



May 2, 2006 with no lifting over five pounds and no reaching above the shoulder. On January 24, 2007 she underwent right shoulder arthroscopic surgery with subacromial decompression and repair of the rotator cuff. On April 9, 2007 appellant filed a claim for total disability beginning April 10, 2007. She indicated that she returned to work in a light-duty status on March 26, 2007 but was asked to throw parcels at work on April 7, 2007 and this violated her restriction against using her right arm. Appellant stated that her work limitations included no use of her right arm but, the second week of her return to light duty following her surgery, she performed the job of an employee who was on vacation. This job involved working alone at a station where she accepted mail from patrons and weighed parcels by lifting them onto a scale. Appellant was released to return to light-duty work as of May 7, 2007.

In a form report dated February 2, 2007, Dr. Julie M. Nefkens, an attending specialist in occupational medicine, indicated that appellant was totally disabled from January 24, 2007, the date of her surgery, to March 25, 2007. A March 20, 2007 disability certificate from her stated that appellant should have minimal right arm use. In a March 27, 2007 form report, Dr. Nefkens indicated that appellant could perform modified work as of March 26, 2007 with no reaching above the right shoulder and minimal right arm use. On April 9, 2007 she indicated in a form report that appellant was totally disabled from April 10 to May 8, 2007.

On April 11, 2007 the Office asked appellant to provide evidence establishing that she was unable to perform her light-duty job on April 10, 2007 due to a change in the nature and extent of her accepted right shoulder condition or a change in the nature and extent of her light-duty physical requirements.

In an April 19, 2007 narrative report, Dr. Nefkens stated that she took appellant off work when she saw her on April 9, 2007 because appellant alleged that her supervisor would not release her from work to attend physical therapy sessions and because her supervisor asked her to perform tasks that exceeded her physical restrictions. She noted that another treating physician, Dr. Sacco, expressed his concern that appellant was “overdoing it” at work. Dr. Nefkens stated that appellant should stay off work to allow full healing of her arm.

On April 27, 2007 the Office asked appellant to provide additional information regarding the allegations in Dr. Nefkens’ reports, including the dates and times that her supervisor denied her time to go to physical therapy sessions and when she was asked to perform tasks that exceeded her physical restrictions.

On May 2, 2007 appellant stated that her physician provided a work limitation of no use of her right arm. She indicated that from April 2 to 6, 2007 she worked alone at a different postal branch where she performed the work of two employees who were on vacation. Appellant lifted parcels and heavy mail tubs. She stated that on April 7, 2007 Willie Smith, her supervisor, asked if she could throw parcels because an employee had called in sick. Appellant refused. She alleged that Mr. Smith “harassed” her about her work restrictions because he did not have any paperwork regarding this matter but she ignored him. On April 9, 2007 appellant told Dr. Nefkens that Mr. Smith was assigning work outside her restrictions so the physician placed her off work.

By decision dated May 29, 2007, the Office denied appellant's claim on the grounds that the evidence did not establish that she sustained a recurrence of total disability between April 10, and May 7, 2007 causally related to her June 15, 2005 employment injury.

Appellant requested a review of the written record. By decision dated November 21, 2007, the Office affirmed the May 29, 2007 denial of appellant's claim on the grounds that the evidence did not establish that she sustained a recurrence of total disability on April 10, 2007 causally related to her June 15, 2005 employment injury.<sup>1</sup>

### **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 to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and that she cannot perform the light-duty position. As part of this burden of proof, 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 job requirements.<sup>2</sup>

### **ANALYSIS**

Appellant has the burden to provide medical evidence establishing that she was totally disabled between April 10 and May 7, 2007 due to a worsening of her accepted right shoulder conditions, a right arm fracture and sprain and strain, or a change in her job duties such that she was unable to perform her light-duty work. She alleged that a change in her job duties caused her recurrence of total disability.

The record shows that appellant returned to light-duty work on March 26, 2007 following her right shoulder surgery. In a March 27, 2007 form report, Dr. Nefkens indicated that appellant could perform modified work as of March 26, 2007 with no reaching above the right shoulder and minimal right arm use. On April 9, 2007 she indicated in a form report that appellant was totally disabled from April 10 to May 8, 2007 but did not provide a rationalized explanation for the disability. In an April 19, 2007 narrative report, Dr. Nefkens stated that she took appellant off work when she saw her on April 9, 2007 because of her allegations that management was violating her medical restrictions and would not release her from work to attend physical therapy sessions. She stated that appellant should stay off work to allow full healing of her right arm. Dr. Nefken's reports are not based on a complete and accurate factual background. Appellant alleged that she was medically restricted against all use of her right arm. However, Dr. Nefken provided restrictions of no reaching above the right shoulder and minimal

---

<sup>1</sup> The Board notes that, while this appeal was pending, the Office issued a December 11, 2007 wage-earning capacity decision. The issue in the December 11, 2007 decision is a different issue than the issue on appeal to the Board. Because this decision does not change the status of the decision on appeal, the December 11, 2007 wage-earning capacity decision is not null and void. See *Douglas E. Billings*, 41 ECAB 880 (1990) (holding that the only decisions of the Office which are null and void, because they were issued while the case was on appeal to the Board, are those decisions that change the status of the decision on appeal).

<sup>2</sup> *Hubert Jones, Jr.*, 57 ECAB 467 (2005); *Terry R. Hedman*, 38 ECAB 222 (1986).

right arm use, not a complete prohibition on use of the right arm. Appellant failed to provide supporting documentation of her allegations that management was not following the work limitations imposed by Dr. Nefken for her return to work on March 26, 2007 and denied her time for physical therapy. Therefore, Dr. Nefken's decision to place appellant on total disability as of April 10, 2007 was not based upon a complete and accurate factual background. Dr. Nefken placed appellant off work, not because she found a worsening of her accepted right shoulder condition, or that she had performed work outside her restrictions, but in the mistaken belief that management was violating the restrictions of no reaching above the right shoulder and minimal right arm use. Therefore, Dr. Nefken's decision to place appellant off work between April 10 and May 7, 2007 does not establish that she was totally disabled for work due to a change in the nature and extent of her employment-related right shoulder condition, or a change in the nature and extent of her light-duty job requirements. On April 27, 2007 the Office asked appellant to provide information regarding the allegations made to Dr. Nefken that she was required to perform work outside her restrictions and was denied time to go to physical therapy sessions, such as dates and times and the names of the supervisors involved. However, she failed to provide corroborating evidence that she was required to work outside her restrictions.

In one statement, appellant alleged that her total disability beginning April 10, 2007 was caused by lifting parcels and mail tubs between April 1 and 6, 2007 when she performed the work of two employees who were on vacation. She alleged that she was required to lift parcels and heavy mail tubs which violated her medical restriction against all use of her right arm. However, as noted, appellant's restrictions were no reaching above the right shoulder and minimal right arm use. Additionally, there is no medical report addressing her work between April 1 and 6, 2007 substituting for two employees at another branch. Therefore, appellant has not established that she was totally disabled as of April 10, 2007 because she performed work between April 1 and 6, 2007 that did not conform to her medical restrictions. She stated that on April 7, 2007 Mr. Smith asked her to throw parcels and she refused. Appellant indicated that Mr. Smith "harassed" her about her work restrictions but she ignored him and did not actually throw parcels. Therefore, this incident on April 7, 2007 involving Mr. Smith does not establish that there was a change in her work duties such that she was unable to perform her light-duty work.

The medical evidence of record is not based on a complete and accurate factual background and fails to establish a change in appellant's accepted right shoulder condition such that she was unable to perform her light-duty work. The factual and medical evidence does not establish that appellant had a change in her light-duty job requirements such that she became totally disabled. The Board finds that appellant failed to meet her burden of proof to establish that she was totally disabled between April 10 and May 7, 2007 due to a change in the nature and extent of her employment-related right shoulder condition, or a change in the nature and extent of her light-duty job requirements. Therefore, the Office properly denied her claim for a recurrence of total disability.

**CONCLUSION**

The Board finds that appellant failed to establish that she sustained a recurrence of total disability between April 10 and May 7, 2007 causally related to her June 15, 2005 employment injury

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 21 and May 29, 2007 are affirmed.

Issued: July 14, 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