

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIZABETH A. CARITA and DEPARTMENT OF THE NAVY,
NAVAL STATION PHILADELPHIA, Philadelphia, PA

*Docket No. 99-1852; Submitted on the Record;
Issued May 24, 2001*

DECISION and ORDER

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

The issue is whether appellant has met her burden of proof to establish that she sustained a recurrence of disability beginning May 24, 1990 causally related to her March 2, 1989 employment injury.

The Office of Workers' Compensation Programs accepted that on March 2, 1989 appellant, then a 33-year-old safety specialist, sustained low back strain in the performance of duty.¹ She stopped work on June 5, 1989 and did not return. The Office paid appellant compensation for temporary total disability from June 31, 1989 to May 22, 1990. Dr. Mark Leone, an osteopath, released appellant from his care May 24, 1990.

On June 2, 1989 appellant filed a claim for a recurrence of disability beginning May 8, 1989 causally related to her March 2, 1989 employment injury.

The record indicates that appellant resigned her position with the employing establishment effective January 2, 1990 with the stated reason "to stay home and raise daughter."

By decision dated November 7, 1996, the Office denied appellant's claim for compensation after May 23, 1990 on the grounds that she had refused suitable employment pursuant to 5 U.S.C. § 8106.²

¹ Appellant was approximately five months pregnant at the time of her employment injury.

² Prior to issuing its November 7, 1996 decision, the Office referred appellant for an impartial medical evaluation. The impartial medical examiner, Dr. Randall N. Smith, determined that appellant's 1989 magnetic resonance imaging (MRI) scan revealed a herniated disc at L5-S1. He further found that an MRI scan obtained in 1992 revealed a small disc herniation at L3-4. Dr. Smith recommended a functional capacity evaluation to determine her restrictions and found that she could work for two to four hours per day.

In a letter dated November 14, 1996, appellant requested a hearing before an Office hearing representative. By decision dated May 27, 1997, the hearing representative reversed the Office's November 7, 1996 decision after finding that the Office had incorrectly applied the penalty provision of section 8106. The hearing representative found that the Office should further develop the issue of whether appellant sustained a recurrence of disability on May 24, 1990 due to her March 2, 1989 employment injury.

By letter dated June 16, 1997, the Office requested that appellant submit medical evidence relevant to her claimed recurrence of disability effective May 24, 1990 and enclosed a Form CA-2a for completion.

On June 27, 1997 appellant submitted the notice of recurrence of disability (Form CA-2a) alleging that she sustained a recurrence of disability beginning May 24, 1990 causally related to her March 2, 1989 employment injury.

By decision dated September 22, 1997, the Office denied appellant's claim for a recurrence of disability due to her accepted employment injury. In a letter dated September 24, 1997, appellant, through her representative, requested a hearing. By decision dated May 11, 1998, the hearing representative set aside the Office's September 22, 1997 decision. The hearing representative found that the March 5, 1998 report of Dr. Carl Mogil, an osteopath and appellant's attending physician, were sufficient to require further development of the record.

On remand the Office referred appellant to Dr. Steven Valentino, an osteopath, for a second opinion evaluation. By decision dated July 15, 1998, the Office denied appellant's claim for a recurrence of disability beginning May 23, 1990. In a decision dated February 8, 1999, a hearing representative affirmed the Office's July 15, 1998 decision.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

In a report dated March 5, 1998, Dr. Mogil, an osteopath and appellant's attending physician, diagnosed degenerative disc disease and a "small focal disc herniation at L3-4." He noted that electrodiagnostic testing showed "acute and chronic S1 radiculopathy bilaterally with the right side worse than the left..." He listed findings on examination and stated:

"Upon review of [appellant's] records, I found that in March of 1994, [she] was evaluated by Dr. Randall N. Smith at the request of the [Office]. Dr. Smith confirmed the fact that there is a disc herniation present at L3-4 but termed it 'a small disc herniation.' This was in a 1989 study. A herniated disc was noted at the L5-S1 disc space as well. Relative spinal stenosis was noted in the lower lumbar spine which Dr. Smith felt was related to [appellant's] multiple injuries and disc herniation, causing her present problem. Dr. Smith recommended continued treatment of a conservative nature and a functional capacity evaluation.

"[Appellant] relates her symptoms to injuries sustained when she bent over to pick up trash while at work on March 2, 1989. At that time, she was in the second trimester of her pregnancy and medical attention had to be held off until she successfully completed delivery of the baby. Our records also reflect that

[appellant] had previous problems with her low back in 1978 when she attempted to move a box of copy paper. As a result of the 1989 injury, it is my professional opinion within a reasonable degree of medical certainty that [appellant] has been disabled and unable to work in any capacity from May 24, 1990 through the present time.”

In a report dated June 22, 1998, Dr. Valentino, an osteopath who provided a second opinion evaluation, reviewed appellant’s history of injury and the medical evidence of record, including the results of objective testing. He diagnosed resolved lumbar strain. Dr. Valentino related:

“Based on today’s evaluation, review of medical records and diagnostic studies, [appellant] has fully recovered from her history of lumbar strain causally connected to her work injury of March 2, 1989. Today’s evaluation revealed no evidence of any ongoing disability or need for treatment. Clearly there was no disc herniation or radiculopathy that could be causally connected to her history of work injury. I point out once again that the MRI [scan] of August 24, 1989 was completely normal. Although [appellant] had no positive objective findings, she did score very highly in the area of symptom embellishment which has no causal relationship to her employment history. Her current symptoms are not caused, aggravated, precipitated or accelerated by her employment history of March 2, 1989. [Appellant’s] prognosis is excellent. There is no evidence of any ongoing disability or impairment. She has reached maximum medical improvement.”

The Board finds that there is a conflict in the medical evidence between Dr. Mogil, appellant’s attending physician and Dr. Valentino, an Office referral physician. Section 8123(a) of the Federal Employees’ Compensation Act,³ provides in pertinent part: “If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.”⁴

Consequently, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for a rationalized medical opinion regarding whether appellant was disabled after May 24, 1990 causally related to her March 2, 1989 employment injury and whether she sustained a herniated disc causally related to her employment injury. After such development as it deems necessary, the Office shall issue a *de novo* decision.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8123(a).

The decisions of the Office of Workers' Compensation Programs dated February 8, 1999 and July 15, 1998 are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
May 24, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member