United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 06-2079**
	)	**Issued: May 9, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Dickinson, ND, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 11, 2006 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated August 18, 2006 finding that he had not established a recurrence of disability on November 8, 2000. 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 has met his burden of proof in establishing that he sustained a recurrence of total disability on November 8, 2000.

FACTUAL HISTORY

On June 20, 1997 appellant, then a 50-year-old mail carrier, filed an occupational disease claim alleging that on June 18, 1997 he realized that his carpal tunnel syndrome was due to his employment duties of casing and carrying mail. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and bilateral surgical carpal tunnel releases on August 20, 1997.

The Office granted appellant a schedule award for 10 percent impairment to each of his upper extremities on February 17, 2000.

Appellant accepted a light-duty job offer on September 23, 2000 as a modified city carrier. The position entailed no reaching above the shoulder, no operation of a motor vehicle, repetitive movements with his wrists or elbows no more than 12 times an hour or once every 5 minutes as well as pushing up to 65 pounds, pulling up to 52 pounds and lifting up to 40 pounds for 2 hours each in an 8-hour workday. Appellant's work duties included watering trees and plants, emptying trash containers, moving empty equipment, answering telephones and retrieving hold mail, certified mail or registered mail. These work restrictions complied with those provided on May 15, 2000 by Dr. Keith A. Bengtson, a physician Board-certified in physical medicine and rehabilitation. Appellant returned to work on October 23, 2000. Dr. Thomas R. Templeton, a Board-certified family practitioner, completed a note on October 27, 2000 and indicated that appellant should make very limited use of his hands. He stated that appellant should repeat not using his hands more often than every 30 minutes. Dr. Templeton completed a second note on November 2, 2000 and stated that both of appellant's wrists and hands were obviously swollen. He recommended that appellant cease using his hands until he was evaluated by a hand surgeon.

The employing establishment offered appellant a second modified position performing claims/lobby, monitor/safety checks duties within the same work limitations on November 6, 2000. Appellant rejected this position on November 7, 2000. Dr. Templeton completed a note on November 7, 2000 and stated that appellant could be employed as a lobby greeter, but could not carry a clip board, push, pull, move equipment or climb a ladder. He also deferred judgment to appellant's hand surgeon.

Appellant filed a notice of occupational disease and a notice of recurrence of disability on November 7, 2000. On October 27, 2000 he realized that his condition of bilateral carpal tunnel syndrome and bilateral median neuritis was related to repetitive use of his hands while performing his employment duties. He stated that his light-duty assignment was withdrawn. Appellant stopped work on November 8, 2000 and stated that his condition was not stable and that Dr. Templeton had found that he could perform no work with his hands.

In a letter dated November 13, 2000, the Office informed appellant that he had abandoned his suitable work position and allowed him 30 days for a response. On December 14, 2000 the Office stated that appellant's reasons for refusing the suitable work position were unacceptable and allowed him 15 days to accept the position. By decision dated January 9, 2001, the Office terminated appellant's compensation benefits on the grounds that he abandoned suitable work. Appellant requested an oral hearing on January 24, 2001.

On February 2, 2001 the postmaster, Richard J. Harsche, stated that he informed appellant on October 20, 2000 that every effort would be made to accommodate him and that he should inform the employing establishment if any duties assigned adversely impacted his condition. Appellant's supervisor, Robert Johnson, also provided a statement dated February 2, 2001 detailing the duties appellant performed from October 23, 2000 through Thursday, November 2, 2000 including, answering the telephone every 30 minutes and verifying mail on two occasions.

In a note dated May 11, 2001, Dr. Mitchell D. Burnbaum, a Board-certified neurologist, noted significant breakaway weakness in appellant's finger extensors, his abductor polices and his flexor polices longus. Appellant did not exhibit intrinsic hand wasting. Dr. Burnbaum noted that pinprick was spotty through the arms and hands, but not in a peripheral or nerve root distribution. He found significant bilateral carpal tunnel syndrome on nerve conduction. Dr. Burnbaum diagnosed symptom magnification.

Mr. Johnson submitted an additional statement dated December 21, 2001 asserting that he had never advised appellant that his limited-duty position was no longer available. He informed appellant that there was plenty of work available within his restrictions. Mr. Johnson noted that a custodian began working on April 24, 2000 which was several months before appellant initially returned to work.

By decision dated April 10, 2002, the hearing representative affirmed the January 8, 2001 termination decision.

Appellant requested reconsideration of this decision on May 22, 2002. He provided a copy of a deposition of Mr. Johnson, noting that when appellant returned to work in October 2000 he alleged that he could not perform some of the job duties listed on his position description. Mr. Johnson then attempted to provide appellant with various alternative duties within his work restrictions. Appellant also included a deposition from Rebecca LeTexier, injury compensation specialist for the employing establishment. In a deposition dated April 16, 2002, Dick Harsche, the postmaster, stated that he reviewed appellant's job offers after Mr. Johnson prepared them and suggested additional duties. By decision dated July 31, 2002, the Office declined to reopen appellant's claim for further consideration of the merits.

Appellant submitted a report from Dr. Catherine Willner, a Board-certified neurologist, dated August 7, 2002 describing his medical treatment and findings on examination. She diagnosed presumed failed carpal tunnel surgeries with history suspicious for causalgia. Dr. Willner did not provide work restrictions and did not address any period of partial or total disability. In additional treatment notes dated through November 2002, Dr. Willner diagnosed chronic hand pain and swelling. She treated appellant's condition with gloves wrapped in warm towels as well as topical medications. Dr. Willner examined appellant on May 5 and November 3, 2003 and noted that she had no further treatment options available for him.

Appellant appealed the April 10, 2002 Office decision to the Board on August 26, 2002. In an order dated March 18, 2004, the Board remanded the case on the Director's motion to determine whether he sustained a recurrence of total disability on November 8, 2000.[1] The Director noted that the January 9, 2001 decision improperly terminated appellant's compensation benefits based on his abandonment of a suitable work position without first determining whether he had sustained a recurrence of total disability.[2]

[1] Docket No. 02-2328 (issued March 18, 2004).

[2] *William M. Bailey*, 51 ECAB 197 (1999).

In a letter dated May 17, 2004, the Office requested additional factual and medical evidence from appellant regarding his alleged recurrence of disability on November 8, 2000. The Office allowed 30 days for a response. On June 22, 2004 the Office informed appellant that his November 8, 2000 claim for recurrence of disability was invalid and no further action would be taken as his claim was considered to be open for medical expenses and ongoing treatment related to his accepted condition of bilateral carpal tunnel syndrome. In response to inquiries by appellant's attorney, the Office again indicated that his recurrence claim would not be pursued on October 4, 2004.

Appellant submitted a note from Dr. Willner dated November 1, 2004 diagnosing presumed failed carpal tunnel surgeries and noting that his history was suspicious for causalgia. Dr. Willner noted that appellant felt his symptoms were stable with bearable pain unless he attempted to use his hands. She did not address appellant's ability to work.

In a December 16, 2004 decision, the Office found that the medical evidence was not sufficient to establish that appellant experienced a recurrence of total disability on or after November 8, 2000. It denied his claim for wage-loss compensation.

Appellant, through his attorney, requested an oral hearing on January 10, 2005. Counsel appeared at the oral hearing on June 22, 2005. He contended that upon appellant's return to work in October 2000, appellant was informed that his light-duty position was no longer available. Counsel also alleged that appellant's light-duty job requirements changed after he accepted the light-duty position such that he was constructively removed from employment and that appellant's injury-related condition had worsened.

By decision dated June 22, 2005, the hearing representative denied appellant's recurrence of disability claim finding that he was not totally disabled as of November 8, 2000. Appellant did not establish a change in the nature and extent of his injury-related condition or a change in the light-duty job requirements.

Appellant requested reconsideration on October 25, 2005. He submitted a May 3, 2004 note from Dr. Willner reporting that his symptoms remained chronic and consistent. Dr. Willner did not offer an opinion regarding his ability to work. By decision dated November 18, 2005, the Office declined to reopen appellant's claim for further consideration of the merits. It found that the evidence submitted was insufficient to warrant review of the September 1, 2005 decision.

Appellant requested reconsideration on May 24, 2006. He submitted a functional capacity evaluation dated September 2005 which found that he could only perform infrequent incidental use of his hands. Appellant also submitted a September 21, 2005 report from Dr. Christopher B. Ryan, a physician Board-certified in physical medicine and rehabilitation. Dr. Ryan noted his history of injury and medical treatment. He noted findings on physical examination and concluded that appellant had experienced a worsening of his condition after his return to work in October 2000. Dr. Ryan stated:

> "[O]bjective evidence clearly demonstrates that [appellant's] functional capacity deteriorated substantially and catastrophically after the attempt to return to work in October 1999. This coincided with a worsening of symptoms and objective

findings of swelling. Thus, [appellant's] injury progressed after his attempted return to work in October 1999."

Dr. Ryan concluded that appellant's work restrictions of 2000 were no longer current and that the September 2005 functional capacity evaluation demonstrated a change in the nature and extent of the injury-related condition. He stated that appellant was not currently capable of performing the limited-job duties assigned in October 1999.

By decision dated August 18, 2006, the Office denied modification of the September 1, 2005 merit decision. The Office found that appellant was capable of performing his light-duty position, that the medical evidence did not establish that his condition had worsened and that appellant did not establish that the employing establishment withdrew his light-duty position.

LEGAL PRECEDENT

A recurrence of disability is the 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 which caused the illness. The 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 (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[3]

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-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 cannot perform such limited-duty work. 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 limited-duty job requirements.[4]

ANALYSIS

The Office accepted appellant's claim for bilateral carpal tunnel syndrome. He underwent surgery on both wrists. Appellant's attending physician, Dr. Bengtson released him to return to work with restrictions on May 15, 2000. He returned to work in a light-duty position October 23, 2000 which did not exceed his work limitations. Appellant stopped work on November 8, 2000 alleging a change in the nature and extent of his light-duty job requirements and a change in his injury-related condition. In support of a change in his injury-related condition, the only contemporaneous medical evidence consists of notes from Dr. Templeton dated October 27 and November 2, 2000. He increased his hand use restrictions to once every

[3] 20 C.F.R. § 10.5(x).

[4] *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

30 minutes and then eliminated the use of appellant's hands. Dr. Templeton supported these more restrictive work limitations with a finding of swelling in the hands and wrists. He did not offer any medical reasoning explaining how or why appellant's condition had worsened such that he should limit the use of his hands and deferred any further judgment of appellant's condition. These notes are not sufficiently detailed or rationalized to support a change in the nature and extent of appellant's injury-related condition. In a November 7, 2000 note, Dr. Templeton stated that appellant could perform the duties of a lobby greeter. As he indicated that appellant could work, his reports do not support that appellant was totally disabled as of November 8, 2000. Dr. Templeton's notes do not establish that appellant sustained a recurrence of total disability due to a change in the nature and extent of his injury-related condition.

Appellant submitted a note from Dr. Burnbaum, a Board-certified neurologist, dated May 11, 2001 diagnosing bilateral carpal tunnel syndrome. Dr. Burnbaum noted that appellant exhibited symptom magnification. As he did not address appellant's disability for work as of November 8, 2000 his note is not sufficient to establish that appellant was totally disabled due to a change in the nature and extent of his injury-related condition.

In a series of notes dated August 7, 2002 through November 1, 2004, Dr. Willner a Board-certified neurologist, diagnosed failed carpal tunnel surgeries and causalgia. She stated that appellant's condition was chronic, but did not address his disability for work as of November 8, 2000. These notes are not sufficient to establish a change in the nature and extent of appellant's injury-related condition and cannot meet his burden of proof in establishing a recurrence of disability.

Dr. Ryan, a physician Board-certified in physical medicine and rehabilitation, examined appellant on September 21, 2005 and noted a worsening of his symptoms since October 2000. He based his opinion on the finding of swelling as reported by Dr. Templeton and on September 2005 functional capacity evaluation. While this testing may indicate that appellant's injury-related condition had worsened by the date of the testing in September 2005, it is not sufficient to establish that appellant had a change in the nature and extent of his injury-related condition at the time of his alleged recurrence of total disability on November 8, 2000. Dr. Templeton's reports are not sufficient to establish appellant's claim for the reasons described above. Without detailed and rationalized contemporaneous evidence of a change in his employment-related condition, appellant has not established that he was totally disabled beginning November 8, 2000 as alleged.

Appellant also claimed that the employing establishment did not provide him with suitable light-duty work within his restrictions. The record establishes that he returned to a light-duty position which complied with the work restrictions as set forth by Dr. Bengtson, an attending physician. Appellant reported to work and contended that he could not perform all the duties listed in the position description and that the duties worsened his condition. Mr. Johnson, appellant's supervisor, provided a list of the duties performed by appellant from October 23 through November 2, 2000 including, answering the telephone every 30 minutes and verifying mail on two occasions. There is no evidence substantiating appellant's allegation that he was required to work beyond his established work restrictions or that his light-duty position was no longer made available for him. Mr. Johnson asserted that he never told appellant that his light-duty position was no longer made available. He advised that there was work available for

appellant within his restrictions. Appellant has not submitted any evidence substantiating his condition that suitable light duty was not available.

In response to appellant's allegations that he was unable to perform the duties of the modified clerk position he accepted, the employing establishment offered him an alternative position as a lobby greeter. Dr. Templeton agreed that appellant could act as a lobby greeter within additional restrictions. Appellant declined this position. Counsel argued that it was inappropriate for the employing establishment to make an effort to provide appellant with alternative work duties. However, it is apparent that Dr. Templeton was provided with a copy of the lobby greeter position description. While noting swelling of the hands and wrist, Dr. Templeton clearly found appellant capable of work in this capacity. Dr. Templeton did not find appellant totally disabled and the employing establishment had a full-time position available. Appellant, however, stopped work. The evidence does not establish that his modified position was ever withdrawn or that work was otherwise not made available. Mr. Johnson testified in response to appellant's complaints that he attempted to provide appellant with alterative duties to conform with his work restrictions. The evidence of record fails to support appellant's contentions that he was unable to perform the modified duty made available.

CONCLUSION

The Board finds that appellant has not submitted sufficient evidence to substantiate a change in the nature and extent of his injury-related condition on November 8, 2000, as alleged. Appellant has not submitted sufficient evidence to establish a change in the nature and extent of his light-duty job requirements resulting in a recurrence of total disability.

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2007
Washington, DC

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

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

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