

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

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P.G., Appellant )

and )

DEPARTMENT OF HEALTH & HUMAN )  
SERVICES, SOCIAL SECURITY )  
ADMINISTRATION, San Bernardino, CA, )  
Employer )

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**Docket No. 06-1625  
Issued: March 14, 2007**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 6, 2006 appellant filed a timely appeal from the May 19 and June 30, 2006 merit decisions of the Office of Workers' Compensation Programs, which denied her claim of recurrence. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of appellant's claim of recurrence.

**ISSUE**

The issue is whether appellant sustained a recurrence of disability on or about February 15, 2005 as a result of her April 12, 1998 employment injury.

**FACTUAL HISTORY**

On the prior appeal,<sup>1</sup> the Board noted that appellant, a 44-year-old legal assistant, injured her right thumb in the performance of duty. She filed a claim alleging a torn ligament in her

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<sup>1</sup> Docket No. 03-221 (issued April 10, 2003).

right thumb, which she first noticed on April 12, 1998.<sup>2</sup> The Office accepted her claim for aggravation of osteoarthritis in the metacarpophalangeal joint of the right thumb and authorized an arthrodesis of the right thumb with bone graft.<sup>3</sup> The Office paid benefits, including a schedule award for a 17 percent permanent impairment of the right upper extremity. The Board set aside the Office's November 29, 2001 schedule award and remanded the case for further development. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.<sup>4</sup>

Appellant returned to work with restrictions. On March 13, 2006 she filed a claim alleging a recurrence of disability. Appellant stopped work on February 15, 2005 but received regular wages from the employing establishment until March 28, 2005.

Dr. Charles S. Lane, the attending orthopedic surgeon, reported on March 4, 2005 that appellant continued to be permanent and stationary. He noted that her job had changed since he last saw her on December 12, 2003: "[Appellant] states that over the last year she had been working for a different judge which involved increased lifting of larger files, more than two inches and heavier than 10 pounds. After she works up the file she types." Dr. Lane found that appellant was able to work, although her subjective complaints were insidiously increasing.

On April 17, 2005 Dr. Stuart H. Kushner, an orthopedic surgeon and associate of Dr. Lane, reported that appellant was involved in a nonindustrial car accident on March 25, 2005 and was evaluated for whiplash. He noted that she was terminated from the employing establishment on March 28, 2005 and was currently working as a pari-mutuel clerk at a racetrack four nights and about 26 hours a week. Appellant stated that her right elbow pain improved after she stopped working two jobs, that is, after she was terminated from the employing establishment. Dr. Kushner found that appellant was capable of performing her usual and customary occupation.

On October 24, 2005 Dr. Lane reported: "The patient relates that she stopped working at the [employing establishment] in February in regards to a 'proposal to remove' her from her job by her supervisor whom she states has not been accommodating her work restrictions, after she had made complaints about him." He noted that appellant switched to night duty in the last week and began to notice increased symptoms over the weekend. Dr. Lane found that appellant could not perform the same job "since accommodating her restrictions has not been met." He noted that appellant had trouble lifting and handling files, which increased her pain. Dr. Lane modified

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<sup>2</sup> She described her occupation as legal assistant/pari-mutuel clerk: "At my part-time job at the Southern California Race tracks as a pari-mutuel clerk, I work at a machine which is necessary to hit the total button after each customer and/or transaction. A few weeks ago I found it very painful at work and I noticed that I hit the total button with my thumb."

<sup>3</sup> OWCP File No. 13-1163260.

<sup>4</sup> After further development, the Office issued a decision on October 14, 2003 denying additional schedule compensation. The Office found that appellant had a 17 percent permanent impairment of the right upper extremity due to the accepted thumb condition, for which she previously received a schedule award. Appellant sustained another injury in the performance of duty on June 13, 2001, which the Office accepted for right shoulder tendinitis, right rotator cuff syndrome and right lateral epicondylitis. OWCP File No. 13-2031790. That case is not before the Board on the present appeal, which seeks review of the Office's decision to deny her claim of recurrence.

her restrictions and concluded: “Since these accommodations cannot be made, the patient appears to be temporarily totally disabled to pursue her usual and customary occupation.”

Dr. Kushner also saw appellant on October 24, 2005. He reported findings consistent with mild lateral epicondylitis and stated: “I would not expect mild lateral epicondylitis to preclude her from work.” Appellant showed him several pictures, which she stated documented the files she was required to lift at work. Dr. Kushner reported as follows:

“I have not reviewed a job analysis for her previous work at the [employing establishment], but it is my understanding that said work was secretarial in nature. The exact weight of the files she was required to lift is not clear. Based upon information currently available to me and in the absence of an opportunity to review any sort of job description for her position at the [employing establishment], I believe that [appellant] is capable of performing her previous work as a senior case technician at the [employing establishment].”

On December 23, 2005 appellant filed a claim for compensation for wage loss beginning March 28, 2005. She told Dr. Lane on April 14, 2006 that the modified work described in his October 24, 2005 report was not offered her. “Consequently,” he reported, “she could not meet the demands of her occupation and her employment was terminated.”

On April 5, 2006 Dr. Janet B. Langsdon, a family care physician, reviewed her care of appellant. She reported that appellant complained on May 12, 2005 that she was unable to do her job as a senior case technician. Appellant advised that this was partly because of mental illness, but also because she was not able to carry greater than two-inch files and lifting: “She felt this was secondary to preexisting left carpal tunnel syndrome and whiplash injury from her motor vehicle accident on March 25, 2005.” Dr. Langsdon noted appellant’s perspective on disability:

“Prior to coming to the Kaiser Permanente system, [appellant] had in February of 1999 a right thumb metacarpophalangeal joint fusion secondary to a torn ligament. Because of this she tended to use her left hand and wrist excessively in order to protect her right thumb. [Appellant] felt that all of these things were contributing to why she could not work at the [employing establishment]. She continued to work ... as a pari-mutuel clerk at the racetrack.”

Appellant informed Dr. Langsdon that when she was fired she was told that she was unapproachable due to her mental illness. Dr. Langsdon indicated that she gave appellant an off-work order from March 6 to April 30, 2006. She felt that appellant would likely not be able to work.

In memorandum dated January 26, 2004, the employing establishment responded to the allegation that it did not accommodate appellant’s restrictions:

“I believe that we have and continue to accommodate her as well as the restrictions. The supervisors and lead continue to pull and carry the heavy cases for her. Cases that are assigned to her for work-up are no larger than two inches or heavier than five pounds. We will continue to abide by these restrictions.”

In a decision dated May 19, 2006, the Office denied appellant's claim of recurrence. The Office found that the medical evidence did not establish an objective worsening of her accepted right thumb condition and did not establish that she sustained a recurrence of her April 12, 1998 work-related condition without intervening cause.

Appellant requested reconsideration. She noted the circumstances of her termination:

"I reported to Dr. Charles Lane on August 8, 2003 that my supervisor was not accommodating his work restrictions. It went on until they removed me for being rude to my supervisor. The case is pending in U.S. Court at this time because I have always denied the allegations. My supervisor had to make up a story so that he wouldn't have to accommodate the doctor's restrictions."

Appellant submitted a June 5, 2006 report from Dr. Lane setting out her current work restrictions. On June 11, 2006 she again requested reconsideration. Appellant argued that she was wrongfully terminated: "Management didn't want to comply with Dr. Lane's work restrictions. My condition was not stable at the time I was terminated and I believe I am entitled to benefits."

In a decision dated June 30, 2006, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that the medical evidence did not establish that she sustained a recurrence of disability causally related to her original injury.

### **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 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 her 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>5</sup>

### **ANALYSIS**

Appellant filed a claim for compensation alleging that she sustained a recurrence of disability on or about February 15, 2005. She therefore has the burden of proof to establish a change in the nature and extent of her accepted right thumb condition or a change in the nature and extent of her light-duty job requirements.

The medical opinion evidence does not support appellant's claim. Dr. Lane, the attending orthopedic surgeon, followed appellant for her right thumb injury. He reported on March 4, 2005 that she was able to work. Dr. Lane reported this less than three weeks after appellant stopped work. He cleared her to work even though appellant alleged that her job over

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<sup>5</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

the last year entailed increased lifting of larger files, files that were more than two inches thick and heavier than 10 pounds.

On April 17, 2005 Dr. Kushner, the orthopedic surgeon, who followed appellant for her June 13, 2001 shoulder and elbow injury, also reported that appellant was capable of performing her usual and customary occupation. This was 20 days after appellant was terminated from the employing establishment. The medical opinion evidence contemporaneous to appellant's claimed recurrence of disability does not support that she was disabled for work, much less that she was disabled due to a change in the nature and extent of her accepted right thumb condition or a change in the nature and extent of her light-duty job requirements.

On October 24, 2005 Dr. Lane reported that appellant appeared to be temporarily totally disabled to pursue her usual and customary occupation because her supervisor did not accommodate her work restrictions. The opinion is equivocal and the employing establishment denied appellant's allegation. The supervisors and lead continued to pull and carry the heavy cases for appellant and the cases assigned to her for work-up were no larger than two inches or heavier than five pounds. The alleged failure to accommodate is unsubstantiated. When appellant informed Dr. Lane on March 4, 2005 that her job had changed and that she was lifting larger files, files that were more than two inches thick and that weighed more than 10 pounds, he nonetheless reported that she was able to work. Dr. Lane did not explain why he gave a different opinion eight months later. Because he relied on a questionable history and did not explain his change of opinion, his October 24, 2005 report that appellant appeared temporarily totally disabled is of diminished probative value.<sup>6</sup>

Dr. Kushner, who also saw appellant on October 24, 2005, reported that she was capable of performing her previous work as a senior case technician. He discounted photographs of work files, as the weight of the files was not clear. Instead, Dr. Kushner looked to the sedentary nature of her position and the information available to him and cleared appellant for work. This does not support appellant's claim.

On April 14, 2006 Dr. Lane stated that the employing establishment terminated appellant because she could not meet the demands of her occupation. This is again an unsubstantiated history. There is no evidence that the employing establishment terminated appellant because residuals of her accepted right thumb injury were such that she could no longer perform her restricted duties. Indeed, appellant stated in her request for reconsideration that she was removed "for being rude to my supervisor." It is immaterial whether, as she reported, the employing establishment did not later offer her another position consistent with her restrictions. Appellant's claim is that she sustained a recurrence of disability on or about February 15, 2005.

In her April 5, 2006 report, Dr. Langsdon, the family care physician, offered no opinion on whether appellant sustained a recurrence of disability on or about February 15, 2005. She reported appellant's feelings on the matter. Dr. Langsdon noted an off-work order from March 6 to April 30, 2006, but she did not say whether it was for a worsening of the accepted right thumb

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<sup>6</sup> See *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

condition or a change in the light-duty job requirements or something else, such as her mental state.

The Board will affirm the Office decisions denying appellant's claim of recurrence. Appellant submitted no probative medical opinion soundly explaining how her disability on or about February 15, 2005 was due to a change in the nature and extent of her accepted right thumb condition, nor has she established that her disability was due to a change in the nature and extent of her light-duty job requirements.

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of disability on or about February 15, 2005. The contemporaneous medical opinion evidence does not support that she was disabled for work. Later medical opinion evidence supporting disability appears to rely on the unsubstantiated history appellant provided and is not well rationalized. The weight of the evidence fails to establish a recurrence of disability.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 30 and May 19, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 14, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

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

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