

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANET M. ABRAMS and DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS, DECENNIAL CENSUS DIVISION,
Watertown, NY

*Docket No. 02-346; Submitted on the Record;
Issued July 9, 2002*

DECISION and ORDER

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

The issue is whether appellant has established that she sustained a recurrence of total disability commencing May 8, 2000, causally related to an accepted February 16, 2000 lumbar strain.

The Office of Workers' Compensation Programs accepted that on February 16, 2000, appellant, then a 35-year-old office operations supervisor, sustained a lumbar strain when she slipped and fell on an icy concrete walkway while supervising the loading of a truck. She stated that her legs went out from under her and she landed in a sitting position, leaning slightly backward. Appellant experienced immediate pain and numbness in her low back, followed by persistent radicular pain into the right lower extremity.

Appellant's date-of-injury job duties involved supervising office clerks, collection of data, conducting training sessions, testing potential employees and serving as a postal liaison. The physical requirements were listed as lifting up to 10 pounds 1 hour per day, sitting, standing and walking 2 hours per day, standing and stooping for 30 minutes per day.

Appellant was absent from work on February 21, 2000 and received continuation of pay for that day. Following a return to work in early March 2000, she was placed in a modified-duty position effective March 25, 2000. Appellant performed this position with a full-time assistant until May 1, 2000, when the assistant was reassigned. She worked through May 8, 2000, stopped work and did not return.

On September 8, 2000 appellant filed a Form CA-2a. She noted that she accepted an administrative position outside the office on March 24, 2000, so that she could adjust her schedule and take rest breaks. In an associated statement, appellant recalled that at the time of her February 16, 2000 injury, she was required to learn 10 manuals of operations instructions and was preparing to begin 2 other operations. She was able to read these manuals and speak on

the telephone while lying on her couch at home in late February 2000. Appellant noted that when she returned to work in early March, prescribed pain medication made it difficult for her to concentrate and that she required assistance from clerks to complete her assigned duties. She advised Dr. Heap on March 8, 2000 that as a supervisor, she had some control over her schedule and wished to try to work, so he released her to light duty. Appellant noted that it became more difficult for her to go into the office to work. She noted that supervisor Theresa Marzano sent her home on March 28, 2000 during a training session as she was in too much pain. Effective March 24, 2000, appellant was assigned an administrative field operations supervisory position, working from her home. Her duties involved setting up training sites and courier systems for Jefferson and Lewis counties, supervising the delivery of work and training kits to crew leaders and advising other supervisors. Appellant was also assigned a full-time clerk, Manfred Laube, to help with driving and lifting. On May 5, 2000 Ms. Marzano advised appellant that her position was ending and offered her a courier position requiring frequent long distance driving or an enumerator position. Dr. Heap then held appellant off work beginning May 8, 2000.

Appellant submitted medical evidence in support of her claim for recurrence of disability.

In a February 18, 2000 report, Dr. Gerald Amatucci, an attending family practitioner, provided a history of the February 16, 2000 injury. He obtained February 18, 2000 lumbar x-rays showing a loss of lordotic curvature, suggestive of paraspinal muscle spasm and lumbar pain, without fracture or decreased disc spaces. In an associated February 18, 2000 form report and slip note, Dr. Amatucci diagnosed a lumbar strain, lumbosacral radiculitis and contusions causally related to the February 16, 2000 injury. Dr. Amatucci held appellant off work through February 22, 2000 and released appellant to light-duty work effective February 23, 2000. He prohibited bending, limited standing and walking to no more than 30 minutes at a time and lifting to no more than 20 pounds. Dr. Amatucci indicated that the restrictions should remain in place until February 26, 2000.

In a March 8, 2000 report, Dr. Ernesto Diaz, an attending Board-certified orthopedist, noted a history of injury and treatment. On examination, he found a full range of lumbar motion, an intact neurologic examination and tenderness to palpation in the right paravertebral musculature. Dr. Diaz diagnosed low back pain and muscle strain and prescribed physical therapy. He limited appellant to light duty until her next appointment in May 2000.¹

In reports from May 8 to 18, 2000 report, Dr. Diaz noted that four weeks of physical therapy had not produced a significant improvement in appellant's lumbar and sacral pain.² On examination he found tenderness to palpation in the sacrococcygeal area attributable to the February 16, 2000 fall. Dr. Diaz prescribed medication, a transcutaneous electrical nerve stimulator (TENS) unit and held appellant off work until May 23, 2000. Dr. Diaz suggested work restrictions of no lifting or pulling over 10 pounds, if approved by Dr. Walker R. Heap, a Board-certified orthopedic surgeon specializing in the spine, to whom he referred appellant.

¹ In a February 23, 2000 report, Karen Neville, a nurse practitioner under the supervision of Dr. Diaz, noted that appellant experienced continued lumbar pain with pain and spasm into the right leg, with lumbar tenderness on palpation. She prescribed stretching exercises and an orthopedic follow-up in two weeks with Dr. Diaz.

² Appellant submitted physical therapy notes dated from April 6 to June 13, 2000.

In a May 18, 2000 report, Dr. Heap provided a history of injury and treatment, noting that appellant had no history of back complaints prior to the February 16, 2000 slip and fall. He reviewed lumbar x-rays showing a slightly decreased disc space at L5-S1 with asymmetry, narrowing of the facets and flattening of the normal lordotic curvature. On examination, Dr. Heap found involuntary guarding the straightening of the lordotic curvature, great rigidity with extension, restricted lateral bending, and exquisite tenderness at the proximal sacral junction with mild tenderness at L5-S1 and the transverse process at L5-S1 bilaterally, greater on the right. He also observed decreased sensation in the top and lateral side of the right foot, the anterior lower right leg and similar anesthetics in the left leg. Dr. Heap also found bilaterally positive straight leg raising, Bragard's and LaSegue's signs. He diagnosed an acute low back strain with a possible small herniated disc, and found appellant totally disabled for work. Dr. Heap recommended a magnetic resonance imaging (MRI) scan. He submitted a June 20, 2000 follow-up report finding appellant's condition unchanged.

In a June 19, 2000 report, Dr. Diaz explained that he held appellant off work beginning May 8, 2000 as "she was not able to perform light work without pain" and the "further load on her back could make things worse for her."

In a June 28, 2000 file memorandum, an Office claims examiner alleged that appellant had planned to undergo back surgery prior to the February 16, 2000 injury, which was "obviously not work related." The claims examiner did not specify the source of this allegation. Thus, in a June 29, 2000 letter, the Office requested that Dr. Diaz provide a detailed opinion describing objective clinical findings and explaining any causal relationship between the February 16, 2000 injury and appellant's continuing condition.

In a July 11, 2000 report, Dr. Heap noted that appellant's condition seemed to be improving, although straight leg raising tests remained positive bilaterally. He continued to hold appellant off work.

In August 21, 2000 reports, Dr. Paul S. Curtis, a Board-certified orthopedic surgeon and an associate of Dr. Heap, opined that appellant remained disabled for work.

In a September 1, 2000 letter, the Office advised Dr. Heap that "documentation in [appellant's] file clearly indicated that [appellant] had planned back surgery prior to February 16, 2000." However, he stated that appellant had no history of back problems prior to the February 16, 2000 injury.

In September 14, 2000 reports, Dr. Heap opined that appellant's condition was unimproved, persistent and continuous since the February 16, 2000 injury and was "causally related to the injuries described." He stated that appellant's "symptomatology [was] aggravated by her work." Dr. Heap stated that there was "no history from any of [appellant's] physicians, nor from [appellant] nor any of the records that there is any prior history of planned back surgery or prior history of back problems, as stated on September 1, 2000 in a letter [from the Office].... The statement in this letter is entirely erroneous and is not factual." He submitted periodic reports holding appellant off work through mid-November 2000, noting that her condition was deteriorating.

A September 18, 2000 lumbar MRI scan showed “moderate degenerative disc disease at L4-5 and L5-S1,” with a small disc herniation at L4-5 and a small left paracentral disc herniation at L5-S1.³

In an October 10, 2000 report, Dr. R. Scott Collins, an attending Board-certified orthopedist, provided a history of injury and treatment. On examination, he found midline tenderness to palpation at L5-S1. Dr. Collins diagnosed “[s]tatus post work-related injury,” disc degeneration and L4-5 and L5-S1 with protrusion and sacral tenderness.”

In an October 30, 2000 statement, Ms. Marzano, appellant’s supervisor, stated that she was unaware of appellant’s light-duty restrictions as of May 5, 2000, when she offered appellant the enumerator or supervisor positions. Ms. Marzano acknowledged that on May 8, 2000, Dr. Diaz submitted forms indicating that appellant was disabled for work for two weeks.

In an October 31, 2000 note, Dr. Heap held appellant off work for six weeks due to continued tenderness in the sacrum representing a possible fracture.

A November 16, 2000 whole body bone scan was “unremarkable,” ruling out “a sacral or coccygeal fracture.”

In reports dated November 30 and December 4, 2000, Dr. Collins recommended a pain clinic evaluation as the bone scan was negative. He commented that appellant’s “pain may be related to her discogenic disease.”

In a December 5, 2000 telephone memorandum, an Office claims examiner indicated that appellant could not have been performing light duty as there was no light-duty position available, and that therefore, she must have been performing regular duty as of May 8, 2000. The claims examiner did not indicate the source for this information.

By decision dated December 7, 2000, the Office denied appellant’s claim for recurrence of disability commencing May 8, 2000 on the grounds that the evidence substantiated neither a change in appellant’s accepted condition or in the nature and extent of her assigned duties.

³ The record contains a September 27, 2000 form report by Dr. A. Barrett, an orthopedist pertaining to the compensation claim of Harry A. Martin Jr., a postal clerk. This report indicated that Mr. Martin could work four hours per day light duty. There is no indication of record that Mr. Martin has any relation to appellant’s compensation claim.

Appellant disagreed with this decision and in a December 13, 2000 letter requested an oral hearing before a representative of the Office's Branch of Hearings and Review.⁴

In a January 17, 2001 report, Dr. Collins opined that appellant remained disabled due to the February 16, 2000 injury, with continuous symptoms and findings from the date of injury onward.

In a June 26, 2001 report, Dr. Heap requested that the Office authorize the functional capacity evaluation. He noted that the three positions offered appellant on May 5, 2000 required driving long distances and to lift large bundles of papers in and out of a truck. Dr. Heap opined that appellant was unable to perform such duties.

At the hearing, held July 12, 2001, appellant testified that her date-of-injury duties as an office operations supervisor required lifting boxes of files weighing 15 pounds or more, standing, sitting, stooping and walking. She asserted that from March 25 to May 1, 2000, the employing establishment accommodated her injury by allowing her to work at home as an administrative field office supervisor, involving distributing supplies and test kits to couriers. Appellant was assigned Mr. Laube for her full 40-hour work week to perform all driving, carrying and heavy lifting, including moving 400 boxes of training materials and loading them into and out of a car. She noted that on approximately May 1, 2000, Mr. Laube was assigned to other duties. Thus, from May 1 to 5, 2000, appellant had to carry boxes weighing from 15 to 60 pounds. On May 5, 2000 appellant's supervisor advised her that she was being assigned to a courier position, which required driving approximately 200 miles each day. However, Dr. Heap found her totally disabled as of May 8, 2000. Appellant stated that since she stopped work on May 8, 2000, she usually spent the day laying down at home, resting.

At the hearing, Mr. Laube testified that following the February 16, 2000 injury, he was assigned to assist appellant full time at her home office, lifting and carrying approximately 400 boxes weighing 15 to 30 pounds.

At the hearing, Mr. Winfrey testified that he was an office operations supervisor, the position appellant held as of the February 16, 2000 injury. Mr. Winfrey asserted that prior to February 16, 2000, he observed appellant carrying boxes weighing 10 to 20 pounds each. He noted that from late March to late April 2000, he was aware that appellant was assigned to work at her home, with Mr. Laube as an assistant. Mr. Winfrey noted that he also helped appellant

⁴ In a February 12, 2001 letter, appellant's attorney requested that the Office subpoena Ralph Winfrey, Manfred Laube and Barbara Williams. Appellant's attorney alleged that Mr. Winfrey, an employing establishment official, would testify that appellant was offered the enumerator and supervisory positions on May 5, 2000 because Ms. Marzano knew that appellant could not perform those duties due to the February 16, 2000 injury. Appellant's attorney alleged that Ms. Laube would affirm that he had to physically assist appellant and that she could not work full time. The attorney also alleged that Ms. Williams would testify that she "overheard Shannon, a census supervisor and Ms. Marzano, the manager of the local census office in Watertown, saying that they finally 'got rid of that bitch.'" By letter dated April 16, 2001, the Office denied issuance of the subpoenas as appellant's attorney had not shown that this was the best or only way to obtain the testimony of the three proposed witnesses. As appellant's attorney called all three witnesses at the July 12, 2001 hearing, appellant did not appeal the denial of subpoenas.

occasionally with lifting tasks at her home, including moving 200 to 400 boxes for various projects.

At the hearing, Ms. Williams testified that appellant was assigned to work from home in March 2000, assisted by Mr. Laube and that her preinjury duties required lifting boxes weighing 10 to 30 pounds on a daily basis.

In an August 7, 2001 letter, appellant asserted that lifting and driving at work from May 1 to 5, 2000 caused a recurrence of total disability related to the February 16, 2000 injury. She asserted that the lumbar disc herniations visible on the September 8, 2000 MRI scan were caused by the February 16, 2000 slip and fall. Appellant submitted additional evidence.

In a July 3, 2001 report, Dr. Charles J. Moehs, a physician performing a functional capacity evaluation for Jefferson County Social Services, provided a history of injury and treatment. He opined that appellant “developed some nerve damage directly related to the trauma. For that reason, she is experiencing increased episodes of shooting pain into her legs with movement and various maneuvers.” Dr. Moehs recommended additional medical treatment, and did not suggest an employment plan.

In a July 19, 2001 report, Dr. Heap opined that appellant “had an exacerbation of her back pain from her job-related activities.” He explained that when appellant “returned to work with restrictions, she had an individual helping her do the job.... Then, this individual was taken away from her and she had to do this entire job herself, which was more than she could handle, and thus had the aggravation of her injury.”

In a July 27, 2001 report, Dr. Curtis noted appellant’s continuing low back pain with radicular pain and increasing numbness into the right foot and calf. He opined that appellant remained totally disabled for work.

By decision dated and finalized September 10, 2001, the Office hearing representative affirmed the December 7, 2000 decision, finding that appellant had not established either an objective worsening of her accepted lumbar strain or a change in the nature and extent of her light-duty job requirements. The Office found that appellant was not on light duty following the February 16, 2000 injury, that her date-of-injury job appeared to be within the restrictions Dr. Amatucci noted on February 26, 2000, and that appellant submitted insufficient evidence to justify light duty on and after March 1, 2000. The Office also found that appellant submitted insufficient medical evidence to establish that her accepted condition had worsened on or after March 8, 2000 such that she could no longer perform her assigned duties. The Office commented that the medical evidence contained few objective findings other than lumbar pain, thereby indicating that appellant was not disabled for work during the claimed periods. The Office hearing representative noted that the September 27, 2000 form report indicated that appellant was capable of light-duty work as of that date.

The Board finds that the case is not in posture for decision.

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, the employee must establish

that he or she cannot perform the light duty through submitting reliable and probative evidence. The employee must show a change either in the nature and extent of the injury-related condition or in the light-duty job requirements.⁵

In this case, appellant's date-of-injury position description as an operations supervisor involves office work, bending, stooping and lifting. In her September 8, 2000 statement and at the July 12, 2001 hearing, appellant explained that on March 24, 2000, she was assigned to work at home by supervisor Ms. Marzano and that Mr. Laube was assigned to work with her on a full-time basis to perform lifting and driving tasks. When Mr. Laube was assigned to other duties on May 1, 2000, appellant had to perform these tasks without assistance through May 5, 2000, resulting in the claimed recurrence of disability beginning May 8, 2000. Appellant's account was corroborated at the hearing by Mr. Laube and coworkers Mr. Winfrey and Ms. Williams.

Thus, the Board finds that appellant has submitted sufficient factual evidence substantiating that her duties were changed on March 24, 2000 due to the effects of the February 16, 2000 injury and that she was still performing those modified duties as of May 8, 2000.⁶

The Board notes that in a December 5, 2000 memorandum, the Office alleged, without specifying the source, that appellant could not have been working light duty as an unnamed individual stated that there was no light duty available at the time of appellant's injury. The Office used this telephone memorandum as the basis for finding that appellant was not working light duty at the time of the alleged May 8, 2000 recurrence of disability. The Board finds that there was no dispositive evidence in this memorandum on which to base the finding that appellant could not have been on light duty as of May 8, 2000.

The Board also notes that although the Office hearing representative found that a September 27, 2000 form report indicated that appellant was capable of performing light duty, this report does not pertain to appellant. The report states on its face that it related to the treatment of Mr. Martin, Jr., a postal worker. Thus, this report is irrelevant to this case and the Office's reliance on it, attributing its findings to appellant, is in error.

The Board finds that appellant has submitted sufficient medical evidence to require further development. Appellant submitted medical evidence showing that she was under continuous medical treatment for the February 16, 2000 injury from February 18, 2000 onward.

Appellant's physicians attributed several diagnoses to the accepted February 16, 2000 injury. In a February 18, 2000 report, Dr. Amatucci, an attending family practitioner, diagnosed lumbar strain, lumbosacral radiculitis and contusions, with objective findings of a loss of lordotic curvature suggesting paraspinal muscle spasms. Dr. Ernesto Diaz, an attending Board-certified orthopedist, found tenderness to palpation in the right paravertebral musculature on a March 8, 2000 examination and diagnosed low back pain and muscle strain. In a May 11, 2000 report,

⁵ *Mary G. Allen*, 50 ECAB 103 (1998); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ The Board notes that Ms. Marzano's October 30, 2000 statement that she was unaware of appellant's light-duty restrictions is not credible in view of the three witness accounts corroborating appellant's version of events.

Dr. Diaz opined that the February 16, 2000 fall caused sacrococcygeal trauma evidenced by mid-sacral tenderness to palpation.

Dr. Heap, an attending Board-certified orthopedic surgeon and spine specialist, submitted a May 18, 2000 report noting a decreased disc space at L5-S1 with asymmetry, loss of lordotic curvature, involuntary guarding and rigidity with extension maneuvers, areas of decreased sensation in both lower extremities, bilaterally positive straight leg raising, LaSegue's and Bragard's signs and diagnosed an acute low back strain with a possible herniated disc. Dr. Heap reiterated these findings in reports through July 19, 2001. Dr. R. Scott Collins, a second attending Board-certified orthopedic surgeon, also diagnosed a herniated L5-S1 disc with protrusion.

Most relevant to appellant's specific allegation that performing lifting and driving tasks without assistance from May 1 to 5, 2000 caused the alleged recurrence of disability, Dr. Heap, an attending Board-certified orthopedic surgeon, in his July 19, 2001 report, noted that when Mr. Laube was assigned "away from her and she had to do this entire job herself, which was more than she could handle and thus had the aggravation of her injury."

Appellant's physicians are in agreement that the February 16, 2000 fall caused her continuing symptoms. All of them held appellant off work beginning on May 8, 2000. The Board notes that the Office undertook no medical development in this case. There are no opinions controverting those of appellant's attending physicians. Also, the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute scientific certainty.⁷ The support for causal relationship is consistent and uncontroverted and thus requires additional development by the Office.

On return of the case, the Office shall refer appellant, the complete medical record and a statement of accepted facts to an appropriate Board-certified specialist or specialists to obtain a rationalized opinion regarding what conditions were caused by the February 16, 2000 slip and fall and for what periods appellant was disabled due to the accepted conditions. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.⁸

The decision of the Office of Workers' Compensation Programs dated and finalized September 10, 2001 is hereby set aside and the case remanded for further development consistent with this decision and order.

⁷ See *Kenneth J. Deerman*, 34 ECAB 641 (1983).

⁸ The Board notes that there is no indication of record as to why an Office claims examiner stated in a June 28, 2000 memorandum that appellant had scheduled back surgery prior to the February 16, 2000 injury, which indicated a history of back problems. The claims examiner did not refer to any report, memorandum or conversation as the source for this very serious allegation. Yet, the claims examiner accused Dr. Heap, in a September 1, 2000 letter, of providing inaccurate or evasive reports that concealed the alleged prior scheduling of back surgery, alleging that unspecified "documentation ... clearly indicated" that appellant had planned back surgery prior to the February 16, 2000 injury. This allegation was later proven erroneous by Dr. Heap in his September 14, 2000 report in consultation with Dr. Diaz, as well as appellant's testimony at the hearing.

Dated, Washington, DC
July 9, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member