U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHELLY A. MULHERN and U.S. POSTAL SERVICE,
POST OFFICE, Rochester, NY

Docket No. 98-1437; Submitted on the Record;
Issued January 10, 2000

DECISION and ORDER

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

The issue is whether appellant had continuing disability causally related to her work-related injury.

On March 16, 1992 appellant, then a 35-year-old letter carrier, filed a claim for occupational disease alleging that on November 16, 1991 she became aware that her overuse syndrome was caused by her federal employment.[1]

In a medical report dated March 2, 1992 and received by the Office of Workers' Compensation Programs on April 17, 1992, Dr. T. Wibberley Baker, appellant's treating physician and a specialist in occupational medicine, stated that appellant had been treated by her office for ongoing overuse syndrome in both forearms, and that she was now requesting a "work hardening activity that would permit progressive strengthening of the muscles in her forearms to permit her to return to competitive work in the [employing establishment]."

On March 25, 1992 the employing establishment stated that appellant cased letters using her left hand only and answered the telephone while on limited duty.

Appellant subsequently filed multiple claims for continuing disability from November 16, 1991 to April 30, 1993.

On October 22, 1992 the Office accepted appellant's claim for aggravation of bilateral sprain, shoulder and arm. The Office also authorized nerve conduction studies and physical therapy.

On January 27, 1993 the Office asked Dr. Baker the following questions relating to the work-hardening program: what will it consist of; how frequent; and the duration.

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[1] The Board notes that the document numbered 258 in the record does not apply to this claim.

In attending physician's reports dated January 12, 1993 and received by the Office on February 3, 1993, Dr. Baker requested work hardening for appellant's right hand and upper extremity as well as nerve conduction studies of her right hand. He noted that appellant was totally disabled.

On February 2, 1993 Dr. Baker stated that work hardening consists of four hours a day of progressive muscle strengthening for five days a week for four to six weeks.

In a medical report dated March 19, 1993, Dr. Baker stated that appellant was symptomatic with right shoulder pain, upper back and elbow. She stated that appellant had myofascial pain syndrome and overuse syndrome with involvement of the right upper extremity including back, shoulder and arm. He again noted that appellant was totally disabled.

In a report dated April 15, 1993, appellant's physical therapist noted that appellant had completed three weeks of a work-hardening program and recommended that she return to the program for one week after maternity leave to prepare her for mail carrying.

On May 10, 1993 the employing establishment requested Dr. David C. Marzulo, an osteopath who is Board-certified in psychiatry and neurology, to assess appellant's capacity to return to work.[2] The employing establishment noted that appellant had a shoulder sprain.

In a work restriction evaluation form dated May 11, 1993, Dr. Marzulo stated that appellant could not lift over her shoulder, that she had restrictions in pulling and pushing, grasping and fine hand manipulation. He also noted that appellant should "avoid high speed repetitive hand work," and that she should be restricted to lifting no more than 5 to 15 pounds. He further noted that appellant's hand restrictions were likely to be "indefinite and permanent."

In a medical report dated May 13, 1993, Dr. Vito Laglia, Board-certified in family practice, stated that appellant had less discomfort in her right shoulder, could abduct her right arm fully, had minimum pain in the trapezious but had no spasms or localized tenderness. He also noted that appellant's carpal tunnel syndrome was relieved with rest. Dr. Laglia further noted that appellant had undergone a work-hardening program, but that it "was unrealistic." He stated that appellant was no longer disabled but that she was not working "mainly because of maternity leave." Dr. Laglia then discharged appellant from care effective that date.

In a medical report dated May 18, 1993, Dr. Laglia stated that appellant was in the last stages of her pregnancy, and that her right shoulder function had improved. He noted that appellant's disability from work was caused by her pregnancy, "not the shoulder."

On June 24, 1993 the employing establishment stated that appellant was discharged from care by her treating physician and went on maternity leave on May 13, 1993.

On April 12, 1994 appellant filed a claim for recurrence of disability noting that the date of recurrence of disability was May 13, 1993. In an attached narrative appellant stated that her compensation should have been continued through May 13, 1993 and that her only medical

[2] Dr. Baker initially referred appellant to Dr. Marzulo in November 1992.

change had been the development of a right wrist ganglion which was tender and caused pain. Appellant noted that she still "suffer(s) from the continued pain in my right shoulder. This is constant and increases with any extra activities involving the right arm and hand."

In a medical report dated April 18, 1994, Dr. Brock H. Powell, appellant's treating physician and Board-certified in preventive medicine, stated that appellant had been examined on April 15, 1994. Upon examination Dr. Powell noted that appellant had right shoulder interior tenderness with pain upon abduction. He recommended reevaluation at a work-hardening center followed by a medical reexamination. Dr. Powell noted that appellant was totally disabled at that time. In a medical report dated April 28, 1994, he stated that appellant was totally disabled due to myofascial pain syndrome of the right shoulder. Dr. Powell also requested that the Office reopen appellant's claim "because of the error in closing in May 1993."[3]

By letter dated June 6, 1994, the Office advised appellant that she needed to submit additional information regarding her claimed recurrence of disability. The Office noted that appellant was on light or limited duty at the time of her claimed recurrence of disability, and thus she was required to submit medical evidence which would establish that she cannot perform that light or limited-duty job.

In a medical report dated July 27, 1994, Dr. Powell stated that there had been little change in appellant's right shoulder condition and that she remained symptomatic with pain in that shoulder. He noted full range of motion but mild discomfort with abduction over 90 degrees, and adduction over 100 degrees with no evidence of atrophy. Dr. Powell stated that appellant had myofascial pain syndrome of the right shoulder and recommended a work hardening program prior to returning to work which would be helpful "in evaluating the degree of restriction that may be necessary upon returning to work." He noted that appellant was partially disabled at that time.

In an undated letter received by the Office on September 19, 1994, appellant stated that Dr. Laglia was in error when he discharged her from care on May 13, 1993 because she remained symptomatic with pain. She noted that her pregnancy was not relevant to her work-related injury and that she had not returned to work after November 16, 1991.

On February 14, 1995 the Office notified appellant that it had insufficient medical evidence on file relating her recurrence of disability on May 13, 1993 to the original November 16, 1991 injury.[4] The Office noted that appellant had 15 days to submit additional evidence to establish her claim.

In a medical report dated March 15, 1995, Dr. Karl Auerbach, a specialist in internal medicine, stated that appellant had had overuse syndrome of the upper extremities for many years which recurs with activity. Dr. Auerbach noted that an examination failed to clarify a diagnosis. However, he stated that overuse syndrome is "frequently a combination of the

[3] Dr. Powell noted that appellant was left handed.

[4] The Board notes that the Office referred to the date of recurrence as May 12, 1993 rather than May 13, 1993, the date appellant stated in her claim.

original injury of soft tissue damage plus current activity. As such it is often difficult to discern which of the problem is coming from the work-related claim and which of the problem is coming from the present activity as indeed is the case in this situation. My best estimate is that at this point half of her problem is due to the old injury and its persistent impact on her musculoligamentous system and half would have to be described to more recent events and activities." Dr. Auerbach added that he did not think that appellant could return to her regular duties as mail carrier "without further aggravating the situation."

In a decision dated September 30, 1995, the Office denied appellant's claim for a recurrence of disability on the grounds that Dr. Laglia had discharged appellant from care finding that she no longer had residuals from her work-related injury.

On July 27, 1996 appellant requested reconsideration. In support of her request appellant submitted a June 24, 1996 medical report from Dr. Baker[5] and a July 17, 1996 report from Dr. Powell. Dr. Baker stated that appellant had been under her care since November 1991 when appellant's original injury developed.[6] She noted that appellant had never experienced a recovery from her condition. Dr. Baker noted that she could not understand the rationale behind Dr. Laglia's May 13, 1993 discharge of appellant from care although she noted that Dr. Laglia was not experienced in occupational medicine. She stated:

> "[Dr. Laglia] concluded that because when he examined her that [appellant] was expecting, that the pregnancy by definition was her disabling condition and accordingly recommended closure of her file of muscle strain and tendinitis involving the right shoulder and right arm. The scientific basis for his doing this is totally unclear to me as the logic is not evident to me. It was appropriate for her to transfer over to maternity leave for a period of time, however the medical disability had not resolved during the time of her pregnancy."

Dr. Baker stated that there was no recurrence of disability, rather there was a continuation of a work-related injury that was incorrectly closed out, thus requiring a claim for recurrence of disability to be filed. Further, she noted that her recollection was that appellant remained symptomatic and thus she disagreed with the judgment of Dr. Laglia who found that appellant was no longer symptomatic. Dr. Baker noted: "The difficulty that presents in this case is that Dr. Laglia in my judgment did not have sufficient knowledge of this patient based on a single visit to make a determination as to whether her condition had resolved or not. Simply because she was expecting a child and could be transferred to maternity leave was no basis for discontinuing her ongoing disability on her work-related diagnosis." Dr. Baker added that appellant had not yet reached maximum medical improvement.[7]

Dr. Powell's medical report of July 17, 1996 stated that on February 14 and April 15, 1994 appellant's level of disability should have been partial. He also noted that appellant should

[5] The date on the report is June 24, 1996, but the signed date on the signature block is July 31, 1996.

[6] Dr. Baker's last medical report was in April 1993; Dr. Laglia's report was in May 1993.

[7] Dr. Baker noted that not all of appellant's records were available for her review at that time.

not have been discharged on May 13, 1993 because her work-related condition had not resolved at that time. He added: "An error in the dictated report from May 13, 1993 resulted in closure of her case."

On November 5, 1996 the Office denied appellant's request for reconsideration on the grounds that medical evidence sufficient to warrant reconsideration had not been received.

On November 1, 1997 appellant requested reconsideration. In support of her request appellant submitted a November 3, 1997 medical report from Dr. Baker. In that report Dr. Baker stated that she had had an opportunity to review appellant's medical reports and reaffirmed her conclusions as reported in her June 24, 1996 report. She added that appellant was on maternity leave from May 13, 1993 to February 1994 at which time she was reexamined by Dr. Powell for the original work-related injury.

On December 29, 1997 the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of the prior decision.

The Board has duly reviewed the case record in the present appeal and finds that the case is not in posture for decision regarding whether appellant has continuing disability based on her work-related injury.

Proceedings under the Federal Employees' Compensation Act[8] are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. The Office has an obligation to see that justice is done.[9]

In this case, appellant's treating physician, Dr. Baker, a specialist in occupational medicine, stated in multiple medical reports that appellant was totally disabled from work based on her overuse syndrome in both forearms and recommended a work-hardening program prior to appellant returning to the workplace. The record shows that appellant attended a work-hardening program but stopped attending just before she was placed on maternity leave. The work-hardening therapist noted that appellant would need to return to the program prior to her returning to work.

Further, Dr. Marzulo, an osteopath who is Board-certified in psychiatry and neurology, stated that appellant could return to work but that she had permanent work restrictions.[10] Nonetheless, Dr. Laglia, Board-certified in family practice who examined appellant on one occasion, stated that her disability was as a result of her pregnancy and not her shoulder. His examination consisted of references to carpal tunnel syndrome and to appellant's subjective symptomology.

[8] 5 U.S.C. §§ 8101-8193.

[9] *Gary L. Fowler*, 45 ECAB 365 (1994).

[10] The Board also notes that in 1994 Dr. Powell considered appellant to be totally disabled due to myofascial pain syndrome and that in 1995 Dr. Auerbach opined that appellant could not return to her regular duty because of her overuse syndrome.

Dr. Laglia noted: "Complicating the matter is her pregnancy." However he makes no findings as to what the pregnancy complicates and why. Dr. Laglia further noted that appellant's work-hardening program was unrealistic because: "They told her she could do her work with the other hand." In contrast, Dr. Baker's April 19, 1993 report noted: "On physical examination, she is tender in the supraspinatus and trapezious muscle areas. She is tender in the right shoulder. Impression of myofascial pain syndrome and overuse syndrome with involvement of the upper back, right shoulder and right forearm." Although the reports from Drs. Baker and Marzulo do not contain sufficient rationale to discharge appellant's burden of proving by the weight of reliable, substantial, and probative evidence that she continued to have residuals from her work-related injury,[11] they raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.[12] Moreover, the record fails to show that the Office prepared a statement of accepted facts or specific questions for any of appellant's treating physicians, nor did it refer appellant's medical record to either an Office medical adviser or an Office medical consultant for review.

On remand, the Office should refer appellant, together with a statement of accepted facts and the medical evidence of record to an appropriate Board-certified specialist or specialists for evaluation and a rationalized opinion as to the relationship between appellant's condition and her work-related injury. After such further development as is deemed necessary, the Office shall issue an appropriate decision.

[11] For example, Dr. Baker refers to appellant's condition as overuse syndrome while the Office accepted appellant's claim for aggravation of bilateral sprain, shoulder and arm.

[12] *See Horace Langhorne*, 29 ECAB 820 (1978).

The December 29, 1997 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
January 10, 2000

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member