

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

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A.N., Appellant )  
and ) Docket No. 11-394  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: October 26, 2011  
Tampa, FL, Employer )  
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)

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 7, 2010 appellant, through counsel, filed a timely appeal from a November 9, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for a recurrence of disability.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act (FECA)<sup>2</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> The Board notes that appellant did not appeal OWCP's July 7, 2010 schedule award decision on this appeal. See 20 C.F.R. §§ 501.3(a)-(c).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following issuance of the November 9, 2010 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

## **ISSUE**

The issue is whether appellant has established a recurrence of total disability commencing February 11, 2010 causally related to her May 7, 2006 employment injury.

On appeal appellant's attorney contends that OWCP's November 9, 2010 decision was contrary to fact and law.

## **FACTUAL HISTORY**

On May 11, 2006 appellant, then a 46-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her back and left arm when a shelf fell on her in the performance of duty on May 7, 2006.

On July 10, 2006 appellant accepted a limited-duty assignment as a modified mail processor.

By decision dated September 1, 2006, OWCP accepted appellant's claim for head contusion without open wound, left shoulder and upper arm contusion, and thoracic back sprain and lumbar back sprain.

Appellant filed a Form CA-7 claim for compensation for intermittent periods beginning June 8, 2007.

In a January 3, 2008 second opinion examination report, Dr. Jeffrey M. Oettinger, a Board-certified orthopedic surgeon, diagnosed chronic myofascial paracervical discomfort without evidence of radiculopathy. He opined that appellant no longer suffered from any of the conditions accepted by OWCP, but experienced mild paracervical myofascial discomfort. Dr. Oettinger opined that appellant reached maximum medical improvement and placed the following restrictions on her permanently: limited reaching above the shoulder and no pushing, pulling or lifting more than 30 pounds.

On February 28, 2009 appellant rejected a rehabilitation job offer from the employing establishment on the grounds that there were changes in salary and medical restrictions. She submitted a November 18, 2008 Form CA-17 and a February 27, 2009 Form CA-17 with the following additional restrictions: no loading and unloading, no standing longer than 1 hour, no prolonged bending or twisting and no more than 30 minutes of reaching above the shoulder at a time.

On March 12, 2009 appellant accepted an amended rehabilitation job offer as a modified mail processor.

In a letter dated September 17, 2009, the employing establishment notified appellant that it determined that there was no work available for her based on a comprehensive review of its operational needs within a 50-mile radius and her medical restrictions. It advised that she would be placed on administrative leave until October 9, 2009.

In an October 16, 2009 letter, the employing establishment notified appellant that there was no work available for her and that she retained her restoration rights for her compensable injury in the event that her medical restrictions improved and she was able to perform additional duties.

In a February 16, 2010 medical report, Dr. Francisco Torres, a Board-certified physical medicine and rehabilitation physician, indicated that appellant presented with back pain characterized as sharp stabbing. He reported that she had no trauma since their last visit and that the pain interfered with her normal work. Dr. Torres diagnosed cervical myofascial pain, thoracic or lumbosacral radiculopathy, thoracic myofascial pain, muscle spasm, sacroilitis, lumbar myofascial pain, facet syndrome, lower trapezius (LT) scapulo thoracic dysfunction, lumbar herniated nucleus pulposus (HNP), spinal enthesopathy and L5-S1 discogenic syndrome with mild stenosis.

On February 26, 2010 appellant filed a Form CA-7 claim for compensation for the period February 11 to 26, 2010.

By letter dated March 4, 2010, OWCP acknowledged receipt of the Form CA-7 claim for wage-loss compensation. It noted that appellant's limited-duty assignment had been withdrawn effective September 17, 2009 as part of the U.S. Postal Service, National Reassessment Program. OWCP informed her that the evidence was insufficient to establish that she continued to suffer injury-related residuals for the accepted employment-related conditions. It allotted 30 days for appellant to respond to its inquiries and submit additional evidence.

Appellant submitted a February 16, 2010 Form CA-17 by Dr. Torres with the following restrictions: no standing longer than 1 hour, no repetitive bending or twisting and no more than 30 minutes of simple grasping at a time.

In an April 14, 2010 medical report, Dr. Torres reiterated the diagnoses in his February 16, 2010 report and indicated that appellant had a history of an employment injury in May 2006 with low back pain and left shoulder pain.

By decision dated April 21, 2010, OWCP denied appellant's claim for a recurrence of disability commencing February 11, 2010 on the grounds that the medical evidence was not sufficient to establish that her work stoppage was due to her employment-related injury or that she continued to have residuals from her employment-related conditions.

In a narrative statement dated April 28, 2010, appellant argued that her light-duty work assignment was withdrawn due to her employment-related injury. She contended that the reduction of her hours from six days to one day did not constitute a withdrawal of her limited-duty assignment as she had been working five days a week until September 17, 2009 when the employing establishment informed her that there was no work available after which she worked zero days a week.

Appellant submitted a June 16, 2009 report by Dr. Torres who diagnosed spinal enthesopathy, cervical thoracic and lumbar myofascial pain, lumbar radiculopathy and left scapulo thoracic dysfunction.

In a January 8, 2010 medical report, Dr. Torres opined that appellant continued to have dysfunction of the cervicothoracic unit with limitation of range of motion with no focal neurological deficits. He indicated that appellant's condition was permanent and the objective findings included decreased range of motion, ankylosis of the thoracic segment with spinal enthesopathy with no sensory or motor loss. Dr. Torres reported that appellant continued to have chronic pain, requiring physical therapy, gentle manipulation and neuromuscular massage.

On May 10, 2010 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative.

In a May 12, 2010 report, Dr. Torres reiterated his diagnoses that appellant's pain interfered with normal work quite a bit. He indicated that he explained to appellant that he could not predict with any degree of medical certainty whether or not the symptoms would progress or worsen over time.

Appellant submitted a series of limited-duty and rehabilitation job offers which she accepted on July 10, 2006, March 23, 2008 and March 12, 2009.

In a letter dated August 10, 2010, counsel argued that appellant's light-duty assignment was withdrawn due to her employment-related injury. He enclosed a copy of 20 C.F.R. § 10.5(x) and noted that the recent Board decision in *A.J.*<sup>4</sup> mandated it to vacate erroneous loss of wage-earning capacity (LWEC) decisions by OWCP. Counsel argued that appellant's limited-duty job was a makeshift work job without classification and was temporary in nature and denial of compensation would be a denial of appellant's civil rights under the law.

On August 10, 2010 a telephonic hearing was held before an OWCP hearing representative. Appellant testified that the limited-duty positions she held were not described, open and able to be bid upon by others. She testified that the job was created just for her because she had limitations due to an employment injury and it was not permanent but renewed every year. Appellant testified that she brought in medical evidence in the form of a CA-17 every two months for the past three years. She was on leave-without-pay status and wanted to return to her limited-duty position. OWCP's hearing representative stated that OWCP never accepted myofascial pain as an employment-related injury. She acknowledged that OWCP did allow appellant to remain on limited duty which could be a tacit acceptance, indicated that she would consider that issue and agreed to hold the case open for 30 days for submission of additional evidence.

In an August 16, 2010 medical report, Dr. Torres reiterated his diagnoses and opined that based on appellant's symptoms and physical examination, she was not able to return to her previous job as a task automation clerk which required a significant amount of weight lifting. He indicated that her restrictions included: a 15-pound weight limit, no pulling overhead, no pushing or reaching above the shoulder on a continuous movement basis, needs to change positions every 30 minutes and no bending at the waist repetitively. Dr. Torres stated that her restrictions are directly related to her 2006 injury with secondary trauma to the lower back and

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<sup>4</sup> Docket No. 10-616 (issued June 29, 2010).

shoulder region resulting in a bulging central herniation at L5-S1 and chronic and spinal enthesopathy.

Appellant submitted a September 13, 2009 request for reasonable accommodation and a November 13, 2009 Equal Employment Opportunity (EEO) complaint affidavit.

In a letter dated October 7, 2009, the employing establishment responded to appellant's request for accommodation. It notified her that after consideration of her restrictions it concluded that she was a qualified individual with a disability. However, despite its efforts appellant's request was denied because there was no vacant funded position that met her limitations.

By decision dated November 9, 2010, OWCP's hearing representative affirmed the April 21, 2010 decision which denied appellant's claim on the basis that the medical evidence submitted was insufficient to establish that she sustained a recurrence of disability commencing on February 11, 2010, causally related to the accepted employment injury and that her ongoing medical conditions and disability for work were not employment related. The hearing representative noted that OWCP did not issue a formal decision regarding appellant's wage-earning capacity and did not formally accept the condition of myofascial pain.

#### **LEGAL PRECEDENT**

A 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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>5</sup> 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.<sup>6</sup> If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.<sup>7</sup>

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

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<sup>5</sup> See 20 C.F.R. § 10.5(x). See also *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

<sup>6</sup> *Id.*

<sup>7</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (March 2011). See also *Cecelia M. Corley*, 56 ECAB 662 (2005); *Donald T. Pippin*, 54 ECAB 631 (2003); K.C., Docket No. 08-2222 (issued July 23, 2009).

and extent of the light-duty job requirements.<sup>8</sup> OWCP 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.<sup>9</sup>

In *K.S.*,<sup>10</sup> the Board found that the claimant established that she sustained an employment-related recurrence of disability when her modified transportation clerk position was withdrawn by her employer as part of a National Reassessment Program and there was no indication that the modified work position was withdrawn due to misconduct or nonperformance of job duties.<sup>11</sup>

### **ANALYSIS**

Appellant claimed that she sustained a recurrence of total disability when her modified mail processor position was withdrawn effective September 17, 2009. In a letter dated September 17, 2009, the employing establishment notified appellant that her limited-duty assignment had been withdrawn as part of a National Reassessment Program. It determined that there was no work available for her based on a comprehensive review of its operational needs within a 50-mile radius and her medical restrictions and placed her into an administrative leave status. In a letter dated March 4, 2010, OWCP noted that appellant's limited-duty assignment had been withdrawn effective September 17, 2009 as part of the U.S. Postal Service, National Reassessment Program. In an April 28, 2010 narrative statement, appellant reported that she had been working five days a week until September 17, 2009 when the employing establishment informed her that work was not available. There is no indication that the modified mail processor position was withdrawn due to misconduct or nonperformance of job duties. The Board finds appellant has established that she sustained an employment-related recurrence of disability when her modified work was withdrawn by her employer effective September 17, 2009 as part of a National Reassessment Program.<sup>12</sup>

### **CONCLUSION**

The Board finds that appellant met her burden of proof to establish that she sustained an employment-related recurrence of total disability on September 17, 2009.

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<sup>8</sup> See *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>9</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(c) (March 2011).

<sup>10</sup> Docket No. 08-2105 (issued February 11, 2009).

<sup>11</sup> See *id.*

<sup>12</sup> See *supra* note 9, 10.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 9, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 26, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

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

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