

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PATRICIA A. CADE	:	
	:	CIVIL ACTION
vs.	:	
	:	
CONSOLIDATED RAIL CORPORATION	:	NO. 98-5941

DuBOIS, J.

May 7, 2002

MEMORANDUM

I. INTRODUCTION

On November 10, 1998, plaintiff, a former employee of defendant Consolidated Rail Corporation (“Conrail”), filed a Complaint against defendant alleging violations of Title I of the Americans with Disabilities Act of 1990, as amended, (“ADA”), 42 U.S.C. § 12101, et seq., and § 504 of the Rehabilitation Act of 1973, as amended, (“Rehabilitation Act”), 29 U.S.C. § 701, et seq., seeking declaratory, injunctive, and compensatory relief for denial of employment on the basis of disability and denial of a reasonable accommodation by defendant. On March 29, 2000, the Court dismissed plaintiff’s claims under the ADA on the ground that plaintiff had not exhausted her administrative remedies, but permitted plaintiff’s claims under the Rehabilitation Act to proceed. In her claims under the Rehabilitation Act, plaintiff alleges that Conrail discriminated against her on the basis of her disabilities, a condition in her right knee and an

astigmatism in her left eye, by refusing to return her to her former job as a block operator or reasonably accommodate her.

Presently before the Court is Defendant's Motion for Summary Judgment in which defendant asserts that plaintiff is not entitled to any relief because she is not disabled within the meaning of the Rehabilitation Act.¹ Plaintiff argues that she is disabled within the meaning of the Rehabilitation Act because her physical impairments, an astigmatism in her left eye and a condition in her right knee, substantially limited her ability to engage in major life activities, and in the alternative, that she was "regarded as" disabled by Conrail when she attempted to return to work in 1994, and was not allowed to do so.

After consideration of the evidence presented and the arguments of counsel, the Court concludes that plaintiff is not disabled within the meaning of the Rehabilitation Act. Thus, plaintiff's claims under the Rehabilitation Act fail, and defendant's motion for summary judgment will be granted.

II. FACTS

The evidence presented may be summarized as follows:

Plaintiff began working for Conrail in 1979. Pl.'s Dep., Aug. 16, 2001, at 14-17. At that time, she primarily worked as a block operator and briefly as a delay clerk. See id. Plaintiff was furloughed in 1982, and returned to work for Conrail as a block operator in 1987. See id. at 20;

¹ Defendant also argues that plaintiff is not an "otherwise qualified individual" under the Rehabilitation Act. The Court does not address this issue because defendant's argument that plaintiff is not disabled within the meaning of the Rehabilitation Act, accepted by the Court, is dispositive of the motion.

Pl.'s Tr. Testimony, Feb. 16, 1994 ("Def.'s Ex. B"), at 4.

When she returned to work for Conrail in 1987, plaintiff initially worked as an Extraboard Block Operator at different towers filling in for absent block operators. See id. at 5. Plaintiff then was given a permanent post at the River Rouge Bridge Tower.² See id. According to plaintiff, she was qualified to work as a block operator in six of Conrail's towers in Michigan. See Pl.'s Dep., Aug. 16, 2001, at 20-22. Plaintiff never worked for Conrail outside of Michigan or outside the geographical location within commuting distance of her home. See id. at 22.

As a block operator, plaintiff testified that she was "responsible for the movement of traffic, main line and yard movements."³ Def.'s Ex. B. at 5. And, in her job at the River Rouge Bridge Tower, plaintiff testified that she "was also responsible for raising and lowering of the bridge. Keeping records." Id. Her job was "primarily a seated position requiring seated work for approximately 7 hours of the 8 hour workday." Letter of Jim Ewing, Jul. 11, 1994 ("Pl.'s Ex. A"), at 1.

The workstations in each of the four block towers in the district in which plaintiff worked were located on the second floor requiring her to climb between 17 and 22 steps to access the workstation. See id. "[T]here are no restroom facilities located within the [block] towers

² Plaintiff lost her regular assignment at the River Rouge Bridge Tower after taking a leave of absence during the fall of 1992. When she returned to Conrail in December 1992, she worked as an Extraboard Operator at different towers filling in for other block operators until she stopped working in February 1993. See id. at 35.

³ In its Motion for Summary Judgment, Conrail provides that "Conrail block operators are responsible for planning and coordinating the movement of railroad traffic and keeping records of such movement. They typically watch the movement of trains from large towers adjacent to the railroad, which are accessible only by climbing one or two flights of stairs." See id. at 2-3 (internal citations omitted).

themselves [so] Conrail block operators typically must climb up and down the tower stairs several times per shift.” See Def.’s Mot. for Summ. J., at 2-3 (internal citations omitted).

Block operators are members of the block operator craft and belong to the block operator union. Pl.’s Dep., Aug. 16, 2001, at 17; Pl.’s Dep., Apr. 13, 1993 (“Def.’s Ex. C”), at 25-26. Delay clerks are not members of the block operator craft. Plaintiff never belonged to any craft other than the block operator craft, and never had seniority for any job at Conrail other than block operator. Def.’s Ex. C, at 100; Pl.’s Dep., Aug. 16, 2001, at 18-19.

In October 1991, plaintiff suffered a work-related injury to her knee, resulting in her occasional absence from work. Def.’s Ex. C, at 92. Plaintiff took medical leave for her knee injury in August 1992, see id. at 93, and returned to work in December 1992. See id. At that time, plaintiff’s physician, Dr. Raymond Edison, placed her on work restrictions of no climbing and no lifting. See id. at 100. In February 1993, plaintiff re-injured her knee in a work-related accident and stopped working because climbing the tower stairs aggravated her knee. Pl.’s Dep., Aug. 16, 2001, at 22-26; Def.’s Ex. B, at 35. Plaintiff underwent knee surgery in March 1993, Def.’s Ex. B, at 36, and eight weeks of physical therapy thereafter. See Pl.’s Dep., Aug. 16, 2001, at 73.

Plaintiff also alleges she developed an astigmatism in her left eye. See Complaint, at ¶ 8. The date on which this condition first manifested itself is not noted in the evidence presented. As of April 1993, plaintiff was wearing glasses that corrected her vision to approximately 20/20. See id. at 47-48, 58-59.

Plaintiff filed a Federal Employers’ Liability Act (“FELA”) action against Conrail in the Circuit Court of Wayne County, Michigan, for damages arising out of injuries she sustained in

work-related accidents, including those in which plaintiff injured her knee. See Pl.’s Answer to Def.’s Mot. for Summ. J., at 3; Pl.’s Dep., Aug. 16, 2001, at 22-27. In a deposition taken prior to trial of that case, Dr. Edison, plaintiff’s physician, testified, “[b]ased on my experience with [Cade] ... I conclude that she is unable to continue [working as a block operator],” Dep. of Dr. Raymond C. Edison, Feb. 9, 1994 (“Def.’s Ex. D”), at 28, and that he had restricted her from working in a job requiring constant standing, lifting, pushing, or pulling. See id. at 39. Dr. Edison further testified that plaintiff was physically able to walk, drive, perform the activities of daily living, and work in a clerical capacity. See id. at 40.

At trial in plaintiff’s FELA case in February 1994, plaintiff testified that she could not return to her job as a block operator because she was unable to “go up and down stairs” and could not put a lot of weight on her right knee. Def.’s Ex. B, at 36. She explained that it was too painful for her to climb stairs,⁴ id. at 36, 41, but that she was willing to work for Conrail in some

⁴ Q. Well, alright. How long has it been since you last worked for Conrail?

A. February of ‘93.

Q. Any why haven’t you gone back to work?

A. I had a lot of problems with this knee after the surgery, the knee cap moved. So my knee cap sits to the outside of my leg. And its just certain thing I can’t do. I can’t go up and down stairs. Just certain things I can’t do.

...

Q. Now, why can’t you do your job at Conrail?

A. There’s too much stair climbing and the–In all the towers now, all the bathrooms are outside. So that means that they’re outside, down the stairs. So that means you have to go up and down the stairs quite a bit. If there’s any problems, if you have to walk the tracks, that means you have to go outside and down the stairs.

other capacity if there was a job that she could perform. See id. at 59-60.

Conrail and plaintiff settled the FELA action in February 1994 before verdict. Under the settlement agreement, Conrail paid plaintiff \$30,000. Plaintiff said at her deposition that, as she understood it, Conrail settled the case based upon her testimony and the testimony of her physician that she could not work at her former job. Pl.'s Dep., Aug. 16, 2001, at 68-69.

Plaintiff's knee condition improved after February 1994, and by March 1994, or a year after her March 1993 knee surgery, plaintiff testified that she was able to climb stairs again, but not frequently.⁵ Def.'s Ex. B, at 35-36; Pl.'s Dep., Aug. 16, 2001, at 88. Other than her difficulty climbing stairs, plaintiff admitted she had no other restrictions on her mobility, Pl.'s Dep., Aug. 16, 2001, at 88, but she added that she uses a cane "to get around if [she feels] unusual pain in [her] knees." Aff. & Certification of Pl., Patricia A. Cade In Further Supp. of Her Answer to Def.'s Mot. for Summ. J. ("Pl.'s Ex. B"), at ¶ 12.

With respect to other activities plaintiff testified that her knee condition left her unable to go bowling, Pl.'s Dep., Aug. 16, 2001, at 89, or serve as an usher at church, id. at 91, because she could not "stand for a long period of time, without sitting or shifting [her] weight." Pl.'s Ex. B, at ¶ 11. She also stated that as a result of her knee condition she could not "sit in a seated position for a long period of time," id. at ¶ 10, but, in amplifying that answer, she admitted she

Q. And why can't you walk up the stairs?

A. My knee won't handle it. It's too painful.

Id. at 36-41.

⁵ The Court notes the timing of the settlement, February 1994, and plaintiff's substantial recovery by March 1994, but does not base its decision on that point.

was able to sit through an entire movie without taking a break. Pl.'s Dep., Aug. 16, 2001, at 90.

After the FELA action was settled, plaintiff's first contact with Conrail was in June 1994 when she called Kevin Dailey at Conrail and notified him that she wanted to return to work as a block operator. See id., at 69-70. According to plaintiff, Dailey told her that she couldn't see, id. at 74; she responded that "glasses could correct the problem if he thought [she] had one." Id. at 76. Plaintiff cannot recall the rest of the conversation, see id. at 74-76, but shortly thereafter, in June 1994, at Conrail's request, plaintiff saw Dr. Shelfoon for a return to work physical.⁶ See id. at 80, 156-57.

In July 1994, plaintiff received a letter dated July 8, 1994 from Conrail directing plaintiff to Dr. Sam Nasser, an orthopedic physician, for evaluation. See id. at 80-81; Letter from Taras Nowosiwky, July 8, 1994 ("Def.'s Ex. E). Dr. Nasser examined plaintiff on July 26, 1994. See Rep. of Dr. Sam Nasser, MD, July 26, 1994 ("Def.'s Ex. F"), at 1. During the examination, plaintiff told Dr. Nasser that she had pain in her right knee and back, and was not getting much pain relief from the treatment at the hospital. Id. Dr. Nasser diagnosed plaintiff with "mild degenerative arthritis of the right knee, possibly post traumatic." Id. at 2. He concluded that plaintiff had "no obvious objective signs that these arthritic changes are affecting her muscle strength or range of motion," and that she could probably return to work, however, that in returning to work, she might have a problem with "some infrequent stair climbing." Id. According to plaintiff, Dr. Nasser told her "he didn't see any reason why [she] couldn't go back to work," and she responded, "good." Pl.'s Dep., Aug. 16, 2001, at 94.

⁶ The parties provided no further information regarding plaintiff's contact with Dr. Shelfoon.

During the July 26, 1994 visit, plaintiff testified that Dr. Nasser filled out a form stating plaintiff was qualified to return to work as a block operator and that she delivered this form to Conrail that same day. Id. at 92-93. Defendant has no record that it ever received this form, and neither plaintiff nor Dr. Nasser have produced the form or any documents in which it is referenced.

Plaintiff's next contact with Conrail was a telephone call that she made in August 1994 to a block operator named Michael Jackson for the purpose of obtaining the phone number of the Alexis Tower. Id. at 95. "Alexis is the location where [employees] call to let [Conrail] know when [they are] available to work." Id. at 96. Rather than giving plaintiff the number, Jackson "said he would call ... [and she] could hear the conversation because they have ... a radio system that he can plug in and talk to Alexis." Id. at 96-97. Jackson placed the call and told the person who answered that "he had Pat Cade on the phone, and she wants the number to call for availability." Id. at 97. According to plaintiff, the Conrail employee responded, "I don't want to talk to her." Id.

Plaintiff testified that, around August 1994, she sent a registered letter to Kevin Dailey, id. at 99, in which she "said that [she] was ready to come back to work, and [she] had tried everything to make [herself] available." Id. Defendant denies receiving any such letter, and a copy of the letter was not produced by plaintiff in discovery; it is presently the subject of a motion for sanctions.

In February 1996,⁷ Kevin Dailey sent plaintiff a letter in which he stated that plaintiff was

⁷ The record contains no evidence of contact between plaintiff and Conrail between the summer of 1994 and February 1996. On this point plaintiff testified at her deposition that she tried to contact Kevin Dailey by telephone at his Conrail office on several occasions, but she

“released to return to work in July of 1994 [by Dr. Nasser]. Since you failed to do so, this is to advise you have forfeited your seniority.”⁸ Id. at 101. Plaintiff never wrote to Dailey in response, and never tried to contact Conrail after February 1996. See id. at 103. She did, however, write to her union steward in Michigan, but she never received a response from the union. See id. at 101-02.

Before filing the present action, plaintiff was a member of a class action certified in the United States District Court for the Western District of Pennsylvania to pursue claims under the Americans with Disabilities Act and § 504 of the Rehabilitation Act. The class was comprised of current and former employees and applicants of Conrail “who ‘ha[d] been denied employment ... because of their disabilities.’” Freed v. Consolidated Rail Corp., 201 F.3d 188, 190 (3d Cir. 2000) (citation omitted). On August 20, 1998, the district court de-certified the class and entered judgment in favor of Conrail ““without prejudice to the right of any plaintiff, or any other employee, to assert individual claims against Conrail under the ADA [or] Rehabilitation Act.”” Id.

III. STANDARD OF REVIEW

“If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

provided no dates and admitted that she never spoke to him. See Pl.’s Dep., Aug. 16, 2001, at 116-17.

⁸ According to plaintiff, this letter officially terminated her employment at Conrail. See Pl.’s Answer to Def.’s Mot. for Summ. J., at 6. It is unclear from the record whether this letter did in fact officially terminate plaintiff’s employment at Conrail.

moving party is entitled to a judgment as a matter of law[,]" summary judgment shall be granted. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Supreme Court has explained that Rule 56(c) requires "the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Therefore, "a motion for summary judgment must be granted unless the party opposing the motion can adduce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 618 (3d Cir. 1987) (citing Anderson and Celotex Corp.).

In considering a motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 159, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (quoting United States v. Diebold, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)). However, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Therefore, "[i]f the evidence [offered by the non-moving party] is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted). On the other hand, if reasonable minds can differ as to the import of the proffered evidence that speaks to an issue of material fact, summary judgment should not be granted.

IV. DISCUSSION

“The Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq.,⁹ forbids federal employers from discriminating against persons with disabilities in matters of hiring, placement or advancement.” Mengine v. Runyon, 114 F.3d 415, 418 (3d Cir. 1997). To establish a prima facie case of discrimination under this Act, “the employee bears the burden of demonstrating (1) that he or she has a disability; (2) that he or she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) that he or she was nonetheless terminated or otherwise prevented from performing the job.” Donahue v. Consolidated Rail Corp., 224 F.3d 226, 229 (3d Cir. 2000) (quoting Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996)).¹⁰

An “individual with a disability,” the first element of a prima facie case of discrimination under the Rehabilitation Act, is defined as an individual who: “(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment.” 29 U.S.C. § 705(20)(B). Plaintiff contends that she is disabled under the first and third prongs of this

⁹ Section 504(a) of the Rehabilitation Act provides in pertinent part, “[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a).

¹⁰ Section 504(d) of the Rehabilitation Act provides that “the standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990.” 29 U.S.C. § 794(d). See Donahue, 224 F.2d at 229 & n.2 (“The elements of a claim under § 504(a) of the Rehabilitation Act are very similar to the elements of a claim under Title I of the [ADA].”); McDonald v. Pennsylvania Dept. of Pub. Welfare Polk Center, 62 F.3d 92, 94 (3d Cir. 1995) (“Congress made clear its intention that identical standards were to be applied to both Acts.”).

definition—that her “physical ... impairments substantially limit[ed] one or more [of her] major life activities” and that Conrail “regarded [her] as having such an impairment” when she asked to return to work and Conrail did not rehire her. The Court addresses each argument in turn.

A. Actual Disability

To establish an actual disability, “a claimant must initially prove that ... she has a physical or mental impairment.” Toyota Motor Mfg., Kentucky, Inc. v. Williams, 122 S.Ct. 681, 690 (2002) (quoting 42 U.S.C. § 12101(2)(A)). “The Rehabilitation Act regulations issued by the Department of Health, Education, and Welfare (HEW) ... define ‘physical impairment,’ the type of impairment relative to this case, to mean ‘any physiological disorder or condition ... or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs’” Id. (quoting 45 C.F.R. § 84.3(j)(2)(i) (2001)).¹¹

“Merely having an impairment does not make one disabled for purposes of the ADA.” Id. at 690; see also Kelly v. Drexel Univ., 94 F.3d 102, 108 (3d Cir. 1996) (quoting Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995)). To establish a disability, plaintiff must show that her impairment substantially limits one or more major life activities. Toyota, 122 S. Ct. at 691 (citing 42 U.S.C. § 12102(2)(A)). The terms “major life activity” and “substantially limits” must be interpreted strictly so as “to create a demanding standard for qualifying as disabled.” Id. at 691.

“‘Major life activities’ ... refers to those activities that are of central importance to daily

¹¹ The Supreme Court considers these regulations to be “of particular significance because at the time they were issued, HEW was the agency responsible for coordinating the implementation and enforcement of § 504 of the Rehabilitation Act.” Toyota, 122 S. Ct. at 690 (citing Bragdon v. Abbott, 524 U.S. 624, 632, 118 S.Ct. 2196, 141 L. Ed. 2d (1998) (citations omitted)).

life.” Id. Examples of “major life activities” include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, sitting, standing, and lifting. 45 C.F.R. § 84.3(j)(2)(ii); Kralik v. Durbin, 130 F.3d 76, 79 (3d Cir. 1997) (quoting 29 C.F.R. § 1630 App.).

Although the term “substantially limited” is not defined in the Rehabilitation Act regulations, the EEOC regulations implementing the ADA provide guidance on the meaning of this term. See Scarborough v. Natsios, No. Civ. A. 99-2454, 2002 WL 441117, *12 (D.D.C. March 20, 2002) (“Congress drew the ADA’s definition of disability almost verbatim from the definition of ‘handicapped individual’ in the Rehabilitation Act,’ so it is appropriate to use the definition of ‘substantially limits’ under the ADA to interpret the same phrase in the Rehabilitation Act.” (quoting Toyota, 122 S.Ct. at 689)). The EEOC regulations define “substantially limited” as follows:

(i) [u]nable to perform a major life activity that the average person in the general population can perform, or (ii) [s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. § 1630.2(j)(1). The EEOC regulations further provide that the following factors may be considered in assessing whether plaintiff’s physical impairment substantially limits a major life activity: “(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” 29 C.F.R. § 1630.2(j)(2).

In Toyota, the Supreme Court explained that:

“[S]ubstantially” in the phrase “substantially limits” suggests “considerable” or “to a large degree.” See Webster’s Third New International Dictionary 2280 (1976) (defining “substantially” as “in a substantial manner” and “substantial” as

“considerable in amount, value, or worth” and “being that specified to a large degree or in the main”); see also 17 Oxford English Dictionary 66-67 (2d ed. 1989) (“substantial”: “relating to or proceeding from the essence of a thing; essential”; “[o]f ample or considerable amount, quantity, or dimensions”). The word “substantial” thus clearly precludes impairments that interfere in only a minor way with the performance of [a major life activity] from qualifying as disabilities.

Id. at 691.

Thus, to be substantially limited in a major life activity, “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must be permanent or long-term.” Id. (citing 29 C.F.R. §§ 1630.2(j)(2)(ii)-(iii) (2001)).

To establish a disability, plaintiff cannot “merely submit evidence of a medical diagnosis of an impairment,” id., but must ““prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience ... is substantial.”” Id. at 691-92 (quoting Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555, 567, 119 S.Ct. 2162, 144 L. Ed. 2d (1999)).

Plaintiff claims that she is actually disabled because her physical impairments—a condition in her right knee and an astigmatism in her left eye—substantially limit at least one of her major life activities. The Court now considers whether plaintiff’s knee condition or her astigmatism is a physical impairment that substantially limits plaintiff in a major life activity.

1. Plaintiff’s Knee Condition

Plaintiff contends that her knee condition is a physical impairment that substantially limits her from engaging in life activities—walking, climbing stairs, sitting, standing, bowling, performing manual tasks, and working—all of which she categorizes as major life activities.

Defendant admits that plaintiff's knee condition may constitute a physical impairment, see Def.'s Mot. for Summ. J., at 13. Thus, with respect to this issue, the Court must determine whether plaintiff has adduced sufficient evidence from which any reasonable juror could conclude that plaintiff's knee condition substantially limits her from engaging in at least one major life activity.

The Court must follow a two-step inquiry. First, the Court must determine whether plaintiff is substantially limited in any major life activity other than working. Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 783 (3d Cir. 1998). If the Court finds that plaintiff is substantially limited in a major life activity other than working, the inquiry ends. Id. at 784. If the Court finds otherwise, the Court must determine whether plaintiff "is substantially limited in the major life activity of working." Id.

(a) Life Activities Other than Working

(1) *Walking and Climbing Stairs*

The Third Circuit recognizes that walking is a major life activity, see Kralik, 130 F.3d at 78 (quoting 29 C.F.R. § 1630.2(i)), but has not so ruled with respect to climbing stairs.

Defendant contends that "[c]limbing stairs is not a sufficiently basic and essential function to qualify as a major life activity." Def.'s Mot. for Summ. J., at 11. Other courts, including the Fifth Circuit, have held that climbing stairs is not a sufficiently "basic, necessary, function" to qualify as a major life activity. Robinson v. Global Marine Drilling Co., 101 F.3d 35, 37 (5th Cir. 1996); Piascyk v. City of New Haven, 64 F. Supp. 2d 19, 26 (D. Conn. 1999), aff'd, 216 F.3d 1072 (2d Cir. 2000) (holding that climbing stairs and ladders do not qualify as major life activities); Miller v. Airborne Express, No. 3:98-CV-0217-R, 1999 WL 47242, *4, *5 (N.D. Tex. Jan. 22, 1999) (holding climbing stairs is not a major life activity). This Court assumes for

purposes of this motion only that climbing stairs is a major life activity and considers whether plaintiff is substantially limited in either of the two activities—walking and climbing stairs—together.

Moderate restrictions on a claimant’s ability to walk and climb stairs are insufficient to establish a substantial limitation. In Kelly, 94 F.3d at 106-8, the Third Circuit ruled that a plaintiff, who suffered from “severe post-traumatic degenerative joint disease of the right hip and protrusio acetabulum of the right hip joint” and as a result walked slowly, could not walk for more than one mile, and used a handrail when climbing stairs, had only moderate difficulty climbing stairs and walking and thus, was not substantially limited in the major life activity of walking. See also Penchishen v. Stroh Brewery Co., 932 F. Supp. 671, 673-75 (E.D. Pa. 1996) (holding that a plaintiff with a metal plate in her left ankle that required plaintiff to “use stairs by placing both feet on each step before moving to the next step” was not substantially limited in the activity of walking, only that she walks and climbs stairs slowly); Stone v. Entergy Servs., Inc., Civ. A. No. 94-2669, 1995 WL 368473, *3-4 (E.D. La. June 20, 1995) (holding that plaintiff’s “muscle weakness, partial paralysis, one leg longer than the other and one foot longer than the other,” which required plaintiff to rest after climbing two flights of stairs and “to be careful to put [his] whole foot on the stair when ... going up” because he could not lift his right foot off the ground, was not a substantial limitation). In this case, the Court concludes that, similar to the plaintiff in Kelly, there is no evidence that plaintiff’s knee condition constituted a substantial limitation; only that the long-term, permanent effect of her knee condition caused her to have, at most, moderate difficulty climbing stairs and walking as compared with the average person in the general population.

First, although the testimony of plaintiff¹² and her physician, Dr. Edison, suggest that it was too painful for plaintiff to climb stairs in February 1994, Def's Ex. B, at 36, 41; Def's Ex. D, at 28, plaintiff's own testimony establishes that her condition was only this severe temporarily and that by March 1994, she could climb stairs again. See Pl.'s Dep., Aug. 16, 2001, at 87-89. Thus, when plaintiff attempted to return to work in June 1994, her only difficulty climbing stairs was an inability to climb up and down one flight of stairs frequently. See id.

Further, in his report detailing the results of his examination of plaintiff on July 26, 1994, Dr. Nasser diagnosed plaintiff as suffering from "mild degenerative arthritis of the right knee, possibly post traumatic."¹³ Id. at 2. He observed that "outside of some infrequent stair climbing, [Cade] should have no problems with her job" and concluded that "she could probably return to work, given that she has no obvious objective signs that these arthritic changes are affecting her muscle strength or range of motion." Id.

Plaintiff's statement that she uses a cane "to get around if [she feels] unusual pain in [her]

¹² At trial in the FELA action in February 15, 1994, plaintiff testified, "I can't go up and down stairs. Just certain things I can't do." Def.'s Ex. B, at 36. Plaintiff testified that she could not put a lot of weight on her right knee, id., and that she could not climb stairs because her "knee won't handle it. It's too painful." Id. at 41.

¹³ Dr. Nasser observed the following of plaintiff: (1) "no specific localized findings in her gait pattern which would suggest a ... knee problem;" (2) "no obvious muscle wasting present on examination of either of her lower limbs;" (3) "normal appearance of the [right] knee;" (4) "negative Lachman, negative pivot shift, negative McMurray tests;" (5) "[r]ange of motion of both knees is nearly identical when [plaintiff] can be distracted" signifying "fairly substantial voluntary component to her condition;" and (6) "when [plaintiff] can be made to concentrate on some other aspect of her examination, her knee falls into more than 100 degrees of flexion naturally, indicating that her hesitancy is probably at least partial guarding." Def.'s Ex. F, at 1. Dr. Nasser also reported that the radiographs "show some mild degenerative arthritis of the right knee with some slight joint space narrowing," concluding that "this is very mild, involving primarily the medial aspect of the joint." Id. at 2.

knees,” Pl.’s Ex. B, at ¶ 12, is too ambiguous to support a finding of a substantial limitation because it fails to identify the conditions under which or how often plaintiff must use the cane. Moreover, there is no evidence that a doctor ordered Cade to use the cane. See Taylor, 177 F.3d at 187 (citing Douglas v. Victor Capital Group, 21 F. Supp. 2d 379 (S.D.N.Y. 1998)) (holding that plaintiff’s occasional use of cane or crutch that he was not medically required to use could not meet his burden of proof).

Finally, although plaintiff asserts that she cannot walk for extended distances, Pl.’s Letter, Jan. 14, 2002, at 2, there is simply no evidence of such a limitation. At her deposition, plaintiff testified she did not know how far she was able to walk and admitted that no doctor had ever restricted her from walking. Pl.’s Dep., Aug. 16, 2001, at 88-89. Moreover, plaintiff admitted at her deposition that, other than her difficulty climbing stairs frequently, she had no restrictions on her mobility. Id. at 88.

Based on the evidence presented, the Court concludes plaintiff’s knee condition does not substantially limit her ability to walk or climb stairs. Thus, plaintiff’s argument with respect to these activities fails.

(2) *Sitting*

With respect to the activity of sitting, plaintiff’s testimony that her knee condition restricts her from sitting for prolonged periods of time, see Pl.’s Dep., Aug. 16, 2001, at 89-90; Pl.’s Ex. B, at ¶10, is too vague to establish a substantial limitation. See Piascyk, 64 F. Supp. 2d at 29 (“plaintiff’s testimony that when he returned to work, he could not sit for ‘long periods of time,’ sometimes not longer than fifteen or twenty minutes, at other times not longer than two hours ... too vague [a description of his limitation] to establish a substantial limitation.”). The only other

evidence in the record on this issue, plaintiff's testimony that she is able to sit through an entire movie without moving, at most, establishes a moderate, but not substantial, restriction on plaintiff's ability to sit. Helfter v. United Parcel Serv., Inc., 115 F.3d 613, 616 (8th Cir. 1997) (holding plaintiff's statement that she could not sit for longer than 30 minutes insufficient to establish a disability). The Court concludes that, based on the evidence presented, the effect of plaintiff's knee condition on her ability to sit is simply not severe enough relative to the average person in the general population to establish a substantial limitation. See 29 C.F.R. § 1630.2(j)(1); 29 C.F.R. Pt. 1630, App. § 1630.2(j).

(3) *Standing*

Similarly, plaintiff's argument regarding the activity of standing fails. Plaintiff's testimony that she cannot "stand for long periods of time" and had to stop serving as an usher at church, see Pl.'s Dep., Aug. 16, 2001, at 91, and Dr. Edison's testimony in February 1994 that plaintiff could stand if she changed positions "from time to time" as long as she was not constantly standing, Def.'s Ex. D, at 39, are both too vague to establish a substantial limitation. Colwell v. Suffolk County Police Dept., 158 F.3d 635, 644 (2d Cir. 1998) (holding plaintiff's statements that he has difficulty standing "at attention" for "any period of time" or standing "in one spot" too vague to establish a substantial limitation.); Piascyk, 64 F. Supp. 2d at 29 (finding medical testimony "that plaintiff was limited in his ability to endure 'prolonged standing' ... [is] too ambiguous to support a finding of a substantial limitation."). The only other evidence in the record on this issue, plaintiff's testimony that she can stand for an hour without resting if she shifts her body weight or leans, see Def's Ex. A, at 91, is insufficient to establish that plaintiff's knee condition substantially limits her in the activity of standing. See Taylor, 177 F.3d at 186-87

(holding that a plaintiff is not substantially limited in the activity of standing if the plaintiff can stand for at least 50 minutes without resting because such ability “is not significantly less than that of an average person.”); see also Buskirk v. Apollo Metals, 116 F. Supp. 2d 591, 599 (E.D. Pa. 2000).

(4) *Bowling*

With respect to the activity of bowling, plaintiff’s argument fails because, under the circumstances of this case, athletic activities, such as bowling, are not major life activities. See Buskirk, 116 F. Supp. 2d at 598; Colwell, 158 F.3d at 643 (1999) (golfing and skiing do not constitute major life activities); Ouzts v. USAir, Inc., Civ. A. No. 94-625, 1996 WL 578514, at *14 n.14 (W.D. Pa. Jul. 26, 1996)(noting that bowling is not a major life activities).

(5) *Performing Manual Tasks*

Finally, the Court rejects plaintiff’s claim that her knee condition substantially limits her in performing manual tasks. Although plaintiff first raised this argument in a letter to the Court after briefing on defendant’s motion for summary judgment was complete, the Court nonetheless considers the argument. See Pl.’s Letter, Jan. 14, 2002, at 2-3.

“When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives.” Toyota, 122 S.Ct. at 693. Examples of the types of tasks that are considered of central importance to people’s daily lives include household chores, bathing, and brushing one’s teeth. Id. There is simply no evidence in the record that, as a result of her knee condition, plaintiff faced any difficulties performing any of these household or personal hygiene tasks, or any

other tasks that might be considered central to people's daily lives. To the contrary, plaintiff's physician, Dr. Edison, testified in February 1994 that plaintiff was able to drive a car herself, walk, and do the activities in daily living to take care of herself. Def's Ex. D, at 40. Thus, the Court rejects plaintiff's argument with respect to the performance of manual tasks.

(b) The Activity of Working

Finally, the Court considers whether plaintiff is substantially limited in the activity of working. The relevant inquiry is "whether the particular impairment constitutes for the particular person a significant barrier to employment." Mondzelewski, 162 F.3d at 784 (quoting Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996) (citations omitted)). The Court must determine "whether the individual is 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes *as compared to the average person having comparable training, skills and abilities.*'" Id. (quoting 29 C.F.R. § 1630.2(j)(3)(i) (emphasis added)). Further, when determining whether the person's major life activity of working has been substantially limited, the Court must consider the following factors:

- (A) [t]he geographical area to which the individual has reasonable access;
- (B) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
- (C) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii). This assessment must be made on an individualized, case-by-case

basis. See Mondzelewski, 162 F.3d at 784.

Plaintiff summarily argues that “she has shown that she is unable to work in a broad class of jobs [because t]he Defendant has refused to hire her, claiming that she is unable to perform any job of bridge/block operator, delay clerk or any other position within the Defendant Company.” Pl.’s Letter, Jan. 14, 2002, at 3. On the other hand, plaintiff admits in her Complaint that “[s]ince February 1994, Plaintiff has been able to perform her job as a block operator without accommodation ... [and] has also been capable of performing a variety of other jobs, such as delay clerk for which she has seniority.” Complaint, at ¶¶ 9, 10. This admission clearly undermines any argument that plaintiff’s knee condition substantially limited her from working as a block operator or delay clerk when she attempted to return to work at Conrail in June 1994.

Moreover, it is insufficient for plaintiff to demonstrate an inability to perform a single, particular job. Sutton, 527 U.S. at 492. Plaintiff cannot establish that her knee condition substantially limited her in the activity of working by showing that her physical limitations precluded her from working as a block operator; rather, plaintiff must show that her knee condition prevented her from performing a broader class of potential jobs for a person of her vocational skills and training.

To sustain her burden on summary judgment on this issue, plaintiff “must provide some ‘evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (‘few,’ ‘many,’ ‘most’) from which an individual would be excluded because of an impairment.’” Ouzts v. USAir, Inc., Civ. A. No. 94-625, 1996 WL 578514, *16 (W.D. Pa. July 26, 1996) (citations omitted), aff’d, 118 F.3d 1577 (3d Cir.

1997); see also Balls v. AT&T Corp., 28 F. Supp. 2d 970, 975 (E.D. Pa. 1998) (holding that a plaintiff's failure to "present demographic evidence to show from what jobs in her geographic area plaintiff has been excluded due to her disability ... is fatal at summary judgment." (quoting Taylor v. Phoenixville Sch. Dist., 998 F. Supp. 561, 568 (E.D. Pa. 1998), rev'd on other grounds, 174 F.3d 142 (3d Cir. 1999)), aff'd, 229 F.3d 1137 (3d Cir. 2000); Sears v. E.I. Du Pont de Nemours & Co., Inc., 1999 WL 825602, *6 (D. Del. Sept. 30, 1999)("[t]he Interpretive Guidelines make clear that what is required is the presentation of "general employment demographics and/or recognized occupational classifications that indicate the approximate number of jobs ... from which an individual would be excluded because of an impairment." (quoting 29 C.F.R. App. § 1630.2(j))).

Plaintiff presented no evidence that she is disqualified because of her knee condition from any jobs in the geographic area as to which she has reasonable access. Specifically, she presented no evidence of the number and types of jobs utilizing similar training, knowledge, skills or abilities from which she is disqualified. Nor has she presented any evidence with respect to jobs not utilizing similar training, knowledge, skill or abilities from which she is disqualified. She has not even presented any evidence that her knee condition substantially limited her from working as a block operator or delay clerk at any time material to her claim. On the other hand, the record establishes that, in June 1994, plaintiff worked in a clerical capacity for another employer, and continued to work in that job until December 1998. See Pl.'s Dep., Aug. 16, 2001, at 35-39. According to plaintiff's own physician, plaintiff "should have no difficulty with" a clerical job. Def's Ex. D, at 28.

Based on the record presented, the Court concludes that plaintiff was not substantially

limited in the activity of working as a result of her knee condition when she attempted to return to work at Conrail in June 1994. Plaintiff's knee condition was not an actual disability within the meaning of the Rehabilitation Act.

2. Plaintiff's Astigmatism

Plaintiff also claims that she is disabled because she has “an astigmatism of her left eye which condition when uncorrected substantially impaired her ability to see.” Complaint, at ¶ 8. According to plaintiff, an astigmatism is a disability within the meaning of the Act because a visual impairment is a covered condition under the Act. See Plaintiff's Answer to Def.'s Mot. for Summ. J., at 11. Defendant argues that plaintiff's astigmatism is not a disability within the meaning of the Act because it is correctable to approximately 20/20 with corrective lenses.

The issue before the Court is whether plaintiff's vision is an impairment that substantially limits plaintiff from engaging in at least one major life activity. In making such a determination, “a court must look at [a] plaintiff's impairments *after* corrective measures are taken—e.g., medication, eyeglasses.” Marinelli v. City of Erie, 216 F.3d 354, 362 n.4 (3d Cir. 2000) (citing Albertson's, 119 S. Ct. at 2169; Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S. Ct. 2139, 2146, 144 L. Ed. 2d 450 (1999)). A person whose impairment is corrected by mitigating measures does not have an impairment that substantially limits a major life activity and is not disabled within the meaning of the ADA. See Sutton, 527 U.S. at 481-83.

Similar to plaintiffs in Sutton, Cade's visual impairment¹⁴ can be corrected to

¹⁴ For purposes of this motion, the Court assumes, without deciding, that plaintiff's astigmatism is a physical impairment.

approximately 20/20 by wearing glasses that she has worn since April 1993, over a year before plaintiff attempted to return to her job as a block operator. See Pl.’s Dep., Aug. 16, 2001, at 47-48, 59. On this basis, the Court concludes that plaintiff’s astigmatism was not disability within the meaning of the Rehabilitation Act.

B. “Regarded As” Disabled

In the alternative, plaintiff argues that Conrail regarded her as substantially limited in the major life activity of working and thus disabled for purposes of the Rehabilitation Act. See 29 U.S.C. § 705(20)(B)(iii). That section provides that an individual who is “regarded as having a disability” is disabled within the meaning of the Rehabilitation Act.

The “regarded as” argument was raised for the first time in Plaintiff’s Response to Defendant’s Reply Memorandum of Law in Support of Patricia A. Cade’s Answer to Defendant’s Motion for Summary Judgment (“Pl.’s Resp.”), her second filing related to the summary judgment motion.¹⁵ In advancing this argument, plaintiff did not cite to the record.

There are two ways in which an individual may be “regarded as” having a disability: “(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more life activities.” Sutton, 527 U.S. at 489. “In either case, the definition of ‘substantially limits’ remains the same as it does in other parts of

¹⁵ In making her “regarded as” claim, plaintiff argues that “the Defendant has used Plaintiff’s physical capabilities to disqualify her from holding any position as bridge/block operator, delay clerk, clerical position or any other position within the company.” Pl.’s Resp., at 3. The Court considers plaintiff to be claiming that Conrail regarded plaintiff as substantially limited in the major life activity of working.

the statute—i.e., if the individual is attempting to establish that the employer believed the individual to be limited in the life activity of ‘working,’ then ‘working’ must encompass a broad class of jobs.” Tice v. Centre Area Transp. Auth., 247 F.3d 506, 514 (3d Cir. 2001) (citing Sutton, 527 U.S. at 489-93).

Plaintiff asserts that she is “regarded as” disabled under the second of these prongs—that Conrail mistakenly believed that she was substantially limited in the major life activity of working because it mistakenly believed that her knee condition and astigmatism prevented her from working “as bridge/block operator, delay clerk, clerical position or any other position within the company.” See Pl.’s Resp., at 3.

It is clear from the record that Conrail was aware that plaintiff had a knee condition and vision difficulties. At her deposition, plaintiff testified that when she called Conrail and asked to return to work in June 1994, Kevin Dailey told plaintiff, “you can’t see.” And, with regard to her knee condition, plaintiff had testified in her FELA action against Conrail that her knee condition prevented her from working as a block operator at Conrail. However, “the mere fact that an employer is aware of an employee’s impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that the perception caused the adverse employment action.” Kelly, 94 F.3d at 109. The decisive issue is whether Conrail regarded plaintiff as having an impairment that substantially limited her from engaging in a major life activity—in this case, working.

The evidence establishes that Conrail’s orthopedic physician released plaintiff to return to work as a block operator on July 26, 1994, noting only that plaintiff might have some problems

with infrequent stair climbing, see Def.'s Ex. F, at 2, and that Conrail terminated plaintiff because plaintiff had not returned to work after Conrail's physician released her to return to work. Pl.'s Dep, Aug. 16, 2001, at 101. On the latter point, plaintiff testified at the deposition that, in February 1996, she received a letter from Conrail stating that plaintiff forfeited her seniority because she had been "released to return to work in July of 1994 [by Dr. Nasser]. Since you failed to do so, this is to advise you have forfeited your seniority." Id. at 101. This evidence supports the argument that Conrail regarded plaintiff as fully capable of working as a block operator. On the other hand, in its motion, Conrail asserts that, notwithstanding plaintiff's contentions to the contrary and the fact that Dr. Nasser had released plaintiff to return to work, plaintiff was physically unable to work as a block operator at Conrail. See Reply Memo. of Law in Support of Conrail's Mot. for Summ. J., at 5. Based on this argument, the Court concludes that there is an issue of fact as to whether Conrail regarded plaintiff as unable to work as a Conrail block operator. That, however, is insufficient to defeat summary judgment on plaintiff's "regarded as" claim.

The fact that Conrail might have regarded plaintiff as unable to work in a single job—as a block operator—is not evidence that Conrail regarded plaintiff as substantially limited in the major life activity of working. See Sutton, 527 U.S. at 492-93; 29 C.F.R. § 1630.2 (j)(3)(i) ("[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."). Rather, to establish that Conrail regarded plaintiff's knee condition or astigmatism as substantially limiting her in the activity of working, plaintiff must demonstrate that Conrail regarded her as unable to perform a class of jobs or broad range of jobs in various classes. Plaintiff presented no evidence that Conrail held such a perception. In fact,

plaintiff testified at her deposition that since 1992 she has never talked to anyone at Conrail about working in any job other than that of block operator or train dispatcher—a job for which plaintiff did not pass the qualifying test. See Pl.’s Dep., Aug. 16, 2001, at 68, 108. There simply is no evidence that Conrail regarded plaintiff as unable to work in either a class of jobs or broad range of jobs. Accordingly, the Court rejects plaintiff’s argument that Conrail regarded her impairments as substantially limiting her from engaging in the major life activity of working.

V. CONCLUSION

For the foregoing reasons, the Court concludes plaintiff is not disabled within the meaning of the Rehabilitation Act. Accordingly, the Court grants Defendant’s Motion for Summary Judgment and enters judgment in favor of defendant and against plaintiff. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA A. CADE	:	
	:	CIVIL ACTION
vs.	:	
	:	
CONSOLIDATED RAIL CORPORATION	:	NO. 98-5941

ORDER

AND NOW, this 7th day of May, 2002, upon consideration of Defendant's Motion for Summary Judgment (Document No. 43, filed November 9, 2001), Plaintiff's Answer to Defendant's Motion for Summary Judgment (Document No. 44, filed November 21, 2001), Plaintiff's Supplemental Answer to Defendant's Motion for Summary Judgment (Document No. 46, filed November 29, 2001), Reply Memorandum of Law in Support of Conrail's Motion for Summary Judgment (Document No. 47, filed December 3, 2001), Plaintiff's Response to Defendant's Reply Memorandum of Law in Support of Patricia A. Cade's Answer to Defendant's Motion for Summary Judgment (Document No. 50, filed December 17, 2001), the Affidavit and Certification of Plaintiff, Patricia A. Cade In Further Support of Her Answer to

Defendant's Motion for Summary Judgment,¹⁶ and Plaintiff's Letter to the Court dated January 14, 2002,¹⁷ for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that Defendant's Motion for Summary Judgment is **GRANTED** and **JUDGMENT IS ENTERED** in **FAVOR** of defendant, Consolidated Rail Corporation, and **AGAINST** plaintiff, Patricia A. Cade.

IT IS FURTHER ORDERED that, in view of the granting of Defendant's Motion for Summary Judgment, Defendant Consolidated Rail Corporation's Motion for Sanctions (Document No. 45, filed November 28, 2001) is **DENIED**.

BY THE COURT:

JAN E. DUBOIS, J.

¹⁶ The original of the Affidavit and Certification of Plaintiff, Patricia A. Cade In Further Support of Her Answer to Defendant's Motion for Summary Judgment shall be docketed by the Clerk of the Court.

¹⁷ The original of Plaintiff's Letter to the Court dated January 14, 2002 shall be docketed by the Clerk of the Court.