

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTORIA WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, Bronx, NY

*Docket No. 01-2251; Submitted on the Record;
Issued July 1, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained a recurrence of disability, due to the December 6, 1993 employment injury, commencing August 19, November 24 and December 1, 1999; and (2) whether appellant established that she sustained a cervical condition resulting from the December 6, 1993 employment injury.

On December 7, 1993 appellant, then a 27-year-old regular carrier, filed a traumatic injury claim for her lower back. The evidence contemporaneous to appellant's injury including medical reports from appellant's treating physician, Dr. Jacob Y. Nir, a Board-certified physiatrist and magnetic resonance imaging (MRI) scans refer to appellant's injury as a lumbar sprain, lower back pain, lumbar radiculopathy and eventually a herniated disc at L5-S1. In a report dated May 10, 1994, Dr. Sherwood A. Jacobson, a Board-certified neurological surgeon, considered appellant's history of injury, noted that appellant was having pain in her back and neck, reviewed an MRI scan and diagnosed "cervical spine with a small herniated disc." In an August 30, 1996 report, Dr. Nir diagnosed cervical spine derangement.

The Office of Workers' Compensation Programs accepted appellant's claim for lumbosacral sprain, a herniated disc at L5-S1 and lumbar laminectomy. Appellant sustained recurrences of the December 6, 1993 employment injury on January 20 and April 18, 1994, June 9, 1995 and July 19, 1999. On January 6, 1998 appellant returned to light-duty work as a modified carrier technician, which involved standing or sitting at her discretion and no lifting or kneeling.

On September 1, 1999 appellant filed a recurrence of disability alleging that on August 19, 1999 she sustained a recurrence of the December 6, 1993 employment injury. Appellant stated that, since the original injury, she had not been able "to stand very long" and "at times" could not bend, lean forward or walk due to the pain. She stated that, since she returned to work, her condition had not changed "very much."

By decision dated February 15, 2000, the Office denied appellant's claim, stating that the evidence did not establish a change in the nature or extent of her injury-related disability or in the nature and extent of her light-duty position.

On January 26, 1999¹ appellant filed a claim for a recurrence of disability, due to the December 6, 1993 employment injury, commencing November 24, 1999. The claim was received by the Office on February 28, 2000. Appellant stated that, since the original injury, she had pain on a daily basis and was on constant medication.

By decision dated March 16, 2000, the Office denied appellant's claim, stating that the evidence of record did not establish that appellant had cervical derangement resulting from her employment.

In an undated letter received by the Office on April 5, 2000 appellant requested reconsideration of the Office's February 15, 2000 decision.

By decision dated July 10, 2000, the Office denied appellant's claim for a recurrence of disability commencing November 24, 1999, stating that appellant did not establish that a change occurred in the nature and extent of her injury-related disability or in the nature and extent of her light-duty position.

By another decision also dated July 10, 2000, the Office noted that appellant requested reconsideration of the Office's February 15, 2000 decision denying appellant's claim for a recurrence commencing August 19, 1999, but failed to show that there was a change in the nature and extent of her injury-related disability or in the nature and extent of her light-duty job. The Office, therefore, denied appellant's request for modification.

By letter dated August 2, 2000, appellant requested reconsideration of the Office's July 10, 2000 decision, without specifying which July 10 decision she meant or whether she sought reconsideration of both decisions. She submitted medical evidence to support her request, consisting of a medical report from Dr. Nir dated August 2, 2000, a report from Dr. Yvonne D'Souza, dated July 27, 2000 and notes dated August 20, 1999 from Dr. Serge V.P. Moise, a family practitioner. In his August 2, 2000 report, Dr. Nir considered appellant's history of injury and stated that he had treated appellant since November 24, 1999. Dr. Nir stated that, since the work accident, appellant had "persistent low back pain, associated with frequent time off of work because of the increasing pain." He considered that appellant underwent a laminectomy at L5-S1 and stated that the surgery was unsuccessful and that the entire disc was not removed resulting in a herniated fragment. Dr. Nir noted that another physician sought to perform an anterior discectomy, lumbar fusion endoscopy with posterior lumbar fixation at L5-S1 on appellant and he believed the surgery was warranted to treat appellant's seven-year history of pain and her inability to recover significant function. Dr. Nir stated that appellant's current symptoms and injuries were causally related to the December 6, 1993 employment injury.

In a July 27, 2000 report, Dr. D'Souza stated that she treated appellant since April 28, 1992 and appellant had chronic back pain and underwent a laminectomy on November 8, 1995.

¹ Although the claim is dated 1999, it appears to be an error. The Board reads this date as January 26, 2000.

Dr. D'Souza stated that appellant's back pain and lumbar disc disease was a result of chronic strain in her back from her job as a mail carrier. She noted that appellant was seen by Dr. Moise on August 24, 1999 for lower back pain and from Dr. Moise's notes, that was an exacerbation of her chronic back pain due to constant standing at work. She stated that the MRI scan showed a postoperative defect at the L5-S1 disc. Dr. D'Souza stated that appellant needed an electromyogram (EMG) to confirm whether she had lumbar radiculopathy.

Dr. Moise's August 24, 1999 notes are barely legible but refer to appellant's chronic low back pain.

By decision dated November 9, 2000, the Office denied appellant's request for modification. The Office noted that appellant did not specify, which July 10 decision for which she sought reconsideration, but in any event, she did not present evidence to establish that she sustained a recurrence of disability commencing either on August 19 or November 24, 1999.

On February 19, 2001 appellant filed a claim for a recurrence of disability on December 1, 1999 resulting from the December 6, 1993 employment injury. She stated that she had increased cervical and lower back pain.

By letter dated February 22, 2001, appellant requested reconsideration of the Office's March 16, July 10 and November 9, 2000 decisions. Appellant submitted Dr. Nir's reports dated March 4 and 11 and April 13 and 27, 1994, in which Dr. Nir stated that appellant complained of pain in her cervical region as well as her lumbar spine region and diagnosed cervical spine derangement in addition to lumbar spine derangement and lumbar spine radiculopathy. He also opined that appellant was permanently partially disabled. Appellant also submitted Dr. Nir's reports dated July 20, 1995 and August 30, 1996 addressing appellant's cervical spine derangement, lumbar radiculopathy and herniated disc at L5-S1 and that she was permanently partially disabled.

Appellant submitted a disability note from Dr. D'Souza dated August 31, 1999, in which she stated that appellant was unable to work from August 20 to 26, 1999, due to lumbar spine pain. Dr. D'Souza submitted numerous reports from Dr. Nir dated December 17 and 21, 1999, January 27, February 25, May 24, June 9 and 15, 2000 and February 28, 2001. Appellant additionally submitted a statement of "Accident Facts," a form from Dr. Nir's office dated February 23, 1993, in which she stated that on December 6, 1993 she felt pain in her lower back and shoulders and currently felt lower back pain and stiffness in her neck and shoulders.

In a January 27, 2000 report, Dr. Nir diagnosed cervical spine derangement and lumbar radiculitis. He stated that appellant had been treated for a cervical injury since his initial examination and she initially complained of pain in her cervical and lumbar spine. Dr. Nir stated that on November 24, 1999 appellant had an exacerbation of injuries sustained on December 6, 1993 and explained that she developed headaches with neck pain radiating to both shoulders, left more severe than right. He stated that the physical examination showed limited range of motion of the cervical spine region and x-rays taken of the cervical spine on December 9, 1999 revealed spondylosis at C6-7 level and straightening of the cervical lordosis. Dr. Nir diagnosed headaches, neck pain and stiffness radiating down both shoulders and lower back pain

aggravated by lifting, changing position and bending. In his February 25, 2000 report, Dr. Nir essentially made the same findings.

In a report dated June 9, 2000, Dr. Nir reiterated that appellant's laminectomy in 1995 was unsuccessful and since the December 6, 1993 employment injury, appellant had persistent low back pain, associated with frequent time off work because of the increasing pain. He also reiterated that appellant's chronic seven-year history of pain and her failure to recover significant function to return to work warranted surgery consisting of an anterior discectomy and lumbar fusion endoscopy with a posterior lumbar fixation at L5-S1.

In the February 28, 2001 report, Dr. Nir listed numerous diagnoses including disc herniations at L5-S1, L4-5 and C6-7 and opined that appellant was totally disabled.

By letter dated March 5, 2001, appellant submitted two additional reports from Dr. Nir dated February 14 and April 25, 2001. In his February 14, 2001 report, Dr. Nir considered appellant's history of injury, performed a physical examination and reviewed MRI scans, x-rays, an EMG and nerve conduction studies. His diagnoses included postlaminectomy, cervical radiculitis at C5-6 nerve root, lumbar radiculopathy at the L5-S1 nerve root and disc herniation at C6-7. Dr. Nir opined that appellant was totally permanently disabled. He opined that appellant's injuries were causally related to the December 6, 1993 employment injury.

In an April 25, 2001 report, Dr. Nir added the diagnoses of disc herniations at L4-5, L5-S1 and C6-7 and spondylosis at C6-7. He reiterated that appellant was totally disabled.

By decision dated May 29, 2001, the Office denied appellant's request for modification.

The Board finds that appellant did not establish that she sustained recurrences of disability due to the December 6, 1993 employment injury, commencing August 19, November 24 and December 1, 1999.

An individual who claims a recurrence of disability, due to an accepted employment-related injury, has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.² When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty.³ As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the injury-related condition.⁴ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to

² *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

³ *George DePasquale*, 39 ECAB 295, 304 (1987); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁴ *Id.*

the employment injury and supports that conclusion with sound medical reasoning.⁵ An award of compensation may not be made on the basis of surmise, conjecture, or speculation or an appellant's unsupported belief of causal relation.⁶

In this case, appellant did not present any medical evidence with rationale explaining how her alleged recurrences on August 19, November 24 and December 1, 1999 resulted from the December 6, 1993 employment injury. In his reports dated August 2, 2000 and February 14, 2001, Dr. Nir stated that appellant's injuries were causally related to the December 6, 1993 employment injury. He provided no rationale, however, explaining the causal connection. The Board has held that a medical opinion not fortified by medical rationale is of little probative value.⁷ In his reports dated January 27 and February 25, 2000, Dr. Nir stated that appellant had an "exacerbation" of injuries on November 24, 1999 resulting from the December 6, 1993 employment injury. An "exacerbation" or aggravation of an existing injury, however, constitutes a new injury, not a recurrence.⁸ In her July 27, 2000 report, Dr. D'Souza stated that appellant's back pain and lumbar disc disease was a result of chronic strain from her job as a mail carrier. She did not address whether appellant sustained recurrences on the relevant dates and how those recurrences related to the December 6, 1993 employment injury. Dr. D'Souza did not explain how, based on Dr. Moise's notes, appellant had an exacerbation of chronic back pain due to constant standing at work. Therefore, her opinion also lacked medical rationale. Dr. Moise's August 24, 1999 notes do not address causation and are not probative.

Moreover, the medical reports appellant submitted preceding the dates of the August 19, November 24 and December 1, 1999 recurrences such as Dr. Nir's 1994 and 1995 reports are not relevant to establishing that recurrences occurred in 1999. Some of Dr. Nir's reports as in his February 28 and April 25, 2001 reports are not relevant because they do not address causation or the dates the recurrences allegedly occurred. In the June 9 and August 2, 2000 reports, Dr. Nir suggests appellant's chronic pain is due to the unsuccessful laminectomy in 1995 where the entire disc was not removed resulting in a herniated fragment. Again, this does not show a change in appellant's physical condition so as to cause the recurrences on the relevant dates. Appellant has not shown that her job requirements changed. Appellant has, therefore, failed to establish that she sustained recurrences of disability on August 19, November 24 and December 1, 1999.

The Board also finds that appellant did not establish that she sustained a cervical condition related to her December 6, 1993 employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim

⁵ See *Nicolea Bruso*, 33 ECAB 1138 (1982).

⁶ See *William S. Wright*, 45 ECAB 498, 503 (1994).

⁷ *Annie L. Billingsley*, 50 ECAB 210, 213 n. 20 (1998).

⁸ See *Willis J. Clements, Jr.*, 43 ECAB 244, 247 n. 8 (1991).

was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁹ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.¹⁰

The medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. Rationalized medical evidence is medical evidence, which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹¹

In this case, all the medical evidence contemporaneous to appellant's December 6, 1993 employment injury referred only to low back pain or a lumbar sprain or in Dr. Nir's reports, lumbar radiculitis. Dr. Nir referred to appellant complaining of neck pain for the first time in his March 4, 1994 report and diagnosed cervical derangement for the first time on April 13, 1994. In a May 10, 1994 report, Dr. Jacobson diagnosed cervical spine with herniated disc. In a January 27, 2000 report, Dr. Nir diagnosed cervical spondylosis at C6-7 based on x-rays taken on December 9, 1999. None of these physicians provided any medical rationale as to how appellant's cervical derangement or spondylosis resulted from the December 6, 1993 employment injury. Their conclusions are also rendered suspect by the absence of any reference to neck pain in the medical evidence contemporaneous to appellant's December 1993 injury. Their opinions are, therefore, not probative and fail to establish that appellant sustained a cervical condition related to her employment.

⁹ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

¹⁰ *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

¹¹ *Gary L. Fowler*, 45 ECAB 365, 371; *Ern Reynolds*, 45 ECAB 690, 695 (1994).

The May 29, 2001 and November 9, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
July 1, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member