

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL M. ROGERS and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Lyons, NJ

*Docket No. 01-1487; Submitted on the Record;
Issued April 19, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issue is whether appellant has met her burden of proof to establish that she was entitled to wage-loss compensation for intermittent periods of disability between May 24 to August 30, 1999.

On March 17, 1998 appellant, then a 39-year-old kinesiotherapist, filed a traumatic injury claim, alleging that on November 21, 1997 she sustained a back injury while assisting a patient. She had stopped work on December 22, 1997, returned on February 25, 1998 and missed intermittent periods thereafter. By decision dated July 22, 1998, the Office of Workers' Compensation Programs denied the claim on the grounds that appellant had not established fact of injury. By letter dated August 6, 1998, appellant, through counsel, requested a hearing. She underwent lumbar laminectomy on November 10, 1998.

In a January 7, 1999 decision, an Office hearing representative remanded the case, finding that appellant had established that she sustained an employment-related lumbar sprain and herniated discs at L4-5 and L5-S1. The hearing representative advised appellant that she should submit appropriate forms to claim compensation. Appellant returned to sedentary duty, four hours per day, on May 13, 1999, and received wage-loss compensation for the remaining four hours per day.

On June 22, 1999 appellant filed a claim, alleging that on May 24, 1999 she sustained a recurrence of disability and could now only work four hours per day, three days per week. She worked as little as two to five days per week, for four hours per day, thereafter.¹ By decision dated October 5, 1999, the Office denied the recurrence of disability claim, finding that the medical evidence did not indicate that appellant could not perform her light-duty assignment of

¹ The record indicates that, during the period May 24 to August 30, 1999, appellant worked 20 hours the week of June 14, 1999, 19.25 hours the week of August 23, 1999, 16 hours the weeks of June 7, July 5, July 19 and August 2, 1999 and 15.25 hours the week of July 26, 1999. She worked 12 hours or less the remaining weeks.

four hours per day, five days a week. On October 20, 1999 appellant, through counsel, requested a hearing and submitted additional medical evidence from her treating orthopedic surgeon, Dr. Nathan E. Doctry.

At the hearing held on April 22, 2000, appellant testified regarding the November 21, 1997 injury, her subsequent treatment and surgery and her return to work on May 12, 1999. She also testified that she was physically unable to the work five days a week, and shortly thereafter began working three days per week, four hours per shift, which she tolerated better. Dr. Doctry testified that he examined appellant on May 13, 1999, one day after her return to work. He noted findings of increased swelling and spasm on examination and opined that her condition was worsening. He specifically testified that he recommended that appellant should work three half-days per week. Appellant also submitted additional medical evidence.

By decision dated July 18, 2000, an Office hearing representative found that on or after August 30, 1999 appellant was entitled to compensation based on a 12-hour workweek. He stated that the record indicated that she had worked five days a week until the end of August 1999 and, therefore, was not entitled to additional wage-loss compensation beyond four hours per day until that time. The instant appeal follows.

The Board finds that appellant has established that she is entitled to wage-loss compensation for disability during the period May 24 to August 30, 1999.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show 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.²

In the instant case, appellant returned to limited duty for four hours per day five days a week on May 13, 1999. At the April 22, 2000 hearing her treating orthopedic surgeon, Dr. Doctry, testified that, after a trial of working four hours per day for five days per week, he recommended that she cut back to a four-hour day, three days per week. Contrary to the hearing representative's conclusion, the record establishes that appellant intermittently worked for as little as four hours per week during the period May 24 to August 30, 1999.³ As appellant's physician testified that she should only work a 12-hour work week beginning in May 1999, the Board finds that, in addition to the 20 hours per week compensation she previously received, appellant would be entitled to wage-loss compensation for up to an additional 8 hours per week, for the period May 24 to August 30, 1999. On remand, the Office should ask that the employing establishment provide the times appellant worked for the period in question and pay appropriate benefits.

² *Mary A. Howard*, 45 ECAB 646 (1994); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

³ *Supra* note. 1.

The decision of the Office of Workers' Compensation Programs dated July 18, 2000 is affirmed with regard to appellant's entitlement to compensation based on a 12-hour workweek beginning August 30, 1999. It is reversed with regard to her entitlement to additional compensation during the period May 24 to August 30, 1999.

Dated, Washington, DC
April 19, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member