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

| | | |
|---|---|---|
| **W.A., Appellant** | ) | |
| **and** | ) | **Docket No. 08-1233** |
| | ) | **Issued: March 3, 2009** |
| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Martinez, CA, Employer** | ) | |

*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 March 20, 2008 appellant, through his counsel, filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated May 17, 2007, denying her claim for total disability from March 6 to 16, 2007 and the hearing representative's January 25, 2008 decision affirming that decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

### ***ISSUE***

The issue is whether appellant established that she was totally disabled from March 6 to 16, 2007.

### ***FACTUAL HISTORY***

On August 2, 2002 appellant, then a 53-year-old nursing assistant, filed a traumatic injury claim alleging that on that date, while trying to catch a patient who was slipping out of bed, the patient fell on her thereby causing an injury to her right arm, neck and shoulder. On

September 20, 2002 the Office accepted appellant's claim for cervical strain. It later accepted appellant's claim for degeneration of cervical intervertebral disc. The Office paid appropriate compensation and medical benefits.

On May 11, 2006 appellant accepted a job offer with the employing establishment as a voluntary services assistant for 25 hours a week (5 hours a day). This position was modified to accommodate appellant's restrictions.[1]

By decision dated July 27, 2006, the Office found that the position of voluntary service assistant represented appellant's wage-earning capacity and computed her new compensation accordingly.

On March 9, 2007 appellant filed a claim for compensation for the period March 6 through 16, 2007. In support thereof, she submitted a note dated March 8, 2007 from Dr. Gary Martinovsky, a physician, stating that appellant was under his care for treatment of cervical disc disease and indicated that due to a flare-up of pain from this condition, she should be excused from work from March 9 through 16, 2007. Appellant also submitted a March 9, 2007 progress report from Dr. Roger W. Shortz, a Board-certified neurosurgeon, indicating that she was complaining of moderate constant neck and right upper extremity radicular pain symptoms. Dr. Shortz noted positive multiple trigger points over the trapezius muscles. He noted that appellant's overall condition had worsened since the previous examination and that she reported increased soreness in her neck since March 5, 2007 while at work.

By decision dated May 17, 2007, the Office denied appellant's claim for compensation from March 6 through 16, 2007 as the evidence was not sufficient to establish that she was unable to perform the restricted-duty work, to which she was assigned.

On May 29, 2007 appellant requested an oral hearing. She submitted a report dated May 10, 2007 by Dr. Shortz for the State of California wherein he noted that appellant was complaining of moderate neck pain and moderate right upper extremity radicular pain. Dr. Shortz requested permission for epidural injections to manage the pain stemming from nerve root compression as well as physical therapy. In a June 28, 2007 report, he noted that appellant's overall condition improved since his previous examination but that she remained temporarily partially disabled.

At the hearing held on October 25, 2007 appellant described her physical limitations. She noted that in the winter she got an inflammation and took off work for two days and returned to work but was in pain so her physician took her off work March 8 through 15, 2007. Appellant indicated that she could not drive during this time and there was no bus service to her job. She noted that her restrictions at work were no lifting and "not to much bending." Appellant noted that she walks during her job but mostly answers the telephone. She indicated that she uses her

[1] The restrictions agreed upon by the employing establishment were as follows: lifting/pushing/pulling up to 10 pounds up to 4 hours a day; no reaching above the shoulder with right arm; and reaching above the left shoulder limited to 3 hours per day; walking/standing up to 3 hours per day; sitting up to 5 hours per day; operating a motor vehicle up to 2 hours per day; wrist and elbow repetitive movements for up to 4 hours per day; squatting up to 1 hour per day; kneeling and climbing up to ½ hour per day; and twisting up to 3 hours per day.

fingers and hands and that her right hand swells. Appellant noted that during this time she could not turn her head or lift her arm due to inflammation. The hearing representative kept the record open for 30 days for the submission of medical evidence.

In a November 8, 2007 note, Dr. Martinovsky wrote, "This is to verify that [appellant] was under my care for the month of March 2007 and was totally disabled March 6 through 19, 2007."

By decision dated January 25, 2008, the hearing representative affirmed the Office's May 17, 2007 decision.

## ***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 light-duty position or the medical evidence of record establishes that he or 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 show that he or she cannot perform such light duty. 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.[2] To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[3]

Board precedent provides that, when a wage-earning capacity determination has been issued and the employee submits evidence with respect to increased disability for work, the issue presented is whether modification of wage-earning capacity is warranted, not whether appellant has sustained a recurrence of disability.[4] However, the Office is not precluded from accepting a limited period of employment-related disability, *i.e.*, a recurrence, without a formal modification of the wage-earning capacity determination.[5]

---

[2] *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986); 20 C.F.R. § 10.5(x) provides, "*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 physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."

[3] *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Maurissa Mack* 50 ECAB 498, 503 (1999).

[4] *Katherine T. Kreger*, 55 ECAB 633, 636 (2004); *see Sharon C. Clement*, 55 ECAB 552 (2004).

[5] *See Sharon C. Clement*, *supra* note 4; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

## ***ANALYSIS***

The Office accepted appellant's claim for cervical strain and degeneration of cervical intervertebral disc causally related to an August 2, 2002 work-related incident and paid compensation and medical benefits. On May 11, 2006 appellant accepted an offer of employment with the employing establishment as a voluntary services assistant for 25 hours a week. This position was modified to accommodate her restrictions. The Office determined that this position represented appellant's wage-earning capacity. Subsequently, appellant filed a claim for total disability benefits from March 6 through 16, 2007. Due to the fact that her claim was for a limited period of disability, *i.e.,* from March 6 to 16, 2007, the hearing representative appropriately treated appellant's claim as a claim for a recurrence of disability.[6]

In support of her claim, appellant testified with regard to an inflammation and pain and indicated that her physicians took her off work from March 8 through 15, 2007. However, to support her claim for a recurrence of disability, she must submit rationalized medical evidence.[7] In support of her claim, she submitted notes from Dr. Martinovsky indicating that appellant was under his treatment in March 2007 and totally disabled from March 6 through 16, 2007. Appellant also submitted reports by Dr. Shortz noting that he was treating her for neck and right upper extremity pain at this time. However, neither Dr. Martinovksy nor Dr. Shortz provided any explanation as to why appellant was disabled, did not explain why she was unable to perform the requirements of her limited-duty position, nor did either clearly link her disability to the accepted work-related incident. An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.[8] As appellant failed to submit a rationalized medical opinion showing a change in the nature and extent of the injury-related condition and as she has not alleged a change in the nature and extent of the job's requirements, she has not established a recurrence of disability.

## ***CONCLUSION***

The Board finds that appellant has not established that she was totally disabled from March 6 to 16, 2007.

[6] *Id.*

[7] *S.S.*, 59 ECAB ___ (Docket No. 07-579, issued January 14, 2008).

[8] *John D. Jackson*, 55 ECAB 465 (2004); *William Nimitz*, 30 ECAB 57 (1979).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 25, 2008 and May 17, 2007 are affirmed.

Issued: March 3, 2009
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