

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEITH WASHINGTON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA

*Docket No. 99-696; Submitted on the Record;
Issued June 26, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

Whether appellant established that he sustained a recurrence of disability causally related to his accepted employment injury.

On May 1, 1996 appellant, then a 42-year-old AC technician, filed a claim for traumatic injury alleging that he injured his back while lifting a motor at work. The Office of Workers' Compensation Programs accepted the claim for herniated nucleus pulposus with radiculopathy and authorized a discectomy at L4-5 on September 20, 1996. Appellant received compensation for intermittent periods of wage loss from May 8, 1996 to June 5, 1997, when he returned to light duty.

In a final comprehensive report dated June 26, 1997, appellant's treating physician, Dr. Laura Helms outlined appellant's history of injury and course of treatment. Dr. Helms opined that, since his discectomy, appellant had lost 25 percent of his preinjury capacity for activities such as lifting, bending, stooping, pushing and pulling. She noted, however, that not all of appellant's complaints of pain corresponded on physical examination with his work injury. Dr. Helms placed appellant under work restrictions, which included no lifting of greater than 75 pounds and only occasionally lifting of 50 to 75 pounds from waist height.

On August 8, 1997 appellant voluntarily resigned from his light-duty position and received a \$25,000.00 separation incentive payment. He also filed a claim for a schedule award and received an award for 15 percent permanent impairment of the right leg. The award was for 43.2 weeks of compensation for the period June 26, 1997 through April 24, 1998.

On January 13, 1998 appellant filed a claim alleging that he sustained a recurrence of disability beginning August 25, 1997. He stated that he was unable to perform the duties required in his light-duty position due to severe leg pain. The employing establishment indicated that appellant had been performing office duties at the time he left his federal employment and that the position would have been available for an unlimited period of time.

By letter dated March 13, 1998, the Office requested that appellant submit additional medical and factual evidence in support of his claim.

Appellant responded by letter dated March 13, 1998, stating that he “worked two weeks in January 1997 doing filing, answering phones and other clerical work.” According to appellant, he has been in constant pain since he was approved for light duty by Dr. Hemsley on June 25, 1997. He further stated his drive from home to work caused unbearable pain so he stopped work. Appellant noted that his daily activity was now confined to his home.

By decision dated May 18, 1998, the Office denied appellant’s claim on the grounds that the medical evidence was insufficient to establish that he sustained recurrence of total disability causally related to the May 1, 1996 employment.¹

On September 4, 1998 appellant filed a request for reconsideration.

In support of his reconsideration request, appellant submitted an August 12, 1998 report from Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, who discussed appellant’s history of injury and medical treatment, reported physical findings and stated that appellant was temporarily totally disabled through October 6, 1998. He opined that appellant was not capable of returning to his job as an AC technician as he was required to lift extremely heavy objects in that position. Dr. Einbund concluded that appellant was a candidate for vocational rehabilitation.

By decision dated September 23, 1998, the Office denied modification following a merit review of the case. The Office specifically noted that the medical evidence was insufficient to show that appellant was not capable of performing the sedentary duties of an office clerk. The Office further noted that appellant had not been given approval for a change in physicians.

Appellant subsequently filed an appeal with the Board and requested an oral argument which was held on November 18, 1999.

The Board has duly reviewed the case and finds that appellant has failed to establish that he sustained a recurrence of disability causally related to his accepted employment injury.²

When an employee, who is disabled from the job he or she had when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability and show that such light duty can not be performed. As part of this burden of proof, the employee

¹ Because appellant received a schedule award for the period June 26, 1997 through April 24, 1998, he is not entitled to wage-loss compensation related to his alleged recurrence of disability until after April 24, 1998.

² On October 8, 1998 appellant requested reconsideration of the Office’s September 23, 1998 decision and submitted additional evidence. The Office issued a decision denying modification on January 5, 1999. Since the Office’s January 5, 1999 decision was issued after the Board received appellant’s appeal on December 14, 1998 and thereby assumed jurisdiction of the case, the Office’s January 5, 1999 decision is null and void; *see Jimmy W. Galetka*, 43 ECAB 432 (1992).

must how 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.³

In the instant case, appellant has not submitted any evidence to show that he was required to work in a light-duty job which exceeded the lifting limitations imposed by Dr. Helms. After his employment injury, appellant returned to a light-duty position which has been described in the record as a clerical job requiring only sedentary work. Although appellant submitted a report from Dr. Einbund indicating that he was disabled from his position as an AC technician, the doctor did not address whether appellant was capable of performing the duties required of his light-duty office job. Moreover, despite allegations made by appellant that he was unable to drive back and forth from work to his home due to leg and back pain, Dr. Einbund did not address whether appellant was precluded from driving back and forth to work as a result of the May 1, 1996 work injury.

Consequently, the Board finds that appellant failed to establish a recurrence of disability as there is no evidence from which to conclude that appellant was disabled from his assignment as an office clerk due to a change in the nature of that light-duty work or due to change in the nature of his accepted back injury. Inasmuch as Dr. Helms specifically approved appellant for a return to light duty and there is no rationalized medical opinion evidence to show that appellant was disabled from his clerical position at the time of his voluntary retirement, appellant has failed to carry his burden of proof to establish a recurrence of disability. The Office, therefore, properly denied his claim for compensation.⁴

³ *Gary L. Whitmore*, 43 ECAB 441 (1992); *Cloteal Thomas*, 43 ECAB 1093 (1992).

⁴ The evidence submitted by appellant subsequent to the September 23, 1998 decision has not been considered by the Board in rendering this decision. The Board does not have jurisdiction to consider evidence that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from resubmitting his request for reconsideration to the Office.

The decisions of the Office of Workers' Compensation Programs dated September 23 and May 18, 1998 are hereby affirmed.

Dated, Washington, D.C.
June 26, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member