

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MIRIAM C. HUGHES and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL, Augusta, GA

*Docket No. 98-2101; Submitted on the Record;
Issued April 17, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of partial disability commencing November 5, 1996, causally related to her November 11, 1992 accepted right upper extremity employment injuries.

The Office of Workers' Compensation Programs accepted that on November 11, 1992 appellant, then a 36-year-old respiratory therapist, sustained right shoulder strain, right tendinitis, and a single episode of moderate recurrent depression.¹ The Office also accepted that she underwent right shoulder arthroscopic surgery on May 11, 1994. Appellant received compensation on the periodic rolls from July 18, 1994 until the Spring of 1996 when she was released to part-time light duty.² She returned to light-duty work part time on July 15, 1996.

By decision dated November 4, 1996, the Office determined that appellant's part-time employment effective July 15, 1996 fairly and reasonably represented her wage-earning capacity.³ Appellant also advised the Office that she would be returning to full-time light duty on November 4, 1996.⁴

¹ Appellant was "bagging" a patient from the surgical intensive care unit (ICU) to computerized tomography (CT) scan and back to ICU, when her shoulder injury occurred.

² On June 4, 1996 the employing establishment offered appellant a light-duty position as a certified respiratory therapy technician.

³ As appellant's appeal was not postmarked until June 22, 1998, this decision is not now before the Board on the instant appeal; *see* 20 C.F.R. § 501.3(d)(2).

⁴ Both appellant's attending physician, Dr. Craig T. Kerins, a Board-certified orthopedic surgeon, and the second opinion specialist, Dr. Franklin Epstein, a Board-certified neurosurgeon, opined that appellant could work full-time light duty. They could not find any objective evidence to support appellant's continued complaints of pain.

According to Elizabeth Hill from the employing establishment, appellant returned to light-duty work for eight hours per day on November 4, 1996, worked a full shift and then consulted Dr. Kerins and advised that she was in pain and could not tolerate the job.⁵ On November 6, 1996 and thereafter Dr. Kerins indicated that appellant could only work for fours per day, basing his opinion on appellant's complaints of intolerable pain after working for eight hours light duty, but without providing medical explanation or rationale and without objective evidence of a change in her condition.⁶

By an unsigned report dated November 22, 1996, Dr. Robert L. Brand, a Board-certified orthopedic surgeon, noted appellant's pain complaints and opined that a large part of her problem at that time was degenerative disc disease, and he noted the diagnoses of bilateral chondromalacia patella and right adhesive capsulitis of the right shoulder.⁷

On January 29, 1997 appellant filed a claim for a recurrence of partial disability and noted as date of commencement that "complaint never stopped."

On February 11, 1997 Dr. Kerins opined "that the shoulder strain [w]orkers' [c]ompensation injury of 1992 is no longer preventing [appellant] from working an eight-hour day as a certified respiratory therapy technician," and noted that he could find no objective findings upon examination that date. On February 19, 1997 a chiropractor, Dr. Julie A. Brantley, diagnosed multiple cervical subluxations, however, no x-ray reports documenting such subluxations were submitted.

⁵ Dr. Kerins provided an office note dated November 5, 1996 documenting that appellant telephoned him that date requesting to go back to four hours of work a day, stating that she could not tolerate the pain and had been very depressed. He suggested that appellant "go ahead and drop back to four hours," and noted that he had no other treatment to offer her. On November 6, 1996 Dr. Kerins wrote a prescription stating "May return to four hours of light duty." On November 7, 1996 he noted that appellant was to be put on half time at work and indicated that she continued to be depressed and to complain of a lot of discomfort in her upper shoulders and neck. Dr. Kerins recommended that appellant return for follow-up in two to three months.

⁶ On November 20, 1996 Dr. Kerins noted that appellant was frustrated because in order to go on half days she had to have some new findings and that he found no new orthopedic findings. He noted that appellant described her pain in graphic but unusual ways, and opined that the majority of her problems were psychiatric in nature. In a December 3, 1996 office note, Dr. Kerins noted appellant's complaints of left chondrolateral shoulder pain which was mechanical in nature, which had been present since mid-October, and which was not associated with her injury. In a December 3, 1996 incomplete form reports, Dr. Kerins noted appellant's present impairment as "shoulder pain," diagnosed "sprain" and "chronic sprain of right shoulder," checked "yes" to the question of whether appellant's present condition was due to the injury for which compensation was claimed and recommended "four h[ours] [per] d[ay] light duty." On December 5, 1996 Dr. Kerins noted a diagnosis of "tendinitis left shoulder" related to a new injury occurring on October 10, 1996. Also on December 5, 1996 Dr. Kerins opined that appellant was partially disabled from December 3, 1996 due to another injury involving carrying a 25-pound box down a flight of stairs to a trailer. He opined that appellant could return to part-time light duty on December 3, 1996. On December 26, 1996 Dr. Kerins opined that appellant "could do eight hours of light duty, except for the pain she is suffering. As you know, I agree with Dr. Epstein that, except for the pain, she should be able to work a full eight[-]hour day."

⁷ These diagnoses were noted as being applicable as early as August 3, 1995.

By decision dated August 7, 1997, the Office rejected appellant's claim for benefits finding that the "condition/disability" for which compensation was claimed for the period December 2, 1996 through June 1, 1997 was not causally related to the accepted November 11, 1992 employment injuries.⁸ The Office found that the medical evidence submitted was insufficient to support total disability for that period.⁹ It found that there was no medical documentation to establish a worsening in her condition.

The Board finds that this case is not in posture for decision.

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he or she cannot perform the light duty.¹⁰ As part of this burden, the employee must show a change in the nature and extent of the injury-related conditions *or* a change in the nature and extent of the light-duty requirements.¹¹

In this case, the medical evidence does not demonstrate a material change in the nature or extent of appellant's medical condition on November 4, 1996, however, the evidence of record does demonstrate a change in the nature and extent of her light-duty requirements, that being an increase in the number of hours worked from four hours light duty per day to eight hours light duty per day, effective November 4, 1996.

The evidence of record supports that appellant experienced a change in her light-duty job requirements related to the number of hours work beginning November 4, 1996. Appellant complained the next day that she was unable to continue eight hours of light-duty work per day following the eight-hour light-duty shift. The reports of her treating physician tend to support that, because of her increased symptomatology on November 4, 1996 following an increase in her duty hours, she should reduce her light-duty work hours again to four hours per day. Although Dr. Kerins reports are not fully rationalized or there is sufficient evidence to require that the case be remanded for development.¹² This development should include a statement of accepted facts highlighting the change in the nature and extent of appellant's light-duty job requirements on November 4, 1996 and composition of specific questions to be addressed and answered, to be followed by a referral of appellant, together with the complete case record, to an appropriate specialist for a rationalized medical opinion on the issue of whether the changes in appellant's light-duty job requirements on November 4, 1996 caused partial disability for work from that date and continuing.

⁸ The Board notes that the disability appellant was claiming, related solely to her November 11, 1992 injury, commenced November 5, 1996 and was only partial disability for fours per day.

⁹ *See supra* note 8.

¹⁰ *Terry R. Hedman*, 38 ECA 222, 227 (1986).

¹¹ *Id.*

¹² *See John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

The decision of the Office of Workers' Compensation Programs dated August 7, 1997 is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.
April 17, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member