

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM B. GARDINER and U.S. POSTAL SERVICE,  
POST OFFICE, East Brunswick, NJ

*Docket No. 99-2334; Submitted on the Record;  
Issued September 10, 2001*

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DECISION and ORDER

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

The issue is whether appellant sustained a recurrence of disability on October 1, 1998, causally related to his October 8, 1996 employment injury.

Appellant, a 39-year-old letter carrier, sustained scalp lacerations and a cervical strain as a result of an October 8, 1996 employment-related motor vehicle accident. Approximately 10 months after his injury, appellant returned to work in a limited-duty capacity as a modified letter carrier. However, within a week of his return to limited duty, appellant sustained a recurrence of disability on August 21, 1997. The Office of Workers' Compensation Programs accepted appellant's August 1997 claim for recurrence of disability and resumed payment of wage-loss compensation.

Following his August 1997 recurrence of disability, appellant participated in a vocational rehabilitation program. On August 28, 1998 the employing establishment offered appellant a permanent, limited-duty assignment as a modified auxiliary carrier. Dr. Nancy Allegar, appellant's treating physician, reviewed the job offer and approved appellant's return to work as a modified auxiliary carrier. On September 11, 1998 the Office advised appellant that it found the position of modified auxiliary carrier to be suitable to his work capabilities. Appellant accepted the position on September 11, 1998 and he returned to work on September 26, 1998.

On October 1, 1998 after working less than three full days as a modified auxiliary carrier appellant ceased work due to a claimed recurrence of disability. Appellant filed a notice of recurrence of disability (Form CA-2a) on October 17, 1998 wherein he stated he continued to experience back and neck pain and headaches. Appellant also noted on his Form CA-2a that he did not obtain medical treatment immediately following his claimed recurrence of disability.<sup>1</sup>

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<sup>1</sup> The record indicates that Dr. Allegar withdrew her services as treating physician following an altercation with appellant on September 11, 1998. Dr. Allegar reported that during the course of a conversation regarding appellant's limited-duty job offer, appellant became verbally abusive and he exhibited threatening behavior.

By decision dated November 13, 1998, the Office denied appellant's claim for recurrence of disability.<sup>2</sup>

On May 11, 1999 appellant filed a request for reconsideration along with additional medical evidence. In a decision dated May 28, 1999, the Office denied modification.

Appellant filed an appeal with the Board on July 8, 1999. He also requested reconsideration before the Office by letter dated September 24, 1999. Appellant submitted additional medical evidence to the Office under cover letter dated December 14, 1999. The Office subsequently issued a decision denying modification on July 21, 2000.

The Board finds that the Office did not have the authority to issue its July 21, 2000 decision denying modification. The Board and the Office may not simultaneously exercise jurisdiction over the same issue in a case.<sup>3</sup> At the time the Office issued its July 21, 2000 decision, appellant had already filed an appeal with the Board regarding the Office's May 28, 1999 decision denying modification. Inasmuch as the Board had obtained jurisdiction over the case on July 8, 1999, the Office lacked the authority to issue the July 21, 2000 decision denying modification. Accordingly, the Office's decision dated July 21, 2000 is set aside as null and void.<sup>4</sup>

In correspondence dated July 27, 2001 and October 26, 2000, appellant's counsel requested that the Board review the Office's July 21, 2000 decision and the additional medical evidence submitted after the Office's May 28, 1999 decision denying modification. As the July 21, 2000 decision is null and void, the Board will not review this decision. Furthermore, the Board lacks jurisdiction to consider any new evidence submitted subsequent to the Office's May 28, 1999 decision denying modification.<sup>5</sup>

The Board also finds that appellant failed to establish that he sustained a recurrence of disability on October 1, 1998, causally related to his October 8, 1996 employment injury.

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 of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements.<sup>6</sup> In the instant case, appellant

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<sup>2</sup> Despite being advised by the Office of the need for additional factual and medical information, appellant did not submit any medical evidence in support of his claimed recurrence of disability.

<sup>3</sup> *Arlonia B. Taylor*, 44 ECAB 591 (1993).

<sup>4</sup> *Terry L. Smith*, 51 ECAB \_\_\_ (Docket No. 97-808, issued November 29, 1999).

<sup>5</sup> The Board's review is limited to the evidence of record that was before the Office at the time of its final decision dated May 28, 1999. 20 C.F.R. § 501.2(c).

<sup>6</sup> *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

has failed to establish either a change in the nature or extent of his light-duty job requirements or a change in the nature and extent of his employment-related condition.

As previously noted, the position of modified auxiliary carrier, which appellant held at the time of his claimed recurrence of disability on October 1, 1998, was approved by appellant's then treating physician, Dr. Allegar. Additionally, the Office reviewed the job offer in conjunction with the relevant medical evidence of record and concluded that the position was suitable to appellant's work capabilities. Appellant's stated reason for ceasing work on October 1, 1998 was that he continued to experience back and neck pain and headaches, much the same as he did prior to returning to work. While appellant may have personally disagreed with Dr. Allegar regarding his ability to perform the duties of a modified auxiliary carrier, he failed to present any evidence or argument that would undermine the Office's prior determination that the position was suitable to his work capabilities. Appellant has not specifically alleged a change in the nature and extent of his limited-duty job requirements and the record does not support such a finding.

Appellant has also failed to demonstrate a change in the nature and extent of his employment-related condition. The relevant evidence consists primarily of three recent reports from Dr. Bruce R. Rosenblum, a Board-certified neurosurgeon, who first examined appellant on November 25, 1998. At that time, Dr. Rosenblum reported complaints of increased mid and low back pain and noted an impression of post-traumatic back pain syndrome and cervical radiculopathy. He referenced January 1997 magnetic resonance imaging (MRI) scans that showed disc herniations at C4-5 and C6-7 and degenerative disc disease at L4-5. Dr. Rosenblum recommended that appellant obtain additional MRI scans of his cervical, thoracic and lumbosacral spine and advised appellant to remain out of work pending evaluation of the recommended scans. He did not express an opinion as to the cause of appellant's current condition. Additionally, Dr. Rosenblum did not specifically address appellant's limited-duty assignment nor offer any explanation as to why appellant was apparently precluded from performing these duties.<sup>7</sup>

In a follow-up report dated February 20, 1999, Dr. Rosenblum indicated appellant had persistent mid and low back pain and neck pain radiating down his left arm. He also stated he reviewed MRI scans of the cervical, thoracic and lumbar spine that revealed a degenerated disc at L4-5 and disc herniations at C4-5 and C5-6. Dr. Rosenblum noted an impression of predominant cervical radicular syndrome and further commented that appellant was out of work pending review of the results of a myelogram of the cervical, thoracic and lumbar spine and a postmyelogram computerized tomography (CT) scan.

Dr. Rosenblum subsequently reported on March 9, 1999 that a recent myelogram and postmyelogram CT scan revealed a central C4-5 disc herniation and predominantly left lateralizing C5-6 and C6-7 soft disc herniations. He also noted evidence of small right T6-7 and

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<sup>7</sup> Dr. Rosenblum's only reference to appellant's prior employment duties is as follows: "[Appellant] was put in a work hardening program and subsequently was back to work in September of 1998 at a modified work program, but again was only able to work for three days." Dr. Rosenblum also submitted a November 11, 1998 Form CA-17 noting that appellant was temporarily totally disabled. This report, however, does not include any information regarding appellant's job duties nor does it identify any specific physical limitations.

T7-8 disc herniations.<sup>8</sup> He noted an impression of cervicalgia and mid-thoracic pain syndrome. Dr. Rosenblum recommended that appellant undergo thoracic epidural steroid injections and that he remain off work for a period of four weeks following this procedure. He did not specifically comment on appellant's previously diagnosed degenerative disc disease at L4-5.

The evidence submitted in support of appellant's claimed recurrence of disability does not establish a causal relationship between appellant's current condition and his employment injury of October 8, 1996. The Office accepted the claim for scalp lacerations and cervical strain. The various cervical and thoracic disc herniations noted by Dr. Rosenblum have not been accepted as arising from appellant's October 8, 1996 employment injury. Similarly, appellant's diagnosed degenerative disc disease at L4-5 has not been accepted as employment related.<sup>9</sup> Where appellant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>10</sup>

Dr. Rosenblum did not specifically relate appellant's current condition to his October 8, 1996 employment injury. Furthermore, he did not explain how appellant's condition precludes him from performing the duties of a modified auxiliary carrier. Consequently, Dr. Rosenblum's various reports are insufficient to establish that appellant's claimed recurrence of disability is causally related to his October 8, 1996 employment injury. As appellant failed to show a change in the nature and extent of his employment-related condition, the Office properly denied his claim for recurrence of disability.

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<sup>8</sup> While the results of the March 2, 1999 post-myelogram CT scan were submitted, this report is largely illegible.

<sup>9</sup> The Board notes that an October 18, 1996 x-ray of appellant's cervical spine revealed evidence of degenerative disc space changes at C6-7. Similarly dated x-rays of the thoracic and lumbosacral spine were interpreted as normal.

<sup>10</sup> *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

The May 28, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
September 10, 2001

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member