

remanded the case to the Office and directed it to refer appellant for a second opinion examination. The Board found that the medical evidence was sufficient to require further development on the issue of whether appellant's claimed right shoulder, arm and wrist condition was caused by her employment. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The facts and the history relevant to the present appeal are set forth.

The Office conducted further development and accepted appellant's claim for cervical radiculopathy, mild ulnar neuropathy and aggravation of hypermobility of the left first metacarpophalangeal joint.

The record indicates that, after filing her claim, appellant began working a light-duty assignment. On July 15, 1998 the Office confirmed with the employing establishment that appellant had been on light duty since July 1997. The employing establishment advised the Office that appellant retired on July 11, 1998. Appellant provided a January 16, 1998 letter from the employing establishment informing her that, as her claim for compensation had been denied by the Office,² she was required to choose between one of the following options: returning to full duty, applying for permanent light duty, applying for disability retirement, applying for optional or annuity retirement or resigning from service. The employing establishment advised that appellant's application for any of the above listed options would be subject to her meeting eligibility criteria.

On July 29, 2002 appellant filed a claim for compensation beginning in July 1998. On August 28, 2002 the employing establishment, in completing the claim form, advised that light duty was available and remained available.

On December 10, 2002 appellant filed a recurrence of disability claim alleging that the employing establishment withdrew her light-duty work beginning on July 20, 1998. She alleged: "I was told there was no work available to me in my limitations. The [employing establishment] scheduled me for a disability retirement counseling session which is the option that they offered me which is best suited the situation. The light/limited duty they had me on was retracted from me." Appellant stated that she did not request disability retirement counseling but rather the counseling was scheduled for her and her light-duty position was eliminated. The employing establishment advised that appellant worked limited duty up to the date that her disability retirement became effective, July 20, 1998.

By decision dated January 12, 2005, the Office denied appellant's recurrence of disability claim.

On January 13, 2005 appellant requested an oral hearing. The hearing took place on November 17, 2005. At the hearing, appellant contended that she did not request disability retirement. She stated that the employing establishment informed her that light-duty work was not available and also stated that the postmaster told the Office of Personnel Management, in connection with her disability retirement application, that he had no more work for her to do. Appellant asserted that she was not educated on the process of bidding for a permanent light-

² The January 16, 1998 letter predated the Office's eventual acceptance of appellant's occupational disease claim.

duty position and that disability retirement appeared to be the only viable option. She continued working in her light-duty assignment after being informed of the disability retirement option in January 1998 until July 1998, when she entered disability retirement status.

Following the hearing, appellant submitted additional evidence. In a July 14, 1997 letter, the employing establishment informed appellant that she could request a temporary light-duty assignment. On July 31, 1997 appellant's supervisor informed Dr. Arlene P. Imber, an osteopath, that appellant must provide medical documentation of her continuing work restrictions every two weeks. Dr. Imber complied with the supervisor's request, submitting treatment notes confirming appellant's work status at two-week intervals. Subsequent reports from Dr. Imber noted appellant's status and work restrictions. In an October 13, 1997 report, Dr. James J. White, an osteopath, indicated that appellant's prognosis was fair to poor and it was doubtful that she would return to full duty. In a February 13, 1998 report, he noted that appellant reported that "she was given an ultimatum at work that she needs to stay on disability as there is no light duty, or to leave employment." Dr. White opined: "I do not feel that due to her perceptive complaints of pain that it will be likely that she will be able to return to her regular duty at the [employing establishment]. [Appellant] needs to stay on light duty permanently at the [employing establishment]."

Appellant also provided her February 22, 1998 application for disability retirement through the Office of Personnel Management (OPM). The application did not contain an indication from the employing establishment clarifying whether a light-duty assignment was still available to appellant; however, appellant's corresponding "statement of disability" explained: "I have been on light duty since July 1997. My organization is no longer able to accommodate my restrictions." On March 28, 1998 the employing establishment indicated that appellant's performance was less than fully successful in her regular position since March 1997. It checked a box on the application form indicating that the medical evidence presented showed that accommodation was not possible. On June 22, 1998 OPM informed appellant that her request for disability retirement was approved.

By decision dated February 15, 2006, the hearing representative affirmed the Office's denial of appellant's recurrence of disability claim finding that she did not establish that the employing establishment withdrew her light-duty assignment. Appellant requested reconsideration on September 14, 2006.

By decision dated November 8, 2006, the Office denied modification of its February 15, 2006 decision.

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 establishes that appellant is capable of carrying out a light-duty assignment, appellant has the burden of establishing, by the weight of the reliable, probative and substantial evidence, a recurrence of total disability. This burden requires appellant to show either a change in the nature and extent

of the injury-related condition, or a change in the nature and extent of the light-duty requirements.³

The 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."⁴ 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.⁵ 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.⁶

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 light-duty position.

Appellant does not allege that she was totally disabled beginning on July 20, 1998 due to her accepted employment conditions. Instead, she asserts that the employing establishment withdrew her light-duty position beginning July 20, 1998, the date on which she entered disability retirement status. The record reflects that appellant developed cervical radiculopathy, mild ulnar neuropathy and aggravation of hypermobility of the left first metacarpophalangeal joint, in the performance of duty. She was placed on temporary light duty in accordance with her work restrictions. On January 16, 1998 the employing establishment informed appellant that, as her claim had been denied, she had several options to choose between, including annuity, optional or disability retirement, applying for permanent light duty, returning to full duty, or resigning.

At her oral hearing, appellant explained that although applying for permanent light duty was presented as an option in the employing establishment's January 16, 1998 letter, she did not believe this was a viable option. She contended that the employing establishment informed her that no light-duty work was available and that she was not educated on the qualifications or procedures for applying for permanent light duty. As she was unable to perform full duty, was not qualified for optional or annuity retirement and did not want to resign, appellant concluded that applying for disability retirement was her only option.

The Board finds that appellant has not presented sufficient evidence to establish that light-duty work was unavailable. The terms of the employing establishment's January 16, 1998 letter clearly indicates that a permanent light-duty position would remain available to appellant should she apply and qualify for it. There is no evidence that appellant chose to apply for light duty at that time. On August 28, 2002 the employing establishment confirmed that appellant

³ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(1)(c) (May 1997).

⁵ *Id.*

⁶ *Jackie B. Wilson*, 39 ECAB 915 (1988).

worked light duty until she retired and that light duty remained available. There is no persuasive evidence that the employing establishment terminated appellant's light-duty work assignment prior to her voluntary choice to pursue disability retirement. The Board notes that appellant continued working in her light-duty assignment for seven months following receipt of the employing establishment's January 16, 1998 letter before entering disability retirement status. This contradicts her assertion that there was no light-duty work available for her to do. Although the employing establishment scheduled a disability retirement counseling session for appellant, the evidence does not show that she was required to choose that option. Although appellant asserted that she was told that light-duty work was unavailable, she did not produce evidence establishing this; on the contrary, the record reflects that she was offered the opportunity to apply for permanent light-duty work.

Appellant's submission of her disability retirement application and Dr. White's reports are insufficient to meet her burden of proof. Although the employing establishment advised on the disability retirement application that accommodation was not possible, this application was completed after appellant chose to pursue disability retirement under a different statute. The Board notes that a statement from the employing establishment on a disability retirement application filed through OPM is not dispositive on the question of appellant's disability under the Act.⁷ Furthermore, as noted, the employing establishment's January 16, 1998 letter and the August 28, 2002 statement on appellant's claim for compensation directly support that light duty would have remained available had appellant chosen not to retire. Dr. White's February 13, 1998 statement that appellant was "given an ultimatum" at work is also insufficient to meet appellant's burden of proof. He appears to have been reiterating appellant's contention which, as noted, is contradicted by the employing establishment's January 16, 1998 letter which offered appellant the opportunity to apply for permanent light-duty work. Furthermore, two different versions of the February 13, 1998 report are in the record, one of which supports that permanent light duty remained an option for appellant.

Accordingly, 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 due to withdrawal of a light-duty assignment.

CONCLUSION

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

⁷ Cf. *Andrew Fullman*, 57 ECAB ____ (Docket No. 05-967, issued May 12, 2006) (that decisions of other federal agencies or governmental bodies are not dispositive to issues raised under the Act).

ORDER

IT IS HEREBY ORDERED THAT the November 8 and February 15, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 12, 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