

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT TAYLOR, SR. and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, MD

*Docket No. 01-1446; Submitted on the Record;
Issued August 7, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether appellant sustained a recurrence of disability on or after February 17, 1998 causally related to his accepted work-related conditions.

On October 6, 1994 appellant, then a 47-year-old custodian/laborer, filed a notice of occupational disease alleging that he developed a neck and back condition due to work factors.¹ The Office accepted the claim for postlaminectomy syndrome with cervical radiculopathy and severe myofascial spasm. Appellant was off work until April 8, 1997, when he returned to a modified custodial position working four hours per day.²

On February 27, 1998 appellant filed a (CA-8) claim for continuing compensation. The dates of disability were listed as February 16 to 27, 1998.

Appellant subsequently filed a claim for recurrence of disability beginning February 17, 1998.

On April 28, 1998 the Office determined that the modified custodial position reasonably represented appellant's wage-earning capacity. The Office therefore reduced appellant's compensation, effective January 5, 1998, based on his ability to earn wages in that job.

¹ Appellant filed a prior claim for a left shoulder and neck injury sustained on August 29, 1990, which was accepted by the Office of Workers' Compensation Programs for a herniated disc at C6-7. Appellant underwent a cervical laminectomy and returned to work.

² On March 19, 1997 the Office advised appellant that the employing establishment had agreed to offer him a modified position in accordance with his medical restrictions. Appellant returned to work on April 8, 1997 but had difficulty traveling back and forth from work. Appellant's treating physician recommended that he not travel more than 30 minutes to work so on November 25, 1997 the employing establishment offered appellant the same modified position at a location closer to his home. He began that job on December 11, 1997.

By letter dated September 20, 1999, the Office advised appellant of the factual and medical evidence required to establish his claim for compensation for a recurrence of disability.

Appellant submitted an April 24, 1998 report by Dr. William Tham, a Board-certified pain management specialist, indicating that appellant was seen on March 12, 1998 complaining of “problems at work.” Dr. Tham stated that he deferred giving appellant any recommendation regarding not working and told him to see an employing establishment physician for a fitness-for-duty evaluation.³ He noted that appellant had been off work for a few days because of a gastrointestinal upset but that he returned appellant to light duty at that time.

The record also includes a copy of a March 26, 1998 report by Dr. Marcia Kane, a medical officer for the employing establishment. She noted that appellant had been examined for his ability to perform the modified custodian position. Dr. Kane noted that appellant had decreased range of motion of the cervical spine but that he was able to lift both arms to the shoulder level and had equal strength in both arms. She concluded that appellant was fit for duty.

In a March 22, 1999 treatment note, Dr. Tham reported that appellant’s postcervical laminectomy syndrome was stable. He noted that “[m]ost of what remains is described as an irritation with occasional flare-up of pain over the left side neck and shoulder and a little bit down into the upper part of the left arm.”

In a decision dated December 6, 1999, the Office denied compensation on the grounds that appellant failed to establish that he sustained a recurrence of disability on or after February 17, 1998 causally related to his accepted work-related conditions.

Appellant requested a review of the written record on December 14, 1999.

In a decision dated May 10, 2000, an Office hearing representative affirmed the Office’s December 6, 1999 decision.

The Board finds that appellant failed to establish that he sustained a recurrence of disability on or after February 17, 1998 causally related to his accepted work-related conditions.

As used in the Federal Employees’ Compensation Act,⁴ the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁵ An individual who claims a recurrence of disability due to an accepted

³ On a prescription form, Dr. Tham stated, “I suspect [appellant] may not be able to tolerate even light duty. I recommend he see the [p]ost [o]ffice [d]octor for further determination on whether or not he should be working at all.”

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Eldon H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.57(17). Disability is not synonymous with physical impairment. An employee who has a physical impairment, even a severe one, but who has the capacity to earn the wages he was receiving at the time of the injury, has no disability as that term is used in the Act and is not entitled to disability compensation; *see Gary L. Loser*, 38 ECAB 673 (1987); *Cf.* 5 U.S.C. § 8107 (entitlement to schedule compensation for loss or permanent impairment of specified members of the body).

employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.⁶

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 injury-related condition or a change in the nature and extent of the light-duty job requirements.⁷

In this case, appellant has submitted no evidence to support his allegation that he sustained a recurrence of disability on or after February 17, 1998. The Office accepted that appellant suffered from postlaminectomy syndrome with cervical radiculopathy and severe myofascial spasm aggravated by his work duties as a custodian/laborer. Appellant's treating physician, however, approved appellant for a return to modified work for four hours per day effective April 1997. Although appellant contends that the modified job increased his symptoms of back and shoulder pain, and that he was often sick due to the medications he was on for pain, there is no corroborating medical evidence to support his alleged recurrence of disability. Appellant's treating physician did not address appellant's capacity for work. There is no medical evidence or record to establish that appellant is unable to perform the requirements of his light-duty position. Because appellant has not carried his burden of proof by providing a reasoned medical opinion to support his claim for a recurrence of disability, the Board concludes that the Office properly denied compensation.

⁶ *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

⁷ *Mary A. Howard*, 45 ECAB 646 (1994).

The decision of the Office of Workers' Compensation Programs dated May 10, 2000 is hereby affirmed.

Dated, Washington, DC
August 7, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member