

**United States Department of Labor
Employees' Compensation Appeals Board**

MARIA H. HERNANDEZ, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Massapequa, NY, Employer**

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**Docket No. 04-1293
Issued: October 20, 2004**

Appearances:
Maria H. Hernandez, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 19, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 29, 2004, which denied her claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability on August 15, 2003 causing disability on August 15, 16 and 18, 2003 due to her October 16, 1997 employment injury.

FACTUAL HISTORY

On October 16, 1997 appellant, then a 49-year-old letter carrier, tripped while running from a dog and injured her neck, shoulder and upper back. The Office accepted that she sustained a cervical sprain and paid appropriate compensation. Appellant stopped work on October 16, 1997 and returned to a limited-duty position on October 27, 1997.

Appellant came under the care of Dr. Robert J. Lippe, Board-certified in orthopedics, who diagnosed a cervical sprain with underlying degenerative disc disease of the cervical spine. He advised that appellant could return to full-time limited-duty work on October 27, 1997 subject to various restrictions. She continued to work limited duty until July 15, 2002, when she experienced increased symptomology in the left side of her neck, shoulder and arm and the physician recommended that she stop work. On July 24, 2002 Dr. Lippe returned appellant to limited duty where she was limited to casing mail three hours per day and walking one and a half hours per day. She continued this schedule until September 4, 2002, when Dr. Lippe increased her schedule to five hours per day, limited duty. On November 13, 2002 he again increased her schedule to six hours per day, limited duty, subject to various restrictions. On November 19, 2002 Dr. Lippe determined that appellant reached maximum medical improvement with respect to her cervical sprain and exhibited a moderate to permanent partial disability. The physician opined that appellant was permanently restricted to working six hours per day.

On April 4, 2003 the employing establishment offered appellant a limited-duty position for six hours per day which complied with the medical restrictions set forth by Dr. Lippe. Specifically she was restricted to lifting up to five pounds and her duties included casing mail, delivering express mail and small parcels. Appellant accepted this position on April 4, 2003.¹

On September 21, 2003 appellant filed a CA-2a, recurrence of disability claim. She indicated that she experienced a recurrence of upper back and neck pain on August 15, 2003 causally related to her accepted work injury. Appellant did not work on August 15 and 16, 2003 and worked only four and a half hours on August 18, 2003.

Appellant submitted reports from Dr. Lippe dated March 5 to July 25, 2003, who noted that she experienced flare-ups of symptomology on the left side of the neck down the arm and diagnosed cervical sprain, left cervical radiculopathy with underlying spondylosis. In a duty status report dated July 25, 2003, he advised that appellant was to continue working six hours per day on a restricted part-time basis. Appellant was next treated on August 21, 2003 by Dr. Lippe, who decreased her work hours from six to four hours per day due to her symptoms of neck pain and stiffness in the arms. He diagnosed cervical sprain, radiculopathy and spondylosis. In his treatment note of August 21, 2003, Dr. Lippe indicated that appellant was doing poorly and was having a worsening of symptomatology in her neck, shoulder and arm and noted that she missed a lot of work due to her discomfort. The physician diagnosed cervical sprain, left cervical radiculopathy and underlying spondylosis and reduced her work schedule to four hours per day. Dr. Lippe's note of September 19, 2003 indicated that appellant was still having a lot of problems with her neck into her shoulder blade and arm and diagnosed left cervical radiculopathy with underlying spondylosis. He indicated that she could only work limited duty four hours per day.

In a decision dated October 28, 2003, the Office accepted the recurrence of disability commencing August 23, 2003.

¹ The record reflects that appellant filed an unrelated claim for carpal tunnel syndrome, file number 02-2047539 on August 15, 2003 which was accepted by the Office on February 11, 2004. She stopped work completely on November 24, 2003 due to her carpal tunnel surgery. This claim is not before the Board.

By letter dated October 28, 2003, the Office requested detailed factual and medical evidence from appellant, stating that the information submitted was insufficient to establish that she sustained a recurrence on August 15, 2003 which caused disability on August 15, 16 and 18, 2003. The Office specifically noted that she was not treated by her physician between July 25 and August 21, 2003 and that a finding of total disability could only be made upon examination by a qualified physician.

Appellant submitted a duty status report dated November 3, 2003, prepared by Dr. Lippe, who advised that appellant could work part time, four hours per day, limited duty. Also submitted were duty status reports dated December 15, 2003 and January 7, 2004 which noted that she was totally disabled due to carpal tunnel release surgery.

In a decision dated March 29, 2004, the Office denied appellant's claim for recurrence of disability commencing August 15, 2003.

LEGAL PRECEDENT

When an employee who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that 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 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 requirements.²

ANALYSIS

In the instant case, appellant has not submitted sufficient evidence to support 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 commencing on August 15, 2003 which caused disability on August 15, 16 and 18, 2003.

Appellant submitted numerous reports from Dr. Lippe indicating that she was being treated for cervical sprain, radiculopathy and spondylosis that she sustained in the work-related accident of October 16, 1997. However, none of Dr. Lippe's reports, most contemporaneous with the claimed recurrence noted a specific date of a recurrence of disability or particular change in the nature of appellant's physical condition, arising from the employment injury, which prevented appellant from performing her light-duty position on August 15, 16 or 18, 2003.³

² *Terry R. Hedman*, 38 ECAB 222 (1986).

³ *See Eileen R. Kates*, 46 ECAB 573 (1995); *Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971) (where the Board has consistently held that contemporaneous evidence is entitled to greater probative value than later evidence).

The record reveals that appellant was not treated between July 25 and August 21, 2003. In a duty status report dated August 21, 2003, Dr. Lippe decreased her work hours from six hours per day to four hours per day due to her increased symptoms of neck pain and stiffness in the arms. In his note of August 21, 2003, Dr. Lippe indicated that appellant was doing poorly and was having a worsening of symptomology in her neck, shoulder and arm and noted that she missed a lot of work due to her discomfort. He diagnosed cervical sprain, left cervical radiculopathy and underlying spondylosis and reduced her work schedule to four hours per day. Dr. Lippe's note of September 19, 2003 indicated that appellant was still having a lot of problems with her neck into her shoulder blade and arm and diagnosed left cervical radiculopathy with underlying spondylosis. The physician indicated that she could only work limited duty four hours per day. However, none of Dr. Lippe's report's note a specific date of a recurrence of disability as of August 15, 2003, nor did he note a particular change in the nature of appellant's physical condition arising from the employment injury, which prevented her from performing her light-duty position on August 15, 16 or 18, 2003.⁴ Rather, his duty status report of August 21, 2003 and treatment notes of August 21 and September 19, 2003 support that appellant sustained a recurrence of disability after August 21, 2003, at which time Dr. Lippe noted worsening symptomology in her neck, shoulder and arm and advised that she was having a hard time working six hours a day and the physician reduced appellants hours from six to four hours per day. The Office subsequently accepted that she sustained a recurrence of disability commencing August 23, 2003. Although Dr. Lippe indicated that appellant was experiencing a flare-up of her cervical sprain, he never provided a rationalized opinion of why appellant was unable to work on August 15, 16 and 18, 2003. The Board has found that a medical report that does not contain such opinion is insufficient to meet her burden of proof.⁵ Therefore, appellant has not met her burden of proof in establishing that there was a change in the nature and extent of her injury-related condition which would prohibit her from performing her light-duty position on August 15, 16 and 18, 2003.

Appellant does not allege and the record does not support that she experienced a change in the nature and extent of the light-duty requirements or was required to perform duties which exceeded her medical restrictions on August 15, 2003.

Appellant has not met her burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty requirements on August 15, 2003 which would prohibit her from performing the light-duty position she assumed after she returned to work.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability or a medical condition beginning August 15, 16 and 18, 2003, causally related to her accepted employment-related injury.

⁴ *Id.*

⁵ See *Michael E. Smith*, 50 ECAB 313 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 29, 2004 is affirmed.

Issued: October 20, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member