U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AUDREY WHEAT and U.S. POSTAL SERVICE
POST OFFICE, New Orleans, LA

Docket No. 00-1442; Submitted on the Record;
Issued May 7, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a recurrence of disability on July 4, 1997 causally related to her September 21, 1991 injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

The Office accepted that, on September 21, 1991, appellant then a 44-year-old letter sorting machine operator, sustained a left scapulae strain and cervical strain and herniated C5-6 disc along with aggravation of C5-6 spondylosis.[1] She returned to work on March 23, 1992 when she was released to light duty for four hours a day and was subsequently released to six hours a day on June 7, 1992.[2] Appellant subsequently stopped work on February 9, 1995, returned on July 15, 1996 at light duty for eight hours a day.[3] She again worked intermittently and stopped completely on September 14, 1996. Appellant returned to work again on May 1,

[1] The claim for occupational disease was filed on November 6, 1991. The Office also authorized anterior fusion surgery at C5-7, however, it was never performed.

[2] The initial medical treatment records show that appellant sought treatment with Dr. Alain F. Cracco, a Board-certified orthopedic surgeon and Kern Chiropractic. Her position description includes reading the zip code off of a letter and keying it into the letter-sorting machine, operating 10 keys with each hand, with sixty letters processed in an hour. The position required operators to key for 45 minutes every hour with the remaining 15 minutes sweeping the area, bundling letters, moving trays weighing up to 10 pounds, or loading the machine and making sure all the letters are facing in the same direction.

[3] Appellant's position was comprised of patching up damaged letters and flats, handling stamping/canceling mail and distributing it to a manual letter case. The position was mainly sedentary with intermittent sitting, standing, walking, occasional bending, climbing, squatting, kneeling and no reaching above shoulder level or crawling. Lifting, carrying, pushing and pulling were limited to 10 pounds.

1997, at light duty for two hours a day.[4] She again worked intermittently until stopping completely on July 4, 1997.[5]

In a March 31, 1998 report, John M. Boutte, a Ph.D., and clinical psychologist, noted that appellant's doctor indicated she was at maximum medical improvement with respect to her physical condition. He noted that she complained of poor sleep for the past several nights and continued to engage in routine activities, was quite aware of increased muscle tension and significant anxiety and depressed mood in response to pain symptoms. Dr. Boutte noted an increase in migraines and that appellant continued to experience muscle spasms in the back and shoulders.

In an April 21, 1999 report, Dr. Bryant G. George, a neurological surgeon and appellant's physician, noted appellant was incurring chiropractic treatment and most recently had a fall at home on April 15, 1999 on a wet floor. He noted appellant's complaints of headache, neck pain and pain in the left shoulder, low back pain and pain in the right wrist when she placed pressure on it. Dr. George indicated that examination of the neck and upper extremity revealed some muscle tenderness in the left trapezius base and there was normal sensory. He found the reflexes were equal in both upper extremities and there was no weakness and no measurable wasting of the biceps or forearm or of the intrinsic muscles of the hand. Dr. George further advised that appellant continue treatment with the chiropractor for three days a week for six weeks and stated that she was at maximum medical improvement. Additionally, Dr. George advised that appellant was capable of sedentary to light work.

In a May 3, 1999 report, Dr. George indicated that appellant had a sitting intolerance and could not sit for any long periods of time. He requested that her second opinion be scheduled with a physician in the area to avoid driving for an extended period of time.

By letter dated April 9, 1999, the Office advised appellant that her entitlement to further compensation back to July 4, 1997 could not be determined until all remand actions were complete and she would be attending a second opinion examination and would be advised of the date.

By letters dated May 3, 1999, the Office referred appellant along with a statement of accepted facts to Dr. Luiz C. De Araujo, a Board-certified neurological surgeon, for a second opinion examination.

---

[4] This position entailed placing damaged mail in plastic bags, scotch taping mail, preparing and addressing envelopes and retrieving letter volumes for sorting and processing. The physical requirements remained the same as her prior light-duty position.

[5] The record reflects that appellant had a lost wage-earning capacity, determining that her modified position fairly and reasonably represented her wage-earning capacity on April 1, 1998. On April 4, 1998 the Office placed appellant on the compensation rolls at a reduced capacity for working two hours a day and on April 16, 1998 the Office denied appellant's recurrence on or after July 4, 1997 as unrelated to her accepted work injury. This decision was remanded by the hearing representative for further development and issuance of a new decision superceding these decisions and to determine the extent of any injury related disability for work since May 1, 1997 and recommendations for further treatment.

In a June 7, 1999 report, Dr. De Araujo noted examining appellant for symptoms of neck and left upper extremity pain subsequent to a job-related accident, which occurred on September 21, 1991. He also noted complaints of migraine headaches and low back pain, however, he stated that he would not address those in this report as they were not covered by appellant's present claim. Dr. De Araujo stated that appellant developed neck pain radiating into the left trapezius area and left scapular region starting in September 1991 when she was pulling some mail from a sorting machine. He indicated that appellant received conservative treatment with only limited improvement in her symptoms. Dr. De Araujo reviewed past radiological studies and electrophysical studies and noted that the April 1995 study was suggestive of a left sixth cervical nerve root abnormality on the electromyogram. He stated that neurological examination revealed speech, station, gait, coordination and mental status to be normal. The cranial nerves were not examined and she had no detectable motor deficit. Dr. De Araujo found that appellant had sensation slightly decreased to pin in the sixth cervical dermatome on the left side as compared to the right, proprioception was normal, deep tendon reflexes were brisk and symmetrical and superficial reflexes were normal and appellant had no clonus. He noted examination of the cervical spine revealed limitation of range of motion of the neck, particularly on the left lateral rotation due to pain, however, spurling maneuver was negative in both directions. Dr. De Araujo found that appellant had a very small area of tenderness of the paravertebral cervical muscles on the left side in the mid cervical aspect and no spasm of the muscles at that level, although she did have a very small area of spasm of the trapezius on the left side and a trigger point for pain along the scapular border on the left side. He indicated that he believed appellant had a mildly symptomatic left C6 radiculopathy secondary to foraminal stenosis between the fifth and sixth vertebrae on the left side. Dr. De Araujo opined that the symptoms seemed to correlate with the accident of September 21, 1991 as they were absent prior to that date and were a manifestation of symptoms from a previously existing lesion, that is foraminal stenosis secondary to spondylosis of the cervical spine, which had been dormant until that particular date. He stated further that appellant was able to perform light duty since May 1, 1997 and at the very least, she should be able to work on a part-time basis. Dr. De Araujo further opined that, from a physical examination standpoint, appellant should be able to perform the duties of letter sorting machine operator, however he recommended a functional capacity examination. Dr. De Araujo also stated that appellant seemed to have a chronic syndrome of the neck and left shoulder and could perhaps improve with surgical treatment, but she declined to have a foraminotomy of the C5-6 on the left and it was a moot point. He further indicated that he did not feel any further chiropractic treatment or physical therapy would be of benefit to appellant.

In a June 9, 1999 disability certificate, Dr. Timothy Kern, a chiropractor, stated that appellant's condition had "taken somewhat of a backslide symptomatically," due to her recent travels and stated that she needed to continue her chiropractic treatments.

In a July 2, 1999 memorandum,[6] the Office determined that a conflict arose between the medical opinions of Drs. De Araujo and George.

[6] It was in the form of an email.

By letters dated July 13, 1999, the Office referred appellant, the case record and a statement of accepted facts to Dr. Ricardo R. Leoni, a Board-certified neurological surgeon, to resolve the conflict.

In a July 19, 1999 report, Dr. George diagnosed cervical spondylosis and lumbar strain. He noted that appellant's present complaints of headaches, neck pain, pain in the left shoulder, low back pain and insomnia. Dr. George's examination revealed that the neck and upper extremity examination showed post cervical tenderness, with no weakness and her reflexes were equal in both upper extremities, with normal sensory. He found no measurable wasting of the biceps or forearm, or of the intrinsic muscles of the hand. Dr. George found that the back and lumbar extremity examination revealed that appellant was wearing a lumbar brace, her reflexes were intact, with no measurable weakness or wasting and the SLR maneuver was negative. He found severe back spasms of an objective character with marked restrictions of hyperextension movement at the waist and to a lesser degree forward flexion bending at the waist and the muscle insertions were markedly tender to palpation. Dr. George advised continued treatment with Dr. Kern and stated appellant was totally temporarily disabled.

In an August 3, 1999 report, Dr. Leoni, the referee physician, noted that appellant sustained an injury on September 21, 1991, when she was lifting some letters and had the onset of neck and bilateral shoulder pain and this pain at one time was going into her left arm with numbness in her 4th and 5th fingers. He stated that that was getting better and appellant was left primarily with neck pain at the base of her neck. Dr. Leoni noted that appellant did not have any real radicular component at this time and that her neck pain started in 1993. He further stated that appellant's back pain was in her back and did not radiate. Dr. Leoni performed an examination of appellant's neck and noted that she had no weakness in her grasp, her biceps, triceps, or deltoid and her biceps and triceps reflexes were +2 throughout. He indicated that appellant had no neck spasm and no Hoffman's signs in the upper extremities. On examination of her low back, Dr. Leoni noted no radicular component and her straight leg raising was negative. He further found no weakness in her quadriceps muscles, extensor hallucis longus or tibialis anterior or plantar flexion. Dr. Leoni indicated that appellant's knee jerks were +1; her ankle jerks +2 bilaterally and again, her straight leg raising was negative. He opined that appellant's migraine problem began around 1993 and worsened. Dr. Leoni noted that appellant referred to a computerized axial tomography (CAT) scan done after the headaches started but could not locate this report in the file. Dr. Leoni reviewed the August 26, 1998 magnetic resonance imaging scan and opined that appellant had osteoarthritis or spondylitic disease at C5-6 and a small amount of C4-5 and C6-7 but they were minimal compared to C5-6 and stated that she had no real radicular pain at this time and that there were no findings on examination in her upper extremities. He opined that with appellant having spondylosis in this area, the accident may well have aggravated her spondylosis. Dr. Leoni stated that, without neurological deficit, he would not recommend any definite surgery at this time. He further proffered that most aggravations of a spondylosis would be temporary and not something that would last more than six months. Dr. Leoni further offered that he did not see why appellant could not do at least light duty. He also stated that her back problems did not develop until after her cervical problems and he did not have any causal relationship to the accident. Dr. Leoni also addressed the headaches and stated that they could come from neck injuries or even aggravation of osteoarthritis and he thought these could be related to her neck pain, but again she had no

concrete findings and he would only treat appellant conservatively as was currently occurring. Dr. Leoni further advised that due to her complaints, he would only advise light duty and lifting of no more than 15 to 20 pounds, occasionally. He stated that he believed appellant's main problem was cervical osteoarthritis, which may have been aggravated by the September 21, 1991 accident but not enough to cause any neurological defect.

In a September 9, 1999 addendum, Dr. Leoni advised that appellant had osteoarthritis and there "is no way she is not going to have any residuals from her osteoarthritis." He stated that, in relation to the work injury of 1991, "he would think if it was soft tissue problems or aggravation of arthritis, it would usually be better." Dr. Leoni offered that if appellant were having symptoms, he would only have her do limited duty and repeated his recommendation that appellant could do limited duty. He further advised that "there is no way I can tell you whether it [is] from her osteoarthritis or whether it [is] from the aggravation of the osteoarthritis by her accident." Dr. Leoni stated: "[I]t [is] impossible for me to tell you whether [appellant's] residual symptoms are due to either one." He opined that it was probably due to at least a combination of the two, but stated most people with osteoarthritis would get better. Dr. Leoni stated: "[T]here is no way I can tell you if the aggravation has gone away or not."

By letter dated October 1, 1999, the Office again requested clarification from Dr. Leoni. The Office specifically inquired into appellant's ability to perform her light-duty job six hours a day since May 1, 1997.

In an October 5, 1999 addendum, Dr. Leoni advised that, if appellant was feeling as she was on his September 9, 1999 examination, then she could perform the light duty described in the October 1, 1999 clarification letter. He stated that appellant had no reflex asymmetry, no neck spasms, no abnormal Hoffmann's signs and no abnormalities in straight leg raising. Dr. Leoni advised that there was no weakness in her lower extremities and her reflexes were intact. He stated that with appellant's examination essentially being negative, he did not see any reason why she could not do light duty as of May 1, 1997, unless there were other unmentioned circumstances.

By decision dated October 19, 1999, the Office rejected appellant's recurrence of disability claim on July 4, 1997 on the grounds that she failed to establish that her claimed recurrent condition was related to her September 21, 1991 employment injury.

On October 27, 1999 appellant requested reconsideration and submitted additional evidence and argument.

The additional evidence was comprised of a seven-page request for reconsideration, a report from Kern Chiropractic, copies of bills paid to Gulfcoast Pain Institute and Northshore Regional Medical Center and a report from Elaine Sena, a massage therapist and appellant's rejection of an offer from the employing establishment.

In a November 3, 1999 decision, the Office denied merit review of appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant to the issue of a recurrence and insufficient to warrant a review of the prior decision.

The Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability beginning July 4, 1997 causally related to her accepted employment injury September 21, 1991.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a limited or 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 and to show that he or she cannot perform such light duty. As part of this burden, appellant must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[7] Appellant must furnish rationalized medical opinion evidence, based on a complete and accurate factual and medical history, showing a causal relationship between the claimed recurrence of disability and an accepted employment injury.[8] Causal relation and disability are medical issues that must be resolved by competent medical evidence.[9]

Appellant has not provided any medical reports, based on objective findings, which establish that there has been a change in the nature and extent of her condition such that she can no longer perform her light-duty job and also has provided no evidence to establish that there has been a change in the nature and extent of her light-duty job requirements.

In this case, the Office accepted that appellant sustained left shoulder and cervical strains and a herniated C5-6 disc in the performance of duty on September 21, 1991. The Office also authorized a cervical fusion, however it was never performed. Appellant filed a notice of recurrence of disability commencing July 4, 1997. She did not submit any medical evidence that her present condition was causally related to her September 21, 1991 employment injury such that she could no longer perform her light-duty position. For example, appellant did not submit a medical report in which her treating physician explained why her claimed continuing condition would be related to the accepted September 21, 1991 injury such that she could no longer perform her light-duty position.

In this case, appellant's treating physician, Dr. George, opined that appellant was totally disabled. She was then referred to Dr. De Araujo, who disagreed, with the finding that appellant

[7] *Richard E. Konnen*, 47 ECAB 388 (1996);*Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[8] *Armondo Colon*, 41 ECAB 563 (1990).

[9] *Debra Kirk-Littleton*, 41 ECAB 703 (1990); *Ausberto Guzman*, 25 ECAB 362 (1974).

was able to do light duty since May 1, 1997 and at the very least, she should be able to perform the duties of letter sorting machine operator.[10] As there existed a conflict between appellant's treating physician, Dr. George and the physician who performed the second opinion evaluation for the Office, Dr. De Araujo, the Office referred appellant to Dr. Leoni for an independent medical examination. He opined that he did not see any reason why appellant could not do light duty as of May 1, 1997.

When a case is referred to a referee medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11] In the case at hand, Dr. Leoni resolved the conflict between Drs. George and De Araujo by noting that appellant was capable of performing her light-duty job. Dr. Leoni's opinion is based on a review of appellant's medical history and a physical evaluation. He, in a complete and rationalized opinion, found that appellant could perform her light-duty assignment. Dr. Leoni based his opinion on a complete examination, including her neck and back. He stated that appellant's grasp did not show any weakness, her biceps, triceps and deltoid and her biceps and triceps weaknesses were +2 throughout and she had no neck spasm or Hoffman's signs in the upper extremities. Dr. Leoni found no radicular component in appellant's back and found her straight leg raising was negative. He found that appellant had a migraine problem that began in 1993 and worsened and that appellant had osteoarthritis or spondylitic disease at C5-6 and a small amount at C4-5 and C5-7 but they were minimal compare to C5-6 and there was no real radicular pain. Dr. Leoni proffered that at most the aggravations of spondylitis would by temporary and not last more than six months and he did not see any reason why appellant could not do "at least light duty." He further stated that appellant's main problem was cervical osteoarthritis which may have been aggravated by the incident but not enough to cause any neurological deficit. In his October 5, 1999 addendum, Dr. Leoni stated that he did not see any reason why appellant could not do light duty as of May 1, 1997, unless there were other unmentioned circumstances. Accordingly, as Dr. Leoni was the independent medical examiner and he found that appellant could continue to perform her limited-duty position, the Board affirms the Office's denial of appellant's claim for a recurrence because the medical and factual evidence failed to demonstrate that the claimed recurrent disability was the result of a worsening of appellant's accepted condition or a change in her light-duty requirements such that she could no longer perform her light-duty position.

Furthermore, the Board finds that the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

[10] The Board notes that the doctor suggested a functional capacity examination, however, he opined that appellant could do some sort of light duty.

[11] *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2),[12] a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[13]

In the present case, relevant and pertinent new medical evidence did not accompany appellant's request for reconsideration. This is important since the underlying issue in the claim, whether appellant had a recurrence of disability on and after July 4, 1997, which was related to her accepted employment injury September 21, 1991, is essentially medical in nature.

In its November 3, 1999 decision, the Office correctly noted that the evidence submitted was irrelevant and not sufficient to warrant merit review.

Appellant argued that she was not able to work because of pain and she wanted her back condition accepted as a work-related injury, however, these arguments were not new or relevant and of limited probative value.

Appellant provided a massage therapist notes, however, these reports are not probative medical reports, as massage therapists are not defined as physicians under the Act.[14]

Appellant also provided a copy of a bill from her chiropractor and some notes from the chiropractor[15] and a bill from Gulf Coast Pain Institute and Northshore Regional Medical Center.

---

[12] 20 C.F.R. § 10.606(b)(2).

[13] 20 C.F.R. § 10.608(b) (1999).

[14] 5 U.S.C. § 8101(2); *see also Sheila A. Johnson*, 46 ECAB 323 (1994).

[15] Section 8101(2) of the Act recognizes a chiropractor as a physician " only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist." 5 U.S.C. § 8101(2); *See also Marjorie S. Geer*, 39 ECAB 1099, 1101-02 (1988). In this case, appellant did not file a claim for a subluxation of the spine.

These documents, however, are of limited probative value on the relevant issue of the present case in that they do not contain an opinion that appellant's claimed condition is due to the accepted employment incident.[16]

Appellant did not supply any medical reports to provide relevant or pertinent new evidence, nor did she advance a relevant legal argument that had not been previously considered by the Office. Additionally, appellant did not argue that the Office erroneously applied or interpreted a specific point of law. Consequently, appellant is not entitled to a merit review of the claim based upon any of the above-noted requirements under 20 C.F.R. § 10.606(b)(2) (1999). Accordingly, the Board finds that the Office properly denied appellant's October 27, 1999 request for reconsideration.[17]

The November 3 and October 19, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
May 7, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[16] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence, which does not offer any opinion regarding the cause of an employee's condition, is of limited probative value on the issue of causal relationship).

[17] The Board notes that subsequent to the Office's November 3, 1999 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952). Appellant can submit the new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. 10.606(b)(2) (1999); s*ee* 20 C.F. R. § 501.2(c).