

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA NORMAN and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, GA

*Docket No. 98-622; Submitted on the Record;
Issued October 27, 1999*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's position as a modified clerk fairly and reasonably represented her wage-earning capacity; and (2) whether appellant has met her burden of proof in establishing a recurrence of disability on or after July 20, 1997.

Appellant filed a claim on August 22, 1996 alleging that she sustained an injury in the performance of her duties as a clerk. She alleged "injury caused by repetitious movement due to manual casing of mail. Also, injury caused to lower back and spine due to prolong sitting on unsupportive resting stools." The Office accepted her claim for the conditions of cervical and lumbar strain and paid appropriate benefits.

In a medical note dated March 31, 1997, Dr. Thomas L. Dopson, a Board-certified orthopedist and appellant's treating physician, stated "effective March 26, 1997, [appellant] is released to return to full-day employment in modified duty not lifting or carrying more than 25 pounds with frequent position changes of sitting with back support and no standing more than 30 minutes per day. These restrictions are permanent."

On March 26, 1997 appellant returned to work in a limited-duty capacity. In a July 14, 1997 letter decision, the Office determined that appellant's work as a "modified clerk" fairly and reasonably represented her wage-earning capacity.

On August 26, 1997 appellant filed a claim for recurrence of disability commencing July 20, 1997. She indicated that her condition had worsened to the point where she cannot work. Appellant indicated that her supervisor sent her home on July 20, 1997 because of her physical condition and that her doctor recommends more physical therapy. By decision dated October 15, 1997, the Office found that appellant had not sustained a recurrence of disability as there was no medical evidence which support that the accepted conditions had materially

worsened or that there was a material change in the limited-duty requirements.¹ Appellant resigned from employment December 22, 1997.

The Board finds that the Office properly determined that appellant's position as a modified clerk fairly and reasonably represented her wage-earning capacity.

Section 8115 of the Federal Employees' Compensation Act,² provides that the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity. The Board has stated that, generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.³

In the present case, appellant, formerly a clerk, returned to work in a light-duty capacity as a modified clerk, effective March 26, 1997 at the same pay rate. Appellant continued to perform the duties of this position until July 20, 1997, the date she stopped work. The Office determined that the employment fairly and reasonably represented appellant's wage-earning capacity on July 14, 1997, six days prior to appellant's work stoppage. The record indicates that the employing establishment offered appellant the position as a modified clerk, effective March 26, 1997, which included physical restrictions of no lifting over 25 pounds and frequent position changes including sitting. This was consistent with the restrictions set forth in a March 26, 1997 attending physician's supplemental report from Dr. Dopson which indicated that appellant was at maximum medical improvement. Effective March 31, 1997, the employing establishment revised the physical restrictions of the proposed position consistent with Dr. Dopson's March 31, 1997 medical note to include "no lifting over 25 pounds with frequent position changes of sitting with back support; no standing more than 30 minutes per day." Dr. Dopson had indicated that those restrictions were permanent. On April 15 and May 9, 1997 he again indicated that the restrictions should be considered permanent. Thus, the job of modified clerk that appellant accepted is within the physical restrictions specified by Dr. Dopson. The Office met its burden of proof in establishing that appellant was no longer totally disabled and that the position of modified clerk fairly and reasonably represented appellant's wage-earning capacity. Appellant has not submitted any medical evidence that shows she is unable to perform the duties of a modified clerk full time. The Office, therefore, properly based its loss of wage-earning capacity determination on appellant's actual earnings in the modified clerk position. The record indicates that appellant's pay at this position was the same as her date-of-injury position. There is no evidence that this position is seasonal, temporary, less than full time, make-shift work designed for appellant's particular needs.⁴ There

¹ In an October 14, 1997 letter, the Office issued a preliminary determination that an overpayment of compensation had occurred. Inasmuch as the Office has not rendered a final determination concerning overpayment, the Board cannot address this issue.

² 5 U.S.C. § 8115.

³ *Elbert Hicks*, 49 ECAB ____ (Docket No. 95-1448, issued January 20, 1998).

⁴ *Monique L. Love*, 48 ECAB ____ (Docket No. 95-188, issued February 28, 1997).

is no evidence that appellant stopped performing this position because of a change in her injury-related condition affecting her ability to work. The Board therefore finds that the Office properly determined appellant's wage-earning capacity was represented by her actual earnings as a modified clerk and that she had no loss of wage-earning capacity and was not entitled to further compensation benefits.

The Board further finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability on or after July 20, 1997 causally related to her accepted employment injury.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that she 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 she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.⁵ Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her recurrence of disability commencing July 20, 1997 and her August 22, 1996 employment injury.⁶ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.⁷

In this case, appellant has not established a change in the nature and extent of her accepted injury related conditions or a change in the nature and extent of her light-duty job requirements. The most recent medical reports filed around the time of appellant's claimed recurrence of July 20, 1997 indicated that appellant's restrictions remained permanent and that she was capable of working a full day position in a modified duty not lifting or carrying more than 25 pounds with frequent position changes. Thus, the current evidence of record does not support that the accepted conditions have materially changed or worsened since appellant's return to work. By letter dated September 12, 1997, appellant was advised of the deficiencies in the claim and afforded the opportunity to submit the necessary evidence. In a September 21, 1997 letter, appellant stated that her condition has worsened, that she stopped work because she was "in severe pain and to prevent further damage." She also stated that she worked in an isolated area and had to go to several different areas to get mail and supplies which involved walking, lifting, bending and pulling. However, no additional medical evidence was submitted.

Thus, although the Office afforded appellant the opportunity to correct the deficiencies in her claim, appellant has not established a change in the nature or extent of her light-duty job

⁵ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

⁷ *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

requirements or in her medical restrictions. Accordingly, appellant has failed to meet her burden of proof in establishing a recurrence of disability.

The decisions of the Office of Workers' Compensation Programs dated October 15 and July 14, 1997 are hereby affirmed.

Dated, Washington, D.C.
October 27, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member