

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

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<b>DEBORA A. HAWTHORNE, Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 05-1186</b>
	)	<b>Issued: November 25, 2005</b>
<b>DEPARTMENT OF THE AIR FORCE,</b>	)	
<b>LOS ANGELES AIR FORCE BASE,</b>	)	
<b>El Segundo, CA, Employer</b>	)	
	)	

*Appearances:*  
Debora A. Hawthorne, pro se  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Judge  
WILLIE T.C. THOMAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On May 5, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 8, 2005 merit decision, denying her claim for a recurrence of total disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant sustained a recurrence of total disability on or after October 31, 2003 due to her May 15, 2001 employment injury.

**FACTUAL HISTORY**

On May 16, 2001 appellant, then a 45-year-old management analyst, filed a traumatic injury claim alleging that she sustained injury due to a fall at work on May 15, 2001. The Office accepted that she sustained a left arm strain, lumbar strain and bilateral knee abrasions.<sup>1</sup>

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<sup>1</sup> Appellant was involved in a nonwork-related automobile accident on April 1, 2001.

Appellant returned to limited-duty work for the employing establishment in July 2001 and she received appropriate Office compensation for her partial disability.<sup>2</sup>

In April 2002, the Office referred appellant to Dr. J. Pierce Conaty, a Board-certified orthopedic surgeon, for further evaluation of her employment-related condition and ability to work. In a report dated May 6, 2002, he diagnosed lumbar strain and contusions and strains of the left elbow and wrist due to the May 15, 2001 employment injury. Dr. Conaty indicated that appellant reported significant pain and noted that her examination revealed symptom magnification of her subjective complaints. He indicated that she could return to full-time work with restrictions from lifting more than 20 pounds and engaging in standing, lifting, pushing or pulling for more than 2 hours for each activity.

In a report dated May 23, 2002, Dr. Paul Papanek, an attending physician Board-certified in occupational medicine, indicated that appellant reported low back pain which radiated into both legs. He stated that she could work 4 to 6 hours per day as tolerated with no repetitive pushing or pulling, bending or lifting more than 10 pounds. In a report dated May 20, 2002, Dr. Papanek indicated that he disagreed with Dr. Conaty's opinion that appellant's findings were subjective. He submitted additional reports regarding her ability to work.

In April 2003, appellant began working in a limited-duty position for four hours per week in accordance with the recommendations of Dr. Papanek.<sup>3</sup> The job was essentially sedentary in nature and did not require lifting more than five pounds, standing for more than a total of two hours per day or engaging in climbing, squatting or kneeling. Appellant was allowed to alternate between sitting and standing every 15 to 20 minutes.

In July 2003, the Office referred appellant to Dr. Alan S. Roberts, a Board-certified orthopedic surgeon, for further evaluation of her medical condition and ability to work.<sup>4</sup> In a report dated October 27, 2003, he noted that on examination her exhibited normal range of motion of both elbows and wrists and appeared to limit back and lower extremity motion due to reported pain. Dr. Roberts stated that appellant's subjective findings on examination far outweighed her objective findings. He indicated that she should not perform very heavy work and noted, "I would apportion the patient's no heavy work restrictions 50 percent to the natural progression of her fibromyalgia and injuries sustained in the automobile accident of April 1, 2001 and 50 percent to the injuries sustained in the accident May 15, 2001." He indicated that

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<sup>2</sup> Appellant generally worked for six hours per day.

<sup>3</sup> Dr. Papanek indicated that appellant should not lift more than five pounds and should be allowed to alternate between sitting and standing as needed.

<sup>4</sup> The Office indicated that there was a conflict in the medical evidence and that Dr. Roberts served as an impartial medical specialist, but there was no conflict in the medical evidence regarding appellant's ability to work around the time of the referral. Therefore, he served as an Office referral physician. Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

appellant could work eight hours per day and noted that Dr. Papanek's restrictions seemed to be based on subjective findings.<sup>5</sup>

In reports dated in August and September 2003, Dr. Serge Obukhov, an attending Board-certified neurosurgeon, indicated that appellant had degenerative disc disease of the low back with a possible herniation at L5-S1.

Appellant stopped work on October 31, 2003 and alleged that she sustained a recurrence of total disability due to her May 15, 2001 employment injury.<sup>6</sup>

In a November 3, 2003 report, Dr. Papanek indicated that appellant reported multiple symptoms including low back pain, migraine headaches and nausea, that she exhibited a slight left-sided paralumbar spasm on examination and that appellant had a chronic low back strain due to spinal stenosis and chronic pain with very difficult pain management. Dr. Papanek indicated that she was totally disabled from November 3, 2003 to January 1, 2004 and stated, "I believe that the inability to work flows from the patient's subjective symptoms rather than from any objective verifiable factors. However, I am exceeding to [appellant's] request and writing that because of these subjective symptoms rather than objective findings I believe that she is probably unable to be productive at work."

In a report dated January 2, 2004, Dr. Papanek indicated that appellant had no low back tenderness on examination and that straight leg raising was negative to 60 degrees with her not allowing motion beyond that point. He stated that she reported generally experiencing low back pain and that appellant had nausea which she believed to be due to her medications. Dr. Papanek noted that she was totally disabled from January 2 to March 2, 2004 and stated, "Given the above complexity of symptoms I am supporting [sic] that the patient would probably have great difficulty being at work without an increase in subjective symptoms. However, as the previous visit I am once again reflecting that the requirement for total temporary disability is based on subjective symptoms rather than any objective correlated factors.

By decision dated February 20, 2004, the Office denied appellant's claim on the grounds that she did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after October 31, 2003 due to her May 15, 2001 employment injury.

Appellant requested a hearing before an Office hearing representative which was held on February 23, 2005. After the hearing, she submitted a December 2, 2004 report in which Dr. Donna L. Ehler, an attending Board-certified psychiatrist, discussed appellant's emotional condition. Appellant also submitted reports of Dr. Papanek, dated March 2, June 4, September 3, November 9, 2004 and January 12, 2005, which contained assessments of her medical condition and disability which were similar to those contained in his prior reports. The reports collectively

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<sup>5</sup> Dr. Roberts indicated that the fibromyalgia was a preexisting condition.

<sup>6</sup> Appellant also alleged that she injured herself while walking down stairs during a fire drill in late October 2003 and while handling boxes during an office move in early November 2003. The employing establishment stated that she was helped down the stairs by three coworkers and that she was instructed to ask for assistance to handle boxes during the move.

indicated that appellant was totally disabled between March 2, 2004 and March 12, 2005 and that this disability was based on subjective symptoms rather than any objective correlated factors.<sup>7</sup>

By decision dated and finalized April 8, 2005, the Office hearing representative affirmed the February 20, 2004 decision, finding that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after October 31, 2003 due to her May 15, 2001 employment injury.<sup>8</sup>

### **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 job requirements.<sup>9</sup>

### **ANALYSIS**

The Office accepted that appellant sustained a left arm strain, lumbar strain and bilateral knee abrasions due to a fall at work on May 15, 2001. In April 2003, she began working in a limited-duty position for four hours per week. The job did not require lifting more than 5 pounds, standing for more than a total of 2 hours per day or engaging in climbing, squatting or kneeling and allowed appellant to alternate between sitting and standing every 15 to 20 minutes. Appellant stopped work on October 31, 2003 and alleged that she sustained a recurrence of total disability due to her May 15, 2001 employment injury.

Appellant did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability on or after October 31, 2003 due to her May 15, 2001 employment injury. She submitted numerous reports in which Dr. Papanek indicated that she had a chronic low back strain due to spinal stenosis and chronic pain with very difficult pain management and stated that appellant had total disability for periods after October 31, 2003. However, he explicitly stated in these reports that his recommendation concerning disability was based on subjective symptoms rather than any objective verifiable or correlated factors.<sup>10</sup> Therefore, Dr. Papanek did not provide a clear opinion that appellant's claimed recurrence of total disability

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<sup>7</sup> Some of these reports indicated that appellant's only objective finding was spinal stenosis.

<sup>8</sup> The Office hearing representative also indicated that the submission of the report of Dr. Ehler required the case to be remanded to the Office to consider whether appellant had an employment-related emotional condition.

<sup>9</sup> *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>10</sup> In his November 3, 2003 report, Dr. Papanek stated, "I am exceeding to the patient's request and writing that because of these subjective symptoms rather than objective findings I believe that she is probably unable to be productive at work."

was due to her May 15, 2001 employment injury and his reports are of limited probative value on this matter.<sup>11</sup>

Dr. Papanek indicated in his reports that appellant had spinal stenosis, but the Office has not accepted that this condition is employment related.<sup>12</sup> He conducted very brief examinations of her and his reports contain very limited findings on examination. The record does not contain any medical report which presents a well-rationalized opinion that appellant sustained an employment-related recurrence of total disability on or after October 31, 2003.<sup>13</sup>

Moreover, appellant did not show a change in the nature and extent of the light-duty job requirements. For the above-described reasons, she has not shown that she sustained an employment-related recurrence of total disability on or after October 31, 2003.<sup>14</sup>

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after October 31, 2003 due to her May 15, 2001 employment injury.

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<sup>11</sup> See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

<sup>12</sup> The Board notes that the record contains medical evidence which suggests that some of appellant's problems might be due to a nonwork-related degenerative process of the low back. The record also contains an October 27, 2003 report in which Dr. Roberts, a Board-certified orthopedic surgeon and Office referral physician, indicted that her employment-related condition partially contributed to inability to perform very heavy work. However, Dr. Roberts provided no indication that appellant could not perform the extremely limited physical tasks of her limited-duty job after October 31, 2003.

<sup>13</sup> Appellant also alleged that she injured herself while walking down stairs during a fire drill in late October 2003 and while handling boxes during an office move in early November 2003. The employing establishment stated that she was helped down the stairs by three coworkers and that she was instructed to ask for assistance to handle boxes during the move. Appellant did not submit any medical evidence indicating that she sustained total disability from work due to these incidents.

<sup>14</sup> The Office hearing representative noted that the submission of the report of Dr. Ehler, required the case to be remanded to the Office to consider whether appellant had an employment-related emotional condition. As this matter is under development and not ripe for review, the present appeal is limited to the issue of her claim that she sustained a recurrence of total disability due to her May 15, 2001 employment injury. See 20 U.S.C. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case). Appellant submitted additional evidence after the Office's April 8, 2005 decision, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' April 8, 2005 decision is affirmed.

Issued: November 25, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board