

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACKIE D. WEST and DEPARTMENT OF THE AIR FORCE,
ROBINS AIR FORCE BASE, GA

*Docket No. 02-1299; Submitted on the Record;
Issued October 21, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained a recurrence of total disability beginning March 10, 2001 causally related to his March 23, 1970 employment injury.

On March 23, 1970 appellant, then a 33-year-old parachute packer and repairer, filed a claim for a traumatic injury to his back sustained on that date while handling a parachute.

The Office of Workers' Compensation Programs accepted that appellant sustained a lumbosacral strain, a compression fracture at L5 and a psychophysiological musculoskeletal reaction with conversion features.

Appellant's application for disability retirement was approved effective September 29, 1975. In a report dated October 9, 1975, Dr. R.C. Barnes, the employing establishment's chief of occupational medicine services, opined that appellant had "disqualifying factors which are due to the chronic low back pain originating at time of injury."

The Office began payment of compensation for temporary total disability on September 30, 1975.

On November 3, 1976 appellant underwent a partial laminectomy, excision of a herniated disc at L4-5 and a fusion at L4 to S1. On November 13, 1978 he underwent a repair of a pseudoarthrosis.

On August 28, 1985 appellant returned to work at the employing establishment as a fabric worker, working four hours per day with limitations of lifting under 10 pounds, pulling or pushing three times a day and intermittent walking for one hour and standing for two hours.

By decision dated October 22, 1985, the Office found that the position of fabric worker represented appellant's wage-earning capacity. The Office reduced appellant's compensation to that for loss of wage-earning capacity effective August 28, 1985.

On July 8, 1986 appellant filed a claim for an injury to his back and left hip sustained on July 7, 1986 when he used his right foot to move a buck to hold a door open. The Office accepted that appellant sustained a low back strain and he received continuation of pay from July 8, 1986 until his return to his part-time limited-duty position on August 15, 1986.

Appellant stopped work from June 13 to July 5, 2000 and filed a claim for a recurrence of disability causally related to his March 23, 1970 employment injury.

By decision dated December 13, 2000, the Office found that the medical evidence failed to demonstrate that a material worsening of his employment-related condition or that his claimed period of disability was causally related to his March 23, 1970 employment injury.

By letter dated August 22, 2000, the employing establishment advised appellant that one of its physicians, Dr. Laura Torres-Reyes, had determined that he “had permanent restrictions of no walking (one hour per shift) or standing (two hours per shift)” and that, in view of these restrictions, he appeared to be unable to perform the essential duties of his position of fabric worker. On October 20, 2000 the employing establishment issued appellant a notice of proposed removal on the basis of his inability to perform the duties of his position and its unsuccessful efforts to place him in another position commensurate with his physical abilities.

By decision dated March 5, 2001, the employing establishment removed appellant from his employment for the inability to perform the duties of his position. The removal was effective March 9, 2001.

On March 12, 2001 appellant filed a claim for compensation for total disability beginning March 10, 2001. He elected to receive benefits under the Federal Employees’ Compensation Act in preference to those under the Civil Service Retirement System or the Federal Employees’ Retirement System.

By letter dated March 29, 2001, the Office advised the employing establishment that it needed medical evidence that appellant was totally disabled and information on whether appellant’s limited-duty position was still available.

The employing establishment submitted a report dated February 23, 2001 from one of its occupational medicine physicians, Dr. Marvin E. Taylor, stating that appellant was disqualified for his limited-duty position “in July 2000 as his use of a walker further limits his ability to walk intermittently for one hour or stand intermittently for two hours during the course of his four-hour workday.” In a May 1, 2001 statement, the employing establishment stated that the physical requirements of appellant’s position remained unchanged and that its medical officer “agrees that [appellant’s] work restrictions have increased due to a worsening of his condition and that he is unable to perform the duties of his position.”

By decision dated September 20, 2001, the Office found that appellant had not submitted medical evidence sufficient to establish that he was entitled to compensation for temporary total disability beginning March 9, 2001. The Office found that appellant continued to be entitled to medical benefits and compensation for loss of wage-earning capacity.

The Board finds that appellant sustained a recurrence of total disability beginning March 10, 2001 causally related to his March 23, 1970 employment injury.

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 establishes that the employee 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 to show that he or she 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.¹

After a period of disability retirement, appellant returned to a part-time limited-duty position as a fabric worker on August 28, 1985. He remained in this position until March 9, 2001, when his employment was terminated by the employing establishment for his inability to perform the duties of his limited-duty position. As no limited duty was available to appellant after March 9, 2001, the nature and extent of the limited-duty requirements changed so that appellant could no longer perform the limited-duty position.²

The Office's September 20, 2001 decision found that appellant had not submitted sufficient medical evidence to establish a recurrence of total disability. The Board addressed a similar argument in *Arthur L. Gunning* and, in finding a recurrence of total disability, stated:

"The Office argues that appellant did not have a recurrence of disability ... because he did not have a decrease in his ability to work but was terminated only because the employing establishment refused to allow him to continue to work under his work restrictions. This argument confuses the definition of disability, allowing the employing establishment to say appellant is unable to work because of work restrictions arising from his employment injury, yet also allowing the Office to say there is no recurrence of disability because there is no change in his work restrictions."³

Appellant's employment injury disabled him from the position of parachute packer and repairer he held at the time of this injury on March 23, 1970. He was able to return to work in a part-time limited-duty position. The employing establishment determined, based on examinations by its physicians, that appellant could no longer perform this position due to the effects of his employment injury. When the employing establishment removed him from his limited-duty position on March 9, 2001, appellant sustained a recurrence of total disability.

This situation is addressed by the Office's procedure manual, which states that a recurrence of disability includes a work stoppage caused by "withdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury. This withdrawal must have occurred for reasons other than misconduct or

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² *Jackie B. Wilson*, 39 ECAB 915 (1988).

³ 33 ECAB 1808, at 1817 (1982).

nonperformance of job duties.”⁴ The employing establishment terminated appellant’s limited-duty assignment due to his inability to perform his position due to residuals of his employment injury. That the Office believes the employing establishment acted without a sufficient medical basis is irrelevant. The employing establishment’s action created a recurrence of total disability beginning March 10, 2001.

The September 20, 2001 decision of the Office of Workers’ Compensation Programs is reversed.

Dated, Washington, DC
October 21, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b (January 1995).