

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WANDA D. PIVOVARNICK and U.S. POSTAL SERVICE,
POST OFFICE, New Brunswick, NJ

*Docket No. 99-667; Submitted on the Record;
Issued March 12, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained a recurrence of periodic disability commencing December 27, 1996 for intermittent periods until April 17, 1997, when she stopped work, causally related to her February 8, 1994 accepted employment-related lumbar strain and consequential laminectomy; (2) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$789.47 overpayment of compensation for the period December 17, 1996 through January 31, 1997; (3) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (4) whether the Office properly required repayment of the overpayment by the withholding of \$158.00 every four weeks from her continuing compensation benefits.

The Office accepted that on February 8, 1994 appellant, then a 40-year-old clerk, sustained a low back strain when she slipped on ice and fell while in the performance of duty. The Office paid appropriate compensation benefits for temporary total disability and subsequently authorized low back surgery for a herniated disc at L5-S1 which was performed on January 4, 1996.

A magnetic resonance imaging (MRI) scan on September 6, 1996 demonstrated the existence of scarring on the right at L5-S1 which abutted and impinged on the right L5 nerve. An electromyographic study performed on April 30, 1997 demonstrated bilateral L5 radiculopathy, worse on the right.

On October 3, 1996 appellant's treating physician, Dr. Cary Skolnick, a Board-certified orthopedic surgeon, noted that appellant's "MRI showed enhancing scar [and] arachnoiditis" and indicated that appellant could work 4 to 6 hours per day with limited kneeling, bending, twisting and lifting, with a lifting limit of less than 10 pounds.

By letter dated October 15, 1996,¹ the Office advised appellant of the weekly rate used to compute her gross compensation, that she would be paid each four weeks at the regular payment rate until January 4, 1997 or until she returned to duty, whichever occurred first and that she was required to notify the Office immediately when she returned to work and to return to the Office any compensation check received after she returned to work.²

Appellant returned to work on limited duty 30 hours per week, 6 hours per day, 5 days per week, beginning December 17, 1996; however, she continued to receive compensation for temporary total disability through January 31, 1997.³

After appellant returned to limited duty, she alleged that as time passed she began to have additional problems.

By letter dated December 27, 1996, the employing establishment noted that appellant seemed to have tolerated work well until that date, when she called to report that she would be out of work due to "pain."

In a Form CA-20a attending physician's supplemental report dated January 9, 1997, Dr. Skolnick checked "yes" to the form question of whether appellant was totally disabled for her usual work, opined that appellant was "out of work completely," and diagnosed "acute lumbar radiculopathy." He noted that appellant should continue with the pain center as he had no further treatment to offer her at that point.

On April 17 and 27, 1997 appellant filed claims for recurrences of disability commencing December 27, 1996, January 9, February 28 and April 17, 1997, causally related to her February 8, 1994 injury.

By decision dated April 24, 1997, the Office noted that appellant had been reemployed as a modified letter carrier six hours per day and determined that she was entitled to continuing compensation for loss of wage-earning capacity effective December 17, 1996.

In support of her recurrence of disability claims, appellant submitted multiple 1996 reports predating her return to work and a May 8, 1997 form report from Dr. Alexander Pendino, an osteopath, who checked "yes" to the questions of whether appellant was totally disabled from her usual work and whether her present condition was due to the February 8, 1994 injury. Dr. Pendino noted the period of disability as April 18 through May 12, 1997 and indicated the nature of her impairment as "failed back syndrome [with] chronic pain; L5 radiculopathy." Pain management evaluation was recommended.

¹ Form letter CA-6031.

² Appellant had previously signed a Form CA-1032 on July 22, 1996 indicating that she understood that she was required to report immediately any change in her employment status, including part-time activities, as such information was necessary to determine whether an adjustment in benefits was warranted.

³ Appellant was performing limited duty which included casing mail, forwarding duties, general clerical work and answering telephones, with no lifting over 10 pounds, no bending or prolonged walking and with intermittent sitting and standing as tolerated.

On May 16, 1997 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$789.47 as she returned to work on December 17, 1996 for six hours per day, but continued to receive compensation based on total disability through January 31, 1997. The Office found that appellant was not at fault in the creation of the overpayment. The Office advised appellant that she had the right to submit evidence or arguments, or to request a precoupment hearing.

A May 30, 1997 report from Dr. John M. DeSio, a Board-certified anesthesiologist and pain management specialist, reviewed appellant's history and symptomatology. He discussed physical findings upon examination and opined that she was experiencing a right-sided L5 radiculopathy with a mild to moderate degree of reflex lumbar myofascial dysfunction and secondary right sacroiliitis and greater trochanteric bursitis as a result of her compensatory gait.

By decision dated June 18, 1997, the Office denied appellant's recurrence of disability claims finding that neither Drs. Pendino nor DeSio identified a change in the nature or extent of appellant's employment-related condition or in her light-duty job requirements.

On June 25, 1997 appellant, through her representative, requested an oral hearing. The hearing was held on March 25, 1998 at which appellant testified.

Appellant submitted an April 23, 1997 report from Dr. Pendino, who reviewed her history, reported physical examination results and diagnosed "failed back syndrome." He noted:

"Her pain is due to recurrent scar tissue abutting the L5 nerve root which was demonstrated by MRI scan. The initial fall in September of 1994 is responsible for her present symptoms. She has sensory deficits in a right L5 distribution as well as weakness of the right extensor hallucis longus and tibialis anterior and an antalgic gait."

Further electrodiagnostic studies were reported as demonstrating mild to moderate active denervation in the right paraspinal muscles and abnormal somatosensory evoked potentials of the lower extremities.

A May 8, 1997 neurologic evaluation report from Dr. Pendino diagnosed "Failed back syndrome due to right L5 radiculopathy secondary to recurrent scar tissue." Medical progress notes from Dr. Skolnick dated December 31, 1996, January 10 and February 3, 1997 indicated that appellant was seen on those dates complaining of back pain and was referred to a pain specialist.⁴

A December 19, 1996 report from Dr. Harris Bram, a Board-certified anesthesiologist and pain management specialist, noted that appellant complained of back pain with radiation bilaterally into her buttocks, but without frank radicular symptoms. Dr. Bram noted that appellant's pain was exacerbated by driving and reaching for an object such as a telephone, but

⁴ The January 10, 1997 note indicated that appellant presented that date with persistent lumbar pain and that "She is out of work until Monday, January 13, 1997 then resume light-duty status."

was decreased with walking short distances and lying supine with her feet elevated. He diagnosed "failed back surgery," and noted that he did not have much to offer her.

A disability certificate from a physician with an illegible signature dated March 27, 1997 stated: "Above client is under my care; please excuse her from work until April 7, 1997. She is in crisis [and] unable to do physical exertions [and] face pressure." A disability certificate from Dr. Howard S. Cohen, an osteopath, dated April 17, 1997 stated: "Under care for chronic lower back pain -- advise out of work one week."

By decision dated May 11, 1998, the hearing representative affirmed the June 18, 1997 Office decision finding that appellant failed to demonstrate a change in the nature of extent of her injury-related condition or a change in the nature or extent of her light-duty job requirements.

By letter dated June 15, 1998, appellant requested reconsideration and submitted a May 27, 1998 report from Dr. Pendino. He noted that he first saw appellant on April 23, 1997 at which time he found that she had weakness in the right extensor hallucis longus and tibialis posterior muscles, sensory deficits to pin and light touch in the right lateral leg and the dorsum of the right foot, an antalgic gait and significant lumbar pain, which he attributed to "failed back syndrome." Dr. Pendino opined that this failed back syndrome was secondary to recurrent scar tissue abutting the L5 nerve root. He opined that it was "within a reasonable degree of medical probability that [appellant's] sustained fall, while on the job ... is causally related to her present condition." Dr. Pendino opined that appellant's condition worsened "as seen during days where she had to leave work," and opined that "[g]iven the significance of her pain and present findings, I also feel that she was disabled from performing light-duty work, which was aggravating her underlying condition. Standing for long periods, associated with bending and reaching, continued to aggravate her symptoms."

By letter dated July 11, 1998, the Office advised appellant that her compensation for a loss of wage-earning capacity was being reinstated effective April 24, 1997.

By decision dated September 17, 1998, the Office denied modification of the May 11, 1998 decision. The Office found that a recurrence of disability commencing April 27 or 28, 1997 was not supported by the evidence of record.

By decision dated October 15, 1998, the Office finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$789.47 because she returned to work on December 17, 1996 in a light-duty capacity for six hours per day, but continued to receive compensation for total disability through January 31, 1997. The Office found that appellant was not at fault in the creation of this overpayment of compensation and that it would recover the overpayment by withholding \$158.00 per four weeks from appellant's continuing compensation.

The Board finds that this case is not in posture for decision regarding appellant's claimed recurrences of disability.

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 she cannot perform the light duty.⁵ As part of his or her burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.⁶

In this case, appellant has submitted evidence in support of her claim of recurrences of total disability.

The evidence of record demonstrates that the MRI performed on September 6, 1996 indicated the existence of scarring on the right at L5-S1 which abutted the right L5 nerve. On October 3, 1996 Dr. Skolnick noted that appellant's MRI showed enhancing scar and arachnoiditis. This objective evidence of a consequential sequela to appellant's laminectomy, a procedure that was authorized by the Office.

Thereafter, on December 27, 1996 the employing establishment advised that appellant called in sick reporting that she had "pain." The Board has held that the recurrence of disability can only be established by rationalized medical evidence provided by a physician.⁷

In Dr. Skolnick's subsequent January 9, 1997 form report he opined that appellant was out of work completely due to acute lumbar radiculopathy and he checked "yes" to the form question of whether appellant was totally disabled for her usual work. He recommended that appellant continue treatment with the pain center. Additionally, medical progress notes from Dr. Skolnick dated December 31, 1996, January 10 and February 3, 1997 stated that appellant was seen those dates complaining of pain and was referred to a pain specialist.

Appellant also submitted medical evidence from Dr. Pendino, who examined appellant on April 17, 1997. In his April 23, 1997 narrative report, Dr. Pendino opined that appellant's pain was due to recurrent scar tissue abutting the L5 nerve root as demonstrated by MRI. He opined that the original employment injury was responsible for appellant's present symptoms and he identified further impairment due to L5 neurosensory deficits. Dr. Pendino, on his May 8, 1997 form report, checked "yes" to the question of whether appellant was totally disabled from her usual work and "yes" to the question of whether her present condition was due to her February 8, 1994 employment injury. He noted that appellant's period of disability was April 18 through May 12, 1997 and indicated the nature of her impairment as "failed back syndrome [with] chronic pain, L5 radiculopathy." Dr. Pendino further recommended pain management evaluation. In a May 8, 1997 narrative neurologic evaluation, he diagnosed failed back syndrome due to right L5 radiculopathy secondary to recurrence scar tissue. Finally, appellant submitted a May 27, 1998 narrative report from Dr. Pendino, in which objective

⁵ *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁶ *Id.*

⁷ See generally *Jose Hernandez*, 47 ECAB 288 (1996); *Lourdes Davila*, 45 ECAB 139 (1993); *Armando Colon*, 41 ECAB 563 (1990).

findings were noted that were attributable to her failed back syndrome which was secondary to the recurrent scar tissue at L5. He opined that it was within a reasonable degree of medical probability that appellant's sustained fall while on the job was causally related to her present condition. Dr. Pendino opined that appellant's condition had worsened "as seen during days where she had to leave work," and opined that "[g]iven the significance of her pain and present findings, I also feel that she was disabled from performing light-duty work, which was aggravating her underlying condition. Standing for long periods, associated with bending and reaching, continued to aggravate her symptoms."

Appellant submitted a May 30, 1997 report from Dr. DeSio who opined that she was experiencing a right-sided L5 radiculopathy with a mild to moderate degree of reflex lumbar myofascial dysfunction and secondary right sacroiliitis and greater trochanteric bursitis as a result of her compensatory gait.

The December 19, 1996 report from Dr. Bram noted that on that date appellant complained of back pain with radiation bilaterally into her buttocks, but without frank radicular symptoms. He noted that appellant's pain was exacerbated by driving and reaching for an object such as a telephone, but was decreased with walking short distances and lying supine with her feet elevated. Dr. Bram diagnosed "failed back surgery."

A disability certificate dated March 27, 1997 noted that appellant was under his care and requested that she be excused from work as she was in crisis and was unable to do physical exertions and face pressure.

Dr. Cohen noted that on April 17, 1997 appellant had chronic lower back pain and he advised her to stay out of work for one week.

Appellant has, therefore, submitted medical evidence which tends to support that she experienced changes in the nature or extent, or a worsening of her medical condition, which caused her to be totally disabled.

Although none of appellant's treating physicians' reports contain rationale sufficient to discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that she sustained the recurrences of total disability as alleged, they constitute substantial, uncontradicted evidence in support of appellant's claim and raise an uncontroverted inference of causal relationship between her allegedly disabling complaints and periods of disability and her original traumatic injury. The evidence is sufficient to require further

development of the case record by the Office.⁸ Additionally, there is no opposing medical evidence in the record.

Therefore, this case will be remanded to the Office for further development including referral to an appropriate medical specialist for a rationalized opinion on whether appellant experienced disabling changes in the nature or extent of her injury-related condition as alleged.

The Board also finds that the Office properly determined that appellant received a \$789.47 overpayment of compensation for the period December 17, 1996 through January 31, 1997.

Appellant returned to limited duty working six hours per day beginning on December 17, 1996 and continued to work that schedule until April 17, 1997. However, for the period December 17, 1996 through January 31, 1997 appellant continued to receive and accept compensation for total disability when she was entitled only to compensation for partial disability. The difference totaled \$789.47 for the identified period and the Board finds that the Office properly determined that an overpayment was created.

The Board finds that the Office properly found that appellant was not without fault in the creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act⁹ provides that an overpayment of compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.320 of the implementing federal regulations¹⁰ provides the following:

"In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. An individual is with fault in the creation of an overpayment who--

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

⁸ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978); see also *Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987) (if medical evidence establishes that residuals of an employment-related impairment are such that they prevent an employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity).

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ 20 C.F.R. § 10.1 *et seq.*

(2) Failed to furnish information which the individual knew or should have known to be material; or

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

In this case, the Office applied the third standard to determine that appellant accepted a payment which she knew or should have been expected to know was incorrect.

Appellant was advised, by letter dated October 15, 1996, that her entitlement to compensation for total disability continued only so long as she remained totally disabled and that after she returned to work, she should return any compensation checks she received. Based on such notification, the Office properly found that appellant was not without fault as she accepted payment which she knew or should have been expected to know was incorrect. Appellant could not reasonably assume that she would continue to receive full compensation payments for totally disability after her return to limited duty for six hours per day. As appellant is found to be at fault in the creation of the overpayment, she is not entitled to consideration for waiver of the recovery of the overpayment.

The Board finds that the Office properly required repayment of the overpaid amount by withholding \$158.00 per four weeks from her continuing compensation payments.

Section 10.321 of the Office’s implementing regulations¹¹ provides as follows:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual.”

In the present case, the Office advised in its preliminary determination that appellant should complete an overpayment recovery questionnaire and provide financial information to enable it to determine the rate of recovery of the overpayment having due regard to the factors noted above. However, appellant failed to complete such questionnaire and failed to provide any current financial information and the Office was unable to establish a repayment rate, which would minimize any resulting hardship upon appellant. Therefore, in order to recover the debt promptly, the Office determined that it would withhold \$158.00 from appellant’s continuing loss of wage-earning capacity compensation payment every 28 days and apply this sum as repayment of the overpayment. The Board finds that under these circumstances, such a deduction was proper.

¹¹ 20 C.F.R. § 10.321(a).

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 17, 1998 is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board; the decision dated October 15, 1998 is hereby affirmed.

Dated, Washington, DC
March 12, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member