

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY FRITSCH and U.S. POSTAL SERVICE,
UPTOWN STATION, Albuquerque, NM

*Docket No. 00-179; Submitted on the Record;
Issued May 25, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on April 29, 1997; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on August 3, 1999.

Appellant, a 36-year-old window clerk, filed a notice of traumatic injury on November 1, 1988 alleging that he injured his low back in the performance of duty. The Office accepted appellant's claim for lumbosacral strain and herniated disc L5-S1 on November 9, 1988. Appellant returned to light duty in March 1991 working five hours a day. By decision dated May 25, 1992, the Office reduced appellant's compensation to reflect his wage-earning capacity as a distribution clerk.

On April 21, 1992 the Office authorized surgery. Following his surgery appellant returned to full duty effective July 30, 1994. By decision dated March 9, 1995, the Office determined that this position represented appellant's wage-earning capacity and reduced his compensation benefits to zero.

Appellant filed a notice of recurrence of disability on June 22, 1997 alleging that on April 29, 1997 his chronic pain increased and he reduced his work time to five hours a day. By decision dated October 10, 1997, the Office denied appellant's claim for recurrence of disability. Appellant requested reconsideration on September 18, 1998. By decision dated December 7, 1998, the Office denied modification of its October 10, 1997 decision. Appellant requested reconsideration on May 11, 1999. By decision dated August 3, 1999, the Office declined to reopen appellant's claim for consideration of the merits.

The Board finds that appellant failed to meet his burden of proof in establishing that he developed a recurrence of disability.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he 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 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 requirements.¹ Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his recurrence of disability commencing June 22, 1997 and his November 1, 1988 employment injury.² This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.³

In this case, appellant initially alleged that he sustained a change in his employment-related condition. Appellant submitted a series of medical reports from Dr. John Henry Sloan, a physician Board-certified in physical medicine and rehabilitation. On December 3, 1996 Dr. Sloan indicated that appellant could work eight hours a day. Appellant complained of back pain on February 24, 1997. He noted that appellant felt better on March 24, 1997. Dr. Sloan recommended an epidural steroid injection on April 8, 1997 and stated that appellant could continue his work as a mail clerk after the injection. On April 28, 1997 he reduced appellant's work time to six hours a day due to low back and left leg pain. Dr. Sloan increased appellant's hours to seven hours a day on June 26, 1997. Following the Office's October 10, 1997 denial of appellant's claim, he diagnosed appellant's condition as lumbosacral radiculopathy which was chronic in nature.

There is no medical evidence in the record which establishes that appellant has experienced a change in the nature and extent of his employment-related condition. Dr. Sloan indicated that appellant's lumbosacral radiculopathy was chronic in nature with periodic increases in pain which he treated with epidural steroid injections.

Appellant also alleged that he had experienced a change in the nature and extent of his light-duty requirements. Appellant's attorney noted that the employing establishment abolished appellant's position of distribution clerk-letter sorter machine operator on June 22, 1996. He argued that the change of position to distribution clerk resulted in a change in the light-duty requirements as this position required continuous standing, stretching and reaching as well as lifting up to 70 pounds. Appellant submitted a copy of the description of distribution clerk-letter sorter machine operator; however, this description did not include the physical requirements of this position. Appellant also submitted a work restriction evaluation dated October 20, 1993, indicating that appellant could work five hours a day with restrictions on lifting, bending squatting, sitting and standing.

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

³ *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

This evidence does not establish what appellant's work restrictions were at the time of the recurrence as he had returned to work eight hours a day on July 30, 1994 with his physician's permission, thus exceeding the limitations established in 1993. Furthermore, appellant did not submit a copy of the light-duty position description of letter sorter machine operator that he fulfilled until June 22, 1996. He also failed to provide any evidence that the employing establishment required him to fulfill the full duties of the newly assigned position of distribution clerk rather than providing him with light-duty work in this position within his work restrictions.

The Board finds that appellant failed to submit sufficient factual evidence to establish a change in his light-duty requirements, failed to establish a change in his injury-related condition and failed to establish that he sustained a recurrence of disability.⁴

The Board further finds that the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits on August 3, 1999.

Appellant requested reconsideration of the Office's December 7, 1998 decision, on May 11, 1999. By decision dated August 3, 1999, the Office denied appellant's request for review of the merits.

The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument, which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.⁵

In this case, appellant submitted relevant new evidence not previously considered by the Office. Appellant submitted a narrative statement received by the Office on May 14, 1999, which is not previously contained in the record. In this statement, appellant addressed the change in work duties which he felt exceeded his work restrictions. Appellant noted that his current position of distribution clerk required continuous standing, stretching and reaching as well as lifting more than 30 pounds above the shoulder. Appellant also stated that he was required to use a stool that did not provide support for his low back, which was offered by the chair that he used in his letter sorter machine clerk position.

As this is new evidence and as it is relevant to the issue of whether appellant has had a change in the nature and extent of his light-duty requirements, on remand the Office should reopen appellant's claim for review of the merits and issue an appropriate decision.

⁴ The Board notes that the employing establishment, appellant and the Office address the issue of whether appellant's change in positions was the result of a reduction-in-force negating the possibility of a recurrence of disability in accordance with the Office's procedures. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997). However, that analysis is not appropriate in this case as the employing establishment did not merely terminate appellant's employment, but instead provided him with a new position which must comply with his light-duty restrictions.

⁵ 5 U.S.C. §§ 10.609(a) and 10.606(b).

The August 3, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case is hereby remanded for further development consistent with this decision. The December 7, 1998 decision is hereby affirmed.

Dated, Washington, DC
May 25, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member