U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALVATORE C. MARASSA and U.S. POSTAL SERVICE, POST OFFICE, Forest Park, Ill.

Docket No. 97-670; Submitted on the Record;
Issued March 10, 1999

DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof in establishing that he was totally disabled for light-duty work on or after March 16, 1989; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for further review of his case on its merits under 5 U.S.C. § 8128.

In August 1987 appellant, then 28 years old, began employment with the employing establishment. Appellant claimed that on September 10, 1987 he developed left carpal tunnel syndrome from his duties as a mail handler. He noted "no problems of this type with my right hand."

The Office accepted that appellant sustained left carpal tunnel syndrome. On August 3, 1988 he underwent a carpal tunnel release. On September 9, 1988 Dr. James D. Schlenker, a Board-certified hand surgeon and appellant's treating physician, indicated that appellant could return to light-duty work at that time with no lifting over 20 pounds with his left hand, and with a return to full duty using the left hand in six to seven weeks. Prohibition of repetitive activity was not addressed in this report.[1]

[1] Prior to appellant's August 3, 1998 carpal tunnel surgery, Dr. Schlenker had noted that appellant should not lift over 10 pounds, "no repetitive activities, no spreading sacks, no pulling or pushing two hours per day." Following surgery Dr. Schlenker did not indicate that he was reinstating these specific restrictions.

On September 30, 1988 the employing establishment submitted a copy of a proposed job offer to Dr. Schlenker for his approval.[2] On October 11, 1988 Dr. Schlenker found appellant fit for modified full duty as of November 1, 1988. On November 16, 1988 Dr. Schlenker advised the employing establishment that appellant could return to work modified full duty on October 31, 1988 as described in the September 30, 1988 letter.

Appellant returned to light duty in the job of modified custodian with no loss of wage-earning capacity effective November 5, 1988.

On February 24, 1989 Dr. Schlenker found that appellant had recovered completely from his left carpal tunnel syndrome, based upon nerve conduction studies that date. Appellant later testified that at that time Dr. Schlenker discharged him from further treatment.[3] Dr. Schlenker noted no specific job restrictions at that time.

During the interval between his return to duty on November 5, 1988 and his cessation of duty on March 16, 1989 appellant petitioned the employing establishment for an alteration in the terms of his employment agreement.[4]

On February 28, 1989 appellant was directed by his supervisor to clean face bowls and toilet bowls in the washrooms. Appellant refused to perform these duties, and instead went to the health unit complaining of left hand swelling.[5] The supervisor was instructed that expanded job duties for appellant had to be approved by his treating physician. By letter dated March 1, 1989, Dr. Schlenker was asked whether appellant could perform the expanded job duties of washing face bowls and toilet bowls, dusting above shoulder level with feather duster, spot sweep work floor areas, restock work cart, and empty and replace trash liners in office waste paper baskets.

Also by letter dated March 1, 1989, the employing establishment advised appellant that adequate work within his work tolerances was not available on Tour 2, and that he was assigned where there was a need.

Appellant ceased performing the duties of his modified custodial position on March 16, 1989 setting forth his objections to the terms of his reemployment and his refusal to continue therein. By letter dated March 16, 1989, appellant stated:

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[2] The job was that of modified custodian requiring intermittent standing and walking, lifting of a maximum of 10 pounds, intermittent pushing of a cart on wheels, some stair climbing, occasional reaching above the shoulder, and excluding carrying, pulling, stooping, kneeling, crawling or twisting. The job was described as light housekeeping duties including cleaning tables and chairs in lunchroom areas, spot sweeping bathroom floors, dusting waist high window glass surrounding lunchrooms, and damp wiping and disinfecting tables.

[3] Appellant also testified that he did not see Dr. Schlenker again until July 1989 when he sought a medical report regarding the effects of his modified duties. Appellant noted that Dr. Schlenker did not physically examine him at that time.

[4] Appellant filed a grievance over his assignment to Tour 1 instead of Tour 2, which was denied. Also on February 22, 1989 appellant requested reassignment to Tour 2, which was denied.

[5] The nurse noted that the health referral form was marked "job related" by appellant and not by his supervisor.

"Effective March 17, 1989 I am no longer coming in to work. I am not resigning. I find I can no longer work on Tour 1 as a modified custodian and refuse the reemployment I accepted on November 6, 1988 at the [employing establishment], until I am put back on my original and rightful Tour 2 assignment, and if at all possible back into a job in my own craft. Which are justifiable requests under ELM regulations (disability partially overcome) and the provisions of article 13 section 4 of the National Agreement.

"I have suffered deep personal conflicts, mental anguish and problems with my health that I feel are directly related to the hours of Tour 1 and the job of modified custodian. Since November 6, 1988, … I have suffered five or six incidents of swelling in my left hand which all needed medical attention at the nurse's office.[6] I have also suffered one incident and swelling of my left eye after being hit by an ice scraper handle which also needed medical attention in the nurse's office. All of this happened while in my job as a modified custodian on limited duty Tour 1.

"I feel that I was forced by the office of injury compensation to accept the job of modified custodian on Tour 1 beginning on November 6, 1988 after I was told by that office there was no other job available in my craft in either office or plant work since my release from light duty on October 10, 1987 and now on modified duty beginning November 6, 1988 except for the modified custodian position that was only available on Tour 1."

* * *

"Tour 1 consists of only custodial and maintenance personnel which consists of a very small number of employees. As part of the regular custodian's job on Tour 1 he also does what my job analysis states. There are also at any given time a number of other modified custodians on Tour 1 with the same job as mine. Tour 2 custodial force has no limited-duty employees on it (or does my other craft on Tour 2) and is the tour where the bulk of the employees … are assigned. Which would cause me to believe that a modified employee would present the greater help to the regular employees.

"For the above-stated reasons I believe I have been forced out of my rightful position … and will not report back to duty until I have been put back on my proper tour of duty, with a job in my own craft. Or if no job is available in my craft, I will report back to duty on my original tour in the modified custodial position."

[6] Nurse's notes reveal that appellant was seen as follows: November 20, 1988 complaining of left hand swelling and numbness while "wiping down walls and squeezing the trigger of a spray bottle," with slight left hypothenar swelling noted; January 4, 1989 for left eye problems, no injury was noted; January 18, 1989 with complaints of left hand problems, no redness or swelling noted and appellant refused treatment stating "I just want to report it"; February 12, 1989 with left hand complaints after sweeping, thenar edema noted, treated with ice pack; and February 28, 1989 with left hand complaints, slight left hand swelling noted, ice pack applied, nurse noted referral form to health unit was "marked job related by employee and not by his supervisor."

By response dated March 17, 1989, the employing establishment advised appellant that "It appears you are abandoning your modified custodial position. We are informing the Office that, although suitable employment was offered, it is your decision not to avail yourself to the employment." The employing establishment also advised appellant of the provisions of 5 U.S.C. § 8106(c), and that he would not be entitled to compensation.

On March 21, 1989 the Office received a note from appellant stating: "I request the reopening of my workman compensation claim due to the adverse effects the job of modified custodian has had on my mental and physical health."

On April 5, 1989 the employing establishment provided a copy of appellant's letter of abandonment to the Office and it requested information on the period of appellant's schedule award supposedly payable effective March 21, 1989.[7]

The record contains correspondence from appellant to Dr. Schlenker dated July 11, 1989 stating:

> "During my return to work on November 1988, I had recurring problems with my left hand -- swelling, numbness and pain. I believe these problems were due to job assignments that were on my authorized list of duties and some which I was ordered to do which were [not]. The adverse conditions in my hand were occurring frequently, some of which I reported to the medical office at work, and others which I did [not]. The reason being that all they would do was to give me an ice pack for 15 minutes and tell me not to use my hand for the rest of the workday….
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> "I had asked my employer for an assignment change which was denied. So on March 1989 I took a leave without permission. It was [not] until late in June 1989 that I was told by … the Office of Work[er]s' Comp[ensation] Programs that if I could get confirmation from my doctor that the jobs I was performing were directly involved in the abnormal conditions being displayed in my left hand that a change in job status could be possible.
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> "So, if Dr. Schlenker believes the problems I was displaying during the period between November 1988 and March 1989 were a result of my job assignments, I still may be eligible for a change in my job status. This would be accomplished by a letter to the Office of Work[er]s' Comp[ensation] [Programs] supporting my claims that the job assignments I was performing could have been a deteriorating factor in the recovery of my left hand.
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> "Note -- I can[not] remember when my doctor's appointments were after November 1988 but I do know I told Dr. Schlenker I was experiencing these problems."

[7] On August 9, 1989 the Office granted appellant a schedule award for a seven percent permanent impairment of the left arm for the period February 23 through July 25, 1989. Appellant appealed to the Board contending that the amount should be greater. The Board affirmed the award, Docket No. 90-321, issued April 5, 1990.

By report dated August 10, 1989, Dr. Schlenker noted that he reviewed appellant's July 11, 1989 correspondence,[8] incorporated appellant's statements into his own report, and concluded:

> "I believe that repetitive activities would aggravate the condition of his hands. Apparently, [appellant] has been carrying out certain tasks which have aggravated the conditions of his hands. I believe that some type of permanent modified work should be considered. Otherwise, there is a possibility he will have recurrence of his symptoms."

By letter dated September 14, 1989, the employing establishment advised that appellant had been removed from employment effective June 9, 1989 for unauthorized absence, and noted that appellant had been released to return to modified duties in November 1988 and had been discharged from all treatment in February 1989 with his physician's observation that he had made a full recovery, that appellant did not perform duties beyond his work tolerance limits between November 1988 and March 1989, and that appellant had essentially quit his employment over a dispute regarding the duty hours to which he was assigned. The employing establishment noted that appellant had grieved his tour assignment, and opined that now that appellant had been terminated, he was attempting to retroactively argue that he was not able to continue his employment for medical reasons.

On October 19, 1989 appellant responded to three Office questions stating that he had not had any active medical care since March 1, 1989 since the medical problems he was having with his left hand stopped occurring once he was no longer completing the job of modified custodian; that he had not actually been seen by Dr. Schlenker since February 1989, and that Dr. Schlenker's reevaluation of the correlation between appellant's "new hand injuries" and his job of modified custodian was accomplished with the "medical reports" (nurses notes) from the employing establishment, and that he was still awaiting the outcome of his grievance.

On November 7, 1989 the employing establishment advised the Office that appellant was examined by Dr. Schlenker on February 24, 1989 and found to be completely recovered from carpal tunnel syndrome, yet that, on February 28, 1989, after refusing to clean the bathroom, he reported swelling of the left hand. The employing establishment noted that appellant then worked until March 17, 1989 without further visits to the health unit, abandoned his position, and stated that unless he was returned to his former craft and placed on the day shift he would refrain from returning to his modified position.

By report dated August 10, 1990, Dr. Schlenker reviewed appellant's recitation of events since February 24, 1989, noted that he had not witnessed the swelling or paresthesias appellant had while working, and recommended further testing "to determine whether or not he indeed has a problem with swelling and paresthesias when carrying out repetitive activities."

[8] The Board notes that Dr. Schlenker did not examine appellant for this report or at any point subsequent to February 24, 1989 when he opined that appellant was completely recovered, until August 10, 1990.

By report dated September 13, 1990, Dr. Schlenker noted that appellant underwent a work capacity evaluation on August 23, 1990, noted that prior testing showed bilateral decreases in strength from November 22, 1988 to February 23, 1989 and speculated that "this decrease could be attributed to his return to work and subsequent problems that ensued." Dr. Schlenker noted that such testing required voluntary maximal effort to be valid, and he opined that he felt that appellant put forth reasonable effort. He now noted, however, that appellant's strength testing results had greatly improved. Dr. Schlenker opined that grip strength assessments did demonstrate partial permanent loss of strength in the left hand, but he indicated that appellant's strength was adequate to perform his former job. Dr. Schlenker opined that lifting assessment demonstrated that appellant could lift up to 15 pounds consistently without difficulty, 15 to 35 pounds occasionally and 35 pounds plus only rarely, and noted that volumetric measurements could not verify appellant's complaints of edema with repetitive activities, as all measurements of swelling were normal. He opined that appellant could return to modified full duty that avoided all repetitive activities and with the above-noted lifting restrictions.

In a follow-up report dated September 14, 1990, Dr. Schlenker stated that when appellant returned to full duty after surgery he noticed swelling in his wrists when carrying out repetitive activities, and he opined that there appeared to be "a direct correlation between the amount of repetitive work that he carried out and the swelling and tingling which he developed in the hand." Dr. Schlenker opined that "[b]ecause of the problems he was having carrying out repetitive activities, he left the job that he had" and reported that apparently "they were unwilling to modify his job so there was less repetitive activities." Dr. Schlenker also noted that appellant still noticed that when he carried out repetitive activities or heavy work he developed pain and paresthesias in both wrists and hands, the left side still being more symptomatic than the right.[9]

On February 17, 1991 an Office medical adviser opined that appellant could perform the job as outlined without risking further injury, but noted that the additional proposed duties of March 1, 1989 would involve excessive repetitive movements of the hands, which might cause recurrent problems.

By letter dated March 11, 1991, the Office advised appellant that the Office medical adviser found that the March 1, 1989 proposed expansion of his modified custodian position would have been too much for his condition and likely would have caused recurrent problems.

By letter to the Office dated March 22, 1991, the employing establishment noted that appellant never performed the March 1, 1989 proposed duties, and reiterated that he worked within the restrictions given in his accepted job offer. It noted that appellant left the employment because he stipulated that unless he was placed on Tour 2 in another assignment, he would not be returning to work.

[9] The Board notes that appellant testified that he had not worked since March 16, 1989, and that no right hand condition was ever alleged by appellant or accepted by the Office as being related to his August to September 1987 mail handling duties.

By letter dated May 2, 1991, the employing establishment advised the Office that, after review of the file by their injury compensation specialist, it appeared that the facts had been misconstrued. The employing establishment advised that appellant was not assigned additional duties, his condition was not aggravated by additional duties, and he did not stop work because of additional duties. The employing establishment asserted that appellant performed only the duties listed on the July 6, 1988 job offer, and that he stopped work, as evidenced by his March 16, 1989 letter, because he was not given the day shift and placed in mail processing upon his 1988 restoration to duty. The employing establishment noted that, although appellant accepted the modified custodial position in 1988 he decided on March 16, 1989 to relinquish the position. The employing establishment noted that, although appellant would have them believe he stopped work because of medical reasons, the evidence showed that his work stoppage resulted when he attempted to renegotiate his 1988 restoration to duty.

In a report dated April 16, 1992, Dr. Schlenker referred to the job description in the 1988 letter,[10] and opined:

> "Apparently the job [appellant] actually performed as modified custodian was more intensive in terms of repetitive activities. Apparently he washed lockers and walls, swept floors of the facility, moved garbage containers throughout the complex, hand dusted all pillars in the facility, had to swing a long pole with a duster attached to disengage debris held in a net below the ceiling and under carriages of equipment. He had to move all different types of equipment everyday in [e]xcess of the stated limitations. In other words, his modified work was not as modified as the description in the letter of July 6, 1988 detailed."

Dr. Schlenker opined that appellant performed repetitive activities which would be sufficient to aggravate an underlying tendency toward carpal tunnel syndrome and concluded that his modified work also aggravated his underlying condition toward carpal tunnel syndrome and contributed to his persistent symptoms. Dr. Schlenker further opined that one aspect of appellant's job, washing tables repetitively for long periods of time, involved considerable repetitive activity which, in combination with force, "will contribute to the development or aggravation of the underlying tendency toward carpal tunnel syndrome," and he stated that he believed the aggravation of appellant's underlying condition was work related. Dr. Schlenker recommended that appellant be placed in a modified job which followed the actual description as outlined in the July 6, 1988 letter.

By letter dated April 27, 1992, the employing establishment commented on Dr. Schlenker's recitation of the work appellant actually performed, advising him that from November 1988 to March 17, 1989 appellant did not work outside of the duties outlined in the July 6, 1988 job offer. The employing establishment advised that, after Dr. Schlenker's February 24, 1989 report advising that appellant had completely recovered from carpal tunnel syndrome, his supervisor attempted to increase his duties, but that appellant never performed those duties and continued to work only the duties outlined in the job offer for 17 days until he

[10] The job description submitted to Dr. Schlenker on September 30, 1988 had been originally submitted to him on July 6, 1988.

advised that he was not returning to work. The employing establishment opined that appellant's present symptoms of carpal tunnel syndrome were not work related since he was asymptomatic prior to his work stoppage, and it advised that appellant's reasons for stopping work were clearly stated in his March 17, 1989 letter and involved his desire to be placed on the day shift in mail processing.

By decision dated July 6, 1992, the Office rejected appellant's claim finding that appellant's resignation of March 16, 1989 was not related to his employment condition. The Office found that limited duty was available within appellant's work restrictions as approved by Dr. Schlenker, and that appellant's resignation was for reasons not related to the duty available. The Office further noted that Dr. Schlenker's August 10, 1989 report spoke in general terms of preventive measures against a possible recurrence, and that he did not actually examine appellant until 18 months after his February 24, 1989 examination when he opined that appellant had completely recovered.

By letter dated July 8, 1992, appellant requested an oral hearing on the denial of his claim. A hearing was held on May 26, 1993 at which appellant testified and submitted further factual evidence for consideration.

By decision dated October 18, 1993, the hearing representative affirmed the July 6, 1992 Office decision finding that appellant was not entitled to monetary compensation for employment-related disability on and after March 16, 1989. The hearing representative noted that appellant's March 16, 1989 resignation letter to the employing establishment made no mention of the physical requirements of the modified custodial position nor presented any allegations that he was required to perform duties outside his medical work restrictions, but instead presented objections to the hours of his employment and to the position he was holding. The hearing representative noted that subsequently appellant attempted to "reopen" his claim on the basis that he was medically incapable of performing his assigned duties beyond March 16, 1989. The hearing representative noted that, although appellant claimed that the employing establishment nurse's notes established his claim, such notes merely reflected appellant's presentation with left hand complaints allegedly related to his duties, and did not establish that he was required to work outside of his medical restrictions. The hearing representative noted that, although appellant repeatedly argued that the employing establishment would not honor his work restrictions, the employing establishment repeatedly and consistently replied that appellant's allegations were untrue. The hearing representative noted that on July 6, 1992, without directly addressing appellant's contention that he was required to perform duties in excess of his work restrictions, the Office rejected his claim finding that the employment position that appellant held from November 5, 1988 through March 16, 1989 was suitable to his medical condition. The hearing representative found that the scenario presented by the employing establishment with regard to the events occurring on and after February 28, 1989 was more consistent than that presented by appellant. The hearing representative noted that at the hearing and subsequent to the hearing appellant did not successfully rebut the positions of the employing establishment. The hearing representative found that Dr. Schlenker's February 24, 1989 report finding appellant completely recovered was highly probative as he actually examined appellant at that time, but that his August 10, 1989 report was not, as he did not examine appellant but relied on appellant's letter version of the facts and his symptoms. The

hearing representative found that Dr. Schlenker's subsequent reports were based, not upon an accurate and complete factual and medical history, but on appellant's unsubstantiated version of the facts and his symptoms. The hearing representative found that Dr. Schlenker presented no objective findings that verified appellant's claims of symptomatology and disability beginning March 17, 1989. The hearing representative concluded that the record did not establish that appellant was required to perform duties beyond those for which he was cleared by this treating physician and did not establish that the performance of his modified duties between November 5, 1988 and March 16, 1989 caused disability for the duties of the modified position on and after March 16, 1989.

By letter dated January 27, 1994, appellant requested reconsideration of the hearing representative's decision. In support he argued that the employing establishment made false statements and misrepresentations and had concealed facts. Specifically, appellant referred to two accident reports he had filled out, and he alleged that these demonstrated that he was worked over his modified custodial position restrictions and suffered additional injury. In an employee's statement dated January 4, 1989, appellant alleged that he was hit in the left eye by the handle of an ice scraper while rearranging equipment in the custodial equipment cage. The supervisor noted that appellant had been moving equipment in a maintenance cage and put two shovels next to the ice scraper causing vibration, which made the ice scraper move and hit him in the eye. The supervisor noted that preventive action would be taken to ensure that employees will recognize similar hazards or unsafe practices. The employing establishment nurse noted a contusion of the left eye arch. In a February 12, 1989 statement, appellant alleged that he swept multiple areas using a toy broom and dust pan which he switched from hand to hand and when he was finished he noticed swelling in his left hand. Appellant's supervisor noted that appellant was assigned to do some policing with a toy broom and dust pan and when finished he asked to go to the health unit, stating that he had swelling in his left hand.

By decision dated August 15, 1994, the Office denied appellant's request for modification of the prior decision finding that the evidence submitted was not sufficient to warrant modification. The Office found that, while not all of the actions described in the two accident reports may have been explicitly stated in the formal job description issued by the employing establishment, the evidence submitted did not establish that such duties required appellant to work outside his physical restrictions. The Office noted that the original job offer did include the duties of spot sweeping floors. The Office further noted that the case record did not contain medical evidence to establish that appellant was disabled from performing his modified custodian duties on or after March 16, 1989. The Office noted that appellant was examined by Dr. Schlenker on February 24, 1989, after the two employment incidents mentioned in the accident report forms, and was found to be completely recovered from his carpal tunnel syndrome. The Office further noted that the case record did not contain any medical evidence which demonstrated a worsening of appellant's left hand condition between the time he was found to be completely recovered, February 24, 1989, and March 16, 1989 when he stopped work. It concluded that appellant had failed to demonstrate that his left carpal tunnel syndrome caused him to be disabled from his modified custodial duties on or after March 16, 1989. The Office concluded that appellant had failed to demonstrate 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.

Appellant requested an appeal before the Board, which was docketed as No. 95-82, but by letter dated June 15, 1995, he requested cancellation of his appeal so that he might request reconsideration. The appeal was dismissed by order dated July 11, 1995.

Thereafter, appellant requested reconsideration by the Office. Appellant argued that the employing establishment health unit nurse's notes documented that he was wiping down walls which he alleged was beyond his physical restrictions.

In a memorandum to the Office dated October 11, 1995, the employing establishment noted that the accusation that appellant was wiping down walls with a cloth and spray bottle was unsubstantiated, and it observed that such duty was within appellant's physical limitations of no lifting over 10 pounds and intermittent walking.

By decision dated October 27, 1995, the Office denied modification of the prior decision finding that the evidence submitted was insufficient to warrant modification. The Office found that the fact that appellant reported to the employing establishment health unit on November 20, 1988 complaining about left hand pain and claiming that he was wiping down walls, did not establish that he was required to perform specific job duties outside his work restrictions. The Office also found that the medical evidence of record did not support disability on or after March 16, 1989.

Appellant again requested reconsideration, and submitted further evidence and argument.

By report dated February 21, 1996, Dr. Schlenker reported a factual history based upon appellant's version of the facts, noted that appellant was apparently assigned to wash tables and walls, and commented that the original job description stated that he was only to do this type of work occasionally and not repetitively. He stated that when appellant returned to this activity he again developed symptoms of carpal tunnel compression. Dr. Schlenker stated that appellant also had to sweep large areas of floors and carry equipment which greatly exceeded his weight restriction, and concluded that he was asked to do work which was in excess of his restrictions. He opined that this tended to aggravate appellant's symptoms of carpal tunnel compression, but then stated that he was not sure that these activities actually caused a recurrence of his carpal tunnel syndrome. On the basis of his examination, Dr. Schlenker opined that appellant had residual symptoms of median neuropathy, but noted that he was not certain that these symptoms represented an actual recurrence of carpal tunnel syndrome. He then stated that "even if [appellant] has recurrence of carpal tunnel syndrome, I am not certain that this would necessarily be caused by the work which he carried out which was, in fact, somewhat in excess of the restrictions which I have placed upon him."

By letter dated May 13, 1996, the employing establishment reiterated that appellant stopped work on March 16, 1989 citing the demand that he be placed back on Tour 2 in the mail handler craft as a condition for his return to duty. The employing establishment noted that when it became apparent to appellant that he was not eligible for further compensation benefits since suitable work remained available to him, he then tried to build a case that he stopped work as a result of his medical condition. The employing establishment noted that appellant's condition actually improved from November 1988 until February 24, 1989 when he was determined to have completely recovered from his carpal tunnel syndrome.

On June 10, 1996 appellant submitted a May 21, 1993 note from the union president which stated that appellant "performed a number of assignments which were outside of his medical restrictions." She stated that one of appellant's regular assignments was stocking custodial supplies, the "majority of these supplies were in excess of [appellant's] restrictions." No further specifics were included.

Appellant submitted a June 14, 1996 statement from the union president which noted that appellant was required to unpack, lift, stack, arrange and rearrange custodial supplies which arrived in boxes. She noted that boxes could contain from four to six 1-gallon containers which had to be placed on the shelves in the supply cage. She further noted that appellant also cleaned ledges and glass in 12 windows in the lunchrooms as needed, and washed tables for four to six hours a day. In an earlier April 9, 1996 statement, the union president had provided information to the Office requested by appellant, which stated that in 1989 there were approximately 75 to 80 tables located in 4 canteens.

By letter dated June 18, 1996, appellant argued that 1 gallon weighed 8 pounds, such that the total weight of a box of 4 to 6 containers was from 36 to 54 pounds which he claimed he had to lift. Appellant alleged that washing tables and chairs for long periods of time damaged his left hand. By letter dated August 10, 1996, appellant argued that no amount of time had been set for the length of time appellant was to have washed tables to comply with his medical restrictions of no repetitive activities.

By decision dated August 10, 1996, the Office modified the prior decision finding that the evidence submitted warranted modification of the prior decision. The Office found that, although the evidence submitted lent some support to the allegation that there were occasions when appellant might have worked duties other than those specifically described in the limited-duty job offer, there was nothing in these statements to establish that these duties were outside the 20-pound lifting restriction noted by Dr. Schlenker in his September 9, 1988 medical report nor that they were outside the repetitive restriction. The Office noted that the cleaning of tables and chairs, and the activity of sweeping were both specifically included in the original job offer approved by Dr. Schlenker. The Office further noted that the medical evidence of record did not support that the duties appellant performed caused him to be totally disabled commencing March 16, 1989, or that he had a recurrence of carpal tunnel syndrome on or near March 17, 1989. The Office noted that Dr. Schlenker's medical reports beginning in August 1989 and continuing made it manifestly evident that he accepted without question appellant's allegation that he had an increase in his assigned work duties beyond his work tolerance limitations, and appellant's description of the effects of such additional duties on his medical condition, yet admitted that he did not even examine appellant until August 9, 1990, 17 months after appellant stopped work. The Office noted that, in his most recent report, Dr. Schlenker stated that he was not certain that appellant's median nerve neuropathy symptoms represented an actual recurrence of carpal tunnel syndrome, and that, if carpal tunnel syndrome had recurred, he was not certain that this would necessarily be caused by work that he carried out at the employing establishment. The Office noted that, in spite of appellant's contention that he worked outside of his medical restrictions, Dr. Schlenker's February 24, 1989 report, finding that appellant had completely recovered, in conjunction with his most recent report, supported that appellant was no longer disabled due to carpal tunnel syndrome. The Office modified the prior

decision to reflect that appellant occasionally performed duties which were not specifically cleared by his physician during the period November 5, 1988 through March 16, 1989, but found that it was not established that these duties or his specifically approved duties caused him to be totally disabled for the limited-duty job he held and abandoned on March 16, 1989.

Appellant again requested reconsideration, and in support he offered further argument. Appellant alleged that the Office failed to follow its procedures, that no one asked Dr. Schlenker whether the washing of tables and chairs as performed by appellant was over his restrictions, that no one asked whether the lifting as described by the union president violated his lifting restrictions, and that no one ever asked Dr. Schlenker for an opinion as to whether all the extra duties appellant had described caused him to become disabled. Appellant argued that the original job offer did not specify how many hours a day he would be required to wash tables and chairs, that the original job offer did not specify the duty of lifting and stocking custodial supplies, and that the job offer did not include washing walls, sweeping facility floors, or moving equipment by hand.

By decision dated November 13, 1996, the Office denied appellant's request for further review of his case on its merits finding that the evidence submitted was repetitious and cumulative, and was insufficient to warrant further review of the case on its merits.

The Board finds that appellant has not met his burden of proof in establishing that he was totally disabled for light-duty work on or after March 16, 1989.

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 of record establishes that he 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 show that he cannot perform such light duty. 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.[11] In the instant case, appellant has failed to establish either a change in the nature and extent of his light-duty requirements or a change in his accepted injury-related condition.

Appellant's specific postoperative work restrictions, as per Dr. Schlenker's September 9, 1988 evaluation, were limited to light duty with no lifting of over 20 pounds with the left hand. When provided a copy of the modified custodian's duty requirements, Dr. Schlenker opined on November 16, 1988 that appellant could return to work as described in the September 30, 1988 letter. This position required intermittent standing and walking, lifting of a maximum of 10 pounds, intermittent pushing of a cart on wheels, some stair climbing, occasional reaching above the shoulder, and excluded carrying, pulling, stooping, kneeling, crawling or twisting. The nature of the job was noted to include light housekeeping duties, and it included some specifics.

Appellant returned to modified light duty on November 5, 1988.

[11] *See Cloteal Thomas*, 43 ECAB 1093 (1992); *Stuart K. Stanton*, 40 ECAB 859 (1989); *Terry R. Hedman*, 38 ECAB 222 (1986).

Appellant claims that he worked "outside his light-duty restrictions." As proof appellant argues that the employing establishment health unit nurse's notes reported that he had been washing walls. The Board notes that the specific record entry referred to does not document that appellant was doing what he alleged, but merely states that appellant claimed to the nurse that he was wiping down walls and squeezing the trigger of a spray bottle. As a report merely of what appellant claimed he was doing, and not factual observation of such activity, this report does not substantiate that appellant was wiping walls as alleged. Further, the Board notes that this housekeeping activity, even if appellant was performing it, did not fall outside of Dr. Schlenker's postoperative return-to-work restrictions of no lifting over 20 pounds and light duty only. Therefore, the Board finds that there is no probative evidence that appellant worked outside his job restrictions with this alleged activity.

Appellant alleged that he worked outside his restrictions when he swept various extensive facility floor areas. However, he provided no substantiation of his allegation that he was required to sweep various extensive facility floor areas. Information from appellant's supervisor reported that appellant had been assigned only to "police" certain areas, not to sweep the entire facility with a toy broom. Further, the Board notes that spot sweeping was specifically listed in the job description approved by Dr. Schlenker, such that it did not fall outside his work restrictions. The accident report which appellant filled out following this alleged sweeping activity is only appellant's contention of what he was doing, and is not probative of what he actually did, particularly in light of the supervisor's statement that appellant was only assigned to "policing" duties. Therefore, it is not probative of what actually happened. Therefore, appellant has not established that this alleged sweeping was outside of his work restrictions.

Appellant also claims that he had to wash and wipe tables for four to six hours a day. His union representative reiterated that appellant spent 4 to 6 hours a day wiping tables, and she indicated that the employing establishment had 75 to 80 tables. The Board notes that cleaning, wiping and disinfecting tables and chairs was specifically mentioned in the offered position description and had been approved as an appropriate activity for appellant by Dr. Schlenker. Further, the Board notes that such duty does not violate appellant's working restrictions of no lifting over 20 pounds and light duty only. Although appellant claims that this activity was repetitive, the Board notes that, following appellant's remedial surgery, Dr. Schlenker had not specified that appellant needed any restriction on repetitive duties, in either his September 9, 1988 report or in his February 24, 1989 report. The Board notes that preoperative work restrictions are not necessarily applicable to postoperative conditions resulting after remedial surgery, as postoperatively an employee's condition is substantially changed. The Board further notes that, although Dr. Schlenker, in his reports dated August 10, 1989 and subsequent, opines that, at the time of those reports, appellant should avoid repetitive activities, he had not so opined in his September to November 1988 "return-to-work" opinions, in his February 1989 "completely recovered" opinion, or in any other opinion given during the course of appellant's modified employment from November 5, 1988 to March 16, 1989. As the only duty restrictions specified for this period of time were light duty only and no lifting over 20 pounds with appellant's left hand, and as Dr. Schlenker had approved this specific task, appellant has not

established that washing or wiping tables and chairs was outside his articulated work restrictions at that time for the period November 5, 1988 through March 16, 1989.[12]

Appellant further alleges that he was required to lift weight in excess of his 20-pound lifting limit, and in support he submitted the union president's statement which indicated that he was required to unpack, lift, stack, arrange and rearrange custodial supplies which arrived in boxes. The union president noted that the boxes could contain four to six 1-gallon containers which had to be placed on the shelves. Appellant argued that a 1-gallon container weighed 8 pounds which meant that such boxes weighed 35 to 45 pounds, which was over his 20-pound lifting limit. The Board, however, notes that part of appellant's job as detailed by the union president was to unpack the boxes, which would entail appellant lifting only one 1-gallon container at a time to put it on a shelf, which was no more than eight or so pounds. The Board notes that lifting this one-gallon weight was certainly within appellant's left hand work restrictions. The Board further notes that appellant had no lifting restriction specified for his right hand. The Board, therefore, finds that this evidence does not establish that appellant was being worked outside of his job restrictions.

The union president also made some general statements, without specifics, to the effect that the majority of the custodial supplies appellant was required to stock "were in excess" of his restrictions. The Board notes that this statement, without specifics, is merely an unsubstantiated opinion and is, therefore, not probative of the fact that it alleges.

Appellant alleges that the duties proposed by his supervisor on February 28, 1989 were outside of his work restrictions. He points to medical reports years later which stated that such duties were beyond his capabilities at that time, as proof that he was required to work outside his restrictions. However, the record clearly establishes that appellant never performed these proposed duties, as his own statement claiming that he refused to perform the duties, and as the employing establishment's multiple statements noting that he never performed the proposed duties, point out. Therefore, this is not probative evidence that appellant was required to perform duties in excess of his work restrictions.

Finally, appellant argues that medical reports made beginning five months after he stopped work, and continuing for seven years prove that he worked outside of his restrictions. These reports claim, among other things, that appellant was made to perform intensive repetitive work and duties involving washing lockers and walls, sweeping facility floors, moving garbage containers throughout the facility, hand dusting all the pillars in the facility, and swinging a long pole to dislodge debris from the ceiling and under carriages. The employing establishment repeatedly denies that appellant was required to perform such duties, and it advises that appellant was never worked outside of his job restrictions. The Board notes that these medical reports were based only upon an unsubstantiated, inaccurate factual and medical history provided by

[12] The Board further notes that appellant, in his March 16, 1989 resignation letter, stated that there were "at any given time a number of other modified custodians on Tour 1 with the same job as mine." This would tend to indicate that, with a number of other modified custodians performing the same duties of wiping tables on the same tour, appellant would not have been required to wipe all 75 to 80 tables, but merely a smaller portion of that number, and since he claimed that table-wiping took 4 to 6 hours, this tends to suggest that he did not perform this duty continuously or repetitively, but worked slowly, taking his time and taking breaks.

appellant, and not upon a complete factual and medical history as demonstrated by the record. Consequently, these reports are of diminished probative value, and do not establish that appellant was required to work outside of his September 1988 to March 1989 stated job restrictions.[13]

As appellant has not submitted any probative evidence to support that he was required to lift things with his left hand in excess of 20 pounds, or was required to perform duties not falling into the category of light duty, he has not established a factual basis for his allegations that he was required to work outside of his September 1988 to March 1989 stated job restrictions.

The medical evidence of record is also insufficient to establish that appellant was disabled from his light-duty position due to a change in the nature and extent of his accepted left hand condition. Appellant's employment-related condition was accepted for left carpal tunnel syndrome; on August 3, 1988 he underwent a successful surgical release of his left carpal tunnel compression. On September 9, 1988 his treating surgeon, Dr. Schlenker, opined that appellant could return to light-duty work with no lifting over 20 pounds with his left hand. On November 16, 1988 Dr. Schlenker, after reviewing the physical requirements of the modified custodial position, approved the position as suitable to appellant's partially disabled condition. Thereafter appellant performed in the modified custodial position for over four months without medically documented problems.[14] In fact, on February 24, 1989 after examination and testing of appellant, Dr. Schlenker opined that he had completely recovered from his left carpal tunnel syndrome. Therefore, at that point the record contains no evidence of a change in the nature and extent of appellant's injury-related condition, except to support that neurologically he had completely recovered.

Thereafter, appellant continued to perform his light-duty assignment without medically documented problems for another 20 days until March 16, 1989 when he turned in his letter of resignation stating that he would not return to work unless he was reassigned to Tour 2 in the mailhandler's craft, or if that was impossible, he would return to a Tour 2 assignment in his same modified custodial position. Appellant did not state that he was stopping work because he had become physically disabled for his light-duty assignments, or because his left carpal tunnel syndrome had flared up. The fact that he was willing to return to work in the same capacity as a modified custodian if he was assigned to Tour 2, tends to support that he was physically able, as of March 16, 1989, to perform the position of modified custodian. Appellant did not even mention his accepted employment-related condition until after he was advised that he was not entitled to further compensation benefits, and only then did he request a reopening of his workers' compensation claim due to "adverse effects" of the modified custodial job.

Further, after his work stoppage on March 16, 1989 appellant did not seek medical attention for 17 months. This failure to timely seek medical treatment does not support that he developed a change in the nature and extent of his injury-related condition which caused

[13] *See George E. Williams*, 44 ECAB 530 (1993); *Robert J. Krstyen*, 44 ECAB 227 (1992); *Daniel J. Overfield*, 42 ECAB 718 (1991).

[14] The Board notes that a nurse is not a physician under the Act, such that nurses notes do not constitute probative medical evidence; *see Joseph N. Fassi*, 42 ECAB 677 (1991); *Betty G. Myrick*, 35 ECAB 922 (1984); 5 U.S.C. § 8101(2).

disability for light duty as of March 16, 1989.[15] On July 11, 1989 appellant wrote Dr. Schlenker requesting a letter stating that the job assignments he was performing could have been a deteriorating factor in the recovery of his left hand. In response, and without examining appellant, Dr. Schlenker provided an August 10, 1989 report incorporating appellant's unsubstantiated allegations of repetitive work activities, and speculating that appellant had been carrying out certain tasks which aggravated his hands. This report is of diminished probative value because it was not based upon an accurate factual and medical history as supported by the record, because it was totally unrationalized, omitting any specifics and failing to address how these "certain tasks," which supposedly aggravated appellant's hands,[16] could have been being performed and could have been aggravating his hands, when, based upon his own examination and testing on February 24, 1989, Dr. Schlenker had found that appellant had completely recovered from his carpal tunnel syndrome, because the report was not made within a reasonable period of time after appellant stopped work claiming disability, and because Dr. Schlenker did not even examine appellant for the report.[17] Further, this report does not identify a specific change in the nature or extent of appellant's left hand, but merely speculates that appellant might possibly have a recurrence if he performs repetitive activities. Therefore, this report does not support that appellant experienced a change in the nature or extent of his accepted employment condition.

Dr. Schlenker's subsequent reports all suffer from several of the same deficiencies noted with regard to the August 1989 report, namely inaccurate factual and medical histories, lack of medical rationale, and increasing remoteness from the time period in question, and hence are also of diminished probative value, such that they are insufficient to establish appellant's claim of change in the nature or extent of his left carpal tunnel syndrome during the period November 5, 1988 to March 16, 1989. Additionally, all of these reports apparently ignore the fact that, contemporaneously, Dr. Schlenker found that appellant had completely recovered as of February 24, 1989, and attempt, after the fact, to provide a different scenario for that same time period, further diminishing their probative value.

As no other probative medical evidence was submitted addressing appellant's physical condition on March 16, 1989, the Board finds that the evidence of record establishes that appellant was not totally disabled for his light-duty work within the meaning of the Federal Employees' Compensation Act commencing March 16, 1989, and hence is not entitled to monetary compensation for his work stoppage.

[15] *See, e.g., Karen E. Humphrey*, 44 ECAB 908 (1993) (failure to obtain medical treatment may cast doubt on an employee's statements claiming injury); *see also Robert A. Gregory*, 40 ECAB 478 (1989); *Dorothy Kelsey*, 32 ECAB 998 (1981).

[16] The Board notes that Dr. Schlenker did not address how appellant's right hand became involved as of August 10, 1989 when only the left hand had previously been symptomatic and treated by him. As of September 30, 1987 appellant claimed that his right hand had no problems similar to his left; thereafter he ceased mailhandling duties, did not return to work for over one year, and then returned only to modified light duty with lifting restrictions.

[17] *See supra* note 13.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for further review of his case on its merits.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[18] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[19]

In this case, appellant requested reconsideration, but offered only further argument, repeating arguments which had been previously considered in earlier decisions. As these arguments were repetitious of those previously made and considered, they have no evidentiary value and do not constitute a basis for reopening his claim.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[20]

Appellant has made no such showing of abuse in this case.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated November 13 and August 10, 1996 are hereby affirmed.

Dated, Washington, D.C.
March 10, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

[18] 20 C.F.R. § 10.138(b)(2).

[19] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[20] *Daniel J. Perea*, 42 ECAB 214 (1990).

A. Peter Kanjorski
Alternate Member