



arthrosis at L5-S1. It paid compensation for periods of wage loss from May to December 2005. Appellant was given work restrictions by Dr. James Dunnan, Board-certified in family medicine, on November 9 and December 4, 2005. On December 28, 2005 he was offered a modified position in compliance with Dr. Dunnan's restrictions which prescribed time limits for certain physical requirements and prohibited twisting.

Appellant returned to light-duty employment on December 29, 2005. On July 5, 2006 he filed a Form CA-7 claim for compensation for the period June 16 to 30, 2006. On July 8, 2006 appellant filed a notice of recurrence alleging disability as of June 16, 2006 which he attributed to his accepted injury. In July 11 and 19, 2006 letters, the Office requested additional medical evidence in support of his claim. Appellant submitted additional claims for compensation for the period June 16 to August 27, 2006.

On July 14, 2006 Dr. Dunnan stated that appellant experienced several recurrences of pain associated with his back condition, most recently on June 19, 2006. He opined that appellant's condition was permanent. In prescription notes dated June 19, 21 and 28, 2006, Dr. Dunnan found that appellant was incapable of work due to low back pain for the periods June 16 to 25 and June 29 to July 16, 2006.

On June 28, 2006 Dr. Dunnan recommended light or limited duty which prohibited appellant from stooping, kneeling, bending, climbing or twisting due to an aggravation of preexisting severe facet arthrosis at L5-S1. He opined that the restrictions were permanent and that appellant was unable to perform his regular letter carrier's duties.

In notes dated April 3 to July 18, 2006, Dr. Dunnan diagnosed low back pain and left leg pain. Two magnetic resonance imaging (MRI) scans, dated August 16, 2004 and July 24, 2006, were obtained. The August 16, 2004 MRI scan diagnosed moderate bilateral foraminal stenosis and left facet arthropathy for L5-S1. The July 24, 2006 MRI scan report diagnosed an L5-S1 broad-based bulging disc.

In response to an inquiry from the employing establishment, on August 18, 2006, Dr. Dunnan stated that appellant had been out of work due to severe low back pain with limited range of motion which caused his capability level to be more restrictive.

On August 31, 2006 the Office denied appellant's claim for intermittent wage loss commencing June 16, 2006, finding that the medical evidence did not demonstrate that he was totally disabled from work during the time period. On September 8, 2006 appellant requested a review of the written record.

In a September 18, 2006 letter, Dr. Dunnan noted that he had examined appellant on April 3, 2006 and found that he had increased pain since returning to work but that appellant was determined to continue to work. Appellant was also examined on June 19, 2006 due to severe pain associated with his back condition, at which time Dr. Dunnan decided to revise appellant's work restrictions. Dr. Dunnan stated that appellant remained out of work because his employer had not provided a job offer to accommodate his current restrictions.

In an October 20, 2006 letter, the employing establishment informed the Office that appellant had provided his duty station with a work restrictions note dated June 28, 2006 and that appellant was not being accommodated in this capacity.

On October 23, 2006 Dr. Dunnan stated that appellant could return to work on January 18, 2007. He completed a work capacity evaluation, noting that appellant was not capable of performing his usual job due to severe back pain and radiculopathy.

On December 8, 2006 the Office affirmed the August 31, 2006 decision on the grounds that medical evidence failed to establish that appellant was totally disabled and unable to work as of June 16, 2006.

### **LEGAL PRECEDENT**

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-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 to show that he or she cannot perform such limited-duty work. 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 limited-duty job requirements.<sup>2</sup> The issue of whether an employee has disability from performing a modified position is primarily a medical question and must be resolved by probative medical evidence.<sup>3</sup>

The Board notes that a recurrence of disability is defined as the 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>4</sup>

### **ANALYSIS**

Appellant did not claim that his light-duty position had changed therefore the issue is whether appellant had a disability from performing his modified position at the time of his alleged recurrence on June 16, 2006. In this case the burden is on appellant to show a change in the nature and extent of his injury-related condition, aggravation of severe facet arthrosis at L5-S1. The Office accepted appellant's claim for aggravation of preexisting severe facet arthrosis at L5-S1. After being offered a modified position appellant returned to work on December 29, 2005. On June 16, 2006 appellant stopped working due to a worsening in his condition alleging that he could no longer perform his light-duty position.

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<sup>2</sup> *Cecelia M. Corley*, 56 ECAB \_\_\_\_ (Docket No. 05-324, issued August 16, 2005); *Bryant F. Blackmon*, 56 ECAB \_\_\_\_ (Docket No. 04-564, issued September 23, 2005).

<sup>3</sup> *Cecelia M. Corley*, *supra* note 2.

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

The medical evidence of record indicates that appellant was no longer capable of performing his current modified work duties, at the time of his alleged recurrence. Dr. Dunnan stated that appellant had suffered a recurrence of pain from his back condition when he examined appellant on June 19, 2006. He also opined that appellant was incapable of work due to low back pain from June 16 to 25 and June 29 to July 16, 2006. In his June 28, 2006 certificate of light duty, Dr. Dunnan increased appellant's physical restrictions to prohibit stooping, kneeling, bending, climbing or twisting due to an aggravation of his preexisting severe facet arthrosis at L5-S1. Dr. Dunnan explained in a September 18, 2006 letter that he revised appellant's restrictions because of the recurrences of severe pain associated with appellant's back condition. He further explained that appellant was out of work because the employer had not provided a job offer which would accommodate these new restrictions. Dr. Dunnan continuously diagnosed appellant with low back pain as well as radiculopathy. Additionally the July 24, 2006 MRI scan report diagnosed an L5-S1 broad-based bulging disc which had not been diagnosed in the August 16, 2004 MRI scan.

Appellant's burden is to demonstrate through medical evidence that he was disabled from performing the modified position, not that he was totally disabled from performing any position. He accepted a modified position on December 28, 2005. Appellant found his condition to worsen while performing this position to the point where he could no longer physically work. His doctor diagnosed an aggravation for facet arthrosis at L5-S1, appellant's accepted condition, and prescribed new restrictions to reflect appellant's current condition. Appellant's doctor consistently diagnosed appellant with low back pain and opined that he was incapable of performing his current modified position.

While not well rationalized, all the medical evidence suggests that appellant's condition had worsened since he returned to his light-duty position and that he was incapable of performing the modified position. There is no contrary medical evidence.

The Board notes that proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation benefits, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>5</sup> The case will be remanded for the Office to further develop the evidence and make a determination as to appellant's condition. Following such further development, the Office shall issue a *de novo* decision on whether appellant sustained a recurrence on June 16, 2006.

### **CONCLUSION**

The Board finds this case to not be in posture for a decision and will be remanded for proceedings consistent with this order.

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<sup>5</sup> See *Richard E. Simpson*, 55 ECAB 490 (2004); see also *William J. Cantrell*, 34 ECAB 1223 (1983).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 8, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings to be followed by an appropriate decision.

Issued: September 21, 2007  
Washington, DC

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

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