

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

C.S., Appellant)

and)

**DEPARTMENT OF DEFENSE, DEFENSE)
COMMISSARY AGENCY, Moffett Field, CA,)
Employer)**

**Docket No. 10-1996
Issued: June 3, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 29, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 25 and June 28, 2010 merit decisions denying her claim for a recurrence of total disability. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of total disability on February 15, 2008 due to her accepted employment injury.

FACTUAL HISTORY

In September 2006, the Office accepted that appellant, then a 42-year-old lead commissary support clerk, sustained left lateral epicondylitis, left medial epicondylitis, left

¹ 5 U.S.C. § 8101 *et seq.*

forearm strain and left wrist strain due to the repetitive duties of her job. Appellant underwent a left lateral epicondylectomy on September, 14, 2007. On October 24, 2007 Dr. Roy Kim, a Board-certified orthopedic surgeon, released appellant to work full time with restrictions, including no pushing, pulling, lifting or repetitive movement with her elbow or left hand.

On October 29, 2007 appellant accepted a limited-duty position as a lead commissary support clerk. The purpose of the position was to serve as a work leader over a group of three or more commissary support clerks and supply technicians engaged in providing store level accounts maintenance, computer operation and supply support to the commissary management team. Appellant's duties included distributing and balancing workload among employees in accordance with established workflow, monitoring status and progress of work, making day-to-day adjustments in accordance with established priorities and ensuring written instructions. She was advised that under no circumstances was she to deviate from the physical requirements in Dr. Kim's October 24, 2007 work capacity evaluation report of "no pushing/pulling, lifting, repetitive movement of elbow with left hand."

In reports dated December 29, 2007 and January 16, 2008, Dr. Kim reiterated that appellant was able to work limited duty, provided that she be restricted from lifting, pushing or pulling more than five pounds with her left hand.²

On October 19, 2009 appellant filed a recurrence of total disability claim alleging that the employing establishment had withdrawn her light-duty assignment effective February 15, 2008. In a letter dated October 29, 2009, she stated that the employing establishment had offered her a position as a lead store associate at the time it abolished the original light-duty job. Appellant rejected the job offer because she was unable to physically perform the required duties, such as lifting up to 50 pounds, stocking shelves, performing housekeeping duties and prolonged standing.

On November 13, 2009 the employing establishment stated that appellant voluntarily resigned because she was unable to perform her duties and received a \$25,000.00 separation incentive at the time of her resignation.³ It noted that her light-duty position was abolished and the title would have been changed to lead store associate, had she remained employed. The employing establishment noted that it would have continued to accommodate appellant's restrictions.

The position description for lead store associate reflects that the primary purpose of the position is to lead three or more employees in carrying out the main work assignments needed to successfully operate a commissary store. The employee distributes and balances workload among employees in accordance with established work flow, monitors status and progress of work and makes day-to-day adjustments in accordance with established priorities, instructs employees in specific tasks and job techniques, ensures written instructions and prepares

² The record contains medical reports from appellant's treating physicians subsequent to the date of appellant's claimed recurrence of disability.

³ The record contains a Form SF-50B reflecting appellant's resignation effective February 15, 2008 due to her inability to perform work duties. The form also reflects that she received a \$25,000.00 separation incentive.

production reports as required. As necessary, the lead store associate conducts on-the-job training covering all aspects of the work performed in the various functional retail areas of the store, including front end operations, shelf stocking, inventory, merchandising, and work in any area of the commissary, including such functions as operating the electronic checkout system, totaling purchases and making correct change, verifying various forms of media, processing a variety of accounting documents including requisitions, deposit reports, operating various computer equipment needed to order and replenish stock, supporting the work performed in the various commissary departments (*e.g.*, meat, produce, grocery), and ensuring compliance with safety and security practices and procedures. Physical effort involves frequent lifting, pushing, pulling, carrying and handling of commissary products weighing up to 50 pounds without assistance, heavier products removed with assistance from other workers or by using weight-handling equipment. Work also involves prolonged standing, stooping, kneeling, bending and climbing.

In a December 27, 2007 field nurse report, Barry L. Markman, a registered nurse, stated that appellant initially returned to full-time limited duty on October 29, 2007 and continued in her job as a lead clerk with no reported difficulties. Pursuant to information received from the employing establishment and appellant, Mr. Markman stated that the employer was eliminating the lead clerk position and replacing it on February 17, 2008 with a lead store associate position, which required lifting up to 50 pounds. Appellant declined the position because she believed she would not be physically capable of performing the job. On December 21, 2007 she informed Mr. Markman that she planned to stay at work until the change over occurred. Appellant continued to be able to perform the regular duties of her lead clerk position within specified limitations.

In a January 25, 2010 decision, the Office denied appellant's claim finding that the evidence was insufficient to establish any disability causally related to the accepted employment injury. It also found no evidence to substantiate a withdrawal of a modified-duty assignment made to accommodate her work injury.

On January 29, 2010 appellant, through her representative, requested a telephonic hearing, which was conducted on April 14, 2010. Appellant testified that she stopped work on February 15, 2008 because her light-duty position was abolished and her employer could no longer accommodate her restrictions. She declined the lead store clerk position because she was unable to perform the required duties. Appellant was allegedly told that she could accept the new job or resign. She acknowledged that she did not stop work due to a worsened physical condition.

By decision dated June 28, 2010, an Office hearing representative affirmed the January 25, 2010 decision denying appellant's recurrence claim. He found that the evidence supported that appellant's regular job as a lead commissary support clerk was abolished. The Office hearing representative also found that the new position offered was within the limitations established by her treating physician. Noting the employing establishment's statement that modified work would have continued to be available to appellant, he found that she would be able to perform the duties required of the new position using only her right hand.

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 show that she cannot perform such light duty. 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 light-duty job requirements.⁴

Office procedures provide that a recurrence of disability can be caused by withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.⁵

ANALYSIS

Appellant claimed that she sustained a recurrence of total disability when her modified lead commissary support clerk position was withdrawn effective February 15, 2008. She did not contend that her left elbow condition had worsened such that she was unable to perform the duties of her modified position. Rather, appellant claimed that she was not able to physically perform the required duties of the lead store associate position offered by the employing establishment when her position was abolished. The Board finds that she sustained an employment-related recurrence of total disability when her modified work was withdrawn by her employer effective February 15, 2008.

The record reflects that on October 29, 2007 appellant accepted a limited-duty position as a lead commissary support clerk, a position that was in keeping with her physician's restrictions of "no pushing/pulling, lifting, repetitive movement of elbow with left hand." The Office found, and the evidence establishes, that her lead commissary support clerk position was abolished effective February 15, 2008. In its place, the employing establishment offered appellant a position as a lead store associate, which it contended would accommodate her restrictions. The substitute position, however, required physical activity outside the limitations established by her physician.

Although the employing establishment contended that it would have continued to accommodate appellant's restrictions, the job description for lead store associate does not support this contention. Appellant would be required to conduct on-the-job training covering all aspects of the work performed in the various functional retail areas of the store, including front end operations, shelf stocking, inventory, merchandising, and work in any area of the commissary, including such functions as operating the electronic checkout system, totaling purchases and making correct change, verifying various forms of media, processing a variety of accounting documents including requisitions, deposit reports, operating various computer equipment needed to order and replenish stock supporting the work performed in the various

⁴ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(c) (January 1995).

commissary departments (*e.g.*, meat, produce, grocery), and ensuring compliance with safety and security practices and procedures. Physical effort would involve frequent lifting, pushing, pulling, carrying and handling of commissary products weighing up to 50 pounds without assistance, heavier products removed with assistance from other workers or by using weight-handling equipment. The hearing representative found that appellant would be able to perform the duties required of the new position using only her right hand. The Board finds, however, that the physical requirements as outlined exceed those established by her physician. Therefore, the position did not comport with Dr. Kim's restrictions.

There is no indication that the modified lead commissary supply clerk position was withdrawn due to misconduct or nonperformance of job duties. The Board finds appellant has established that she sustained a recurrence of total disability when her modified work was withdrawn by her employer effective February 15, 2008.

CONCLUSION

The Board finds that appellant met her burden of proof to establish that she sustained an employment-related recurrence of total disability on February 15, 2008.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 28 and January 25, 2010 decisions are reversed.

Issued: June 3, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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