



discectomy and fusion and plating at C5-6 and C6-7 which were performed on January 8, 2003 by Dr. James S. Ogsbury, a Board-certified orthopedic surgeon.

Appellant accepted the employing establishment's February 13 and 27, 2003 offers of limited-duty work. She missed work intermittently from February 10 through June 16, 2003 due to medical appointments, pain management and therapy. On July 10, 2003 appellant accepted the employing establishment's limited-duty job offer. She missed work intermittently from July 12, 2003 through March 30, 2004 for physical therapy.

On January 20, 2004 appellant filed claims for compensation (Form CA-7) for the period December 13, 2003 through January 9, 2004. She indicated that she was performing modified work with restrictions. Appellant submitted medical records regarding her cervical condition.

By letter dated January 28, 2004, the Office advised appellant that her claim could not be paid at that time as she failed to submit medical evidence which established that her work hours were reduced or that she had any medical appointments scheduled on the claimed dates. The Office provided 30 days in which appellant could submit the necessary medical documentation to establish her claim.

Appellant submitted additional medical records regarding her cervical condition. In form reports dated February 27 and March 30, 2004, Dr. Daniel J. Gerber, an attending Board-certified physiatrist, opined that she could work six to eight hours a day with restrictions.

By decision dated April 14, 2004, the Office denied appellant's claim for compensation for the period December 13, 2003 through January 9, 2004. It found that she failed to submit contemporaneous medical evidence to establish her claim. The Office found that appellant's attending physician released her to return to light-duty work six to eight hours a day and she failed to submit medical evidence establishing that this work restriction had changed. It also found that, based on the average number of hours worked one year prior to appellant's pay rate effective date, she was entitled to 33 hours per week.

By letter dated May 11, 2004, appellant's attorney advised the Office that he had previously submitted an entry of appearance on behalf of appellant and that he had not received a response to his requests for information regarding her claim, including the April 14, 2004 decision. Counsel requested that the Office reissue this decision with a new date so that he could properly review appellant's legal rights with her.

On May 20, 2004 the Office reissued its April 14, 2004 decision, which denied appellant's claim for compensation for the period December 13, 2003 through January 9, 2004.

On May 24, 2004 the Office received Dr. Gerber's May 11, 2004 approval of the employing establishment's modified-duty job offer.<sup>1</sup>

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<sup>1</sup> Previously, on March 30, 2004, Dr. Gerber found that appellant could not perform the duties of a modified-duty position offered to her by the employing establishment because it did not meet her lifting restriction of 5 to 10 pounds.

On June 3, 2004 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability on May 21, 2004 as a result of the employing establishment's withdrawal of her limited-duty work assignment. Also on June 3, 2004 she filed a (Form CA-7) claim for compensation for the period May 22 through June 5, 2004. Appellant submitted a hospital emergency room report dated April 12, 2004, which stated that she suffered from acute chronic low back pain. Dr. Gerber's May 19, 2004 report stated that appellant expressed ongoing stressors at work regarding a recent referral for formal retraining. He stated that the results were good from a current mix of migraine and pain medications with no compliance on appellant's part. In a June 18, 2004 report, Dr. Gerber diagnosed lumbar radiculopathy and stated that appellant's prognosis was good.

On June 14, 2004 the Office received the employing establishment's May 11, 2004 controverted claims. It stated that she failed to submit medical documentation to her supervisors or to anyone else at the employing establishment for the claimed dates. The employing establishment also stated that modified work was made available to appellant during the claimed period. It indicated that she was charged absent without leave (AWOL) until May 17, 2004 when she suddenly returned to work with no medical documentation for her absence or ability to return to work.

In a June 18, 2004 letter, appellant requested an oral hearing before a hearing representative regarding the Office's May 20, 2004 decision. Her attorney contended that the record contained sufficient medical evidence to support her claim for compensation. She submitted Dr. Gerber's April 12, 2004 emergency room treatment note which stated that she suffered from acute low back pain.

By letter dated June 22, 2004, the Office advised appellant that the evidence submitted was insufficient to establish her recurrence of disability claim. The Office addressed the factual and medical evidence she needed to submit to establish her claim.

On July 6, 2004 the Office received a copy of appellant's June 3, 2004 CA-2a form claim. On the reverse of the form, the employing establishment stated that appellant's limited-duty assignment was not withdrawn from her. It indicated that she refused to sign an offer for a job that was within her restrictions.

By letter dated August 2, 2004, appellant's attorney advised the Office that he did not receive a copy of its June 22, 2004 developmental letter. He stated that appellant missed work from May 8, 2004 until she returned to work on May 19, 2004 and that she used sick leave during this period. Counsel indicated that, two days after returning to work, the employing establishment, on May 21, 2004, sent appellant home because it was no longer able to accommodate her medical condition. He contended that she was not claiming a recurrence of disability beginning May 8, 2004, but rather she was alleging that she sustained a recurrence of disability on May 21, 2004. Counsel stated that this dismissal constituted a withdrawal of limited-duty work which by definition constituted a recurrence of disability. He also stated that appellant's recurrence of disability claim was not medical in nature since it arose from the employing establishment's actions. He indicated that prior to May 8, 2004 she performed limited-duty work that was later withdrawn by the employing establishment. Counsel concluded

that appellant had not suffered any new injuries since her return to work on May 19, 2004 and that she had been off work since May 21, 2004.

By decision dated September 22, 2004, the Office denied appellant's recurrence claim. The evidence of record was insufficient to establish that she sustained a recurrence of disability beginning May 8, 2004 causally related to her March 2, 2002 employment injuries.

In a letter dated October 19, 2004, appellant, through her attorney, requested an oral hearing before an Office hearing representative regarding the Office's May 20 and September 22, 2004 decisions.

By decision dated February 10, 2005, an Office hearing representative affirmed the May 20 and September 22, 2004 decisions, finding that the evidence of record was insufficient to establish that appellant was disabled for work during the periods December 13, 2003 through January 9, 2004 and beginning May 8, 2004. The hearing representative also found that appellant failed to establish that her limited-duty position was withdrawn by the employing establishment.

In a letter dated March 30, 2005, appellant's attorney reiterated his contention that she sustained a recurrence of disability due to the employing establishment's withdrawal of her limited-duty job on May 20, 2004. He argued that she was entitled to compensation from May 20, 2004 until the date she returned to work.

On April 1, 2005 the employing establishment reiterated its contention that it did not withdraw appellant's limited-duty position from her. Rather, she refused to accept a position within her restrictions.

On May 17, 2005 appellant filed a CA-2a form claim alleging that she sustained a recurrence of disability on May 20, 2004. She stated that on May 20, 2004 the employing establishment withdrew her limited-duty job. The employing establishment told her to leave and that she would be contacted by its injury compensation control office for vocational rehabilitation placement.

By letter dated June 7, 2005, the Office closed appellant's May 17, 2005 recurrence of disability claim. It stated that the issue of whether the employing establishment had withdrawn her limited-duty position had already been adjudicated and denied twice, on September 22, 2004 and April 4, 2005.<sup>2</sup>

In a letter dated February 9, 2006, appellant, through her attorney, requested reconsideration of the hearing representative's February 10, 2005 decision. Counsel stated that he was only seeking reconsideration of this decision with regard to the Office's September 22, 2004 decision. He argued that appellant sustained a recurrence of disability on May 21, 2004

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<sup>2</sup> In the April 4, 2005 decision, the Office found that appellant did not sustain a recurrence of disability from February 8 to 28, 2005. The evidence of record was insufficient to establish that she was totally disabled during the claimed period or that the employing establishment withdrew her limited-duty position. On February 28, 2005 appellant accepted the employing establishment's February 18, 2005 offer for a modified clerk position.

and not May 8, 2004 as a result of the employing establishment's withdrawal of her limited-duty position. Counsel contended that the Office improperly calculated appellant's average earnings for the period December 13, 2003 to January 9, 2004. He further contended that all of appellant's employment-related conditions had not been accepted by the Office. Lastly, counsel argued that medical records from David D. Robinson, Ph.D., were sufficient to establish that appellant sustained an employment-related emotional condition for which she was entitled to compensation.

By letter dated May 1, 2006, the employing establishment reiterated that it did not withdraw appellant's limited-duty position. It further contended that her earnings were properly calculated. The employing establishment argued that appellant's absences from work were self-directed and, therefore, the period covered by these absences were not compensable. It also argued that her claim had been accepted for several conditions other than a cervical strain. Lastly, the employing establishment contended that the medical evidence of record did not establish that appellant sustained an emotional condition in the performance of duty. It stated that it had submitted all medical records pertaining to appellant.

In a December 23, 2004 letter, Gina M. Munoz, a station manager at the employing establishment, stated that she advised appellant on May 20, 2004 that she could no longer work because she had not accepted a job offer. Ms. Munoz stated that, during a redress mediation on August 31, 2004, appellant was asked to produce a copy of a signed job offer and to date she had failed to do so.

By decision dated June 12, 2006, the Office affirmed the February 10, 2005 decision. It found that appellant was contending that she sustained a recurrence of disability on May 21, 2004 rather than on May 8, 2004. The Office further found the evidence of record insufficient to establish that she sustained a recurrence of disability due to the employing establishment's withdrawal of her limited-duty position on May 21, 2004.

### **LEGAL PRECEDENT**

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>3</sup> This term also means an inability to work 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) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>4</sup>

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

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<sup>3</sup> 20 C.F.R. § 10.5(x).

<sup>4</sup> *Id.*

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 employment-related condition or a change in the nature and extent of the light-duty job requirements.<sup>5</sup>

Office's procedure manual defines recurrence of disability to include withdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury.<sup>6</sup> The procedure manual also indicates that, to constitute recurrence of disability, the withdrawal of a light-duty position must have occurred for reasons other than misconduct or nonperformance of job duties.<sup>7</sup> The Board has held that a claimant's showing that light-duty work was unavailable constitutes a change in the nature or extent of light-duty requirements sufficient to establish a recurrence of disability.<sup>8</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability due to withdrawal of a limited-duty position. She does not allege that she was totally disabled beginning on May 21, 2004 due to her accepted employment-related cervical strain and displacement of a cervical disc without myelopathy. Instead, appellant asserts that the employing establishment withdrew her limited-duty position beginning on May 21, 2004, the date on which she was told that work was no longer available.

In this case, the employing establishment advised appellant to stop working on May 20, 2004 because she refused to sign a limited-duty job offer that was within her restrictions. The Board has held that, when a claimant stops work for reasons unrelated to her accepted employment injury, she has no disability within the meaning of the Federal Employees' Compensation Act.<sup>9</sup> Though this dismissal acted effectively as a withdrawal of light-duty status, it cannot form the basis for a disability compensation claim because the dismissal had nothing to do with appellant's ability to perform the limited-duty requirements of the offered position. As the withdrawal of her position was premised on the misconduct, the loss of her position under these circumstances does not establish a recurrence of disability.<sup>10</sup> Additionally, the record is devoid of any medical evidence establishing that appellant did not and/or could not perform the offered limited-duty assignment at the time that the employing establishment dismissed her from work due to misconduct. Dr. Gerber, an attending physician, approved of the offered position.

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<sup>5</sup> *Barry C. Peterson*, 52 ECAB 120, 125 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(1)(c) (May 1997).

<sup>7</sup> *Id.*

<sup>8</sup> *Jackie B. Wilson*, 39 ECAB 915 (1988).

<sup>9</sup> Federal (FECA) Procedural Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(1)(c) (May 1997); *see also John W. Normand*, 39 ECAB 1378 (1988); *Carolyn R. Gray*, (Docket No. 05-1700, issued June 20, 2006).

<sup>10</sup> *See* 20 C.F.R. § 10.5(x); *see also Lester Covington*, 47 ECAB 539, 542 (1996); *Major W. Jefferson, III*, 47 ECAB 295, 298 (1996).

The Board finds that appellant did not submit sufficient evidence to meet her burden of proof in establishing that she sustained a recurrence of disability beginning on May 21, 2004.

**CONCLUSION**

The Board finds that appellant did not meet her burden of proof in establishing that she sustained a recurrence of disability beginning on May 21, 2004 causally related to her accepted employment-related conditions on the grounds that the employing establishment withdrew light-duty work.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 12, 2006 and February 10, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 20, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board