

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PATRICIA A. TESTA and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Atlantic City, NJ

*Docket No. 01-1403; Submitted on the Record;  
Issued August 1, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant's employment-related disability ceased by July 12, 1999, the date she returned to light duty.

On September 13, 1997 appellant, then a 56-year-old operations officer, sustained an injury while in the performance of duty when she contracted rickettsial disease while removing body parts of dead birds from the runway of the Atlantic City International Airport. The Office of Workers' Compensation Programs accepted her claim for rickettsial disease and paid compensation for temporary total disability.

On June 25, 1999 Dr. Albert J. Tahmoush, a Board-certified neurologist, reported that appellant had been treated at his clinic since June 1998. Her condition was stable, Dr. Tahmoush reported and she would be able to return to sedentary work with no lifting or walking more than 50 feet on July 12, 1999.

Appellant attempted a return to full-time light duty on July 12, 1999. Her supervisor reported, however, that appellant approached her two days later and asked for a reduction in hours. Appellant explained that it was too much for her to start back at eight hours a day. The supervisor agreed and advised that appellant would probably be charged leave each day to cover her shift.

Appellant began working six hours a day on July 15, 1999, but later that day, according to other employees she became dazed, confused and disoriented and was driven home by her son. She filed a claim asserting that she sustained a recurrence of disability on July 15, 1999. Appellant described the recurrence as follows: "Became faint and very fatigued with painful joint pain and persistent stinging. Had to be relieved of duty and driven home that day. Fatigue, joint pain, stinging hands, face, feet all were original symptoms that have never gone away and intensify when fatigued."

On a work capacity evaluation form dated August 19, 1999, Dr. Tahmoush indicated that appellant could not work eight hours a day but could work six hours “at this time.”

On November 16, 1999 Dr. Julius L. Gall, a Board-certified family practitioner, reported: “Please be advised that [appellant] was returned to work on July 12, 1999 on light duty, sedentary work with limitations. Since working eight hours per day proved too physically demanding, [appellant] is only able to work six hours or less per day at this time.”

On December 28, 1999 in response to an Office recurrence development checklist Dr. Gall supplied the following information:

“[Dates of all examinations and treatment.] [Appellant] was seen August 2, 1999 for hip pain. At that time, she was referred to Dr. Bannon. On September 15, [1999] a blood test was performed. On September 22, 1999 she was seen for migraines, ITP [Idiopathic Thrombocytopenia Purpura], DJD of hands, and neuritis. On November 3, [1999] a blood test was performed. On December 20, [1999] [appellant] was seen for DJD of hip and neck, and neuropathy of feet. On December 27, 1999, she was seen for cervicalgia and DJD of neck. [Appellant] saw Dr. Bannon on August 5 and 19, 1999.

“[History of the recurrence as given by appellant.] [Appellant] is unable to work an eight-hour shift as of July 15, 1999 due to fatigue, joint pain and neuropathy of feet/hands.

“[A detailed description of medical findings before and after the date of recurrence.] Neuropathy symptoms persist with acute and multiple joint pains.

“[A firm diagnosis.] Lymphoglandular disease, peripheral nerve angiopathy, [ITP].

“[Periods of total and partial disability, with restrictions.] Total disability September 13, 1997 [to] July 11, 1999. Partial July 11, 1999-present.

“[Copies of admission, treatment and discharge summaries are needed for any period of hospitalizations.] Not hospitalized since July 15, 1999.”

In a decision dated March 3, 2000, the Office denied appellant’s claim of recurrence on the grounds that there was no evidence of a change in the nature and extent of her injury-related condition or of her light-duty assignment.

On June 6, 2000 Dr. Gall reported as follows:

“[Appellant] is still suffering from the residual effects of rickettsia disease for which she was hospitalized. This disease has left her with an autoimmune disorder, ITP and a neuropathic disorder which causes burning and stinging of her hands and feet. A muscle and nerve biopsy was performed to determine damage and [appellant] has undergone chemotherapy to control the neuropathy. She also

experiences deep joint pain for which she has taken physical therapy and pain management.

“[Appellant] continues to suffer from fatigue, joint pain and neuropathy of feet and hands which impedes her daily functions. The arthralgias, fatigue and neuropathies are chronic and render her weak and fatigued preventing her from fulfilling her job requirements and attendance.”

In a report dated September 15, 2000, Dr. Gall related appellant’s history and medical treatment in detail. He summarized his report as follows:

“In summary, [appellant] had an acute infection which resulted in two chronic autoimmune diseases, ITP and [n]europathy. She was treated with long-term corticosteroids and Cytoxan (a toxic chemotherapeutic agent). Her treatment resolved her ITP and stabilized her neuropathy, but left her with chronic fatigue and persistent neuropathy for which she takes Neurontin. She has never recovered her strength and well being that she had prior to her illness in the fall of 1997. She does not have the physical endurance for a full eight-hour day and I expect no further recovery.”

In a decision dated November 1, 2000, but not finalized until January 22, 2001, an Office hearing representative affirmed the denial of appellant’s claim of recurrence. The hearing representative noted:

“The medical evidence confirms the claimant’s treatment after the work exposure was extended due to the infection she developed. However the medical evidence did not include a detailed discussion of the connection between the claimed exposure, the treatment, and the subsequent infections until Dr. Gall’s report of September 2000. The case file evidence confirms that the Office did not update the accepted condition to include any of the subsequent conditions identified in the reports. However, the case file evidence suggests that the Office allowed for the additional treatments and recognized the claimant’s disability, as a result of these conditions, up to the date she was released from treatment in June 1999.”

After affirming the denial of appellant’s claim of recurrence, the hearing representative ordered the following:

“Upon the return of the case file, the Office should write to Drs. Papastamelos and Tahmoush and request a detailed and comprehensive opinion on the connection between the initial work exposure and subsequent infection and allergic reactions to the chemotherapy treatment, and to identify and diagnose the conditions that resulted. After receipt and review of the opinions, the Office should update the accepted condition to include any conditions determined, by the medical evidence, to be related.”

The Board finds that the evidence fails to establish that appellant’s employment-related disability ceased by July 12, 1999, the date she returned to light duty.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>1</sup> After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>2</sup>

Generally, the Office can meet this burden by showing that the employee returned to work, even if that work is light duty rather than the job the employee held when injured, if thereafter the employee earns no less than he or she earned before the employment injury.<sup>3</sup> The Board has held, however, that a short-lived and unsuccessful attempt to return to duty does not automatically discharge the Office's burden of proof to justify termination of compensation.<sup>4</sup>

In this case, appellant's July 12, 1999 return to full-time light duty was short-lived and unsuccessful. Two days after she returned to work she asked her supervisor for a reduction in hours because eight hours a day was too much for her. Her supervisor was receptive. Appellant became faint and very fatigued the following day with painful joints and persistent stinging in her hands, face and feet. She had to be relieved of duty and driven home.

The only medical evidence supporting that appellant could return to light duty came from Dr. Tahmouh, her attending neurologist, who reported on June 25, 1999 that appellant's condition was stable and that she would be able to return to light duty on July 12, 1999. He implied that appellant could return full time, but following her unsuccessful attempt to do so, Dr. Tahmouh reported that appellant could not work eight hours a day. Dr. Gall, the attending family practitioner, completed the Office's recurrence development checklist and indicated that appellant was partially disabled for work after July 11, 1999. There is no medical opinion evidence to the contrary. Thus, when the Office issued its March 3, 2000 decision denying compensation for disability, the weight of the medical evidence supported that appellant's disability had not ceased.

Further, the record contains no medical opinion evidence to establish that appellant's disability was no longer related to the employment. To the contrary, Dr. Gall's June 6 and September 15, 2000 reports support that appellant's partial disability was a result of her accepted employment injury. Dr. Gall reported that appellant was still suffering from the residual effects of her rickettsial disease. Consistent with her complaints upon attempting an eight-hour day, Dr. Gall explained that the rickettsial disease left appellant with an autoimmune disorder (ITP) and a neuropathic disorder that caused burning and stinging of her hands and feet. Appellant

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<sup>1</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>2</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>3</sup> *Billy G. Sinor*, 35 ECAB 419 (1983); see *Terry R. Hedman*, 38 ECAB 222 (1986) (when an employee is disabled on account of employment-related residuals from the job that he held when he was injured and he 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 to show that he cannot perform such light duty).

<sup>4</sup> *Janice F. Migut*, 50 ECAB 166 (1998).

continued to suffer from fatigue, joint pain and neuropathy of feet and hands, impeding her daily functions. These arthralgias, fatigue and neuropathies were chronic and rendered her weak and fatigued “preventing her from fulfilling her job requirements and attendance.” Dr. Gall reported that appellant had never recovered the strength and well being that she had prior to her illness in the fall of 1997: “She does not have the physical endurance for a full eight-hour day and I expect no further recovery.”

The Board finds that appellant’s short-lived and unsuccessful attempt to return to full-time light duty on July 12, 1999 did not shift the burden of proof to her to establish a recurrence of disability, notwithstanding her filing of a claim. The burden of proof remained with the Office to justify the termination of appellant’s compensation benefits. As the evidence in this case fails to establish that appellant’s disability ceased or was no longer related to the employment, the Office did not meet its burden of proof.<sup>5</sup>

The decision of the Office of Workers’ Compensation Programs dated November 1, 2000 and finalized on January 22, 2001 is reversed.

Dated, Washington, DC  
August 1, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>5</sup> The hearing representative’s finding that further development of the medical evidence was warranted on the issue of injury-related residuals is consistent with the Board’s holding. The Office cannot meet its burden of proof to justify termination of compensation when further development of the evidence is necessary to resolve the issue. *E.g., Mary A. Moultry*, 48 ECAB 566 (1997) (reversing the Office’s termination of compensation where there remained an unresolved conflict in medical opinion).