanuk, Jr., an osteopath, it was as a second opinion referral physician.⁴ Moreover, the record was not properly developed to provide a basis for an opinion by him. The issue, as noted above, is disability commencing in November 1990 for the light-duty position appellant had been performing. The statement of accepted facts does not describe the light-duty position, nor does it describe appellant's work history during 1990. In a report dated June 24, 1997, Dr. Stepanuk opined that appellant could perform light duties with a 20-pound lifting restriction, no repetitive twisting, bending, standing or stooping. He stated that he could not comment on the ability to return to regular duties unless he had a job description. The Office sent appellant's date-of-injury job description to Dr. Stepanuk, rather than the light-duty position. In a report dated August 6, 1997, he opined that appellant could not perform the date-of-injury position, but again stated appellant could perform light duties with a 20-pound lifting restriction, no repetitive twisting, bending, standing or stooping. It is not clear from the record whether all of these restrictions were within the light-duty position; there is a brief description of the position in a letter dated February 27, 1990, but the Office should have provided Dr. Stepanuk with a complete and accurate description of the light-duty job. Moreover, he was asked about total disability in May 1989, November 1990 and November 1994 and his response was a brief statement that appellant could perform light duties on "these dates." Dr. Stepanuk did not provide a reasoned opinion as to whether there was a

³ November 1994 represents the date appellant filed the recurrence of disability claim, not the date the recurrence of disability commenced.

⁴ See *John H. Taylor*, 40 ECAB 1228 (1989).

change in the nature and extent of appellant's condition as of November 1990 that disabled him for the light-duty job.

Since the Office referred appellant to Dr. Stepanuk, it should secure an appropriate report on the relevant issues.⁵ The Office should prepare an amended statement of accepted facts, include a complete description of the light-duty job and secure a reasoned medical opinion as to whether appellant had a recurrence of disability on or after November 1990. After such further development as it deems necessary, it should issue an appropriate decision.

The decisions of the Office of Workers' Compensation Programs dated August 15, 1997 and May 7, 1998 are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
April 13, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁵ See *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).