

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANNE E. FLECK and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, St. Cloud, MN

*Docket No. 97-2757; Submitted on the Record;
Issued October 7, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant established that her disability for work from May 18, 1994 to September 24, 1995, was causally related to either her accepted work injury in 1990 or to factors of her federal employment.

On September 19, 1990 appellant, then a 50-year-old quality assurance clinical reviewer, filed a notice of traumatic injury, claiming that she hurt her back and the right side of her body on September 9, 1990 when she slipped on a piece of cellophane on the floor and fell heavily. The Office of Workers' Compensation Programs accepted the claim for strains of the low back, right knee and leg, cervical spine and right shoulder as well as impingement syndrome.

Appellant returned to work but received compensation for intermittent periods of disability from January 1992 through May 1994.¹ Subsequently, appellant claimed compensation for total disability from May 18 to June 10, 1994 and then went on leave without pay on June 13, 1994.²

Following two requests to appellant to submit medical evidence in support of her claimed recurrence of disability, the Office denied the claim on September 16, 1994 on the grounds that the medical evidence was insufficient to establish that the recurrence of disability from the light-duty job appellant was working prior to May 18, 1994 was causally related to the 1990 work injuries.

¹ Appellant worked full time at her sedentary job until June 10, 1993, when she curtailed her work week upon her physician's recommendation. She was instructed to avoid overhead reaching or lifting of more than 20 pounds and to alternate sitting and standing.

² On July 21, 1994 the Office informed appellant that the employing establishment had offered her a position as a social services technician, effective August 29, 1994, which had been found to be suitable to her work capabilities. On August 22, 1994 the Office provided appellant with 15 days to accept the job offer or her compensation would be terminated. The Office did not, however, issue a final decision terminating appellant's compensation.

The Office found that the August 23 and September 13, 1994 reports from appellant's treating physician, Dr. David L. Klaus, a Board-certified orthopedic surgeon, had little probative value because he failed to provide an opinion on the causal relationship of appellant's current condition to the 1990 injuries and his report of appellant's "worsening progression" was based only on appellant's subjective complaints.

Appellant requested a review of the written record and submitted additional medical evidence. On February 10, 1995 an Office hearing representative denied appellant's claim on the grounds that her disability after May 18, 1994 was not causally related to the accepted work injuries. The hearing representative found that appellant did not allege a change in the nature and extent of her light-duty requirements and that Dr. Klaus provided no objective support for any worsening of appellant's condition.

In a letter dated February 7, 1996, appellant requested reconsideration and submitted additional medical evidence. On June 10, 1996 the Office denied appellant's request as untimely filed and lacking clear evidence of error. Appellant appealed to the Board, which on April 29, 1997 remanded the case at the request of the Office for merit review of the claim.³

On remand, by compensation order dated June 10, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support was insufficient to warrant modification of its prior decision.

The Board finds that appellant has failed to meet her burden of proof in establishing that her recurrence of disability from May 18, 1994 to September 24, 1995, was causally related to either the 1990 work injury or to her employment.⁴

When an employee, who is disabled from the job he held when injured, returns to a light-duty position, or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence that he cannot perform such light duty.⁵ 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.⁶

In this case, despite several requests from the Office, appellant has failed to submit the medical evidence necessary to establish that her recurrence of disability for 16 months in 1994 through 1995 was causally related to the lumbar strain she sustained in 1990. Appellant has also failed to demonstrate either that her back condition worsened to the point that she could not perform the duties of her sedentary, part-time job or that the physical requirements of that

³ Docket No. 97-50, issued on April 29, 1997.

⁴ The Office accepted appellant's claim for a recurrence of disability resulting from an injury to her right knee on July 26, 1993 and paid appropriate compensation from September 25, 1995 onward. Appellant accepted disability retirement on November 16, 1995.

⁵ *Richard E. Konnen*, 47 ECAB 388 (Docket No. 94-1158, issued February 16, 1996).

⁶ *Gus N. Rodes*, 46 ECAB 518, 526 (1995).

position changed. A review of the medical evidence reveals the deficiencies upon which the Office relied in denying the claim.

A February 1, 1994 report from Dr. Robert A. Wengler, a Board-certified orthopedic surgeon, contains a complete history of appellant's various falls at work and of her medical treatment. Following a thorough physical examination, Dr. Wengler diagnosed spinal stenosis and nerve root impingement involving either the 4th or 5th lumbar nerve root. He added that appellant demonstrated acute radiculopathy, although her symptoms were "significantly more severe historically now than they were before." Based on the information provided by appellant, Dr. Wengler concluded that "there was a significant persistent aggravation of the neck and the back symptoms which developed as a function of the September 1990 fall."

Dr. Wengler provided no medical rationale for linking appellant's back pain in 1994 to the lumbar strain sustained in 1990. Nor did he opine that appellant was totally disabled due to specific work factors. In fact, he noted that she had not lost any substantial time from work, described herself as a workaholic and continued to work 8 to 10 hours a day on a regular basis. Because Dr. Wengler's opinion on causal relationship is cursory and his opinion on the cause of appellant's current back problems nonexistent, the Board finds that Dr. Wengler's report is insufficient to meet appellant's burden of proof in establishing any work-related disability.

On June 21, 1994 Dr. Klaus diagnosed chronic pain secondary to degenerative changes of the lumbar facets and discs, chronic cervical strain, right shoulder impingement syndrome and early degenerative arthritis of the left knee. He stated that appellant was totally disabled as of May 18, 1994. However, on July 14, 1994 Dr. Klaus completed a disability form finding her capable of working 8 hours a day with specified restrictions—no sitting or standing for prolonged periods, no bending or twisting at the waist, no lifting or carrying more than 15 pounds and the opportunity to lay down intermittently.

In a letter dated August 23, 1994, Dr. Klaus stated that when he saw appellant in May 1994 he felt, "according to her reports," that she was unable to sit or stand for any prolonged period of time without changing position frequently and required resting in a supine position to alleviate her pain. He opined that she was no longer able to carry on with the job she had been performing.

On September 13, 1994 Dr. Klaus opined that appellant was unable to return to work, probably on a permanent basis, based on her history and examination and given the "slowly worsening progression" of her physical condition. Dr. Klaus added that the rationale for "this recommendation" was based on appellant's reports of limited mobility and intolerance of both standing and sitting, with frequent muscle spasms in her neck and back as well as pain in her right shoulder, knee and leg. Because of her pain, appellant was unable to adhere to any definite schedule and frequently had to lie down for one or two hours. Because of her medication, appellant became drowsy and was unable to remain alert and concentrate on cognitive tasks.

In his December 8, 1994 letter, Dr. Klaus stated that all appellant's injuries were related to the 1990 fall at work. The force of the fall "was absorbed by putting strain on the muscles and ligaments" in appellant's lumbar spine and right leg, which aggravated the degenerative changes in the facets and discs. The fall produced an inflammatory response by the body to try and repair

the lumbar strain and, indirectly, appellant would place more strain on other parts of the body, which had also been previously injured. Because of the pain, appellant lost range of motion and gradually strength, flexibility, and endurance of the muscles in her neck, shoulder and right leg. Appellant also developed a chronic pain syndrome.

Dr. Klaus again stated that appellant was unable to perform the duties of her light-duty job because “she reports that she is unable to tolerate pain.” She uses several medications, which do impair her concentration, to try to diminish the pain. She also has to lie down frequently to take the stress off the muscles and ligaments of her lower back and neck. He added that because appellant’s work limitations resulted from pain, “and pain is by nature a subjective phenomenon,” he could offer little further “of an objective nature” other than right leg weakness and diminished range of motion of appellant’s neck, right shoulder and lower back.

In an August 29, 1997 report, Dr. Klaus stated that “a multitude of degenerative conditions in appellant’s neck, shoulder, both knees and lower back” restrict her from doing any regularly scheduled activities and require frequent resting. Dr. Klaus added that appellant would be unable to return to work.

The obvious omission in all of Dr. Klaus’ reports is a discussion of how appellant’s back condition in 1994 was still causally related to the 1990 fall or was caused by specific work factors involving the packing of file folders over six months in early 1994 in preparation for an office move. While appellant attributed her worsening condition to the repetitive activity of packing files, he did not mention this work factor in any of his reports. While Dr. Klaus found appellant to be totally disabled as of May 18, 1994, he indicated in July 1994 that she was capable of full-time work within certain physical restrictions. Ultimately, he found appellant totally disabled for all work, but he did not conclude that this disability was work related, either as a recurrence of her 1990 lumbar strain or as a result of injuries caused by work factors. Therefore, the Board finds that his reports are insufficiently probative to meet appellant’s burden of proof.

Appellant argues that two factors support the conclusion that her work-related back condition deteriorated to the point of rendering her totally disabled; first, the magnetic resonance imaging (MRI) scan dated September 30, 1994, showed a congenitally small canal through L2 to the sacrum, disc bulging at L2-3, L4-5 and L5-S1 with mild facet changes, and foraminal stenosis at L5-S1; and, second, the Office approved lumbar decompression surgery and accepted the claim for permanent aggravation of degenerative disc disease of the lumbar spine with stenosis.

First, the MRI scan does not establish any worsening of appellant’s condition caused by work factors. Dr. Klaus’ interpretation of the scan does not even mention appellant’s work or the 1990 fall as causing the changes. Nor does the scan report itself attribute any of the conditions found to work factors or the 1990 fall. Therefore, this evidence is not probative regarding the relevant issue of causation.

Second, the fact that the Office approves a particular treatment or accepts a condition as work related does not establish that a claimant is totally disabled for work.⁷ The burden of proof remains with appellant to establish that the condition or treatment caused disability for work. Here, the lumbar condition was accepted and the surgery approved on November 3, 1995, subsequent to the period for which appellant is claiming disability compensation. Nothing in the record establishes that the aggravation of appellant's degenerative disc disease caused disability prior to September 25, 1995, when appellant began receiving compensation for a recurrence of disability due to her knee problems. Therefore, the Board finds that appellant has not met her burden of proof.

Finally, the facts that appellant experienced periodic flare-ups of pain, that she believed that her current back condition was due to the 1990 fall and that she determined that she was unable to work after May 18, 1994 do not constitute medical evidence that her disability for work from May 18 to September 24, 1994 was caused by work factors or resulted from the lumbar strain sustained in the 1990 fall.⁸

The June 10, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
October 7, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁷ See *Carolyn F. Allen*, 47 ECAB 240, 245 (Docket No. 94-828, issued December 7, 1995) (finding that payment of expenses for medical treatment does not constitute acceptance of a claim).

⁸ See *Kathryn Haggerty*, 45 ECAB 383, 389 (1994) (finding that neither the fact that appellant's condition became apparent during a period of employment nor appellant's belief that her condition was caused by her employment is sufficient to establish a causal relationship); see also *John L. Clark*, 32 ECAB 1618, 1624 (1981) (finding that a medical opinion based on a claimant's complaint that he hurt too much to work, with no objective signs of disability being shown, was insufficient to establish a basis for compensation).