

United States Department of Labor  
Employees' Compensation Appeals Board

---

M.B., Appellant )

and )

U.S. POSTAL SERVICE, SOUTHERN )  
CONNECTICUT PROCESSING & )  
DISTRIBUTION CENTER, Wallingford, CT, )  
Employer )

---

Docket No. 08-54  
Issued: April 25, 2008

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On October 5, 2007 appellant filed a timely appeal from a September 10, 2007 merit decision by a hearing representative of the Office of Workers' Compensation Programs that denied, in part, her claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant met her burden of proof in establishing that she sustained a recurrence of disability from November 28 to December 28, 2006 causally related to her accepted August 2004 employment injury.

**FACTUAL HISTORY**

On April 13, 2005 appellant, then a 56-year-old automation clerk, filed an occupational disease claim stating that she developed a tingling sensation in her left arm from repetitive

reaching on the job. In a June 6, 2005 report, Dr. Gerald Becker, a Board-certified orthopedic surgeon, noted appellant's previous history of a spinal fusion at the C4-5 level, diagnosed left disc herniation at C5-6 and opined that her condition was caused by "repetitive trauma at work superimposed upon her previous fusion at the C4-5 level above C5-6." The Office accepted appellant's claim for cervical intervertebral disc discoloration with myelopathy at C5-6 and paid appropriate compensation. Appellant stopped work on December 18, 2005 and, on December 20, 2005, she underwent a C5-6 anterior fusion with left iliac crest bone graft. Dr. Becker performed the procedure and noted preoperative and postoperative diagnoses of C5-6 disc herniation. The Office authorized the surgery.

On September 12, 2006 appellant underwent a functional capacity evaluation, performed at Dr. Becker's request, which reflected that she was capable of performing light-duty work for eight hours per day. In an October 4, 2006 note, Dr. Becker indicated that appellant's neck pain continued and that physical examination demonstrated tightness of her paracervical musculature. He concluded that appellant had "ongoing pain status post injury and subsequent cervical fusion." In a November 3, 2006 work capacity evaluation, Dr. Becker advised that appellant could work with restrictions for eight hours per day. In a report dated the same day, he explained that appellant had continuing pain and mildly reduced range of motion in her cervical spine. Dr. Becker noted that appellant's functional capacity evaluation specified that she could perform light-duty work for eight hours per day, but noted that she would require frequent position changes as she had difficulty standing for more than 15 minutes at a time.

On November 1, 2006 the Office referred appellant to Dr. Michael Opalak, a Board-certified neurosurgeon, for a second opinion to determine her work capacity.

Appellant returned to light-duty work, eight hours per day, effective November 18, 2006. Her light-duty job offer noted her restrictions against reaching above shoulder level, standing for more than 15 minutes and pushing, pulling or lifting greater than 15 pounds. It indicated that appellant's job responsibilities would include sorting mail in letter and flat cases as well as tying out mail in the cases within her restrictions. The offer noted: "You will get mail within restrictions." Appellant left work early on November 24, 2006, claiming increasing pain. She stopped work completely effective November 28, 2006.

Dr. Opalak examined appellant and prepared a report on November 27, 2006. He noted appellant's complaints of neck pain, weakness and headaches aggravated by activity, bending, sitting, standing and walking. Dr. Opalak advised that appellant underwent a cervical fusion in December 2005, which had healed by July 2006 although she continued to complain of significant neck pain. He noted that appellant had "marked limitation of range of motion of her neck," but that postoperative diagnostic testing revealed "nice fusion" of the C4-5 and C5-6 discs. Dr. Opalak concluded that appellant could return to light duty but could not work in her date-of-injury job as an automation clerk. He explained that she still demonstrated significant myelopathy, which would prevent her from performing her regular job. Dr. Opalak stated that appellant could work light duty, eight hours a day, in accordance with the functional capacity evaluation, with a permanent lifting restriction of 15 pounds, "because her myelopathy is going to automatically interfere with her capacity to work heavier amounts." In a work capacity evaluation also dated November 27, 2006, he advised that appellant could work for six and a half hours per day with permanent restrictions.

On December 8, 2006 appellant submitted a claim for compensation for leave without pay from November 24 to December 8, 2006. On December 12, 2006 she filed a claim for recurrence of disability. Appellant indicated that she experienced a recurrence of disability on November 24, 2006. She explained that she had continuing neck pain and was unable to take medication at work, as her prescribed medication made her drowsy. On December 22, 2006 appellant submitted a claim for compensation for leave without pay from December 9 to 22, 2006.

On January 5, 2007 the Office found a conflict in the medical evidence between Dr. Becker and Dr. Opalak concerning the degree of appellant's disability for work. It referred appellant to Dr. Harry Engel, a Board-certified neurosurgeon, to determine whether she was able to return to work and, if so, in what capacity.

In a December 29, 2006 work capacity evaluation Dr. Becker indicated that appellant could work in a limited-duty capacity for between four and six hours per day. In a report dated the same day, he stated that appellant "continues to have pain in her neck aggravated by her return to work." Dr. Becker explained that when appellant returned to work she was required to case mail, which "involved a fair amount of reaching forward and this aggravated her neck pain." He advised that appellant had tight neck muscles and reduced range of motion and that x-rays taken at the examination revealed some anterior subluxation at the C3-4 level, "likely aggravated by [her] bending forward at work." Dr. Becker noted that appellant was unable to reach forward or do any casing of mail, but could perform other sedentary tasks.

On January 10, 2007 the employing establishment offered appellant a limited-duty position for six hours per day. She accepted the position and returned to work effective January 12, 2007.

Dr. Engel examined appellant and prepared a medical report on January 26, 2007. He noted her history of C5-6 disc herniation and surgical treatment and her complaints of neck and left upper extremity pain, which she attributed to repetitive reaching, lifting, bending and twisting. Dr. Engel noted that, while appellant had returned to work, she was only able to work six hours in each shift, as her arms and neck would then become so fatigued that she would have to stop. He also noted that appellant was unable to take her medication at work, as it made her drowsy. Upon physical examination, Dr. Engel found that appellant's neck range of motion was significantly reduced and painful, although her lateral compression tests were negative. He concluded that appellant was able to work for six hours per day on a restricted basis. Dr. Becker explained that appellant was restricted from frequent reaching, as it caused her "further aggravation, discomfort and muscle spasm." In an accompanying work capacity evaluation, he noted that appellant was capable of working for six hours per day with permanent physical restrictions.

By decision dated February 13, 2007, the Office denied appellant's claim for a recurrence of disability on the grounds that "the evidence of file fails to establish that the claimed recurrence is causally related to the approved injury."

In a February 26, 2007 note, Dr. Becker advised that appellant had ongoing pain and reduced range of motion in her neck “status post work injury and subsequent fusion between C4 and C6.”

On March 7, 2007 appellant requested an oral hearing, which was held on July 10, 2007. In an April 23, 2007 report, Dr. Becker indicated that appellant’s neck pain and reduced range of motion continued.

In a June 5, 2007 form report, an Office medical adviser noted that appellant’s work-related aggravation of cervical disc degeneration had not yet resolved. He indicated that appellant’s anticipated recovery date was unknown, but that she would “possibly never” recover from her accepted work injury.

On June 18, 2007 Dr. Becker again noted appellant’s continuing complaints of neck pain and numbness. He advised that she could work limited duty, six hours per day, “indefinitely.”

By decision dated September 10, 2007, the hearing representative affirmed the Office’s decision denying appellant’s claim for a recurrence of disability in part, finding that she was not entitled to compensation for a recurrence of disability between November 28 and December 28, 2006, but was entitled to compensation between December 29, 2006 and January 12, 2007. She explained that, effective December 29, 2006, Dr. Becker changed appellant’s work restrictions, but the employing establishment did not offer her a job in accordance with her new restrictions until January 12, 2007. However, the hearing representative concluded that appellant’s limited-duty job did not exceed the restrictions in place between November 28 and December 28, 2006, and therefore she had not established a recurrence of disability for that period.

### **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 light duty can be performed, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability. As part of this burden, the employee must 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.<sup>1</sup>

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. This term also means an inability to work that takes place 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

---

<sup>1</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>2</sup>

### ANALYSIS

In the instant case, the medical evidence does not establish a change in the nature and extent of appellant's injury-related condition between November 28 and December 28, 2006. The record reflects that appellant returned to a limited-duty job effective November 18, 2006. The job required her to work light duty for eight hours per day with restrictions against twisting, reaching above shoulder level or lifting greater than 15 pounds. The employing establishment noted that appellant would be required to sort letters in flats and cases, but would only receive mail within her restrictions. The record reflects that the requirements of the light-duty job were commensurate with those recommended in the September 12, 2006 functional capacity evaluation, with which appellant's treating physician, Dr. Becker, concurred on November 3, 2006.

On November 27, 2006 Dr. Opalak performed a second opinion examination, after which he concluded that appellant's significant myelopathy prevented her from working in her regular-duty job as an automation clerk. However, he concluded that appellant was capable of working for eight hours per day in a light-duty job. Dr. Opalak recommended that appellant work within a 15-pound lifting restriction "because her myelopathy is going to automatically interfere with her capacity to work heavier amounts." The record reflects that appellant's light-duty job, which she began on November 18, 2006 and stopped on November 28, 2006, was commensurate with Dr. Opalak's recommendation that she work eight hours per day in a light-duty job, with a 15-pound lifting restriction. The Board notes that in a work capacity evaluation also prepared on November 27, 2006 Dr. Opalak recommended that appellant work for six and a half hours per day. However, Dr. Opalak did not explain the discrepancy between his narrative report, finding that appellant could work eight hours daily and his form report, indicating that she could work six and one half hours daily. The Board finds that appellant's light-duty job was commensurate with the recommended work restrictions within the functional capacity evaluation, with which her treating physician agreed and with the recommendations in Dr. Opalak's November 27, 2006 narrative medical report.<sup>3</sup> Accordingly, the Board finds that the medical evidence establishes that appellant was able to work her light-duty position from November 28 and December 28, 2006 and that there had been no change in the nature and extent of appellant's injury-related condition.

In addition, the Board finds that appellant has not established a change in the nature and extent of her light-duty job requirements. Appellant was offered, and accepted, a limited-duty job beginning effective November 18, 2006. She worked in her light-duty job from

---

<sup>2</sup> 20 C.F.R. § 10.5(x).

<sup>3</sup> Following appellant's referral to Dr. Opalak, the Office found a conflict in the medical evidence between Drs. Opalak and Becker regarding the degree of appellant's disability and referred appellant to Dr. Engel to resolve the conflict. The Board notes, however, that there was no conflict between Drs. Becker and Opalak as each physician offered similar light-duty restrictions. *See* 5 U.S.C. § 8123(a). In any event, it is not necessary for the Board to review Dr. Engel's report as Dr. Engel did not address, and the Office did not request that he address, appellant's ability to work from November 28 to December 28, 2006.

November 18 to 24, 2006. On November 24, 2006 appellant left work early, claiming increased pain. She stopped work completely on November 28, 2006. The job offer required appellant to do some mail casing, but assured her that she would only be assigned mail to case within her restrictions. The job offer noted appellant's lifting restriction of 15 pounds and provided for eight hours of light work per day. The Board finds that this job was commensurate with appellant's work restrictions at the time the employing establishment made the offer and that there is no evidence that the employing establishment either withdrew the position or changed its terms during the time she worked under the terms of the assignment. Appellant has not asserted that the employing establishment changed the terms of the light-duty job; rather, she simply states that she was in too much discomfort to continue working. Accordingly, the Board finds that appellant has not established a change in the nature and extent of the light-duty job requirements.

The Board notes that Dr. Becker changed appellant's job restrictions effective December 29, 2006. The hearing representative noted this change and awarded appellant compensation for a recurrence of disability during the time that the employing establishment did not make appropriate light duty available for appellant, between December 29, 2006 and January 12, 2007. The Board finds, however, that the record does not support appellant's claim for a recurrence of disability between November 28 and December 28, 2006, the only issue before the Board.

#### **CONCLUSION**

The Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability between November 28 and December 28, 2006, causally related to her accepted occupational disease.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 10, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 25, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board