U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EVONNE CAPERS and U.S. POSTAL SERVICE, MANHATTANVILLE STATION, MORNINGSIDE UNIT, New York, NY

Docket No. 00-2710; Submitted on the Record;
Issued June 13, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained recurrences of disability commencing July 25 and October 3, 1997 causally related to accepted February 5, 1991 injuries; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's November 2, 1999 request for a review of her case on the merits.

The Office accepted that on February 5, 1991 appellant, then a 40-year-old letter carrier, sustained contusions of the low back and buttocks, a cervical sprain and a herniated C4-5 cervical disc when an automobile struck a mail cart which in turn struck appellant, knocking her to the ground.[1] Appellant stopped work on February 5, 1991 and received appropriate compensation. She returned to work from November 2, 1992[2] to January 1993, when she sustained a recurrence of disability and again received compensation. Appellant had intermittent work absences through 1997 related to chronic cervical and lumbar radiculopathy.[3]

Appellant sought care beginning in mid-1991 from Dr. Hal S. Gutstein, a Board-certified neurologist.[4] In an April 26, 1993 report, Dr. Gutstein opined that repetitive motions such as

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[1] A February 26, 1991 cervical magnetic resonance imaging (MRI) scan showed an annular bulge at C3-4, a herniated C4-5 disc, "causing an extradural defect on the CSF." A March 5, 1991 lumbar computed axial tomography (CAT) scan showed spinal stenosis and "prominence of the ligamentum flavum" at L4-5." A July 22, 1992 cervical MRI scan showed "[b]ulging disc vs. a small midline herniations of the nucleus pulposus at C3-4," "[b]ulging disc at C4-5," "[l]ateral herniated disc at C5-6 to the right with a question of cord compression on the right and an acute episode." An August 13, 1992 spine x-ray series showed "Grade II retrolisthesis C4 over C5," a "normal thoracic spine, "joint space narrowing at" L5-S1 and a "Grade I spondylolisthesis L5 over S1."

[2] The record contains a March 30, 1993 decision finding a $707.59 overpayment of compensation for the period November 2 to 14, 1992, as appellant received total disability compensation for this period while working. The record indicates that appellant repaid the $707.59. This decision is not before the Board on the present appeal.

[3] The Office accepted a claim for a recurrence of disability commencing February 2, 1995.

[4] Dr. Gutstein referred appellant to Dr. Stanley M. Sonn, a chiropractor, for chiropractic spinal manipulation to

writing and stamping aggravated her "right sided herniated disc at C4-5 and bulging" disc at C3-4," and caused right shoulder bursitis. He stated that appellant's condition was due to the February 5, 1991 accident, "aggravated by the repetitive motion activities" of her light-duty position. Dr. Gutstein recommended that appellant not return to that position.

On August 24, 1993 Office referred appellant, the medical record and a statement of accepted facts to Dr. Arthur R. Sadler, a Board-certified orthopedic surgeon, for a second opinion examination. In a September 23, 1993 report, Dr. Sadler did not find objective signs of disability and found appellant medically able to perform her date-of-injury job. The Office then found a conflict of medical opinion between Drs. Gutstein and Sadler, and referred appellant to Dr. Martin J. Barschi, a Board-certified orthopedic surgeon, for an impartial medical examination. In a June 3, 1994 report, Dr. Barschi diagnosed a cervical sprain with right radiculopathy and a resolved lumbar strain, both caused by the February 5, 1991 accident. He opined that appellant had reached maximum medical improvement, should avoid "heavy lifting or carrying with her right upper extremity," but could perform full-time light duty.

Appellant performed light-duty clerical work from October 3, 1994 onward with intermittent absences.[5] Dr. Gutstein submitted periodic reports through September 1996, diagnosing a "permanent partial disability involving cervical radiculopathy due to C4-5 herniated disc and C3-4 bulging disc." He noted permanent restrictions against lifting more than three pounds with the right arm and no simple grasping or fine manipulation with the right hand.

In November 1996, appellant accepted an offer as a part-time flexible modified clerk within the limitations provided by Dr. Barschi. She performed the position through February 1997 and continuing. By decision dated February 7, 1997, the Office determined that the modified position fairly and reasonably represented appellant's wage-earning capacity.

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treat two spinal subluxations demonstrated by August 13, 1992 x-rays, a retrolisthesis at C4-5 and L5-S1 spondylolisthesis. Dr. Sonn treated appellant from late 1991 through 1993. In a March 8, 1993 report, Dr. Roy G. Kulick, an orthopedic surgeon to whom appellant was referred by Dr. Gutstein, diagnosed a cervical sprain, and bursitis of the right shoulder. In a June 8, 1993 report, Dr. Benisse Lester, an attending orthopedist, diagnosed right carpal tunnel syndrome and a right thumb contusion. There are no claims before the Board regarding carpal tunnel syndrome or a right thumb injury.

[5] On August 16, 1994 the employing establishment offered appellant a light-duty clerical position within the restrictions given by Dr. Barschi. As Dr. Gutstein held appellant off work from September 14 to October 3, 1994, appellant began work on October 3, 1994 and was off work again from December 7, 1994 through 1995 due to cervical and lumber radiculopathy.

On August 8, 1997 appellant filed a claim for a recurrence of disability commencing July 25, 1997.[6]

In a September 26, 1997 note, Dr. Gutstein requested that appellant "be returned to previous location as the present situation is aggravating her spinal condition."

On October 6, 1997 appellant filed a notice alleging that she sustained a recurrence of disability commencing October 3, 1997.[7] She attributed her neck and arm pain to being forced to adhere to safety precautions at her workstation.[8]

In an October 6, 1997 letter, the employing establishment noted that appellant presented Dr. Gutstein's September 26, 1997 note on September 29, 1997, threatening to "file a recurrence [claim] if the condition was not corrected." Mr. Boyd explained that an October 1, 1997 safety inspection revealed sufficient egress and no safety hazard.[9]

In a January 13, 1998 report, Dr. Gutstein stated that "on or about October 3, 1997 in response to a change in job responsibilities," appellant experienced an exacerbation of cervical radiculopathy, disabling her for work from September 22 to 26, 1997. He attributed these symptoms to "repetitive turning her head from side to side, exertional activities and repetitive

[6] On August 14, 1997 appellant refused the employing establishment's January 3, 1997 offer of a sedentary, modified clerk position. Dr. Gutstein approved the position on February 10, 1997, recommending that appellant take 20 minute breaks every 1 and 1/2 to 2 hours throughout the workday. She asserted there was "no such thing as a 'modified clerk'" position, that she did not understand the concept of retained pay and grade and that she was not a "partially recovered" employee but a "permanently disabled employee." In a September 18, 1997 letter and checklist, the Office advised appellant of the type of medical and factual evidence needed to establish her claim. The Office emphasized the need for a rationalized report from her physician explaining how the accepted February 5, 1991 injuries would cause the claimed recurrence of disability beginning on July 25, 1997.

[7] Appellant filed Equal Employment Opportunity (EEO) grievances regarding the job duties mentioned in her claims for recurrence of disability. On September 16, 1997 she filed an EEO complaint alleging discrimination on the basis of physical handicap and retaliation. Appellant alleged that on September 10, 1997 Avery Boyd, her immediate supervisor, moved her desk to a "high traffic area" in retaliation for bringing a safety hazard to his attention. On November 19, 1997 appellant filed an EEO grievance alleging that on October 3, 1997 she was forced to sit in an unsafe location in a position that aggravated her neck and arm pain. On February 12, 1998 the employing establishment denied the September 16, 1997 grievance, finding that "changes to [appellant's] work site were made to place [her] in a more visible area to ensure proper supervision." This grievance was later settled by mutual consent of both parties on April 28, 1998.

[8] In an October 14, 1997 letter, the employing establishment controverted appellant's claim, asserting that appellant had threatened to file the claim if her workstation was not moved to another division. After an October 1, 1997 safety investigation revealed no hazard and therefore no reason to move appellant's workstation, appellant filed her claim for recurrence of disability. In a December 30, 1997 letter, the Office advised appellant that there were no work site hazards as she had alleged. The Office advised appellant to submit a rationalized report from Dr. Gutstein explaining "if or why [appellant] could not do limited duty." The Office included a list of other factual and medical evidence necessary to establish appellant's claim for recurrence of disability.

[9] An October 1, 1997 investigation demonstrated that the location of appellant's chair relative to foot traffic behind her workstation did not pose a safety hazard.

motion particularly in the right arm." Dr. Gutstein opined that these activities caused a worsening "in her cervical herniated discs" at C4-5 and bulging discs at C3-4.[10]

By decision dated July 22, 1998, the Office denied appellant's claims for recurrences of disability commencing July 25 and October 3, 1997, on the grounds that causal relationship was not established.[11] The Office found that appellant had not demonstrated "a change in the nature and extent of" either her light-duty job requirements or the accepted conditions.

Appellant disagreed with this decision and requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held March 18, 1999. She was represented at the hearing by Don Springman of the National Association of Letter Carriers. At the hearing, appellant stated that, on July 25, 1997, her desk was moved to a high traffic location, requiring her to walk 50 feet to retrieve magazines while carrying tubs of mail weighing more than 10 pounds, in violation of her medical restrictions. She was off work one week in September 1997. Appellant submitted additional evidence.[12]

In an April 5, 1999 report, Dr. Gutstein asserted that walking 50 feet to retrieve magazines and carrying mail tubs weighing more than 10 pounds caused a severe worsening of the accepted conditions. He found decreased cervical motion, diminished right triceps reflex, diminished sensation and muscle weakness throughout the right arm and abnormalities in a cervical nerve root.

In an April 15, 1999 letter, the employing establishment explained that, on July 25, 1997, appellant's desk was moved approximately 10 feet to accommodate her safety concerns. Appellant therefore had to walk approximately 10 feet to pick up magazines, not 50 feet as alleged. She then asserted that the noise from a canceling machine caused headaches, but an industrial noise check revealed that the ambient noise was within safe limits. The employing establishment asserted that appellant did not like her new workstation as it was not as private as her previous location, that she did not work productively and was away from her desk most of the time, talking with coworkers.

By decision dated May 21, 1999 and finalized May 24, 1999, an Office hearing representative affirmed the July 22, 1998 decision. The hearing representative found that Dr. Gutstein's January 13, 1998 report was of no probative value as he opined that appellant "was disabled for work for a period of five days, a week-and-a-half before the exacerbating event occurred." The hearing representative found that appellant was not required to walk 50 feet, as the employing establishment submitted sufficient evidence showing that appellant had to

[10] On the reverse of the claim form, the employing establishment controverted appellant's claim, alleging that she "called in on July 6, 1998 and claimed she ha[d] a recurrence and" elected to use sick leave. "This happen[e]d right after the fourth of July holiday." The employing establishment also submitted a July 22, 1998 letter controverting appellant's claim due to a lack of medical evidence.

[11] In reports from July 13 to September 17, 1998, Dr. Gutstein held appellant off work through November 1, 1998 due to "lumbar and cervical radiculopathy." On July 15, 1998 appellant filed a notice of recurrence of disability commencing July 6, 1998. There is no final decision of record regarding this claim.

[12] Appellant also resubmitted a copy of Dr. Gutstein's January 13, 1998 report.

walk 10 feet at the most. As Dr. Gutstein's reports were based on appellant's account of being required to walk 50 feet and lift and carry heavy mail tubs, his reports were found to be of severely diminished probative value as they were based on a seriously inaccurate factual history. The hearing representative therefore concluded that appellant had submitted insufficient evidence to substantiate that she was disabled for her assigned light-duty position.

Appellant disagreed with this decision and requested reconsideration in a November 2, 1999 letter. She alleged that the hearing representative relied on the uncorroborated statements of hostile postal supervisors. Appellant submitted additional evidence.[13]

A July 1, 1997 safety report indicates that waste tubs were "relocated to provide safe entrance and exit to [appellant's] work location…." Appellant filed a second hazard report regarding the waste tubs on September 10, 1997. On September 11, 1997 a supervisor recommended that waste be "eliminated from the carrier section." Mr. Boyd stated that appellant's desk was moved to provide ample work space and egress "in excess of six feet at left and four feet behind and six feet at right." On September 11, 1997 appellant also alleged that noise from the mail sorting machine caused "severe headaches." Mr. Boyd replied that there was proper egress and that the mail sorting machine would be run only when appellant was at lunch, noting that it never ran for more than 10 minutes at a time.

Appellant requested to "return to her previous location" on October 1, 1997. The employing establishment asserted in an October 3, 1997 letter that there was no need to relocate her as no safety hazard existed at her workstation. Appellant then filed an October 3, 1997 hazard report alleging that the chair issued to her that day hurt her back and neck. Mr. Boyd stated that the chair was of the authorized model and there was no hazard found.

Appellant's application for Social Security disability benefits was approved effective June 25, 1999. Her application for disability retirement through the Office of Personnel Management (OPM) was approved effective October 13, 1999.

By decision dated February 10, 2000, the Office denied reconsideration on the grounds that the evidence submitted was "duplicative … or irrelevant to the issue of the distance walked to obtain mail."

Appellant disagreed with this decision and in a May 7, 2000 letter requested reconsideration. She alleged that she should have been referred to a neurologist for the second opinion and impartial medical examinations, that Mr. Springman did not represent her interests at the hearing and that she did not receive a copy of the transcript or the employing establishment's comments on it. Appellant also requested reconsideration of the February 10, 2000 decision. She submitted additional evidence.

In an April 10, 2000 report, Dr. Gutstein opined that moving tubs of waste mail, walking 50 feet to retrieve magazines, frequent lifting and carrying more than 10 pounds, cutting labels, sealing envelopes, "repetitive motion" and a change in desk position "requiring her to move her

[13] Appellant also submitted another copy of Dr. Gutstein's September 16, 1998 report.

neck on the right side" caused cervical radiculopathy, traumatic tendinitis and synovitis of the right shoulder, scarring in the herniated cervical discs, sensory and motor nerve irritation with functional loss and paraspinal muscle spasm. Dr. Gutstein noted work absences from July 5 to 9 and September 22 to 26, 1997 attributable to these duties. He found appellant totally disabled for work beginning January 1998.

By decision dated July 21, 2000, the Office denied modification of the May 21, 1999 decision, finding that appellant had not shown a change in her condition or in the light-duty job requirements. The Office also found that the second opinion and impartial examinations were proper, that appellant invited Mr. Springman to represent her at the hearing and there was no indication of impropriety and that she was mailed a copy of the transcript and the employing establishment's comments at her correct address. The Office noted that Dr. Gutstein's April 10, 2000 report was of little probative value as it was based on "erroneous and exaggerated information." The Office noted that the only proper avenue regarding the February 10, 2000 decision was to appeal to the Board, as set forth in the appeal rights accompanying that decision.

Regarding the first issue, the Board finds that appellant has not established that she sustained July 25 and October 3, 1997 recurrences of disability causally related to accepted February 5, 1991 injuries.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 such that he or she cannot perform the light-duty position. As part of this burden, the employee must show a change either in the nature and extent of the injury-related condition or the light-duty job requirements.[14]

The light-duty position appellant performed as of July 25, 1997 was deemed suitable work within her medical restrictions. Appellant submitted several statements asserting that her light-duty job requirements changed on July 25, 1997, when her desk was moved from its prior location to allow for better egress around her work site. She asserted that this move forced her to walk 50 feet to retrieve magazines for processing, carry tubs of mail weighing more than 10 pounds and exposure to hazardous noise from a canceling machine. Appellant also alleged that a chair issued to her on October 3, 1997 caused back and neck pain. However, appellant did not submit factual evidence corroborating her allegations.

In an April 15, 1999 letter, the employing establishment explained that on July 25, 1997 appellant's desk was moved 10 feet from its prior site, not 50 feet, in response to appellant's allegations of insufficient egress creating a hazard, to provide more space to the back and sides of her work site. Similarly, appellant has not established that she was required to carry heavy tubs of mail. A September 11, 1997 industrial noise survey did not find hazardous noise and the chair issued to appellant on October 3, 1997 was the standard, authorized model used at the employing establishment and no hazard was demonstrated.

[14] *Terry R. Hedman*, 38 ECAB 222 (1986).

Thus, appellant has not established that she had to walk 50 feet to and from her desk to retrieve magazines, carry tubs of mail weighing more than 10 pounds or was exposed to hazardous noise or an injurious chair. Appellant has substantiated only that on July 25, 1997, her desk was moved 10 feet from its prior location. She must then show that this change in work site caused a worsening of her condition that disabled her for work for the alleged periods.

Appellant submitted several medical reports from Dr. Gutstein, an attending Board-certified neurologist, mentioning the July 25, 1997 work site change. In a September 26, 1997 and January 13, 1998 report, Dr. Gutstein asserted that the change in appellant's desk position in July and October 3, 1997 "aggravate[ed] her spinal condition" by requiring her to turn her head to the right. In an April 5, 1999 and April 10, 2000 reports, Dr. Gutstein added that walking 50 feet to retrieve magazines, carrying mail tubs weighing more than 10 pounds, repetitive motion with the right arm, and sealing envelopes caused cervical radiculopathy and traumatic tendinitis and synovitis of the right shoulder. Dr. Gutstein noted work absences from July 5 to 9 and September 22 to 26, 1997 attributable to these duties.

There are several difficulties with Dr. Gutstein's reports. First, they rely on appellant's grossly inaccurate account of being made to walk 50 feet to retrieve magazines, whereas she only had to walk 10 feet. Also, they mention carrying heavy tubs of mail, which was also not established as factual. Dr. Gutstein's opinion on causal relationship is thus severely diminished due to his reliance on an inaccurate factual history.[15] Additionally, he did not explain how and why the sedentary clerical duties he had previously approved, such as sealing envelopes, would cause or aggravate the accepted conditions. Also, the Office did not accept a right shoulder condition or cervical radiculopathy as related to the February 5, 1991 injuries. This lack of rationale further diminishes the probative value of his opinion.[16]

Thus, appellant has not established her claims for recurrences of disability due to a lack of rationalized medical evidence explaining how and why the established change in her light-duty job requirements would cause or aggravate any condition.

Regarding the second issue, the Board finds that the Office in its February 10, 2000 decision properly denied appellant's November 2, 19999 request for reconsideration on its merits under 5 U.S.C. § 8128(a) on the basis that the request did not meet the requirements set forth under section 8128.[17]

Under section 8128(a) of the Federal Employees' Compensation Act,[18] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[19] which provides that a claimant may obtain review of the merits if his or her written

[15] *Thomas A. Faber*, 50 ECAB 566 (1999).

[16] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

[17] *See* 20 C.F.R. §10.606(b)(2) (i-iii).

[18] 5 U.S.C. § 8128(a).

[19] 20 C.F.R. § 10.606(b)(1999).

application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by the Office; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."[20]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[21]

Accompanying her November 2, 1999 letter requesting reconsideration of the Office's decision dated May 21 and finalized May 24, 1999, appellant submitted documents dated July 1 through October 3, 1997 relating to her safety complaints regarding waste mail tubs, hazardous noise and egress around her workstation. None of these documents confirms the critical allegation that appellant was required to walk 50 feet to retrieve magazines or carry heavy tubs of mail in violation of her work limitations. They are therefore irrelevant to the issue in question at the time appellant requested reconsideration. Arguendo, these documents establish that none of the safety hazards appellant alleged in fact existed.

Appellant also submitted a June 25, 1999 approval for Social Security disability benefits, and October 13, 1999 approval of her application for disability retirement through the OPM. Neither determination is relevant to appellant's claims for recurrence of disability as they do not specifically address the claimed time periods of disability. Also, the Board notes that determinations of other federal agencies, such as the Social Security Administration, are not binding on the Office as they are based on different standards of medical proof and do not require that the disability be employment related.[22]

Therefore, the Office's February 10, 2000 decision denying appellant's November 2, 1999 request for reconsideration is proper under the law and facts of this case, as the documents submitted in support of her request were irrelevant to her claims for recurrence of disability.

The Board also finds that appellant did not establish her May 7, 2000 allegations of impropriety by the Office in the processing of her claim. Appellant asserted that she should have been referred to a neurologist and not an orthopedic surgeon for the second opinion and impartial medical examinations. The Board notes that Dr. Sadler, the second opinion physician and

[20] 20 C.F.R. § 10.606(b).

[21] 20 C.F.R. § 10.608(b).

[22] *Daniel Deparini*, 44 ECAB 657 (1993).

Dr. Barschi, the impartial medical examiner, are both Board-certified orthopedic surgeons and are thus qualified to provide an opinion regarding spinal injuries.

Appellant also alleged that Mr. Springman, a union steward, did not adequately represent her at the March 18, 1999 hearing. The Board notes that the record indicates that appellant chose Mr. Springman to represent her at the oral hearing. Mr. Springman was not invited to appear by the employing establishment, or otherwise compelled to attend. Therefore, appellant's dissatisfaction with Mr. Springman's services is a consequence of her own choice, and cannot be remedied by the Office or by the Board.

Appellant also alleged that she did not receive a copy of the hearing transcript and the employing establishment's comments. However, the record demonstrates that the Office mailed appellant a copy of both documents at her address of record. Therefore, appellant is presumed to have received these documents.[23]

The decisions of the Office of Workers' Compensation Programs dated July 21 and February 10, 2000 are hereby affirmed.

Dated, Washington, DC
June 13, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[23] *Kimberly A. Raffile*, 50 ECAB 243 (1999).