

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

F.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Denver, CO, Employer**

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**Docket No. 07-396
Issued: July 6, 2007**

Appearances:

John S. Evangelisti, Esq., for the appellant

No appearance, for the Director

Oral Argument June 5, 2007

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 8, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 8, 2006 merit decision denying his claim for recurrence of disability on and after March 11, 1995. 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 met his burden of proof to establish that he sustained an employment-related recurrence of disability on or after March 11, 1995.

FACTUAL HISTORY

On June 27, 1990 appellant, then a 49-year-old mail handler, filed an occupational disease claim alleging that he sustained a pinched neck nerve due to such repetitive duties as handling and lifting heavy mail sack, trays and boxes. The Office accepted that appellant sustained a neck neuropathy (pinched nerve) and paid compensation for periods of disability. In an April 9, 1991 report, Dr. Boswell B. Dorsett, an attending Board-certified neurologist,

indicated that appellant suffered from a left cervical radiculopathy involving the sixth left cervical root. Dr. Dorsett stated that appellant had marked pain when working above his shoulder with his left arm.

In mid 1991 appellant began working in various light-duty positions for the employing establishment. By late 1991, appellant's periods of work stoppage increased and he generally used sick leave or went on leave without pay status. On December 18, 1991 he underwent a posterior foraminotomy at C4-5 and C5-6 which was authorized by the Office. By early 1993, appellant was working four hours per day in a light-duty position for the employing establishment.

On June 2, 1993 appellant returned to full-time work for the employing establishment as a modified mail handler. The position involved removing labels from letter trays and three-pound cardboard sleeves and stacking the trays and sleeves with assistance from coworkers when stacking above shoulder height. Two 15-minute breaks and a 30-minute lunch break were allowed. The physical duties of the position required intermittent lifting for four to six hours per day of no more than 20 pounds (with no lifting for more than two hours at a time), intermittent simple grasping for four to six hours per day (with no grasping for more than two hours at a time), intermittent sitting for four to six hours per day, walking for up to one hour per day, intermittent sitting for four to six hours per day and intermittent standing for four to six hours per day. On May 12, 1993 Dr. Dorsett indicated that appellant was capable of performing the modified mail handler position.¹

Appellant accepted disability retirement with the Office of Personnel Management effective June 15, 1995. Beginning in March 1995, he filed claims for continuing claim compensation on account of disability (Forms CA-8) for wage loss for the period beginning March 11, 1995 and continuing. Between March and June 1995, appellant tended to work for four hours per day and went into leave without pay for the other four hours per day. On February 3, 1998 appellant filed a claim for a recurrence of disability (Form CA-2a) beginning June 15, 1995. He indicated that he never returned to full duty and was working four hours per day until he retired on June 15, 1995. On March 12, 2002 appellant filed a claim for compensation (Form CA-7) for wage loss due to use of leave without pay for the period beginning June 1, 1995 and continuing.²

In a July 15, 2005 decision, the Office denied the claims effectuated by appellant's CA-7, CA-8 and CA-2a forms finding that he had not met his burden of proof to establish that he sustained a recurrence of disability on and after March 11, 1993. The Office found that there

¹ In an August 2, 1993 award of compensation, the Office granted appellant a schedule award for a 47 percent permanent impairment of his left arm. In January 2007, the Office reduced the schedule award to reflect that appellant actually had a 14 percent permanent impairment of his left arm. The Office later declared an overpayment as a result of this partial rescission of schedule award compensation. In January 2002, appellant established that he had a 43 percent permanent impairment of his left arm.

² The precise nature of appellant's recurrence of disability claim, effectuated by these forms, is unclear. It appears that he is claiming partial disability compensation for the period March 11 to June 1, 1995 and total disability compensation for the period June 1, 1995 and continuing. Appellant continued to receive medical benefits related to his work injury.

was no contemporaneous medical evidence showing that appellant was unable to perform the modified mail handler position he returned to on June 2, 1993.

In a June 9, 2006 statement, appellant requested reconsideration of his claim and alleged that he sustained a recurrence of disability because the modified mail handler position required him to perform duties which were outside his work restrictions. He claimed that between June 1993 and June 1995, Joe Bilger, his supervisor, was aware of his light-duty restrictions but required him to perform tasks that were not in his job description and which were beyond his physical work restrictions. Appellant asserted that Mr. Bilger ordered him to pick mail and sleeves off the floor, lift mail trays weighing up to 35 pounds, stack the trays in general purpose containers and push general purpose containers weighing up to 500 pounds distances of more than 100 feet at a time. He claimed that, everyday between June 1993 and June 1995, Mr. Bilger made him pull mail trays weighing up to 35 pounds off mail sorting machines, a task which required lifting while bending and stack these trays in over the road containers to heights of almost six feet. Appellant asserted that he had to push over the road containers, which weighed up to 1000 pounds, for distances of more than 75 feet at a time. He claimed that Mr. Bilger made him sort mail sacks weighing up to 40 pounds, load them onto dollies and push the dollies, which weighed up to 500 pounds, for distances as long as a city block. Appellant claimed that three or four days per week he had to load pallets with mail trays and sleeves to heights of four feet and push the pallets, which weighed up to 750 pounds, for distances as long as a city block.³

In a July 13, 2006 letter, the Office requested that the employing establishment reply, within 20 days, to the arguments contained in appellant's June 9, 2006 statement. In a July 19, 2006 letter, an injury compensation specialist stated: "upon review of the decision of the [d]istrict [O]ffice and the subject case file, the [a]gency concurs with the [d]istrict [O]ffice and is in full support of their decision. The [a]gency concurrence is based on the fact that it has received no new additional evidence, medical or otherwise, relevant and material to the issue in question."

In a decision dated September 8, 2006, the Office affirmed its July 15, 2006 decision. The Office rejected appellant's assertion that he sustained a recurrence of disability because his modified mail handler position required him to perform work outside his work restrictions. The Office made note of the July 19, 2006 letter of the employing establishment and acknowledged that the employing establishment had not responded to appellant's specific claims regarding his work duties. It noted that Dr. Dorsett did not seem to be aware of appellant's claim that he had to perform work outside his work restrictions and asserted that there was no medical report of record which showed that he could not perform the modified mail handler position, either on a part-time or full-time basis.

³ Appellant also resubmitted an October 27, 1994 report in which Dr. Dorsett discussed his medical condition and indicated that he should pursue light-duty work pending medical retirement.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ 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 he 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 he 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.⁶

It is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁷

ANALYSIS

The Office accepted that appellant sustained a neck neuropathy (pinched nerve) in 1990 and appellant began working in light-duty positions for the employing establishment. On June 2, 1993 he began working as a modified mail handler for the employing establishment. The position involved removing labels from letter trays and three-pound cardboard sleeves and stacking the trays and sleeves with assistance from coworkers when stacking above shoulder height. The physical duties of the position required intermittent lifting for four to six hours per day of no more than 20 pounds (with no lifting for more than two hours at a time), intermittent simple grasping for four to six hours per day (with no grasping for more than two hours at a time), intermittent sitting for four to six hours per day, walking for up to one hour per day, intermittent sitting for four to six hours per day and intermittent standing for four to six hours per day.⁸

Appellant claimed that he sustained an employment-related recurrence of disability on and after March 11, 1995. After the Office initially denied his claim on July 15, 2005, he submitted a June 9, 2006 statement in which he alleged that he sustained a recurrence of

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁷ *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

⁸ Dr. Dorsett, an attending Board-certified neurologist, indicated in May 1993 that appellant could perform the job.

disability because he was required to perform tasks which were outside the work restrictions of his modified mail handler position. Appellant claimed that he was required to lift mail trays weighing up to 35 pounds and mail sacks weighing up to 40 pounds, stack mail trays and sleeves in containers to heights of up to 6 feet and push mail containers weighing up to 1000 pounds for long distances. The Office requested that the employing establishment respond to appellant's June 9, 2006 statement, but the employing establishment merely indicated in a July 19, 2006 letter that it agreed with the Office's July 15, 2006 decision. In a September 8, 2006 decision, the Office affirmed its July 15, 2005 decision. It acknowledged that the employing establishment had not responded to appellant's specific claims regarding the duties of the modified mail handler position.

The Board finds that the case should be remanded to the Office for further development of the factual evidence as the Office did not adequately consider appellant's claim that he sustained disability because he was required to perform duties beyond his work restrictions. As noted above, a change in the nature and extent of light-duty job requirements may serve as a basis for establishing an employment-related recurrence of disability.⁹ Appellant submitted a June 9, 2006 statement in which he made a number of specific claims that the duties of the modified mail handler position had been changed such that he was required to work outside his work restrictions. The employing establishment did not respond to these specific allegations¹⁰ and the Office, as part of its responsibility in the development of the evidence, had an obligation to make further attempts to obtain such a response.¹¹

The Board finds that on remand the Office should make further attempts to have the employing establishment respond to appellant's specific claims, as articulated in his June 9, 2006 statement, that he was required to work outside his work restrictions while performing the modified mail handler position. After such development it deems necessary, the Office should issue an appropriate decision regarding appellant's claim that he sustained an employment-related recurrence of disability on or after March 11, 1995.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant sustained an employment-related recurrence of disability on or after March 11, 1995. The case will be remanded to the Office for further development of the evidence in accordance with this decision of the Board.

⁹ See *supra* note 6 and accompanying text.

¹⁰ The employing establishment indicated that it agreed with the basis of the Office's July 15, 2005 decision, but appellant had not made the specific allegations contained in his June 9, 2006 statement at the time the July 15, 2005 decision was issued.

¹¹ See *supra* note 7 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 8, 2006 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: July 6, 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