

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARY MAH and U.S. POSTAL SERVICE,  
POST OFFICE, San Francisco, CA

*Docket No. 01-1478; Submitted on the Record;  
Issued June 3, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of disability from March 31, 1997 to April 11, 2000.

On November 4, 1991 appellant, then a 31-year-old postal clerk, filed a notice of traumatic injury when an iron gate fell on the back of her neck on November 4, 1991.<sup>1</sup> The Office of Workers' Compensation Programs accepted appellant's claim for head and neck contusion, neck sprain, herniated disc C6-7 with discectomy and fusion on September 11, 1992. Appellant's attending physician, Dr. Kenneth I. Light, a Board-certified orthopedic surgeon, stated that appellant could return to a light-duty clerical position for 4 hours per day from 8 a.m. to 12 noon, with no lifting over 10 pounds, no casing, no reaching above the shoulder and no pushing. Dr. Alan G. Zacharia, a Board-certified orthopedic surgeon, agreed that appellant remained partially disabled and indicated that she also should do no fine-motor handwork and no upper extremity work in general. Appellant was on and off work from the date of her injury until March 6, 1995, when she returned to a modified data entry clerk position.<sup>2</sup> She returned to work on her own by an agreement between her union and management and not through the modified job offer. Appellant indicated at an oral hearing that her position involved keying, scanning and sorting labels, answering the telephone, some stamping and sealing of envelopes and working at her own pace. She worked this modified-duty position until March 31, 1997 when she filed a claim for total disability.

Appellant submitted a June 19, 1998 attending physician's report from Dr. Zacharia indicating that she was totally disabled from March 31, 1997 to June 19, 1998, which stated: "P[atien]t is permanently disabled, retired."

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<sup>1</sup> Appellant also filed a notice of occupational disease which was accepted for the conditions of bilateral wrist strain and bilateral elbow tendinitis. The two claims were combined.

<sup>2</sup> By decision dated March 18, 1996, the Office found that appellant's earnings in this position represented her wage-earning capacity.

In an attending physician's report from Dr. Zacharia dated March 5, 1999, he indicated that appellant was totally disabled from March 31, 1997 to March 5, 1999 and stated: "P[atien]t is permanently disabled, p[atien]t is retired." The Office allowed appellant an additional 30 days to submit evidence.

By decision dated July 31, 1999, the Office denied appellant's claim for recurrence of disability.

After the Office's decision appellant submitted a September 11, 1999 report from Dr. Zacharia in which he stated:

"Most of the symptoms of the patient's upper extremity repetitive strain syndrome have resolved with the discontinuance of her work activities. Although most of the C6-7 dis[c] symptoms have also improved, she continues to have cervical radicular symptoms and a restriction of cervical motion. She has reached maximum medical improvement and this has been true since 1997, just prior to her work capacity evaluation at Mills-Peninsula Hospital."

\* \* \*

"[Appellant] has not worked since March 31, 1997. She is followed on an occasional basis. I do not believe she will return to her usual and customary job and that disability retirement is reasonable."

Appellant requested an oral hearing. By decision dated February 2, 2000, the hearing representative affirmed the Office's July 31, 1999 decision.

Appellant also submitted several progress reports from Dr. Zacharia. In an April 11, 2000 progress report, Dr. Zacharia stated: "P[atien]t was denied disability retirement February 2, 2000. It should be understood that the light-duty job as done before caused VERS and that her [appellant's] repetitive strain capacity is small." Appellant returned to her light-duty modified position for four hours per day on May 1, 2000.

In a May 30, 2000 report, Dr. Zacharia discussed appellant's latest return to work and indicated that her symptoms had worsened. He stated: "P[atien]t rtw at old job at keying, filing, sorting, etc. Her symptoms [increased] as expected but she is tolerating. Motrin helps but upsets."

In a progress report dated September 12, 2000, Dr. Zacharia stated:

"Discussed p[atien]t's light-duty job at her [office] and she says she can work at her own pace and alternate activity, 20 h[ou]rs/w[ee]k. This is congenial with her disability. The VERS will have occasional flare-ups which should respond to conservative management as previously opined."

Appellant requested reconsideration on January 23, 2001 and submitted a January 12, 2001 narrative report from Dr. Zacharia, stated: "I do not believe [appellant] will return to her

usual and customary job and that disability retirement is reasonable.” He stated in his new report:

“There seems to be confusion over my meaning when I referred to her “usual and customary” job. By way of clarification, this was meant to refer to the job she was doing when she was taken off work on March 31, 1997, *i.e.*, the modified four[-]hour per day job that she was doing that was associated with the deterioration of her symptoms such that she could no longer work at all.”

\* \* \*

“That being said, she improved while off work for the extended period of time from March 31, 1997 to April 11, 2000. Her symptoms diminished and she gradually rehabilitated to a level at which she could return to some form of work. It should be noted that (regardless of its specific description) her current employment requires very little keyboarding (apparently less than 30 minutes per day) and this has enabled her to remain in the current position with a modicum of symptoms.”

In a merit decision dated March 15, 2001, the Office denied modification of the previous decision.<sup>3</sup>

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

There is medical evidence in support of appellant’s claim, in the form of Dr. Zacharia’s January 12, 2001 narrative report and several progress reports indicating that appellant was totally disabled beginning March 31, 1997. Dr. Zacharia stated in his September 11, 1999 report that appellant had not worked since March 31, 1997 and opined that she would not be able to return to her “usual and customary” job. He clarified this statement in his January 12, 2001 report that the “usual and customary” job he referred to was appellant’s modified-duty job, not the original job she had before her injury. However, Dr. Zacharia provided no medical rationale to support his statements that appellant was totally disabled from March 31, 1997 to April 11, 2000 and could not perform her modified-duty job. While Dr. Zacharia’s narrative report and progress reports are insufficient to discharge appellant’s burden of proving by the weight of the reliable, substantial and probative evidence that she was totally disabled from March 31, 1997 to April 11, 2000, they do constitute sufficient evidence in support of appellant’s claim to require further development of the record by the Office.<sup>4</sup>

The Office should request that Dr. Zacharia provide a detailed report supported by medical rationale describing why appellant was totally disabled during the period in question and could not work her modified-duty job for four hours per day. The Office should then make a *de novo* decision based on the augmented record.

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<sup>3</sup> By decision dated April 20, 2001, appellant was awarded a schedule award for a 20 percent loss of use of the right upper extremity.

<sup>4</sup> *Horace Langhorne*, 29 ECAB 820 (1978).

The March 15, 2001 and July 31, 1999 decisions of the Office of Workers' Compensation Programs are hereby reversed and the case is remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC  
June 3, 2002

Alec J. Koromilas  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member