

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

C.J., Appellant	)	
	)	
and	)	<b>Docket No. 07-2409</b>
	)	<b>Issued: March 11, 2008</b>
U.S. POSTAL SERVICE, GENERAL MAIL	)	
FACILITY, St. Louis, MO, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 19, 2007 appellant filed a timely appeal from the October 11, 2006 merit decision of the Office of Workers' Compensation Programs, which denied compensation for a period of wage loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the claim.

**ISSUE**

The issue is whether appellant sustained a recurrence of disability on or about April 26, 2006.

**FACTUAL HISTORY**

On July 31, 2000 appellant, then a 32-year-old mail processor, sustained an aggravation of carpal tunnel syndrome in his right hand as a result of his federal employment.”<sup>1</sup> The Office

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<sup>1</sup> Appellant had a previous employment injury in 1994, which the Office accepted for bilateral carpal tunnel syndrome and bilateral tendinitis of the wrists. He underwent surgical decompressions in 1998 and received a schedule award for a three percent impairment of his right upper extremity. OWCP File No. 11-0157002. On a prior appeal, the Board found that appellant did not meet his burden of establishing that he had intermittent periods of disability from January 13, 1999 through January 10, 2000 due to his employment-related carpal tunnel syndrome. Docket No. 01-2124 (issued February 19, 2002).

accepted appellant's claim for right carpal tunnel syndrome and authorized a surgical release. Appellant received compensation for periods of disability and for permanent impairment.

Dr. Kosit Prieb, an attending hand surgeon, released appellant to limited-duty work with permanent restrictions: no intense hand work on machines; no pushing or pulling; may use ice packs to wrists and hands when needed; no repetitive wrist motions with either wrist. Appellant began working limited duty in the Lockbox section on August 12, 2002.<sup>2</sup>

On April 4, 2004 Dr. Bruce Schlafly, a hand surgeon and Office referral physician, reviewed appellant's history. Appellant stated that, although he followed his permanent work restrictions, he experienced residual pain and numbness in his hands aggravated by their use. His hands did not bother him as much currently as they did when he was working on the machines. Dr. Schlafly examined appellant and evaluated permanent impairment. He noted that appellant's prognosis was good, provided he follow the current work restrictions. Dr. Schlafly recommended no lifting greater than 10 pounds with the right hand alone, no lifting greater than 20 pounds with the left hand alone and no lifting greater than 30 pounds using both hands. He completed a work capacity evaluation indicating that appellant had restrictions on repetitive wrist movements and on pushing, pulling and lifting.

Appellant stopped work on or about April 26, 2006 and claimed compensation for wage loss beginning May 22, 2006. On July 10, 2006 he explained:

"On April 23, 2006 I was approached by my immediate supervisor Byron Bardley stating that Sonya Robinson a supervisor P&DC, Tour One wanted to speak with me about working on the DBCS [delivery barcode sorter] Machines. I spoke with Mrs. Robinson and she stated that she had documents stating that I could work on the machines. I told Mrs. Robinson that I had permanent restrictions and I even went to the Medical Unit to get a copy of my restrictions to give to her. The next night April 24, 2006 Mrs. Robinson spoke with me again and she stated that she spoke with Toni Farmer, Supervisor, Light/Limited Duty Department. Toni Farmer told Mrs. Robinson that I was able to work on the machines and that I needed to report to the DBCS machines. Once again I stated to Mrs. Robinson that I wasn't able to work on any machines. Mrs. Robinson stated that I needed to get my business straightened out with Toni Farmer the next day because when I report back to work the next night I had to report to the machines. The next morning I met with Toni Farmer and she stated that I could work on the machines and I needed to report to the machines on April 25, 2006 at 10:30 p.m. I went to the [i]njury [c]ompensation [d]epartment and spoke with Bob [Robert M. Kicielinski] and explain to him what Sonya Robinson and Toni Farmer both told me that I had to report back to the machines. He stated that I had to do whatever they tell me. I explained to him that I had permanent restrictions on file with OWCP. Bob told me that it was nothing that he could do. So I tried to get in contact with you [claims examiner] to explain what was going on so I wouldn't put my job in jeopardy! If I would have went to work and they told me to report to the machines and I wouldn't (sic) reported they could have wrote me up for failure to follow instructions and fired me. So I took off of work and used my

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<sup>2</sup> Appellant rejected the Lockbox job offer on November 7, 2002. It appears he did not accept a formal offer until December 9, 2002.

sick leave and annual leave to try and get something in writing from OWCP stating that they had to honor my restrictions that I received from my doctor.... Currently I'm out on [leave without pay].”

On June 26, 2006 Dr. Prieb noted that appellant had a permanent work restriction of no repetitive use of hands on machines and no repetitive wrist motion with either hand. On July 25, 2006 the Office asked the employing establishment to provide comments from all agency officials identified in appellant's statement as to the accuracy of his contentions. It noted appellant's work restrictions, as follows:

“No pushing & pulling, no intense work with hands on machines and no repetitive wrist motions using either wrists; a recent statement from Dr. Prieb dated June 26, 2006 affirms the work limitations. The Office has determined that the weight of the medical evidence rested with the opinion and recommendations of Dr. Schlafly, namely that the employee has permanent work restrictions; however, the medical opinion by Dr. Prieb is afforded equal weight in regards to the work-limitations.”

During a conference call on September 19, 2006, the Office noted that the employing establishment had not interpreted Dr. Schlafly's report as precluding appellant from working on the machines. On September 20, 2006 Ms. Farmer, a supervisor, stated:

“[Appellant] had not been to work since April 26, 2006.

“[Appellant] did come into my office a day or two before that to speak with me regarding his limitations. I told him that we could only go by what [i]njury [c]omp[ensation] gives us for medical restrictions. We got [Mr. Kicielinski] on the [tele]phone and discussed what limitations [appellant] kept insisting he had. [He] confirmed that the only limitation [appellant] had was the 10/20/30 pound limitation. [Appellant] showed me an old copy of medical restrictions regarding ‘no intense hand work.’ I told him that he had to take this up with [i]njury [c]omp[ensation] as the Production floor only goes by what [i]njury [c]omp[ensation] provides us. He stated [that] he was on his way up to talk with [Mr. Kicielinski] and left my office.”

On September 20, 2006 Ms. Robinson stated:

“I had received a form in June 2005, from our [i]njury [c]omp[ensation] office stating the 10/20/ and 30 pound limitation but nothing to indicate ‘NO intense hand work’ for a rehab[ilitation] job to be given to [appellant]. In the fall of 2005, I saw [appellant] at a machine, having just taken mail to it. I approached [him] regarding my not having any documentation putting him in Lockbox. A conversation ensued regarding needing documentation for updated information to keep [appellant] in Lockbox as he was persisting in stating that he could not work [a]utomation. I told him that I did not know why he was in Lockbox and that I

need information from him to keep him there. [Appellant] told me he was going to take care of it. I did [not] approach him for a couple of months waiting for him to rectify the situation. While waiting for the update, he was allowed to stay in Lockbox.

“In April 2006, I again spoke with [appellant] regarding not receiving an update regarding his limited duty status, (I could not provide him a rehab[ilitation] job offer until he rectified the situation with [i]njury [c]omp[ensation] as there was a question as to his correct medical limitations). Once again [he] told me that he could [not] work [a]utomation and he had been working Lockbox for a long time. I told him that I had given him plenty of time to rectify the situation (5 [to] 6 months) and it was [not] taken care of. I did not at anytime tell him to go to [a]utomation. I did state that[,] if he did not take care of this (correct medical info[r]mation), he would find himself back in [a]utomation. He informed me that he had a statement but he did not show it to me and there was nothing to indicate that he had one. He told me that he was going to take care [of] it. [Appellant] then told me to contact Bob in [i]njury [c]omp[ensation]. [He] further stated that he would contact [Mr. Kicielinski] in [i]njury comp[ensation] and [Mr.] Farmer (in the control point) to clear this up. Again, I did not direct [appellant] to work [a]utomation. I allowed him approximately six months to remedy the situation. After this conversation with [appellant], he has proceeded to call off and has not returned back to work in order for me to address a rehab[ilitation] job offer with him.

“[Mr.] Farmer and I were informed by [Mr.] Kicielinski that the only restrictions [appellant] had was the 10/20/30 pound weight limitation clause. [Mr. Kicielinski] stated [that] there was no mention of ‘no intense movements with his hands.’”

In a memorandum to Mr. Kicielinski, Ms. Farmer responded to appellant’s statement:

“[Appellant] is correct that he had been working in Lockbox since 2002, based on the medical restrictions given to us at that time. In June 2005, you contacted us regarding [his] new restrictions and needed a rehab[ilitation] job offer done base on those medical restrictions. [Ms.] Robinson was given those restrictions and informed to come up with a new job offer. For whatever reason, unknown to me, it took [her] several months to work on the job offer at which time [appellant] continued to work in the Lockbox section. When [Ms. Robinson] got around to doing the new job offer, based on medical restrictions that you supplied, it was determined that [appellant] was capable of working the [a]utomated machines. [Ms. Robinson] met with [appellant], what was said, I do not know. After [appellant’s] meeting with [Ms. Robinson], [he] came into my office to discuss the medical limitations. I told [appellant] that we could only go by what [i]njury [c]omp[ensation] had given us to go by and if he had questions to see you. While [appellant] was in my office, I contacted you by [tele]phone, so there was no ‘playing one party against another.’ You verbalized to me, what was written on paper regarding [appellant’s] restrictions, were the restrictions that were to be

used for determining his job placement. At no point did I direct [appellant] to work the automated machines. What I told him was the job being offered to him were the machines and that[,] if he could not do it, he needed to take this up with [i]njury [c]ompensation. We could only honor what [i]njury [c]omp[ensation] says were his restrictions. When [appellant] left my office, he stated that he was going up to your office to speak with you.”

In a decision dated October 11, 2006, the Office denied compensation for wage loss. It found that the evidence did not establish that appellant was required to work outside of his established work limitations “as a job offer detailing this requirement was not provided as evidence supporting your claim for the period May 22, 2006 through September 4, 2006.” The Office found no documentation to support that the employing establishment removed appellant’s Lockbox limited duty. The Office explained:

“The factual evidence indicates that you chose to stop working the limited[-]duty [l]ock[b]ox position based on the fact that management conducted discussions with you and amongst themselves regarding the need for current medical evidence to justify your entitlement to limited duty which is a management right; the factual evidence also establishes that management conducted discussions with you of the possibility of a change in your limited[-] duty assignment which does not equate to a[n] offer of limited[-]duty work nor does it confirm that you were forced to work in any other position outside of your permanent work-related limitation.”

On March 23, 2007 appellant contended that the Office did not follow through on its July 25, 2006 letter to the employing establishment asking for further information. “[The claims examiner] requested information about my position in Lockbox. She wanted to know if my position was still available. You can contact Ms. Anna at [telephone number] to verify that not only was my position terminated but all of the light/limited[-]duty position in Lockbox was terminated.” Appellant also submitted evidence that the limited duty he accepted on September 29, 2006 was actually available on August 21, 2006, but no one notified him at that time.

On June 20, 2007 appellant requested reconsideration. He argued that his limited-duty job in Lockbox was terminated and that the new position offered to him was in violation of his restrictions.

In a decision dated August 13, 2007, the Office denied appellant’s request for reconsideration.

### **LEGAL PRECEDENT**

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.<sup>3</sup> When an employee who is disabled from the job he held when injured on account of employment-related residuals returns

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<sup>3</sup> 5 U.S.C. § 8102(a).

to a limited-duty position, or the medical evidence of record establishes that he 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 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>4</sup>

Although a claimant has the burden to establish entitlement to compensation benefits, the Office shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.<sup>5</sup>

### ANALYSIS

The Board finds that the case is not in posture for decision. Mr. Kicielinski, Ms. Farmer and Ms. Robinson were all of the opinion that appellant was medically cleared to work the machines in automation. Dr. Schlafly, the hand surgeon and Office referral physician, had imposed only a 10/20/30-pound lifting restriction. There was no longer a limitation on repetitive or “intense hand work” on the machines or so they all believed. Ms. Robinson told appellant that she did not know why he was in the Lockbox section and that she needed updated information to keep him there. In April 2006, she again approached appellant. Ms. Robinson had provided time for him to produce the updated medical documentation to keep him in his Lockbox assignment, but “it was [not] taken care of.” She had documentation that he could work on the machines.

However, appellant states that on April 24, 2006 Ms. Robinson told him he was needed to report to the DBCS machines. When he stated he was not able to work on the machines, she stated that he needed to discuss the letter with Ms. Farmer the next day because when he reported back to work the next night “I had to report to the machines.” Appellant also stated that Ms. Farmer told him he could work on the machines and that he needed to report to the machines on April 25, 2006 at 10:30 p.m. Ms. Robinson and Ms. Farmer both deny directing appellant to work the automated machines.

The Board finds that further development of the factual evidence is necessary on whether appellant was being reassigned to the machines on or about April 26, 2006. This evidence is of the character normally obtained from the employing establishment and is therefore more readily accessible to the Office than to appellant.

The Office asked for, but did not obtain a statement from appellant’s immediate supervisor, Byron Bardley. It was Mr. Bardley who told appellant on April 23, 2006 that Ms. Robinson wanted to speak to him about working on the DBCS machines. He should be

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<sup>4</sup> *Terry R. Hedman*, 38 ECAB 222, 227 (1986); see *Jackie B. Wilson*, 39 ECAB 915, 919 (1988) (where the record established that light duty was no longer available to the claimant, the Board found that the nature and extent of his light-duty job requirements had changed and that the claimant was totally disabled for the job he held at the time that he was injured).

<sup>5</sup> *Robert A. Redmond*, 40 ECAB 796 (1989).

asked to relate what he discussed with Ms. Robinson and what he knew about the status of appellant's Lockbox assignment in April 2006. Mr. Bardley should explain whether he had any reason to think that the Lockbox assignment was coming to an end or that appellant was being instructed to report to the machines. The Office should also ask Mr. Kicielinski for a statement relating his conversations with appellant, Ms. Robinson and Ms. Farmer on or about April 24 and 25, 2006. Appellant contends that he told Mr. Kicielinski that both Ms. Robinson and Ms. Farmer told him to report back to the machines. Mr. Kicielinski should confirm this. He should also explain whether he had any reason to think that the Lockbox assignment was coming to an end or that appellant was being instructed to report to the machines.

The Office should ask Ms. Anna to verify when appellant's Lockbox position was terminated and whether, as he states, all of the light/limited-duty positions in the Lockbox section were terminated. The employing establishment should clarify whether light or limited-duty employees ever begin working an assignment before accepting a formal offer. Appellant began his Lockbox assignment on August 12, 2002 but does not appear to have accepted a formal offer until December 9, 2002. If he signed a formal offer before August 12, 2002, the employing establishment should submit a copy of it.

The Board will set aside the Office's October 11, 2006 decision denying compensation for wage loss and will remand the case for further development of the factual evidence. After such further develop as may be necessary, the Office shall issue an appropriate final decision on appellant's claim.

### **CONCLUSION**

The Board finds that this case is not in posture for decision. Further development of the factual evidence is warranted. The Office's August 13, 2007 nonmerit decision denying reconsideration is therefore moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 13, 2007 and October 11, 2006 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion.

Issued: March 11, 2008  
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