U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARMEN GOULD and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 97-2225; Submitted on the Record;
Issued August 3, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that she sustained a recurrence of disability on September 11, 1995 causally related to her September 1, 1995 accepted lumbar strain injury.

On September 5, 1995 appellant, then a 35-year-old letter carrier, filed a claim for compensation alleging that on September 1, 1995 she sprained her back and strained her right elbow while in the performance of duty. In a September 8, 1995 dispensary note, the employing establishment stated that appellant could return to limited duty on September 11, 1995, with restrictions against bending and lifting, and a restriction against pushing or pulling more than 10 pounds. Appellant was also restricted to an alternating cycle of sitting, standing and walking while at work.

On September 18, 1995 appellant filed a claim for recurrence of disability stating that her back continued to cause pain and that an employing establishment's doctor examined her on September 18, 1995, (appellant returned to work on September 11, 1995) and found that she was not fit for duty. Appellant did not return to work after September 18, 1995.

In reports dated September 22 and October 2, 1995, Dr. Howard Past, appellant's treating chiropractor, stated that appellant had been under his care since September 18, 1995, and that she was symptomatic with moderate to severe back pain with moderate to severe loss of range of motion. Dr. Past stated that appellant should be placed in a total disability status.[1]

By letter dated October 4, 1995, the Office of Workers' Compensation Programs advised appellant that chiropractors are physicians "for compensation purposes only in connection with manual manipulation of the spine to correct a subluxation of the spine, as demonstrated by x-ray to exist, causally related to the claimed work-related injury." The Office therefore stated that

[1] In a September 22, 1995 dispensary note, the employing establishment stated that appellant was not fit for duty from September 22 to October 2, 1995, "per [appellant's] chiropractor."

appellant must arrange for submission of an x-ray report to demonstrate subluxation, but that if she were unable to do so, the reports which she had thus far submitted from her chiropractor would have no probative value and would not be considered medical evidence in her claim. The Office also notified appellant that she could submit medical evidence along with an opinion from a medical doctor or an osteopath establishing a causal relationship between his (or her) findings and appellant's employment injury.

On the same date, the Office notified appellant that it had received her claim for recurrence of disability and advised her regarding the type of medical evidence she would be required to submit to establish her claim for recurrence of disability. The Office noted that appellant had been performing light duty at the time of the alleged recurrence of disability, and thus she would need to demonstrate a change in the nature and extent of her injury or a change in the nature of the light-duty requirements.

In a report dated October 18, 1995, Dr. Past stated that appellant had been under his care since September 18, 1995. He stated that appellant sustained moderate to severe back pain with moderate to severe loss in range of motion, and that appellant was totally disabled from work until "his/her condition stabilizes."

In a report dated November 1, 1995, Dr. Past noted results of a reexamination, stating that appellant would be totally disabled until her condition stabilized.

In a medical report dated November 9, 1995, Dr. John M. Olsewski, Board-certified in orthopedic surgery, stated, postevaluation for lumbosacral strain, that appellant was not able to return to work until "she is involved in an intense physical therapy regimen of trunk strengthening and stabilization types of exercises," and sought authorization from the Office to place her in such a program.

In an attending physician's report dated December 8, 1995, Dr. Past stated that he provided spinal manipulation, electronic muscle stimulation and ultra-sound treatment for appellant's lumbar and thoracic conditions.

In a report dated December 27, 1995, Dr. Past stated that appellant had received chiropractic treatment three times a week beginning on September 18, 1995. He stated that appellant should remain under thrice-weekly treatment "for the purpose of correcting and stabilizing his/her condition." Dr. Past noted that this was not maintenance care.

On January 18, 1996 the Office, in a decision, denied appellant's claim for recurrence of disability on the grounds that the evidence of record failed to establish that appellant's condition was causally related to the September 1, 1995 accepted lumbar strain injury.

In a medical report dated January 11, 1996 and received by the Office on January 17, 1996, Dr. Olsewski related appellant's history of injury, noting that she was "going up stair, slipped, grabbed a hold of a banister and fell," which caused the "onset of lower back pain." Dr. Olsewski then stated that on November 9, 1995 he performed a physical examination, took x-rays and discussed appellant's need for therapy. He noted that appellant had sustained a lumbosacral strain.

In a Form CA-8 dated January 16 and received by the Office on January 23, 1996, appellant claimed pay loss from December 2, 1995 to January 16, 1996.

In a medical report dated January 24, 1996, Dr. Olsewski stated that appellant was still not able to return to work as a result of her lumbosacral strain, but that she would be able to "get … back to work quicker if she were involved in a physical therapy regimen."

In medical reports dated February 5 and April 30, 1996, Dr. Olsewski essentially repeated his January 11, 1996 report.

In a medical report dated May 15, 1996, Dr. Olsewski stated that appellant "has been going to physical therapy aggressively and [is] not really better. Will order magnetic resonance imaging (MRI) scan to rule out any occult pathology."

In a medical report dated May 16, 1996, Dr. Olsewski noted a familiarity with appellant's medical history, noting that she had been under his care since November 9, 1995 for middle to lower thoracic and low back pain. He noted that initial x-rays showed normal hip and sacroiliac joints, no evidence of spondylolysis, spondylolisthesis, disc space narrowing, neuroforaminal narrowing, fracture or dislocation, lytic or blastic process. Dr. Olsewski noted appellant's follow-up visits stating that physical therapy had been authorized at the time of his May 9, 1996 examination, but that appellant had not improved significantly as a result. He also noted that he had requested authorization for an MRI scan.

In an undated letter received by the Office on June 24, 1996 appellant requested reconsideration and authorization for an MRI scan.[2]

In an August 16, 1996 merit decision, the Office denied modification of its January 18, 1996 decision. In an undated letter received by the Office on August 22, 1996 appellant requested reconsideration. In support of her application, appellant resubmitted the May 16, 1996 medical report from Dr. Olsewski.

By decision dated September 17, 1996, the Office denied appellant's application for review finding that the evidence submitted was duplicative in nature and therefore insufficient to warrant review of the prior decision.

The Board finds that appellant has failed to establish that she sustained a recurrence of disability on September 11, 1995 causally related to her September 1, 1995 accepted lumbar strain injury.

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and

[2] In her reconsideration letter, appellant stated that she was placed in a not fit-for-duty status effective September 11, 1995. The Board notes that a dispensary note placed appellant in a not fit-for-duty status from September 8 to 11, 1995. Further, appellant stated in her claim for recurrence of disability that she was placed in a not fit-for-duty status effective September 18, 1995. The record contains a dispensary note which placed appellant in a not fit-for-duty status from September 18 to 22, 1995.

probative evidence that the disability for which he claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish 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 the employment injury and supports that conclusion with sound medical reasoning.[3]

Section 8101(2) of the Federal Employees' Compensation Act provides that the term "'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[4] In order for Dr. Past, appellant's treating chiropractor, to be considered a "physician" under the Act, and therefore establish his reports as probative medical evidence, he must diagnose a subluxation as demonstrated by x-ray. He did not diagnose a subluxation as demonstrated by x-ray to exist.[5] Accordingly, the Board finds that Dr. Past is not a "physician" under the Act and his reports are of no probative medical value to appellant's claim.

Appellant also submitted medical reports from Dr. Olsewski, Board-certified in orthopedic surgery. In none of these reports did Dr. Olsewski provide a rationalized medical opinion establishing a causal relationship between appellant's current condition and her accepted injury. For example, in his May 16, 1996 report, Dr. Olsewski noted appellant's history of injury to her thoracic spine and low back, noted also her physical therapy regimen and its results, and his conclusion that appellant had not recovered sufficiently to return to work. However, his opinion did not explain the nature of the relationship between the diagnosed condition and the September 1, 1995 accepted injury.[6] The Board has long held that medical opinions not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet appellant's burden of proof.[7]

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a recurrence of disability on September 11, 1995 causally related to her September 1, 1995 accepted injury.

The September 17, August 16 and January 18, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
August 3, 1999

[3] *Lourdes Davila*, 45 ECAB 139 (1993).

[4] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

[5] The Board notes that Dr. Olsewski's reading of appellant's x-rays did not include diagnosis of subluxation.

[6] *Charles E. Burke*, 47 ECAB 185 (1995).

[7] *Carolyn F. Allen*, 47 ECAB 240 (1995).

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas, Alternate Member, dissenting:

The appellant herein, Carmen Gould, filed a notice of traumatic injury on September 5, 1995 contending that she sustained a traumatic injury occurring on September 1, 1995. She reported the injury to be injured fingers, back sprain and right elbow strain following a trip and fall on stairs of the postal premises. Appellant reported that she gave official notice and stopped work on September 5, 1995 and returned to work on September 11, 1995.

The record discloses that appellant was issued employing establishment Form 3956 on September 5, 1995 captioned *Authorization For Medical Attention.* This form does not indicate whether a nurse or physician completed the form. Nonetheless, the form indicates that appellant was not fit for duty until September 8, 1995 at which time she should be fit for limited duty. A diagnosis of low back strain was made and a further evaluation was scheduled for September 8, 1995.

The record further discloses that appellant was re-evaluated on September 8, 1995 and found not fit for duty until September 11, 1995 when she should have been able to perform limited duty with specific restrictions of no bending, no lifting, pushing or pushing over 10 pounds and alternate sitting, standing and walking. A follow-up appointment was given for September 18, 1995.

An employing establishment Form 3956 completed on September 18, 1995 discloses that appellant was again evaluated as not fit for duty due to low back strain and given a return appointment for September 22, 1995. All of the forms were signed by the same physician or nurse.

On September 18, 1995 appellant filed a notice of recurrence of disability (Form CA-2a) contending that disability recurred on September 11, 1995 and that she stopped work on September 18, 1995 due to back pain in the lower half of the left side of her back which extended down her leg. She further reported that when examined by the postal medical officer on September 18, 1995 she was found not fit for duty.

The record contains numerous reports from Dr. Howard Past, a chiropractor. However, Dr. Past did not indicate he diagnosed a subluxation by x-ray and therefore does not qualify as a physician under section 8101(2) of the Federal Employees' Compensation Act. His reports of appellant's disabling back condition will be omitted herein.

Appellant submitted a report by Dr. John M. Olsewski, Assistant Professor of Orthopaedic Surgery and Chief of the Orthopaedic Spine Surgery at Montefiore Medical Center. Dr. Olsewski stated:

> "[Appellant] has been referred to me for evaluation of a lumbosacral strain. I do not feel at the present time that she is capable of continuing her activities as a [p]ostal worker until she is involved in an intense physical therapy regimen of trunk strengthening and stabilization types of exercises. I am therefore asking authorization for such therapy."

In a decision dated January 18, 1996, the Office of Worker's Compensation Programs denied appellant's claim for a recurrence of disability commencing September 11, 1995 on the grounds that the recurrence of disability on or after September 11, 1995 was causally related to the accepted injury. The Office did not discuss Dr. Olsewski's report and request for authorization to provide physical therapy.

Dr. Olsewski repeated his request to the Office in a letter dated January 24, 1996. In medical reports dated February 5 and April 4, 1996, Dr. Olsewski reported that the diagnosis was still lumbosacral strain, that appellant still had not received authorization for physical therapy and that he "strongly recommended therapy."

In an interval history note dated May 9, 1996, Dr. Olsewski reported that appellant had reported some improvement, but only slight in physical therapy. He noted that appellant found it somewhat depressing that she had not noticed more improvement as regards her back pain. He further noted that Mr. Steve Laurence, a physical therapist, was of the opinion that appellant had a "tremendous amount of mild fascial type of pain." He reported that in light of the fact that appellant had not shown improvement under aggressive physical therapy, he was requesting authorization for an magnetic resonance imaging (MRI) scan to rule out any other type of occult pathology. He noted that he would see appellant again after the MRI; that she was to continue the physical therapy and that, at the present time, "she remains 100 [percent] totally disabled from her postal workers' job."

Appellant subsequently requested reconsideration, requested authorization for an MRI and informed the Office that she was totally disabled. She submitted a medical report by Dr. Olsewski dated May 16, 1996 which essentially incorporated all of his previous reports and findings.

In a decision dated August 16, 1996, the Office denied modification of its January 18, 1996 decision. In support of its denial the Office gave the following rationale:

> "On review, it was noted that Dr. Olsewski did not examine the claimant until [November 9, 1995], almost [two] months after the date of the alleged recurrence. In addition, it was noted the orthopedic examination conducted by Dr. Olsewski was indicated as being normal as well as x-rays which were also conducted. Despite these findings, Dr. Olsewski had noted that: '... in light of the fact that she must do lifting and extensive carrying of objects on her job, my recommendation was that' she be totally disabled for the next six weeks from her previous level of employment."

From a careful perusal of the total evidence of record, I must respectfully dissent from the conclusion of the majority herein that appellant has not established a recurrence of disability causally related to her accepted injury of September 1, 1995.

Every medical practitioner who evaluated appellant found her not fit for duty and gave an anticipated recovery date for limited duty. Finally, on September 11, 1995, appellant stopped work contending the pain was too severe to continue working and that the pain was extending down into her leg. Appellant reported that the postal medical officer also found her not fit for duty. After being referred for medical treatment with Dr. Olsewski, appellant was again noted to be totally disabled and had to wait several months for approval for authorization for physical therapy. Dr. Olsewski continued to maintain that appellant was 100 percent totally disabled for her postal duties through the date of the Office's most recent decision.

The record does not contain a single report that appellant recovered from her initial injuries. She was consistently found not fit for duty, given an estimated date that she should be fit for limited duty, and a future date given for a follow-up evaluation. On each subsequent evaluation, appellant was found not fit for duty.

The record contains evidence from each employing establishment Form 3956 that appellant's medical condition was rated as not fit for duty on every single examination after each anticipated recovery date for limited duty. In addition, her treating orthopedic surgeon reported appellant to be 100 percent totally disabled and unable to perform her postal duties. There is no medical evidence in this record to the contrary. Appellant has satisfied her burden of proof under *Terry Hedman*, 38 ECAB 222 (1986).

The Office of Workers' Compensation Programs has denied this claim without a single report showing that appellant was capable of performing her postal duties, limited or regular, during the period for which compensation is claimed. The fact that appellant went back to work based on an estimated date she should be able to perform limited duty is commendable and should not be used as a basis for concluding that residuals of the September 1, 1995 injury ceased since after each follow-up appointment she was found not fit for duty.

I find that appellant has been unjustly deprived of compensation benefits for a legitimate work-related injury. I would reverse the decisions of the Office dated January 18 and August 16, 1996. For the foregoing reasons, I must strongly record this dissent.

Willie T.C. Thomas
Alternate Member