

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GERTRUDE W. STUNTEBECK and DEPARTMENT OF VETERANS  
AFFAIRS, MEDICAL CENTER, Cincinnati, Ohio

*Docket No. 97-1082; Submitted on the Record;  
Issued January 11, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether appellant has met her burden of proof to establish a recurrence of disability on or after September 29, 1996 as causally related to her accepted employment injury.

On April 25, 1994 appellant, then a 62-year-old respiratory therapist, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured her lower back when she turned and held a patient to his side to do percussion. The Office of Workers' Compensation Programs accepted the claim for lower back strain and aggravation of osteoarthritis of the left hip and spondylolysis. Appellant stopped work on April 28, 1994 and returned to a light-duty position on February 13, 1995 working four hours per day for three days per week which later increased to four 8-hour days on April 14, 1996.

Appellant filed a claim for a recurrence of disability on October 2, 1996 beginning September 29, 1996.

By letter dated October 18, 1996, the Office advised appellant of the evidence required to establish that her condition on and after September 29, 1996 was due to her accepted April 25, 1994 employment injury. The Office requested a medical report with a complete and accurate history of the employment injury, a detailed description of findings, details of her position and her inability to perform her position, results of x-rays, a diagnosis, recommendations for continued treatment, and a reasoned medical opinion on the relationship of her current disability and the employment injury.

Appellant submitted various treatment notes for the period December 29, 1995 through September 20, 1996 which are unsigned.

In an attending physician's report (Form CA-20a) dated September 20, 1996, Dr. Martin L. McTighe, appellant's attending Board-certified orthopedic surgeon, opined that appellant was totally disabled effective September 20, 1995 due to her hip condition and

recommended physical therapy. Dr. McTighe also opined that he was not “optimistic that she will be able to return to work.”

In a report dated October 11, 1996, Dr. McTighe opined that appellant was totally disabled from her position of respiratory therapist. Dr. McTighe stated that “[c]onsidering the circumstance of her hip and her back problems, I cannot predict that she will ever regain the ability to return to work.” Dr. McTighe opined that appellant “has a lumbar strain superimposed on severe degenerative arthritis in her lumbar spine, and a strain injury to her hip superimposed on osteoarthritic changes in her hip” and that these conditions prevent appellant from performing the activities requiring bending, lifting, pushing and squatting.

By decision dated November 14, 1996, the Office issued a loss of wage-earning capacity decision finding that appellant’s 32-hour per week position as a respiratory therapist fairly and reasonably represented her wage-earning capacity.

In response to the Office’s October 18, 1996 letter, appellant noted that her work load had increased and that she must use a cane to walk. Appellant stated that as a respiratory therapy technician she has to do a lot of walking and the employing establishment has not provided any accommodations for her in her light-duty position. Lastly, appellant noted that her right knee has deteriorated due to her increased work required of her right leg.

By letter dated November 8, 1996, Dr. McTighe, enclosing his office records from March 29, 1996 to the present, noted that for the past eight to nine months she demonstrated a “severe increase in pain in her right lower extremity, specifically at her knee and has had continued difficulty functioning as a respiratory therapist, due to her need to use medication as well as external ambulation aid to balance her adductor weakness.” Dr. McTighe noted that appellant had not been working within the restrictions he recommended and her condition has worsened. Dr. McTighe opined that appellant “has developed a chronic knee strain due to abnormal use of the right lower extremity, superimposed upon an osteoarthritic condition.”

By decision dated November 26, 1996, the Office denied appellant’s claim for a recurrence of disability. In the attached memorandum, the Office found Dr. McTighe’s opinion insufficient as he noted activities that she could not perform were not required in her limited-duty position. Dr. McTighe also failed to provide any objective evidence in support of his opinion that appellant’s medical condition has worsened other than her subjective complaints.

By decision dated January 9, 1997, the Office denied modification of the November 26, 1996 decision denying her recurrence of disability claim. In the attached memorandum, the Office found Dr. McTighe’s November 8, 1996 report to be insufficient as he failed to provide an opinion as to how appellant’s symptoms have caused a disabling condition.

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability on or after September 29, 1996 as causally related to her accepted employment injury.<sup>1</sup>

When an employee who is disabled from the job she held when injured because of employment-related residuals returns to a light-duty position, or the medical evidence of record establishes that she can perform the light-duty job, the employee has the burden of establishing by the weight of the reliable, probative, and substantial evidence a recurrence of total disability that prevents him or her from performing such light duty.<sup>2</sup>

As part of this burden, the employee must show a material 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>3</sup> Thus, the employee must submit rationalized medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the current disabling condition is causally related to the accepted employment-related condition,<sup>4</sup> and supports that conclusion with sound medical reasoning.<sup>5</sup>

In the present case, the Office accepted that appellant sustained an employment-related lower back strain and aggravation of osteoarthritis of the left hip and spondylolysis on April 25, 1994. Appellant returned to work in a light-duty position on February 13, 1995 and then claimed a recurrence of disability on and after September 29, 1996 due to her April 25, 1994 employment injury. Appellant has not submitted sufficient medical evidence to establish that she sustained a disability on or after September 29, 1996 due to her April 25, 1994 employment injury.

Appellant submitted several reports and treatment notes from Dr. McTighe which are insufficient to meet appellant's burden. Dr. McTighe, in an October 11, 1996 report, states that appellant is totally and permanently disabled from work without giving a rationale for this opinion other than noting appellant's subjective complaints of pain and that activities she was unable to perform which are not required of her light-duty position.<sup>6</sup> None of Dr. McTighe's treatment notes, dated March 29, July 5 and September 20, 1996, are relevant to the issue of establishing a recurrence of disability as they note his increasing appellant's work hours and that appellant had found a gait that enabled her to walk without pain, but do not state how appellant is disabled nor how the disability relates back to the accepted employment injury. In his

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<sup>1</sup> The Board notes that additional evidence was received by the Office subsequent to the January 9, 1997 decision. The Board further notes that on appeal appellant submitted new evidence. The Board, however, cannot consider this evidence, inasmuch as the Board's review of the case is limited to the evidence of record which was before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office with a formal request for reconsideration; *see* 20 C.F.R. § 501.7(a).

<sup>2</sup> *Richard E. Konnen*, 47 ECAB \_\_\_\_ (Docket No. 94-1158, issued February 16, 1996).

<sup>3</sup> *Mary A. Howard*, 45 ECAB 646, 651 (1994), quoting *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>4</sup> *Kevin J. McGrath*, 42 ECAB 109, 116 (1990).

<sup>5</sup> *Lourdes Davila*, 45 ECAB 139, 142 (1993).

<sup>6</sup> 5 U.S.C. §§ 8101-8193; *John W. Normand*, 39 ECAB 1378, 1381 (1988).

September 20, 1996 treatment notes, Dr. McTighe does note a continuation of significant abductor weakness in her left hip and her reporting increased pain, but does not state how appellant is disabled nor how the disability relates back to the accepted employment injury. Dr. McTighe's report of November 8, 1996 also is insufficient to establish appellant's burden as the opinion is not rationalized as it contains no supporting medical rationale relating appellant's disability to her employment injury other than that appellant has had increased pain in her right lower extremity, specifically her knee and has had difficulty working in her position as a respiratory therapist due to her medication and need for a cane to walk. Dr. McTighe also opined that the employing establishment's failure to accommodate appellant has caused her condition to work. An award of compensation may not be based on surmise, conjecture or speculation.<sup>7</sup> Therefore, the issue is whether the medical evidence establishes that appellant had a recurrence of disability on or after September 29, 1996.

As noted above, it is appellant's burden to establish a claim for recurrence of disability. Appellant has not established a recurrence of disability commencing September 29, 1996 that is causally related to her April 25, 1994 employment injury. Accordingly, the Office properly denied her recurrence claim.

The decisions of the Office of Workers' Compensation Programs dated January 9, 1997 and November 26, 1996 are hereby affirmed.

Dated, Washington, D.C.  
January 11, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

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<sup>7</sup> See *Daniel D. Morehead*, 31 ECAB 188, 194-95 (1986).