

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA ADDISS and U.S. POSTAL SERVICE,
POST OFFICE, Hauppauge, NY

*Docket No. 97-2748; Submitted on the Record;
Issued September 22, 1999*

DECISION and ORDER

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

The issues are: (1) whether appellant has established that she sustained recurrences of disability on August 4, 26 and 29, September 1 and 23, and October 11, 1995, causally related to her May 4, 1995 accepted cervical strain, lumbosacral strain and bilateral knee injuries; (2) whether appellant has established that she sustained a new injury on October 11, 1995; and (3) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's physician's request for back surgery.

On May 5, 1994 appellant, then 33-year-old clerk, tripped on a piece of plastic strapping on the workroom floor and fell. The Office accepted that appellant sustained cervical strain, lumbosacral strain and bilateral knee injuries including a right knee torn medial meniscus, for which she underwent arthroscopic surgery on March 28, 1995. Appellant returned to limited-duty work on July 13, 1995; she was terminated for cause effective November 13, 1995. On December 5, 1995 and again on January 2, 1996 appellant filed recurrence of disability claims alleging total disability commencing on November 13, 1995, her date of termination due to her May 5, 1994 injuries.¹ Appellant also alleged on one of the claim forms that she fell on October 11, 1995 injuring her neck, shoulders, right side, right arm, lower back and knees. In a prior statement on the date of the alleged injury, appellant claimed that she "was putting mail in a tray and [her] right leg gave out." Appellant further filed an additional recurrence claim alleging "right leg gave out" on October 11, 1995; she stopped work October 12, 1995 and returned

¹ Appellant also alleged that she was terminated in retaliation for her filing an Equal Employment Opportunity (EEO) complaint. The employing establishment stated that appellant was terminated due to failure to follow instructions and Postal regulations, and that her light-duty position would have remained available had she not deviated from regulations. Her union grievance regarding termination was denied. The Office did not render a formal final decision on appellant's November 13, 1995 claim, such that it is not now before the Board on this appeal; *see* 20 C.F.R. § 501.2(c).

October 14, 1995.² Appellant's supervisor noted that the employing establishment physician had found appellant fit to return to duty on the date of alleged recurrence, which occurred after two nonscheduled days.

In a November 10, 1995 statement, appellant claimed that she had knee swelling and pain and cramps, and that her leg was weak, and on several occasions while she was walking or standing the muscles would tighten and the kneecap would slip "out of the socket" and her leg would not support her weight and she would fall. Appellant reported that on October 12, 1995 while at work her muscles tightened and pulled her kneecap to the side of her leg, and that she was taken to the hospital. She alleged that on October 12, 1995 her foot was numb and cold and that she pulled herself up hurting her neck, shoulders, right arm and lower back. Appellant indicated that this happened because it became a continuous routine for her to get her own mail and clean out her cases, which she alleged went against her limited-duty status.

On January 4, 1996 the Office received several more recurrence claims from appellant. She alleged that on August 4, 1995 when sitting with her leg bent she had knee cramps and pain shooting up her leg, and that her kneecap was tender, swollen and weak. Appellant stopped work the next day and returned on August 8, 1995. Appellant's supervisor noted that appellant was not scheduled to work on August 6 or 7, 1995, and that she did not provide any medical evidence supportive of total disability on August 5, 1995. Also on January 4, 1996 the Office received a recurrence claim for August 26, 1995 in which appellant alleged that she had leg cramps when her leg was bent, kneecap tenderness, swelling and weakness. She returned to duty August 29, 1995. Appellant's supervisor noted that she left early on August 26, 1995 using annual leave, was not scheduled to work August 27 or 28, 1995, and did not submit medical evidence to support total disability for limited-duty employment. The Office additionally received a recurrence claim on January 4, 1996 for disability commencing August 29, 1995. She alleged "tenderness, pain, swelling and weak." Appellant's supervisor noted that she had returned to work for two and one half hours, then left, and did not provide any medical support for her alleged total disability for limited duty.³ Appellant further submitted a claim for recurrence of disability commencing September 1, 1995; she returned to duty on September 2, 1995. She described her recurrence as "knee is weak, kneecap is tender, cramps in knee and leg;" her supervisor again noted that no supportive medical evidence documenting total disability for limited duty was submitted. On February 20, 1996 appellant claimed recurrence of disability commencing September 23, 1995, describing the recurrence as "knee swelling kneecap tender." Appellant's supervisor noted that no supporting medical evidence documenting such a

² On the day preceding these alleged new injury/recurrence claims, an October 10, 1995 left knee magnetic resonance imaging (MRI) scan demonstrated a tear in the posterior horn of the medial meniscus and slight capsular effusion. On October 12, 1995 Dr. Eric N. Dubrow, a Board-certified orthopedic surgeon, reported that appellant claimed that on October 11, 1995 she tripped over a plastic band and twisted her right knee, experiencing a popping sensation. Dr. Dubrow indicated that x-rays were negative with no effusion, swelling, tenderness to palpation or neurovascular problems, and he diagnosed "acute subluxation of the right patella secondary to a work-related injury sustained on October 11, 1995." No mention of appellant's leg "giving out" or of her injuring her neck, shoulders, right side, right arm, lower back or left knee was made. An October 11, 1995 employing establishment health unit report indicated as history that appellant's "right leg gave out and twisted right knee."

³ In an August 29, 1995 medical progress note, Dr. Nestor D. Blyznak a Board-certified orthopedic surgeon, found a basically benign examination without limp, effusion, erythema, warmth, point tenderness or crepitation, and with full range of motion.

recurrence was submitted and no evidence supporting total disability for limited duty that date was provided, and that appellant returned to duty the next day.

By letter dated February 25, 1996, the Office requested that appellant submit further factual and medical evidence to support her new injury claim, including an employing establishment response and a comprehensive medical report. Nothing further was received by the Office.

By decision dated March 25, 1996, the Office rejected appellant's claim for a new injury on October 11, 1995, finding that the evidence of record failed to establish that an injury was sustained as alleged. The Office found that the fact of injury was not established as the evidence of record was conflicting regarding the mechanism of a new injury alleged on October 11, 1995 and regarding the nature and extent of such injury, with appellant alleging on her claim form that she fell on October 11, 1995 injuring her neck, shoulders, right side, right arm, lower back and both knees, but with Dr. Dubrow reporting the next day that appellant claimed that she tripped over a plastic band and twisted her right knee. It was also noted the employing establishment health unit records reported only that appellant's "right leg gave out," without any tripping over plastic bands, and without any falling or neck, shoulder, right side, right arm, lower back or left knee injury mentioned, and with appellant in an October 11, 1995 statement claiming that she "was putting mail in a tray and [her] right leg gave out," but thereafter stating that on October 12, 1995 her muscles tightened pulling her kneecap over to the side of her leg.

By letter dated April 15, 1996, appellant requested reconsideration, alleging that not all the medical evidence had been considered. The Office advised that no action would be taken as no factual or medical evidence had been submitted, and no new argument had been made, such that no basis for reconsideration had been identified. The Office determined that the new injury case and the recurrences cases should be doubled.

By decision dated May 6, 1996, the Office rejected appellant's claims for recurrence of disability commencing August 4, 26 and 29, September 1 and 23, and October 11, 1995 finding that appellant had not submitted medical evidence sufficient to demonstrate a change in the nature or extent of her injury-related condition or factual evidence sufficient to demonstrate a change in the nature or extent of her limited-duty employment.

By report dated July 5, 1996, Dr. Arnold M. Schwartz, a Board-certified orthopedic surgeon, requested authorization from the Office for surgical "exploration of the thoracolumbar spine, removal of Harrington Rod instrumentation, bilateral transverse process fusion [of the] lumbar spine, [an] iliac crest bone graft, [and] segmental spinal instrumentation." Dr. Schwartz diagnosed low back syndrome and spondylolisthesis and opined that appellant was disabled. He also provided a July 10, 1996 prescription which noted that appellant could not return to work due to "back pain secondary to injury on October 11, 1995." On September 13, 1996 Dr. Schwartz noted that appellant had cervical disc degeneration as well as lumbosacral disc degeneration and that a computerized tomography (CT) scan and discography of the lumbar spine demonstrated Grade I spondylolisthesis of L5 on S1, a Harrington Rod at the L3 level, degenerative changes of the facets at L3-4 with the inferior aspect of a prior fusion visualized and some artifact from the Harrington Rod present, and degenerative changes in the L4-5 facets. Dr. Schwartz did not explain how these diagnosed conditions were causally related to appellant's May 5, 1994 accepted lumbosacral and cervical soft tissue muscle strain injuries, or bilateral meniscal tear knee injuries.

In response to the Office's request for a medical narrative explaining how the proposed surgery was related to appellant's accepted May 5, 1994 employment injuries, Dr. Schwartz responded indicating that appellant's past medical history was significant for low back problems with previous spinal surgery for scoliosis on July 27, 1981; he reported her history of treatment, and opined that her low back pain was related to the spondylolisthesis at L5-S1. Dr. Schwartz concluded that appellant would benefit from removal of the Harrington Rod, exploration of the scoliosis fusion, and an L5-S1 fusion with instrumentation. He also noted that he had treated appellant in 1993 for neck, right arm and interscapular back pain related to a motor vehicle accident on September 9, 1993.

By letter dated March 20, 1997, appellant, through her representative requested reconsideration of the prior decisions. Appellant's representative argued that appellant's various accounts of the incidents of October 11 and October 12, 1995 were stating the same thing, that appellant had been routinely required to "exceed the requirements of the limited[-]duty position," and that Dr. Schwartz was unequivocal in relating appellant's requested surgery to her May 5, 1994 injuries. The representative argued that appellant was advised by Dr. Dubrow that if the conditions for which he was treating her prevented her from working limited duty, she should stop working. Finally, appellant's representative argued that FECA Procedure Manual Chapter 2.1500.6(a) provided that if a recurrence of disability occurred within 90 days of a return to work, appellant did not have the same burden of proof as if she had worked more than 90 days, and he argued that, since each of appellant's claimed recurrences were within 90 days of appellant's return to work, she had a "relaxed" burden of proof, which she met.

By decision dated June 9, 1997, the Office rejected appellant's request for modification of the April 26 and May 6, 1996 decisions, finding that the evidence submitted in support was insufficient to warrant modification. The Office found that no medical evidence was submitted to the record which supported or documented appellant's alleged recurrences of disability on the dates alleged, that the facts of injury relating to the new injury alleged for October 11, 1995 were inconsistent among appellant's own allegations and between her allegations, Dr. Hunt's history of injury, and the employing establishment records, such that fact of injury had not been established, and that the surgery requested by Dr. Arnold Schwartz was not proven to be due to the accepted soft tissue lumbosacral muscular strain employment-related injuries of May 5, 1994.

Also by decision dated June 9, 1997, the Office separately denied appellant's request for surgery for instrumentation removal finding that the Harrington Rod was clearly not placed due to the May 5, 1994 lumbosacral strain injury.

The Board finds that appellant has not established that she sustained an injury on October 11, 1995 in the performance of duty, causally related to factors of her federal employment.

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁴ Second, the

⁴ *John J. Carlone*, 41 ECAB 354 (1989). *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); *see also George W. Glavis*, 5 ECAB 363 (1953).

employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁵

In the instant case, appellant has established neither. Appellant's statements regarding the activities and incidents of October 11 and October 12, 1995 are not consistent. She claimed to the employing establishment that on October 11, 1995 her leg just gave out, that she was putting mail in a tray when her leg gave out, and that after performing other work, she twisted and her right leg gave out, all supposedly injuring her right knee, yet she alleged on her claim form that she fell that date injuring her neck, shoulders, right side, right arm, lower back and knees, and she told Dr. Dubrow that she tripped over a plastic band and twisted her right knee. However, in a later statement appellant alleged that it was on October 12, 1995, the next day, when her muscles tightened and pulled her kneecap to the side of her leg, and that was why she was taken to the hospital, followed by Dr. Dubrow's October 12, 1995 "diagnosis of acute subluxation of the patella." Appellant alleged that this injury was due to duties against her limited-duty status, and did not mention it being due to a fall, to her leg giving out, to twisting, or to tripping over plastic, and she alleged that she injured her neck, shoulders, right arm and lower back on October 12, 1995 when she "pulled [herself] up," which was in conflict with her statement on her claim form that she fell on October 11, 1995 injuring her "neck, shoulders, right side, right arm, lower back and both knees." As appellant seems to implicate two different days of occurrence of the incident, and as her allegations consist of different activities, causation and injuries sustained, and as she has provided absolutely no corroborating factual evidence to support an incident on either day, she has not established the fact of injury.

Moreover, no probative rationalized medical evidence was submitted in support of an October 11, 1995 injury, as Dr. Dubrow's opinion is of diminished probative value because he based his opinion on causation of a patellar subluxation on an inaccurate history of injury not supported by the record, namely tripping over plastic strapping on October 11, 1995, which was directly contradicted by appellant's own November 10, 1995 statement wherein she alleged that on October 12, 1995 her muscles just tightened up and pulled her kneecap to one side. Further, Dr. Dubrow did not diagnose injury to any other body part other than to her right kneecap, which does not support appellant's claim for back, neck and right side injury. No other probative rationalized medical evidence supporting an October 11, 1995 new injury was provided. Therefore, appellant has failed to establish fact of injury.

The Board further finds that appellant has failed to establish her alleged recurrences of disability on August 4, 26 and 29, 1995, on September 1 and 23, 1995, and on October 11, 1995, causally related to her May 4, 1995 accepted cervical and lumbosacral soft tissue muscle strain and bilateral knee injuries.

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he or she cannot perform the light duty.⁶ As part of this burden, the employee must show a change in the nature

⁵ *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

⁶ *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.⁷

Appellant has established neither of these conditions. Although appellant alleged that she was forced to work outside of her limited-duty restrictions, she has provided no factual corroborating evidence of this allegation, and the employing establishment has contended that duties within her job restrictions remained available to her. Further, appellant has provided no medical evidence supporting a change in her accepted injury-related conditions, bilateral meniscal tears and cervical and lumbosacral soft tissue muscle strains, as Dr. Dubrow merely diagnosed a right subluxed patella and did not relate to appellant's meniscal tear that was surgically repaired on March 28, 1995, and as the remaining bulk of the medical evidence submitted to the Office addressed appellant's treatment for and need for further surgery on her back due to ongoing spinal scoliosis which significantly preexisted her lumbosacral soft tissue muscle strain injury of May 5, 1994.

The Board notes appellant's representative's argument regarding whether the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a) (January 1995) actually impacts appellant's burden of proof to establish a recurrence of disability after a return to light duty, and finds that this cited section refers only to the extent of the medical rationale required in the supporting medical evidence to establish causal relationship. The medical evidence required in this case must establish a change in the nature or extent of appellant's accepted injury-related conditions of bilateral meniscal tears or cervical and lumbosacral soft tissue muscle strain which is not established in this case. The Board notes that the medical evidence of record submitted in support of appellant's claimed recurrences addresses the diagnoses of subluxed right patella, a nonaccepted condition, cervical and lumbosacral disc degeneration, also nonaccepted, "low back syndrome," spondylolisthesis, scoliosis, and degenerative facet changes, all nonaccepted diagnoses. As none of the medical evidence submitted supports a change in appellant's accepted injury-related conditions of bilateral meniscal tears and soft tissue muscle strains, the medical evidence is of diminished probative value.

Finally, the Board finds that the Office properly denied appellant's request for lumbar surgery, as the proposed surgery was clearly for conditions which preexisted her soft tissue muscle strain injuries and torn meniscii, namely scoliosis, removal of instrumentation implanted in 1981, exploration of a prior fusion, new instrumentation and an iliac crest bone graft to stabilize spondylolisthesis at L5-S1, and for other osteodegenerative manifestations not pathologically attributable, based upon the medical evidence of record, to soft tissue muscle strains in 1994.

With regard to prospective surgical authorization, section 8103(a) of the Federal Employees' Compensation Act provides for furnishing to an injured employee "the services, appliances and supplies prescribed by a qualified physician" which the Office "considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation."⁸ The Board has found that the Office has great discretion in

⁷ *Id.*

⁸ 5 U.S.C. § 8103(a).

determining whether a particular type of treatment is likely to cure or give relief.⁹ In the present case, however, the Office did not abuse its discretion in denying appellant's request for surgical authorization as appellant has not presented rationalized medical evidence from a qualified physician supporting the need for such surgery as a result of or causally related to her accepted conditions of cervical and lumbosacral soft tissue muscular strains or bilateral torn menisci.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated June 9, 1997 are hereby affirmed.

Dated, Washington, D.C.
September 22, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁹ *James E. Archie*, 43 ECAB 180 (1991); *Daniel J. Perea*, 42 ECAB 214 (1990); *William F. Gay*, 38 ECAB 599 (1987).