U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALICE MOORE and U.S. POSTAL SERVICE,
POST OFFICE, Champaign, IL

*Docket No. 98-252; Submitted on the Record;*
*Issued March 27, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had not established a recurrence of disability commencing November 25, 1996.

The case has been before the Board on a prior appeal. In a decision dated February 21, 1996, the Board found that the Office had properly suspended appellant's compensation pursuant to 5 U.S.C. § 8113(b) on the grounds that she had failed to cooperate with vocational rehabilitation.[1] The history of the case is contained in the prior Board decision and is incorporated herein by reference. The record indicates that in 1996 appellant received vocational rehabilitation services and was referred to Dr. R.A. Hutson, an orthopedic surgeon, for examination.[2]

Based on Dr. Hutson's work restrictions, the employing establishment offered appellant a light-duty position of unassigned regular clerk. The record indicates that appellant reported for work on November 25, 1996 at 5:00 p.m., and stopped working at approximately 7:30 p.m. She filed a notice of recurrence of disability (Form CA-2a) commencing November 25, 1996.

By decision dated February 28, 1997, the Office determined that appellant had not established a recurrence of disability. In a decision dated October 7, 1997, an Office hearing representative affirmed the prior decision.

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[1] Docket No. 94-931.

[2] The Board notes that, once a claimant cooperates with vocational rehabilitation, the reduction of compensation is ended. The record contains a decision of the Office, issued after the appeal in this case, with respect to compensation prior to April 1996. This is a separate issue and it is not before the Board on this appeal.

The Board has reviewed the record and finds that appellant remained entitled to compensation after November 25, 1996.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[3]

In this case, the Office placed the burden of proof on appellant to establish compensation after November 25, 1996, citing *Terry R. Hedman*.[4] The *Hedman* case provides that 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 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.[5]

Before the burden shifts to appellant under *Hedman*, however, there must be a return to work that is more than a minimal and unsuccessful attempt, or the evidence must indicate that the claimant could perform the position and the stoppage of work was not related to the employment injury.[6] A short-lived or unsuccessful attempt to return to work does not automatically discharge the Office's burden to justify termination of compensation.[7]

The return to work in this case was for less than three hours. Appellant submitted a physician's note dated November 28, 1996 indicating that bed rest was recommended over the next four days and later submitted a report dated September 11, 1997 from Dr. Donald G. Rumer, who stated that appellant's condition was probably aggravated by the trial return to light duty. There is no other medical evidence regarding appellant's ability to perform the position on November 25, 1996.

The Board finds that the burden of proof did not shift to appellant, but it remained the Office's burden to terminate compensation in this case. In this case, the evidence of record is not sufficient to meet the Office's burden. The referral physician, Dr. Hutson, did not provide a clear

[3] *Patricia A. Keller*, 45 ECAB 278 (1993).

[4] 38 ECAB 222 (1986).

[5] *Id.*

[6] *See Carl C. Graci*, 50 ECAB ___ (Docket No. 98-497, issued September 24, 1999) (the return to work was approximately two hours, and the Board also noted that the medical evidence prior to the return to work did not establish that the claimant could perform the position); *Janice F. Migut*, 50 ECAB __ (Docket No. 96-1861, issued December 1, 1998) (return to work for two days; the attending physician opined that appellant had attempted to return to work but was unable to handle the position, and there was no probative evidence that the stoppage of work was unrelated to the employment injury).

[7] *Id.*

opinion that all employment-related conditions had resolved. In his October 9, 1996 report, Dr. Hutson concluded:

> "[Appellant] has signs and symptoms of degenerative lumbar disc disease with right sciatic nerve irritation. She apparently had a lumbar sprain back in 1986 which made her become aware of all of this. The strained tissues have long since healed, and she continues to have difficulty with degeneration of the lumbar disc itself with some right sciatic nerve irritation."

Although Dr. Hutson indicated that the lumbar sprain had resolved, he did not discuss other employment injuries (bulging discs and surgery in 1987) or clearly explain whether he believed there was any causal relationship between the diagnosed conditions and the employment injury. Since it is the Office's burden of proof, the Board finds that the evidence was insufficient to terminate compensation in this case.

The decisions of the Office of Workers' Compensation Programs dated October 7 and February 28, 1997 are reversed.

Dated, Washington, D.C.
March 27, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member