



In a May 24, 2001 report, Dr. Nasrollah Fatehi, a Board-certified neurosurgeon, noted that appellant had undergone a lumbar laminectomy in 1998 and diagnosed lumbar radiculopathy, which he indicated was consistent with the trauma from his fall. He stated that appellant was totally disabled since the date he first examined him, May 14, 2001. A May 24, 2001 magnetic resonance imaging (MRI) scan showed a posterior disc bulge at L5-S1 but no recurrent disc protrusion. In a May 29, 2001 report, Dr. Fatehi indicated that appellant could return to work four hours per day from June 4 to 26, 2001 with no pushing, pulling or lifting over 20 pounds. He returned to limited duty. In an August 28, 2001 report, Dr. Fatehi stated that appellant “should continue with the same work restrictions of 8 hours per day, 5 days per week with a 20-pound weight restriction and should continue to wear sneakers at all times at work.”<sup>1</sup>

On August 29, 2001 the Office advised appellant that it had accepted his claim for lumbar radiculopathy.

In an October 7, 2001 report, Dr. Fatehi noted no improvement following three epidural steroid injections and recommended that appellant continue on the same work status. In reports dated December 13, 2001, January 10 and March 7, 2002, he indicated that appellant’s work status remained unchanged. Dr. Fatehi referred him for physical therapy in May 2002, but discontinued this because of an exacerbation of appellant’s discomfort. In a June 6, 2002 report, he noted that appellant’s low back pain and radicular pain had continued for over one year since his work injury with essentially unchanged symptoms and stated that his examination and work status remained unchanged.

Dr. Fatehi referred appellant to Dr. Warren H. Foer, a Board-certified neurosurgeon, for a second opinion. In a June 13, 2002 report, he noted that appellant was essentially pain-free about 8 to 10 months after his March 17, 1999 laminectomy and discectomy and that he continued to work unrestricted duty until about a year ago. Dr. Foer described appellant’s May 8, 2001 employment injury and his findings on physical examination, which included a nonanatomical pattern of decreased pinprick in the thigh and recommended electromyography (EMG) and nerve conduction studies. An EMG done on July 24, 2002 showed lumbosacral polyradiculopathy and normal nerve conduction of the right leg.

In a July 1, 2002 report, Dr. Fatehi noted that appellant had consistently complained of low back and right leg pain that had failed to improve despite continued treatment, including epidural steroid injections, physical therapy and muscle relaxant, anti-inflammatory and analgesic medications. He stated that appellant appeared to have reached a plateau of improvement about two months after his injury and had failed to improve from that point. Dr. Fatehi recommended “continuation of light-duty status and wearing sneakers while at work.” In an August 1, 2002 report, he stated that appellant’s work status was unchanged.

Appellant’s application for disability retirement was approved by the Office of Personnel Management, effective February 7, 2003. In a February 20, 2003 report, Dr. Fatehi noted that appellant, who he had not seen since August 1, 2002, had, in addition to his persistent chronic low back pain, new symptoms of anterior thigh pain and paresthesias on the right extending to

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<sup>1</sup> The record does not establish when appellant returned to full-time limited duty.

the knee. In a March 13, 2003 report, he diagnosed improving meralgia paresthetica on the right and noncompressive radiculopathy.

On April 20, 2003 appellant filed a claim for compensation for a recurrence of disability beginning February 7, 2003, the date of his disability retirement. He stated that he could not perform his regular duties. The employing establishment stated that it had accommodated appellant's 20-pound lifting restriction and allowed him to wear sneakers at all times at work and that he performed light duty satisfactorily within his restrictions.

By letter dated May 30, 2003, the Office advised appellant that the evidence was insufficient to establish that his total disability beginning February 7, 2003 was related to his original work injury and that it needed a detailed medical report explaining why he could no longer work. In a June 11, 2003 letter, appellant stated that, after his injury, he was not required to perform any work and that he checked in with his supervisor in the morning and waited until it was time to go home. He noted that the employing establishment accommodated his injuries until June 26, 2002 when he was informed by Billy Prescott, the Public Works Center superintendent, that he could take a medical retirement or could be terminated because he was unfit for duty. Appellant stated that he applied for disability retirement, which took effect February 7, 2003. He submitted a copy of his June 26, 2002 application for disability retirement, on which Mr. Prescott stated that appellant's medical restrictions prevented accommodating him in his current position, that he had not been reassigned to a new permanent position, that he had been reassigned to light duty, that he was doing work within his restrictions since his accident and that there was "no position to reassign him to."

By decision dated July 25, 2003, the Office found that the evidence was not sufficient to establish the claimed recurrence of disability beginning February 7, 2003 was causally related to his May 8, 2001 employment injury.

On September 28, 2003 appellant requested reconsideration, contending that he was forced to retire and that his condition had become worse. He submitted a copy of his performance evaluation for the period from July 1, 2001 to June 30, 2002, which stated that he was unable to perform all the duties of his position because of a work injury, but that he was performing restricted duties and had been an asset to the employing establishment. Appellant was rated acceptable on all critical elements. He also submitted a January 29, 2004 report from Dr. Fatehi stating that a fusion and laminectomy on January 16, 2004 had completely resolved appellant's right leg pain.

By decision dated April 15, 2004, the Office denied modification of the July 25, 2003 decision, finding that there was no evidence to substantiate that the employing establishment changed, terminated or withdrew appellant's light duty on February 7, 2003.

### **LEGAL PRECEDENT**

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.<sup>2</sup> When an employing establishment terminates an employee's light-duty job because it does not have work available within the injury-related work restrictions, a recurrence of disability is established.<sup>3</sup>

The Office's regulations state that a recurrence of disability means "an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force."<sup>4</sup> The Office's procedure manual states:

"If the employing [establishment] has withdrawn a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury (*i.e.*, a reduction-in-force or closure of the facility is not involved) and the withdrawal did not occur for cause, the [Office] need only establish continuing injury-related disability for regular duty to accept the recurrence and begin payment of benefits."<sup>5</sup>

### ANALYSIS

Following appellant's May 8, 2001 employment injury to his back, accepted by the Office for radiculopathy, the employing establishment assigned him to light duty, not requiring him to lift more than 20 pounds. This assignment was specifically to accommodate his injury-related restrictions as set forth by his attending Board-certified neurosurgeon, Dr. Fatehi. At no time after his injury was appellant able to perform his regular duties, as attested to by the employing establishment on his April 20, 2003 claim for a recurrence of disability.

Appellant continued to perform his light-duty assignment until February 7, 2003, when his disability retirement became effective. On his June 26, 2002 application for disability retirement, the employing establishment stated that appellant's medical restrictions prevented accommodating him in his current position, that he had not been reassigned to a new permanent position, that he had been reassigned to light duty, that he was doing work within his restrictions since his accident and that there was "no position to reassign him to." Even though the employing establishment allowed appellant to continue his light-duty assignment until his disability retirement became effective on February 7, 2003, as of that date light duty was no longer available to him and he sustained a recurrence of disability as defined by the Office.

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<sup>2</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>3</sup> *Jackie B. Wilson*, 39 ECAB 915 (1988).

<sup>4</sup> 20 C.F.R. § 10.5(x).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7a(4) (May 1997). *Accord, Joseph D. Duncan*, 54 ECAB \_\_\_\_ (Docket No. 02-1115, issued March 4, 2003) (the Board found that appellant's work stoppage was due to downsizing and thus, did not constitute a recurrence of disability).

**CONCLUSION**

The Board finds that appellant sustained a recurrence of disability effective February 7, 2003, as light duty provided to accommodate his injury-related restrictions was no longer made available.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 15, 2004 and July 25, 2003 decisions of the Office of Workers' Compensation Programs are reversed and the case remanded to the Office for payment of appropriate compensation.

Issued: June 8, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member