U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA J. MOORE and DEPARTMENT OF THE NAVY, NAVAL SUPPLY SYSTEMS COMMAND, Jacksonville, FL

Docket No. 98-1613; Submitted on the Record;
Issued November 7, 2000

DECISION and ORDER

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

The issues are: (1) whether appellant sustained a recurrence of disability commencing May 24, 1997, causally related to her May 17, 1990 accepted employment injuries; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for further consideration of her claim on its merits under 5 U.S.C. § 8128(a).

The Office accepted that on May 17, 1990 appellant, then a 37-year-old sales store checker (commissary cashier), sustained a contusion of her left elbow and left reflex sympathetic dystrophy when she slipped in liquid and fell. At the time of injury, appellant was working a regular work schedule of 30 hours per week. Appellant's supervisor indicated that most checkers at the navy commissary worked 30-hour weeks.

Appellant returned to work performing limited duty on August 20, 1991 assigned to checking identification cards 30 hours per week, a light-duty position approved by her treating physician. Appellant's work restrictions were noted as "light duty -- no repetitive use of left hand -- no lifting greater than five pounds with left hand." Appellant, however, was unable to continue at this limited-duty position due to her sensitivity to cold and because the activity required the use of her left upper extremity.[1]

On February 9, 1994 Dr. R.F. Munn, an osteopath, noted appellant's work restrictions as "no work in cold temp[eratures] -- limited use l[eft] arm, may use support as needed."

By report dated March 25, 1994, Dr. Howard L. Brilliant, a Board-certified orthopedic surgeon, recommended that appellant "be assigned to office work that would not require her to use her hand for repetitive activities or heavy lifting and also that she not be required to work in a cold environment." By report dated August 9, 1994, Dr. Brilliant noted that appellant was

[1] The commissary contained freezers and refrigerators to preserve perishable foodstuffs and was kept at 68 to 71 degrees Fahrenheit.

restricted from doing repetitive activities with her hand, that she must be protected from the cold and that she was restricted to lifting 5 to 10 pounds.

By letter dated December 19, 1994, the employing establishment advised appellant that "the permanent part-time position of office automation clerk" had been "identified to accommodate the residual effects from [her] on-the-job injury ... sustained on 17 May 90."[2] The letter was accompanied by the task listing and job analysis/position description of the duties that had been identified for appellant.[3] The letter advised that appellant's "physician ha[d] reviewed the physical aspects of these duties released [her] to perform their full range," and that refusal of the job offer could result in termination of her continued compensation benefits. Appellant accepted the position but noted that she was not a typist, could only use the keyboard with one hand and was still on permanent light duty. The office automation clerk part-time permanent position was for 24 hours per week.

Appellant performed the part-time office automation clerk position from August 6, 1995 until May 24, 1997. By memorandum dated March 19, 1997, the employing establishment advised appellant that, due to a reduction-in-force (RIF), her office automation clerk position was being abolished she was being reassigned to the position of sales store checker, her original job from which she had been found to be disabled, on a part-time permanent basis, 24 hours per week. The memorandum advised that if she declined the offer, the letter constituted her notice of separation. Appellant responded that she was still on light duty, could not work in a cold environment, had lifting limits and could not perform repetitive movements with her left arm.

Appellant stopped work on May 24, 1997 and thereafter filed a claim for recurrence of disability due to the RIF.

On May 17, 1997 the employing establishment certified that no accommodation was available in connection with disability retirement under Federal Employees Retirement Service (FERS), indicating that appellant had splints on both arms, carpal tunnel syndrome, sarcoidosis and blood pressure problems.

By decision dated June 23, 1997, the Office rejected appellant's claim for compensation noting that her loss of wages was due to the abolition of her job due to the RIF and not because she was disabled. The Office advised appellant that her inability to work the new vacant position as commissary cashier did not entitle her to compensation unless she established that her condition had worsened since she began her office job.[4] The Office noted that appellant's work limitations were no working in a cold environment, lifting 5 to 10 pounds and doing office-type protective work.

[2] The employing establishment also advised the Office that date that the position offered was part-time permanent and within the parameters of the medical restrictions outlined by appellant's physician.

[3] This position required skill in operating a typewriter, word processor or computer terminal using a standard keyboard with additional function keys.

[4] The Office did note that appellant's physician had stated that she was unable to perform the cashier job.

On November 17, 1997 appellant requested reconsideration, arguing that she had been on limited duty and was disabled from being a cashier. She detailed further medical conditions which had developed including neurosarcoidosis with pulmonary complications.

By decision dated January 21, 1998, the Office denied modification of the June 23, 1997 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that the part-time position appellant was performing, in which she was subjected to a RIF, was not a limited-duty position, that she could perform the full duties of that RIF position with the residuals of her injury and, that although the report supported that appellant was unable to perform her date-of-injury position, appellant was not disabled for work due to her accepted employment injuries.

By letter dated January 24, 1998, appellant requested reconsideration and resubmitted evidence previously submitted to the record and considered by the Office.

By decision dated March 18, 1998, the Office denied appellant's request for further review of her case on its merits finding that the evidence submitted in support was cumulative and repetitious.

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

In the instant case, appellant was disabled from her regular 30-hour per week date-of-injury job as a cashier, but was able to perform a part-time 24-hour per week sedentary job as office automation clerk, the duties of which either fit within appellant's work restriction limitations, or were performed in a modified manner consistent with her work restrictions. There is no medical evidence of record indicating that appellant's employment-related injuries/conditions ever resolved, or that she did not continue to have employment-related residuals of her accepted conditions.

Appellant was not able to return to her date-of-injury position and the medical evidence of record supports that she was unable to perform the duties of her date-of-injury position. She never returned to her regular-duty schedule working 30 hours per week, but was released to a 24-hour per week position, the duties of which were modified within her medical work restrictions.

In *Terry R. Hedman*,[5] the Board explained that 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 she cannot perform the light duty.[6] As part of her 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 job requirements.[7]

[5] 38 ECAB 222 (1986).

[6] *Id.*

[7] *Id.*

The term "light duty" as used in this explanation does not explicitly exclude those employees who return to "limited duty,"[8] as the principle for the placement of the burden of proof to establish a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty job requirements is essentially the same.

In the instant case, appellant did not return to regular duty, but returned to limited part-time duty. The evidence does not establish that her treating physician released her to perform full duty. The evidence of record supports that appellant's treating physician restricted the use of her left upper extremity and prohibited repetitive activity. This is not consistent with the regular duties of the office automation clerk position, which required typing and word processing using a standard keyboard with additional function keys, and necessitates use of both hands. As appellant had to perform the duties of the office automation clerk using only her right hand, she was performing the duties in a modified manner, consistent with her existing work restriction limitations. Further, as appellant was offered only her previous position from which she had been found medically disabled, continuation of her 24 hour per week work schedule was not possible. The medical evidence of record continued to support total disability from this cashier position.

However, Office procedures indicate that a reemployed claimant may face removal from employment due to a RIF, which would not be considered a recurrence of disability. Rather the claims examiner is instructed to take action according to whether a formal LWEC has been issued. Were no LWEC has been issued, but the claimant worked in the position for at least 60 days, the claims examiner should consider a retroactive LWEC. The Office's procedures further provide that if a retroactive LWEC can not be made, claimant should be reinstated to the daily roll.[9] As the RIF was agency wide and was not restricted to light- limited-duty positions, appellant has not established a change in the nature and extent of her limited-duty job, due to her employment-related injury.

As appellant worked in the office clerk position for an extended period of time, she demonstrated that she had a wage-earning capacity, such that with termination of her accommodation position, a wage-earning capacity could be calculated.

The case will be remanded for further development to determine appellant's entitlement to compensation based upon her demonstrated ability to work part time in the modified office clerk position.

The decisions of the Office of Workers' Compensation Programs dated June 23, 1997 and January 21, 1998 are hereby set aside and the case is remanded for further development in

[8] That is duty limited in duration such as less than full-time duty, or less than the regular duty appellant had been performing on the date of injury, or duty modified, formally or informally, to be consistent with existing work restrictions, such as duty which required typing and word processing was informally modified in appellant's case to allow her to perform typing functions using only her right hand, as she was medically restricted from using her left hand and performing repetitive duties.

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment; Determining Wage-Earning Capacity*, Chapter 2.814.12 (July 1997).

accordance with this decision and order of the Board; the decision dated March 18, 1998 is rendered moot.

Dated, Washington, DC
November 7, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member