

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MYONG S. LANGER and DEPARTMENT OF THE ARMY,
FORT POLK, Fort Polk, La.

*Docket No. 97-445; Submitted on the Record;
Issued June 25, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of disability on January 11, 1996 causally related to her August 21, 1994 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied authorization for appellant's back surgery.

On August 21, 1994 appellant, then a 44-year-old food service worker, sustained injury when she was lifting a 50-pound crate of carrots. Her claim was accepted by the Office for a lumbar strain and herniated disc at L4-5. Appellant received appropriate compensation benefits prior to her return to work in the position of a modified food service worker, originally for four hours a day on August 18, 1995 and then to full-time duty on August 28, 1995. Her duties consisted of copying and stapling papers, answering the telephone, replenishing the salad bar, operating the cash register and wiping the serving line.¹

The record reflects that, following injury, appellant came under the treatment of Dr. Chanh Vinh, a general practitioner, and Dr. John M. Patton, a Board-certified neurosurgeon. Dr. Patton obtained a magnetic resonance imaging (MRI) scan on January 25, 1995 which revealed mild disc bulging at L4-5, a disc protrusion on the left at L5-S1, and a disc protrusion at T12-L1. Appellant was continued on conservative treatment prior to her return to work, however the need for possible disc surgery was raised. On June 8, 1995 an Office medical adviser reviewed the file and noted that there was a discrepancy between the level of proposed surgery, L5-S1, with the level of the accepted disc at L4-5. He noted that this should be resolved prior to authorization of any request for surgery.

¹ By decision dated January 3, 1996, the Office found that appellant's actual wages as a modified food service worker fairly and reasonably represented her wage-earning capacity. On the present appeal, appellant has not sought review of the January 3, 1996 wage-earning capacity determination.

On January 30, 1996 appellant filed a notice of recurrence of disability alleging a recurrence as of January 11, 1996. Appellant contended that working eight hours a day caused leg and back pain. She did not stop work.²

In support of her claim, appellant submitted a January 11, 1996 treatment note from Dr. Patton, who noted appellant's complaint of pain in her back, buttocks and thighs. He reported that physical examination showed straight leg raising to 85 degrees, with no weakness in either leg or foot. Sensory testing was reported as unremarkable. Dr. Patton reviewed appellant's MRI and noted it demonstrated a central L5-S1 disc bulge. He advised that she could either return to work for four hours a day or have surgical intervention, stating: "I certainly can [not] make her completely well and I do [not] feel that she is completely disabled."

By letter dated January 19, 1996, the Office advised appellant that the evidence of record was not sufficient to establish her recurrence of disability claim.

In attending physician reports dated January 18 to April 3, 1996, Dr. Vinh stated that appellant was partially disabled and could only work four hours a day. He also restricted her to no pushing or pulling. In a May 8, 1996 report, Dr. Vinh found appellant to be totally disabled for work and advised that she not return as of his May 7, 1996 examination. Appellant stopped work on May 7, 1996 and did not return.

By decision dated May 23, 1996, the Office denied appellant's claim for a recurrence of disability commencing January 11, 1996. The Office found that Dr. Patton's January 11, 1996 report was not sufficient to establish that her disability on or after that date was causally related to her August 21, 1994 employment injury.³

In a June 20, 1995 report, Dr. Patton noted that appellant had attempted to work four hours a day but continued to experience flank-type back pain as well as right paravertebral muscle pain into the right buttock and both legs to down below the knees. He reported his findings on physical examination and noted that appellant had failed to respond to all modalities of conservative treatment. Dr. Patton stated that he had no other suggestion but to remove appellant's ruptured disc. He indicated that he was willing to proceed with an L5-S1 discectomy, and at some later date do surgery on the upper lumbar and thoracic discs. He advised appellant not to return to work.

On August 1, 1996 an Office medical adviser reviewed the case record and noted that despite conservative treatment, appellant's low back and leg pain had not subsided. He noted, however, that the proposed laminectomy at L5-S1 was not appropriate as appellant's neurological examination remained normal and the recommendation for surgery was based on a diagnostic test which was one and one-half years old.

² Appellant subsequently submitted Office CA-8 forms, claiming intermittent periods of disability after January 11, 1996.

³ In a letter of August 5, 1996, the Office noted receipt of appellant's CA-8 claim forms and advised her to exercise her appeal rights attached to May 23, 1996 decision denying her recurrence of disability claim.

By decision dated August 16, 1996, the Office denied authorization for surgery.

The Board finds that the case is not in posture for decision.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁴

In the present case, appellant sustained injury on August 21, 1994 which was accepted by the Office for a lumbar strain and a herniated disc at L4-5. Following a period of conservative treatment, appellant returned to work under restrictions as set forth by her attending physicians, originally for four hours a day on August 18, 1995 and then to full-time limited duty on August 28, 1995. On January 30, 1996 appellant filed a notice of recurrence of disability commencing January 11, 1996. The record reflects that appellant worked on an intermittent basis until advised by Dr. Vinh to stop work on May 7, 1996. Appellant submitted reports from Dr. Patton, who reviewed appellant's complaints, findings on examination, and conservative treatment. He noted, as of January 11, 1996, that appellant could work only four hours a day. In his June 20, 1996 report, Dr. Patton stated that appellant's response to conservative modalities had failed and recommended surgery for treatment of her lumbar spine.

The Board notes that while the reports of Drs. Patton and Vinh are not sufficient to meet appellant's burden of proof, they are consistent in indicating that appellant experienced a change in the nature and extent of her employment-related condition resulting in partial disability commencing January 11, 1990 and total disability as of May 7, 1990. The reports of Dr. Patton addressed appellant's continuing symptoms following her return to limited duty and her conservative treatment following the 1994 employment injury, which was accepted for a herniated disc. While the Office medical adviser commented on the discrepancy between the L5-S1 disc, for which surgery was recommended, and the level of the accepted disc at L4-5, the Office never requested Dr. Patton to address or otherwise clarify his opinion on this aspect of the case. While the Office medical adviser commented that the diagnostic test was over one year old at the time Dr. Patton recommended surgery in 1996, the Board notes that it included findings pertaining to disc bulges and protrusions which are not otherwise contradicted by any other substantial medical evidence. The evidence submitted by appellant is sufficient to require the Office to further develop the case.⁵

Accordingly, the case will be remanded to the Office for further evidentiary development regarding the issues of whether appellant sustained a recurrence of disability commencing on or after January 11, 1996 causally related to her August 21, 1994 injury and whether surgery, as

⁴ *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ *See Robert A. Redmond*, 40 ECAB 796 (1989).

recommended by Dr. Patton, should be authorized. Should additional diagnostic testing of the lumbar spine be required, the Office should authorize such procedures. After such further development of the case record as the Office deems necessary, a *de novo* decision should be issued.

The decisions of the Office of Workers' Compensation Programs dated August 16 and May 23, 1996 are hereby set aside and the case remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
June 25, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member