U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY L. IOZZO and U.S. POSTAL SERVICE,
POST OFFICE, White Plains, NY

Docket No. 99-126; Submitted on the Record;
Issued September 19, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to monetary compensation benefits on the grounds that she refused suitable work; and (2) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on or after October 13, 1993 causally related to her October 10, 1991 work-related injury.

The Office accepted that on October 10, 1991 appellant, then a 46-year-old mail processor, sustained a subluxation at L5 due to a lifting activity. She returned to limited-duty work repairing damaged mail. The Office paid appellant compensation for intermittent periods of temporary disability and for temporary total disability from January 21, 1992 through September 18, 1993. She now seeks disability benefits from October 13, 1993 through November 8, 1996.

In a report dated November 6, 1992, Dr. Eduardo V. Alvarez, a Board-certified orthopedic surgeon and an Office referral physician, noted appellant's history of injury and her course of treatment with her chiropractor, Dr. Lawrence D. Forgacs. Dr. Alvarez conducted a physical examination and reviewed the medical records, including a magnetic resonance imaging (MRI) scan of the LS-spine dated April 8, 1992. He concluded that appellant was suffering from back pain without any objective evidence of radiculopathy due to spondylolisthesis. Dr. Alvarez stated that the etiology was complex, but that repeated bending and lifting in a predisposed spine could be a causative factor, as these activities were present in her employment. He opined that appellant was employable in some capacity and should be offered extensive rehabilitation services to assist her to return to her job. Dr. Alvarez also opined that spinal manipulation should be abandoned and other forms of treatment explored as appellant had not attained her preinjury condition.

In a report dated December 22, 1992, Dr. Forgacs noted appellant's history of injury and current complaints and conducted a physical examination including x-rays of appellant's lumbar

spine. Dr. Forgacs provided a diagnosis of subluxation at the level of L5, with a disc displacement, sciatica-neuralgia or neuritis, kyphosis acquired. He stated that appellant has continual complaints of stiffness and pain at times of physical and emotional stress and, therefore, opined that appellant has a permanent total disability. Dr. Forgacs noted that post-traumatic pathology was probable since the principal injury was one of ligamentous and muscular sprain and strain to the joints of the body. The findings contained in this report were almost exactly duplicated in reports dated November 29, 1993 and September 1, 1994.[1]

Appellant underwent a functional capacity evaluation on April 2, 1993 which found that she would have difficulty performing the duties of her occupation, even with frequent changes of position when she felt discomfort, secondary to general body fatigue. Appellant appeared to have the aerobic capacity to sustain light activity over a two to four-hour day and a work hardening/simulation program was recommended.

Appellant underwent an aggressive physical therapy program from June 30 through September 10, 1993. In a September 28, 1993 report, the therapist listed her functional capacities: standing as tolerated with ability to change or sit after 20 to 30 minutes; sitting up to 1 hour before requiring positional changes; ambulating, moderate distances as tolerated; pulling/pushing 50 pounds on a cart; and lifting 10 to 20 pounds consistently from knee height to waist. The therapist additionally noted that appellant should have a weight limit of five pounds.

The employing establishment offered appellant a modified mail processor position for four hours a day, beginning October 3, 1993 with work commencing at two hours per day for two weeks, then three hours per day for two weeks and finally four hours per day five days per week. The position description provided that appellant would case mail at a case lowered to desk height. Mail was to be provided in a cart tilted forward for easy access. Appellant was not to lift the entire tray out of the cart, but was to place the mail on the ledge of the case, until she felt there was enough to work with. Small amounts of mail or single letters were then to be distributed into the case. Another clerk would assist appellant when the necessary slot could not be reached and/or when a slot filled up. If the job were performed properly, there would be no need for reaching above the shoulder, lifting more than 10 pounds, bending, climbing or kneeling. The employing establishment noted that an adjustable lumbar chair was available and the attachments recommended by appellant's physician would be purchased.

A form report from Dr. Forgacs dated September 23, 1993 indicated that appellant was totally disabled as a result of her original injury due to instability of the right sacroilliac joint. Dr. Forgacs indicated that past treatment included manipulation of the lumbar spine and that the course of future treatment should remain the same. He further indicated that there were no factors delaying recovery.

[1] In the prognosis section of his September 1, 1994 report, Dr. Forgacs added two sentences stating that appellant could not sit, stand or lift anything without severe pain, which also awoke her at times during the night. This statement is irrelevant to the issue of recurrence of disability. *See Barbara J. Williams*, 40 ECAB 549, 657 (1989) (medical reports that failed to address the issue of recurrence of disability causally related to the initial work injury found to be irrelevant).

On September 28, 1993 Dr. Forgacs indicated that appellant could do the requirements of the rehabilitation job offer. He reserved the right to reevaluate appellant's condition if she experienced any exacerbation of pain and discomfort as a result of the job offer. Also on September 28, 1993 appellant accepted the rehabilitation job offer but noted that she was in constant pain and sometimes her muscle spasms were so severe that walking and normal functioning were impossible.

Appellant worked for two hours on October 3, 5, 12 and 13, 1993. She then stopped working and has never returned. On October 13, 1993 appellant filed a claim for recurrence of disability causally related to her October 10, 1991 employment injury.

By letter dated October 20, 1993, the Office advised appellant that it had reviewed the offer of employment, compared it with the medical evidence concerning her ability to work, and found the offer to be suitable. The Office noted that she was seeking to retire, but advised appellant that a partially disabled employee who refuses suitable work are not entitled to further compensation. The Office gave appellant 30 days to accept the job or provide a reasonable, acceptable explanation for refusing the offer. Appellant did not submit a response.

By decision dated November 29, 1993, the Office denied appellant's claim for compensation on the grounds that she neglected to work after suitable work was procured under section 8106(c).

On November 16, 1993 Dr. Paul G. Kleinman, a Board-certified orthopedic surgeon, performed a physical examination for the employing establishment. Dr. Kleinman diagnosed chronic low back syndrome with preexisting degenerative disc disease and spondylolisthesis, L5-S1 and found no evidence of disc herniation. He stated that appellant's chronic low back strain was causally related, assuming she did not have any back symptoms prior to October 10, 1991. Dr. Kleinman noted that this was questionable as she had been seeing a chiropractor for low back pain. He opined that appellant had a moderate partial disability, had reached maximum improvement and could work a four-hour day with restrictions.

On November 22, 1993 Dr. Elliott Gross, a Board-certified neurologist, performed a neurological examination for the employing establishment. Dr. Gross concluded that appellant's subjective complaints were not correlated by objective findings as there were no significant clinical abnormalities and full spinal motion and normal gait. He noted appellant's preexisting spondylolisthesis and degenerative disc disease, and prior back difficulty. Dr. Gross stated that the accident of October 10, 1991 may have exacerbated these conditions temporarily, but that appellant had returned to preaccident status.

In form reports dated January 1994 and onwards, Dr. Forgacs opined that appellant was totally disabled due to instability of the right sacroilliac joint and required manipulation of the lumbar spine. No medical rationale was provided.

On December 9, 1993 appellant requested a hearing, but subsequently asked that the hearing scheduled for July 20, 1994 be cancelled.

In a decision dated August 26, 1996, Administrative Judge Milagros Farnes of the Merit Systems Protection Board ordered the employing establishment to grant appellant's disability retirement application. The judge found that the results of the clinical tests supported appellant's testimony of subjective pain and that the doctors' reports were persuasive that appellant's condition was severe enough to prevent her from working. The judge further found that the record established that appellant was unable to perform the duties of the rehabiliation position because she was unable to drive to work or sit for any period of time. He also found that the employing establishment was unable to accommodate appellant, that she did not decline an offer of reassignment to a vacant position, and that no vacant position at the same grade or pay level, to which she could have been reassigned existed. Appellant's application for disability retirement was subsequently approved.

On November 25, 1996 appellant claimed wage loss from December 6, 1991 to November 8, 1996. By letter dated March 26, 1997, the Office advised appellant that as a decision was issued on November 28, 1993 suspending compensation benefits because of her refusal to accept suitable employment, she was not entitled to further compensation benefit.

A report from Dr. Stephens dated August 29, 1997 noted appellant's history of injury, present complaints and examination results. He provided diagnoses of degenerative disc disease and spondylolisthesis and rendered permanent restrictions of no prolonged sitting, standing or lifting. Dr. Stephens indicated that appellant was totally disabled beginning August 29, 1997.

Dr. Bourdeau, Board-certified in physical medicine and rehabilitation, examined appellant on November 18, 1997. He noted appellant's history of injury, performed a physical examination and diagnosed lumbar disc syndrome, post-traumatic flexion/hypertextension injury, lumbar nerve compression syndrome, post-traumatic radiculopathy of lumbar area, L3-4 and L4-5 disc bulging by report. Dr. Bourdeau indicated that a definite total disability existed and improvement was not expected beyond appellant's present state. Dr. Bourdeau advised that because of the traumatic injury that appellant received in the accident, she was precluded from pushing, pulling and sitting or standing for long periods of time. He further stated that there was great potential for exacerbation and aggravation of her previous injury, as well as the possibility of aggravation and long-term effects on her present condition.

Appellant again requested a hearing, which was conducted on the written record on September 3, 1998. In a decision dated September 14, 1998, the hearing representative affirmed the Office's previous finding that appellant was not entitled to monetary compensation after October 13, 1993, including compensation under the schedule award provisions of the Act. The hearing representative noted that appellant remained entitled to payment of medical expenses for treatment of her accepted condition of subluxation at L5. He also found that since compensation for wage loss was paid only through September 18, 1993, the District Office should pay appellant compensation for wage loss from September 19 through October 13, 1993.[2]

[2] On September 24, 1998 appellant sought an appeal before the Employee's Compensation Appeals Board which was docketed as No. 99-126. In a February 26, 1999 order, the Board dismissed appellant's appeal on the grounds that no final decision was issued by the Director of the Office within one year of appellant's filing date of September 24, 1998. In a March 8, 1999 letter, appellant requested that her appeal proceed and supplied a timely

The Board finds that the Office properly terminated appellant's compensation on the basis that she refused suitable work.

Once the Office accepts a claim, it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[3] Section 8106(c)(2) of the Federal Employees' Compensation Act[4] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[5] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[6]

The implementing regulation[7] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[8] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.[9]

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[10] In its November 29, 1993 decision terminating appellant's compensation for refusal of suitable work under 5 U.S.C. § 8106(c), the Office found that the position of modified mail processor offered to appellant by the employing establishment was suitable because Dr. Forgacs, appellant's chiropractor, indicated by his signature on September 28, 1993 that appellant could perform the requirements of the rehabilitation job offer. Although Dr. Forgacs stated in a September 23, 1993 form report that appellant was totally disabled as a result of her original injury due to instability of the right sacroilliac joint, he did not provide any medical rationale or reasoning for this finding. Moreover, less than a week later on September 28, 1993, Dr. Forgacs approved the rehabilitation job offer. The record further reflects that on

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decision date. In an October 29, 1999 order, the Board noted that appellant's March 8, 1999 letter was received prior to the finalization of its February 26, 1999 order dismissing the appeal and concluded that its prior order should be vacated and the case proceed to adjudication.

[3] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[4] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[5] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[6] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[7] 20 C.F.R. § 10.124(c).

[8] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[9] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[10] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

September 28, 1993, Dr. Forgacs and the therapist performing appellant's functional capacities testing conferred about her physical limitations. Thus, Dr. Forgacs had actual and specific knowledge that appellant was capable of performing the job requirements. Therefore, his opinion of September 23, 1993 that appellant was totally disabled is of little probative value.

Moreover, the Office fully afforded appellant her procedural protections by advising her in its letter of October 20, 1993 that she had 30 days to accept the job, on which she had worked for four days or provide a reasonable, acceptable explanation for refusing the offer. Appellant neither replied nor returned to work within the 30 days allowed and submitted no medical evidence to establish that she was unable to perform the limited-duty job. Accordingly, the Office has met its burden of proof and the Office's termination of her monetary compensation is affirmed.

The Board further finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability on or after October 13, 1993 causally related to her October 10, 1991 work-related injury.

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. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[11]

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability and her October 10, 1991 employment injury.[12] 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 employment factors and supports that conclusion with sound medical reasoning.[13]

In this case, the medical evidence most contemporanous with appellant's work stoppage on October 13, 1993 is insufficient to meet appellant's burden of proof. Dr. Forgacs reports dated November 29, 1993 and September 1, 1994 contained the same narrative as his initial report of December 22, 1992.[14] Inasmuch as Dr. Forgacs provided no new findings or discussion

[11] *See Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Stuart K. Stanton*, 40 ECAB 859, 864 (1989).

[12] *Lourdes G. Davila*, 45 ECAB 139, 142 (1993); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

[13] *Louise G. Malloy*, 45 ECAB 613 (1994).

[14] The Board notes that appellant submitted with her appeal a November 1, 1993 report from Dr. Forgacs. The Board's review on appeal is limited to the evidence that was before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997). As the November 1, 1993 report was not in the record when the Office issued its final decision on September 14, 1998, the Board cannot review this evidence.

about appellant returning to work and her subsequent work stoppage, his reports lack probative value.

While form reports from Dr. Forgacs dated January 1994 onwards indicated that appellant was totally disabled, there is no mention of the October 13, 1993 recurrence. Further, Dr. Forgacs provided no medical rationale or explanation as to why or how appellant became totally disabled after he had previously approved her return to work. Accordingly, these form reports also lack probative value.

Although the record indicates that appellant had preexisting conditions, Drs. Kleinman and Gross both noted that appellant had either reached maximum medical improvement or had returned to her preaccident status. Neither physician indicated that appellant was totally disabled or was unable to perform the duties of her modified position in October 1993. In the most recent evidence of record, which is approximately four years after appellant's alleged recurrence of disability on October 13, 1993, Drs. Stephens and Bourdeau fail to address whether appellant's total disability was due to the alleged recurrence of October 13, 1993 and causally related to her October 10, 1991 work injury. Therefore, this evidence is insufficient to establish a recurrence of disability.

The record reflects that appellant received a favorable decision from the Merit Systems Protection Board on her application for disability retirement. In determining whether an employee is disabled under the Act, the findings of another federal agency are not determinative.[15] The Act and the statutes of other agencies have different standards of medical proof on the question of disability.[16] Therefore, the Board finds that the August 26, 1996 decision of Administrative Judge Farnes has no evidentiary value in this case because, as the Board has held, entitlement to benefits under one federal act does not establish entitlement to benefits under the Act.

Accordingly, for the above reasons, appellant has not met her burden of proof in establishing that she sustained a recurrence of disability on or after October 13, 1993.

[15] 5 U.S.C. § 8128(b).

[16] *See Daniel Deparini*, 44 ECAB 657 (1991); *Hazelee K. Anderson*, 37 ECAB 277 (1986).

The decision of the Office of Workers' Compensation Programs dated September 14, 1998 is hereby affirmed.

Dated, Washington, DC
September 19, 2000

Michael J. Walsh
Chairman

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member