

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE O. BAILEY and U.S. POSTAL SERVICE,
CHEF MENTEUR POST OFFICE, New Orleans, LA

*Docket No. 02-2184; Submitted on the Record;
Issued May 15, 2003*

DECISION and ORDER

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

The issues are: (1) whether appellant established that she sustained a recurrence of disability on or after December 20, 1998 causally related to an accepted July 1, 1988 lumbar injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's December 6, 2001 request for an oral hearing on the grounds that it was untimely filed.

The Office accepted that, on July 1, 1988, appellant, then a 41-year-old letter carrier, sustained, a herniated nucleus pulposus at L4-5 and L5-S1, and an L5 subluxation, when she twisted her back when startled by a dog.¹ Appellant returned to work in a light-duty capacity on July 6, 1988.² She had intermittent work absences until she again stopped work on January 21, 1994 through October 9, 1998.³ Appellant returned to work on October 10, 1998 as a full-time, modified clerk, performing sedentary clerical and telephone duties, with a lifting limitation of 10 pounds.

Dr. Raul R. Diaz, an attending Board-certified orthopedic surgeon, submitted periodic treatment notes from 1993 through 1997 describing appellant's continuing neck, lumbar, upper and lower extremity pain.

In a March 24, 1998 new patient report, Dr. John J. Watermeier, an attending Board-certified orthopedic surgeon, provided a history of injury and treatment, and related appellant's symptoms of low back and neck pain, left arm and hand weakness and headaches. On

¹ The Office did not accept the concurrent conditions of uncontrollable hypertension, neurotic depression, tension headaches, abdominal pain and a cervical spine condition.

² In a July 26, 1988 report, Dr. Gary D. Watts, an attending chiropractor, diagnosed a spinal subluxation by x-ray. Dr. Watts submitted periodic reports and work restrictions through 1990.

³ Appellant received nurse rehabilitation services in 1993 and 1994. Appellant received wage-loss compensation on the periodic rolls intermittently in 1993 and from June 26, 1994 through mid-October 1998.

examination Dr. Watermeier found a limited range of spinal motion at all levels and positive straight-leg raising tests bilaterally. He obtained x-rays showing mild spondylosis with anterior osteophyte formation and mild disc space narrowing. Dr. Watermeier stated an impression of “by history ... involved in a work-related accident occurring in July 1988. She continues to have symptoms despite the passage of time and treatment.” Dr. Watermeier provided work limitations in periodic reports through 1998, releasing her to full-time light duty in October 1998. In a November 30, 1998 report, Dr. Watermeier noted that appellant’s obesity complicated her condition and diagnosed lumbar disc displacement.

By decision dated December 30, 1998, the Office found that the permanent modified clerk position that appellant had performed since October 19, 1998 was suitable work and was representative of appellant’s wage-earning capacity. The Office terminated appellant’s wage-loss compensation benefits on the grounds that she had no loss of wages.⁴

Although she was scheduled to work eight hours per day, appellant began working a four-hour per day schedule in December 1998 and filed claims for wage loss for the remaining four hours per day. Appellant continued to work four hours per day in the permanent light-duty position through at least October 2001, with intermittent absences.

Dr. Watermeier submitted periodic reports through 1999 noting appellant’s continuing cervical, lumbar, upper and lower extremity pain. He diagnosed cervical and lumbar disc displacement, cervical and lumbar disc syndrome and spinal enesopathy. Dr. Watermeier treated appellant’s symptoms with anesthetic injections and prescribed physical therapy.

In a November 4, 1999 letter, the Office advised appellant of the additional medical and factual evidence needed to substantiate her claims for wage loss on and after December 30, 1998, as Dr. Watermeier had released her to full-time modified duty as of October 1998. The Office advised appellant to submit a rationalized statement from her attending physician explaining how and why the accepted injuries would completely or partially disable her for work on and after December 30, 1998. On December 17, 1999 appellant filed a claim for recurrence of disability commencing October 22, 1998.

In a January 6, 2000 letter, Dr. Watermeier stated that appellant was able to increase her schedule to six hours per day, but had continuing pain symptoms in her neck and back precluding full-time work. He submitted reports from January 11 through October 2000 noting appellant’s continued neck, back and extremity pain. Dr. Watermeier diagnosed cervical and lumbar disc syndrome and displacement and interstitial myositis, treated with anesthetic injections. Dr. Watermeier did not address causal relationship in these reports.

The Office accepted that, on November 15, 2000, appellant sustained an aggravation of the accepted herniated lumbar discs, when a coworker bumped her left hand with a wire cage and another coworker struck the right side of her chair with two cargo containers.⁵ Following an

⁴ An October 19, 1998 wage-earning capacity worksheet showed that appellant was earning more in the modified position than in the date-of-injury position and therefore she had no loss of wage-earning capacity.

⁵ The November 15, 2000 injury was assigned Claim No. 162010055. The claim was later combined under Case No. 160144815.

examination and release by Dr. Watermeier, appellant returned to work on November 16, 2000 in a light-duty, sedentary position as a modified clerk.

In November 21, 2000 reports, Dr. Watermeier diagnosed “aggravation of cervical and lumbar disc syndrome,” due to the November 15, 2000 incident and spinal enesopathy. Dr. Watermeier held appellant off work for six weeks. He prescribed physical therapy, medication and trigger point injections.

Appellant received 45 days of continuation of pay for work absence related to the November 15, 2000 injury, ending on January 1, 2001.

In January 2 and 8, 2001 reports, Dr. Watermeier noted appellant’s continuing neck and back pain and again diagnosed cervical and lumbar disc syndrome and spinal enesopathy. He administered anesthetic trigger point injections. Dr. Watermeier released appellant to sedentary duty for four hours per day through February 13, 2001.

The Office accepted that, on February 6, 2001, appellant sustained a right hip contusion when her chair was struck by a coworker pushing equipment.⁶ A February 8, 2001 emergency room report diagnosed cervical spine strain, right thigh contusion, abdominal pain and lumbosacral degenerative joint disease. Appellant accepted a modified distribution clerk position on February 7, 2001.

A March 23, 2001 lumbar magnetic resonance imaging (MRI) scan showed a herniated disc at L4-5, chronic bilateral hypertrophic facet joint arthropathy at the L4-5, L5-S1 and mild central canal stenosis.

Dr. Diaz submitted periodic notes from July to December 2001 authorizing Dr. Michael Brantmeier, a chiropractor, to perform physical therapy to treat appellant’s neck and back symptoms. Dr. Diaz stated that appellant continued to benefit from chiropractic manual manipulation. He submitted progress notes from March to October 2001.

By decision dated October 26, 2001, the Office denied appellant’s claim for a recurrence of disability on and after December 30, 1998. The Office found that Dr. Watermeier’s opinion that appellant could not work eight hours per day due to neck and back pain did not establish any objective disability for work related to the accepted injuries. The Office explained that appellant did not provide evidence substantiating that her absences from October 1998 to October 2001 were due to the accepted injuries, that her accepted condition had worsened such that she could no longer perform the permanent modified position or that her duties had been changed to include tasks outside her medical limitations.

⁶ The February 6, 2001 injury was assigned Claim No. 162014530, later combined under Claim No. 160144815.

Appellant disagreed with this decision and in a November 15, 2001 letter, postmarked December 6, 2001, requested an oral hearing before a representative of the Office's Branch of Hearings and Review.⁷

On February 13, 2002 Dr. Diaz performed epidural steroid and nerve block injections at L4-5 and L5-S1, to treat diagnosed herniated discs at L4-5 and L5-S1. This procedure was authorized by the Office.

By decision dated June 18, 2002, the Office denied appellant's request for an oral hearing on the grounds that it was untimely filed. The Office found that appellant's request for an oral hearing was not postmarked until December 6, 2001, more than 30 days after the October 16, 2001 decision. The Office noted conducting a limited review of the case and further denied appellant's request for an oral hearing on the grounds that the issues involved could be addressed equally well by the submission of new, relevant evidence accompanying a valid request for reconsideration. The Office specified that appellant's only avenue of appeal was to the Board.⁸ Appellant filed her appeal with the Board on August 26, 2002.

Regarding the first issue, the Board finds that the Office properly denied appellant's claims for a recurrence of disability on and after December 30, 1998.

When a claimant who is on light duty alleges a recurrence of disability, the he or she must show either a change in the nature and extent of the light-duty job requirements, or in the extent of the work-related injury or condition.⁹ To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change, and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.¹⁰

In this case, on October 10, 1998, following a four-year work absence, appellant returned to work as a full-time modified clerk with sedentary work limitations. Dr. Watermeier, an attending Board-certified orthopedic surgeon, released appellant to full-time sedentary duty in mid-October 1998. Appellant performed this position through December 1998. Thus, on December 30, 1998 the Office issued a decision finding that the modified clerk position was

⁷ In a January 7, 2002 letter, the Office's Branch of Hearings and Review advised appellant that her case file was received from the Office, and that, if the case was "not in posture for a hearing, [she would] be advised within 90 days of receipt of [the] letter."

⁸ In a July 12, 2002 letter, appellant requested "a reconsideration for an oral hearing." She submitted additional evidence, including progress notes from Dr. Diaz and Dr. Brantmeier dated from February to October 2002. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). In an August 13, 2002 letter, the Branch of Hearings and Review advised appellant that her case file was received from the Office, and that, if the case was "not in posture for a hearing, [she would] be advised within 90 days of receipt of [the] letter." By letter dated August 28, 2002, the Office noted that appellant's July 12, 2002 request for reconsideration could not be processed, as there was no entitlement to a reconsideration of the Office's June 18, 2002 decision. The Office advised appellant to follow the appeal rights included with the June 18, 2002 decision.

⁹ *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁰ *James H. Botts*, 50 ECAB 265 (1999).

suitable work and that appellant had no loss of wage-earning capacity. However, appellant alleged that she sustained a recurrence of disability on and after December 30, 1998 such that she could no longer work eight hours per day. Appellant continued working only four hours per day through October 2001 and beyond.

Appellant does not allege a change in the nature and extent of her light-duty job requirements. Rather, she asserts that her accepted lumbar condition worsened such that she was no longer medically capable of performing the full-time modified clerk position. Thus, in order to prevail, appellant must submit sufficient rationalized medical evidence substantiating an objective, organic change in her accepted lumbar condition on and after December 30, 1998 and explaining how and why such a change would disable her from performing the modified clerk position.

Appellant submitted several reports from Dr. Watermeier relating her severe, ongoing neck and back pain, with radiation into the upper and lower extremities bilaterally. The Board notes that the Office has not accepted a cervical spinal condition or any radiculopathies as work related. Therefore, the analysis of these reports is based only on their discussion of the accepted lumbar condition.

In a November 30, 1998 report, Dr. Watermeier noted that appellant's lumbar condition was complicated by obesity and diagnosed lumbar disc displacement. In periodic reports through 1999, Dr. Watermeier diagnosed cervical and lumbar disc displacement, cervical and lumbar disc syndrome and spinal enesopathy, noting appellant's continued neck, back and extremity pain. In a January 6, 2000 report, Dr. Watermeier opined that, despite these symptoms, appellant was medically able to increase her work schedule from four to six hours per day. He continued to describe appellant's pain symptoms in reports through October 2000.

While Dr. Watermeier described appellant's continuing lumbar pain, he did not provide objective findings substantiating an organic worsening of the accepted herniated L4-5 and L5-S1 discs. Also, Dr. Watermeier did not explain how and why the accepted July 1, 1988 disc herniations would disable appellant from full-time sedentary work on or after December 30, 1998. Thus, Dr. Watermeier's reports through October 2000 are insufficient to meet appellant's burden of proof.¹¹

The Office accepted that appellant sustained a November 15, 2000 aggravation of the herniated lumbar discs when bumped twice by coworkers pushing equipment and authorized 45 days continuation of pay. Initially, appellant did not lose time due to this aggravation other than to seek medical attention. Dr. Watermeier diagnosed a November 15, 2000 aggravation of the cervical and lumbar disc syndromes and released her to sedentary work as of November 16, 2000. When appellant complained of an increase in her subjective pain symptoms on November 21, 2000, Dr. Watermeier held appellant off work for six weeks. He then released appellant to sedentary work for four hours per day in January 2 and 8, 2001 reports.

The Board finds that appellant established that she was disabled for work from approximately November 17, 2000 through January 1, 2001, due to the November 15, 2000

¹¹ *Samuel Senkow*, 50 ECAB 370 (1999).

injury. However, Dr. Watermeier did not provide medical rationale opining that this period of disability was due to an objective worsening of the accepted lumbar condition or that the November 15, 2000 incident caused any permanent worsening of the accepted condition.

The Office also accepted that appellant sustained a right hip contusion on February 6, 2001. Appellant did not lose time from this injury other than to receive medical attention and was able to resume sedentary work on February 7, 2001. Dr. Watermeier did not provide medical rationale establishing that the February 6, 2001 injury either disabled appellant for work or caused an objective worsening of the accepted lumbar condition.

Appellant also submitted reports from Dr. Diaz, an attending Board-certified orthopedic surgeon, who noted appellant's neck and back pain in periodic reports from July to December 2001, and prescribed physical therapy. However, Dr. Diaz did not provide medical rationale explaining how and why appellant would be medically unable to perform the full-time, light-duty position on and after December 30, 1998.

Consequently, appellant has not met her burden of proof in establishing that she sustained a recurrence of disability on and after December 30, 1998, as she submitted insufficient medical evidence establishing that her accepted lumbar condition worsened such that she was unable to perform the full-time modified clerk position.

Regarding the second issue, the Board finds that the Office properly denied appellant's request for an oral hearing on the grounds that it was untimely filed.

The Federal Employees' Compensation Act¹² is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to an oral hearing or written review of the record before a representative of the Office.¹³ Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative states, in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹⁴ These regulations specifically require that the hearing request must be sent within 30 days as determined by the postmark, or other carrier's date marking, of the date of the decision for which a hearing is sought.¹⁵ The Office's procedures require it to exercise its discretionary authority to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a). The Board has held that the Office's exercise of this discretion is a proper interpretation of the Act and Board precedent.¹⁶

¹² 5 U.S.C. §§ 8101-8193.

¹³ 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB 411 (1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

¹⁴ 5 U.S.C. § 8124(b)(1).

¹⁵ *Samuel R. Johnson*, 51 ECAB 612 (2000).

¹⁶ *Henry Moreno*, 39 ECAB 475 (1988).

In this case, the Office issued an October 26, 2001 decision denying appellant's claim for a recurrence of disability commencing December 30, 1998. Appellant disagreed with this decision and in a letter dated November 15, 2001 and postmarked December 6, 2001, requested an oral hearing before a representative of the Branch of Hearings and Review. As the letter was not postmarked until December 6, 2001, appellant's request for an oral hearing was made more than 30 days after the October 26, 2001 decision, and was therefore untimely filed.

The Office also reviewed appellant's request and properly exercised its discretion in finding that her request was further denied on the grounds that the issues involved could be advanced equally well by submitting new, relevant evidence accompanying a valid request for reconsideration. Thus, the Office's denial of appellant's December 6, 2001 request for an oral hearing was proper under the law and the facts of this case.

The decisions of the Office of Workers' Compensation Programs dated June 18, 2002 and October 26, 2001 are hereby affirmed.

Dated, Washington, DC
May 15, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member