

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL L. DEFRANC and U.S. POSTAL SERVICE,
POST OFFICE, Manchester, N.H.

*Docket No. 96-318; Submitted on the Record;
Issued July 6, 1998*

DECISION and ORDER

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

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained recurrences of disability in March 1992 and March 1993 causally related to her accepted employment injury; and (2) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective August 21, 1994 on the grounds that she had no further employment-related condition or disability after that date.

The Office accepted that appellant sustained low back strain on September 3, 1988 when she attempted to open a stuck window. Appellant returned to limited-duty employment for four hours per day in April 1989. By decision dated December 18, 1991, the Office found that appellant's employment for four hours per day as a limited-duty rural carrier fairly and reasonably represented her wage-earning capacity and accordingly reduced her compensation effective April 8, 1989.

In a report dated February 27, 1992, Dr. Michele Gaier Rush, a Board-certified neurologist and appellant's attending physician, discussed appellant's history of injury and her treatment of appellant. She noted that nerve conduction studies performed on appellant in August 1991 revealed a bilateral L5-S1 radiculopathy. Dr. Rush also noted that appellant had a history of migraine headaches. She stated, "I feel that [appellant] is totally disabled as a result of this injury because she is unable to be pain free for periods longer than 30 minutes at most significantly affecting her ability to work." In an accompanying work restriction evaluation of the same date, Dr. Rush opined that appellant could work two hours per day in accordance with the listed limitations.

By letter dated March 9, 1992, the employing establishment informed the Office that appellant was currently working only two hours per day. Appellant submitted claims for continuing compensation on account of disability (Form CA-8) requesting compensation for six hours per day.

By letter dated May 27, 1992, the Office informed appellant that she should exercise her appeal rights if she disagreed with the Office's December 1991 wage-earning capacity determination. The Office further indicated that Dr. Rush found that appellant was disabled due to headaches and depression rather than her September 1988 employment injury.

In a report dated June 22, 1992, Dr. Rush notified the Office that it had misrepresented her comments in her February 27, 1992 report. Dr. Rush stated that appellant "is disabled because of her chronic and severe low back pain, which occurred on the job at the [employing establishment] in 1988. The other concurrent medical problems are there but are not contributing to this disability."

In a report dated March 4, 1993, Dr. Rush related that her findings on examination were "essentially unchanged" and opined that appellant was disabled from her employment due to severe pain. Dr. Rush referred appellant to Dr. Ralph D. Beasley, a Board-certified anesthesiologist, for pain management. In an accompanying work restriction evaluation of the same date, Dr. Rush found that appellant could not work.

The record indicates that appellant stopped working on March 4, 1993.

In a report dated November 23, 1993, Dr. Beasley, in response to questions posed by the Office, opined that appellant continued to experience residuals from her September 1988 employment injury. Dr. Beasley stated:

"[T]he reason a back strain [has] not resolved in over five years is that this is not a simple back strain. I have felt there has been evidence of iliolumbar ligament strain, which would go along with a back strain, but there has been evidence of piriformis muscle and gluteal muscle myofascial trigger points which have not been adequately treated in the past. There are also electrodiagnostic studies showing L5-S1 radiculopathy, but normal appearing EMG [electromyogram] of the paraspinal muscles indicating that the nerve injury is somewhere distal to the immediate lumbar spine. This would be consistent with a sciatic nerve injury or entrapment by the piriformis muscle. Physical examination has shown that there is decreased sensation along the L5-S1 dermatome, again confirming nerve injury. Therefore, with continuing nerve injury and continuing pain and myofascial trigger points, her complaints would not resolve, for as you can see, it was not just a simple back strain...."

Dr. Beasley stated that he could not determine whether appellant's condition changed after March 3, 1993, as he did not examine her prior to that time. Dr. Beasley also related that he would have to perform a physical capacity evaluation on appellant to determine the nature and extent of any disability.

On November 26, 1993 appellant filed a notice of recurrence of disability (Form CA-2a) alleging that on March 4, 1993 she sustained a recurrence of disability causally related to her September 3, 1988 employment injury.

In a report dated December 23, 1993, an Office medical adviser reviewed appellant's file and diagnosed "chronic low back and leg pain of unknown etiology." He recommended that the Office refer appellant for a second opinion evaluation.

By letter dated January 5, 1993, the Office referred appellant, together with the case record, questions and a statement of accepted facts, to Dr. John Duff, a Board-certified orthopedic surgeon, for a second opinion evaluation. The Office requested that Dr. Duff provide, *inter alia*, an opinion on whether appellant continued to suffer residuals of her September 3, 1988 back strain, whether her condition materially worsened on March 4, 1993 and the dates that she was unable to work in her four-hour per day limited-duty position.

In a report dated January 21, 1994, Dr. Duff diagnosed back pain with sciatica of undetermined etiology and ileitis of the left sacroiliac joint. Dr. Duff stated:

"The complaints of pain which she has cannot be accounted for by a clinical entity as far as I can determine, other than the possibility of the ileitis aggravating the sciatic nerve. I do not believe this is a piriformis syndrome and I do not feel that the positive nerve conduction studies bilaterally and equally have any relationship to the complaint."

Dr. Duff found that the only objective findings on physical examination was "active sacroiliac activity by x-ray and I do not think that accounts for her complaints...." Dr. Duff opined that appellant was physically capable of performing her limited-duty position. He further found "no deterioration in any condition that can account for the increasing episodes of pain" in March 1993.

In a report dated February 18, 1994, Dr. Rush found that appellant was totally disabled due to pain. In an accompanying work restriction evaluation of the same date, Dr. Rush found that appellant was unable to work.

By letter dated March 28, 1994, the Office requested that Dr. Duff discuss whether appellant could perform any of the positions listed in the enclosed statement of accepted facts in either a full or part-time capacity. The Office further requested that Dr. Duff complete an enclosed work restriction evaluation form.

By letter dated April 8, 1994, the Office requested that Dr. Duff provide an opinion whether appellant has any residual disability causally related to her September 3, 1988 employment injury.

In a supplemental report dated January 21, 1994, Dr. Duff found that appellant could perform light-duty work for 4 hours per day, with no lifting over 10 pounds, frequent bending and with alternating sitting and standing. He further stated, "Finally, in my opinion, I do not believe that there is any residual disability related to the September 3, 1988 episode."

By letter dated June 6, 1994, the Office requested that Dr. Duff discuss whether appellant could perform her date-of-injury position and further requested that he complete the enclosed work restriction evaluation.

By letter dated July 15, 1994, the Office informed appellant that it proposed to terminate her compensation on the grounds that the medical evidence established that she had no further disability due to her accepted employment injury. The Office provided appellant 30 days to submit additional evidence or arguments.

In a report dated July 8, 1994, Dr. Duff opined that appellant could not return to her regular employment due to arthritis in her knees.

By decision dated August 16, 1994, the Office terminated appellant's compensation benefits effective August 21, 1994. The Office further terminated appellant's authorization for medical treatment.

In a report dated August 12, 1994, received by the Office on August 18, 1994, Dr. Rush stated that appellant had been compliant with treatment since her 1988 employment injury, but that her low back pain "has now developed into a chronic pain syndrome." She found that appellant was totally disabled due to pain.

By letter dated September 14, 1994, appellant, through her attorney, requested a hearing before an Office hearing representative.

In a report dated November 15, 1994, Dr. Rush related that appellant's "neurologic exam[ination] has remained essentially normal with the exception of some patchy decreases in sensation in both lower extremities." She stated:

"Because [appellant] had absolutely no prior history of back problems I do feel strongly that her current situation is related to the injury sustained at the [employing establishment] on September 3, 1988."

"I believe that [appellant] has developed a myofascial pain syndrome. This condition is extremely difficult to treat despite every effort by the patient to be compliant with the recommendations made by the medical community. [Appellant's] current limitation is pain which is severe and chronic."

By letter dated March 10, 1995, appellant's attorney informed the Office hearing representative that appellant was appealing both the termination of her benefits and the failure to the Office to compensate her for periods of disability subsequent to the Office's wage-earning capacity determination.

In a decision dated August 3, 1995, the Office hearing representative affirmed the Office's August 16, 1994 decision. The hearing representative found that appellant did not establish that she sustained a recurrence of disability such that she required wage-loss compensation for six hours per day from March 1992 to March 1993 or compensation for total wage-loss disability after March 1993. The Office hearing representative further found that the Office met its burden of proof to terminate appellant's compensation benefits.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective August 21, 1994, on the grounds that she had no further employment-related condition or disability after that date.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ After it has been determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²

In the present case, the Office based its termination of appellant's compensation benefits on the opinion of Dr. Duff, a Board-certified orthopedic surgeon, to whom it referred appellant for evaluation. The Board has carefully reviewed the opinion of Dr. Duff and notes that it does not have sufficient reliability, probative value and convincing quality with respect to the conclusions reached regarding the relevant issue of whether appellant continues to suffer residuals of her employment injury. Therefore, the Office did not have an adequate basis upon which to terminate appellant's compensation effective August 21, 1994.

In a report dated January 21, 1994, Dr. Duff diagnosed back pain with sciatica of unknown etiology and ileitis of the left sacroiliac joint. Dr. Duff found that appellant's complaints of pain "cannot be accounted for by a clinical entity as far as I can determine, other than the possibility of the ileitis aggravating the sciatic nerve." He noted that the only objective findings on physical examination was "active sacroiliac activity by x-ray," which he opined was not the cause of her complaints of pain. Dr. Duff found that appellant could perform her limited-duty position at the employing establishment.

The Office requested that Dr. Duff provide further clarification of his January 21, 1994 report, with respect to whether appellant had continuing residuals of her employment-related low back strain. However, in his January 21, 1994 addendum, Dr. Duff did not provide adequate clarification of this matter. In his supplemental report, Dr. Duff stated, "Finally, in my opinion, I do not believe that there is any residual disability related to the September 3, 1988 episode." Dr. Duff, however, did not provide any medical rationale for his opinion. The Board thus concludes that Dr. Duff's report was not well rationalized and insufficient to establish that appellant had no further disability due to the accepted employment injury.

For these reasons, the Office did not meet its burden of proof to terminate appellant's compensation effective August 21, 1994.

The Board further finds that the case is not in posture for a decision regarding the issues of whether appellant met her burden of proof to establish that she sustained recurrences of disability in March 1992 and March 1993 causally related to her accepted employment injury.

¹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

² *Id.*

The Office provided Dr. Duff with a list of questions regarding appellant's condition, including whether her condition worsened in either March 1992 or March 1993 such that she was unable to perform her limited-duty part-time employment. As discussed *supra*, Dr. Duff's opinion does not adequately address these issues. Further, the reports of appellant's attending physician, Dr. Rush, while not fully rationalized, support appellant's contention that she was unable to perform her limited-duty position due to her accepted employment injury. Therefore, the case is remanded for further development on the issue of whether appellant sustained recurrences of disability in March 1992 and March 1993 causally related to her accepted employment injury.³

The decision of the Office of Workers' Compensation Programs dated August 3, 1995 is hereby reversed and the case is remanded for further development consistent with this opinion of the Board.

Dated, Washington, D.C.
July 6, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

³ *John J. Carlone*, 41 ECAB 354 (1989).