

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

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**SHIRLEY S. JACKSON, Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Martinez, CA, Employer**

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**Docket No. 05-69  
Issued: March 10, 2005**

*Appearances:*  
Shirley S. Jackson, *pro se*  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On October 4, 2004 appellant filed a timely appeal from the July 21, 2004 merit decision of the Office of Workers' Compensation Programs, which denied her claim for total disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this denial.

**ISSUE**

The issue is whether appellant is entitled to compensation for periods of leave without pay from October 1, 2001 to October 10, 2002.

**FACTUAL HISTORY**

On January 18, 2001 appellant, then a 42-year-old nurse practitioner, sustained a back injury in the performance of duty. Her symptoms began when she stood up after sitting in an uncomfortable chair and they increased as she performed her duties for the rest of the day. The Office accepted her claim for an L4-5 disc herniation and L5-S1 disc protrusion. The Office authorized surgery and paid compensation for wage loss. Appellant returned to a modified

position on September 4, 2001 working four hours a day. She was released to full-time work (32 hours a week) on October 1, 2001.

On or about May 31, 2002 appellant filed a claim seeking compensation for intermittent wage loss from April 2 to 16, 2002. On June 7, 2002 the Office asked her to submit medical certification to support disability for the dates claimed, including a medical explanation of disability based on objective findings.

The Office received an April 25, 2002 report from Dr. Paul B. Nottingham, appellant's orthopedic surgeon. He reported that he saw her that day for complaints of difficulty walking with her right leg: "[Appellant] states [that] she has decreased strength in her right toe and right foot, stating that she cannot lift her foot to walk. This has all occurred within the last 3½ weeks." Appellant also complained of continuing numbness in the right foot and lateral calf; a fluttering feeling at the top of her right foot, lateral upper right calf and right great toe; and pain in her right groin, right Achilles and right great toe. Dr. Nottingham reported that she was experiencing a progression of her stenosis at L3-4 with right greater than left radiculopathy. He recommended decompression from L3-S1.

On May 1, 2002 Dr. Nottingham reduced appellant's work hours from 32 a week to 24.

On June 25, 2002 the Office referred appellant to Dr. Thomas Mampalam, a neurosurgeon, for an opinion on her restrictions, extent of disability and need for further surgery.

In a decision dated July 16, 2002, the Office denied appellant's claim for wage loss on the grounds that she submitted no medical certification of disability.

On July 31, 2002 the Office received Dr. Mampalam's July 25, 2002 report. He stated that appellant had evidence of lumbar radiculopathy and a right L5-S1 disc protrusion that correlated with her symptoms and signs. Noting that she sustained a low back strain on January 18, 2001 and did not have ongoing symptoms or disability prior to that work injury, he reported that her subsequent symptoms and treatment were attributable to the industrial injury. Although Dr. Mampalam noted that appellant would benefit from a right L5-S1 laminectomy and discectomy, he indicated on a July 22, 2002 work capacity evaluation that she could work 32 hours a week.

Appellant requested an oral hearing before an Office hearing representative. At the hearing, which was held on March 4, 2003 she stated that she took disability retirement on or about October 10, 2002 and she explained that she was seeking compensation for intermittent leave without pay from October 1, 2001 through October 10, 2002.

In a decision dated May 16, 2003, the hearing representative affirmed the denial of appellant's claim for compensation. He found that there was no medical evidence that she was disabled for any period of time from October 1, 2001 through October 10, 2002 and no explanation of why she was unable to work light duty during that period. Appellant requested reconsideration.

In a decision dated July 21, 2004, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that she submitted no evidence to support that she was totally disabled between October 1, 2001 and October 10, 2002.

### **LEGAL PRECEDENT**

When an employee who is disabled from the job 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 of establishing 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 job requirements.<sup>1</sup>

The Office, however, is not a disinterested arbiter, but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on the Office to see that its administrative processes are impartially and fairly conducted.<sup>2</sup> Although the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>3</sup> Once the Office starts to procure medical opinion, it must do a complete job.<sup>4</sup> The Office thus, has the responsibility to obtain from its referral physician an evaluation that will resolve the issue in the case.<sup>5</sup>

### **ANALYSIS**

As she explained at the March 4, 2003 hearing, appellant seeks compensation for all periods of leave without pay from October 1, 2001, when she returned to light duty for 32 hours a week, to October 10, 2002, when she took disability retirement. She, therefore, bears the ultimate burden of proof to show a change in the nature and extent of her injury-related condition or a change in the nature and extent of her light-duty job requirements.<sup>6</sup>

The Office denied appellant's claim because she submitted no medical certification for the disability claimed. Dr. Nottingham, the attending orthopedic surgeon, reduced her hours on May 1, 2002 from 32 a week to 24, but offered no reasoned opinion on whether her injury-

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<sup>1</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>2</sup> *Thomas M. Lee*, 10 ECAB 175 (1958).

<sup>3</sup> *William J. Cantrell*, 34 ECAB 1233 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

<sup>4</sup> *William N. Saathoff*, 8 ECAB 769 (1956).

<sup>5</sup> *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983); *Richard W. Kinder*, 32 ECAB 863, 866 (1981) (noting that the report of the Office referral physician did not resolve the issue in the case).

<sup>6</sup> Appellant does not allege that the periods of leave without pay for which she seeks compensation were a result of changes in the nature and extent of her light-duty job requirements.

related condition had worsened such that she could no longer perform her light-duty job 32 hours a week.

Notwithstanding the lack of probative medical opinion evidence to support appellant's claim for compensation, the Board will set aside the Office's July 21, 2004 decision. On June 25, 2002 the Office referred appellant to Dr. Mampalam, a neurosurgeon, for a second opinion, but his July 25, 2002 report and July 22, 2002 work capacity evaluation did not resolve the issue raised by appellant's claim. He explained that she continued to suffer symptoms and signs of her January 18, 2001 employment injury; he recommended surgery; he indicated on July 22, 2002 that she could work 32 hours a week. But Dr. Mampalam did not resolve whether appellant's injury-related condition worsened so as to disable her intermittently from performing her light-duty job 32 hours a week from October 1, 2001 to October 10, 2002. Having sought a second opinion from Dr. Mampalam, the Office had a responsibility to obtain an evaluation that would resolve this issue.

The Board will remand the case for further development of the medical evidence and an appropriate final decision on appellant's claim for compensation.

### **CONCLUSION**

This case is not in posture for a decision on whether appellant is entitled to compensation for periods of leave without pay from October 1, 2001 to October 10, 2002. Further development of the medical evidence is warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 21, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: March 10, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member