U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE RYS (widow of JOHN E. RYS) and U.S. POSTAL SERVICE, POST OFFICE, Springfield, MA

Docket No. 00-2290; Submitted on the Record;
Issued September 23, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the employee sustained a recurrence of disability from February 6, 1995 through January 26, 1998.

The employee, then a 26-year-old mailhandler, injured his lower back while lifting a 35- to 40-pound mailsack on September 3, 1982. The Office of Workers' Compensation Programs accepted his claim for low back strain, a herniated disc at L4-5, a subsequent disc excision at L4-5 and lumbosacral fusion. The employee filed claims for recurrence of his work-related low back disability in February 1986 and March 1993, both of which were accepted by the Office. He went off work in October 17, 1993. The Office paid the employee compensation for appropriate periods.

On April 25, 1994 the Office referred the employee to Dr. Jacques Archambault, a Board-certified orthopedic surgeon, in order to determine whether he was capable of performing light duty. In a report dated May 17, 1994, Dr. Archambault stated his findings on examination, reviewed the medical records and the statement of accepted facts and concluded that the employee could return to a sedentary job for 20 hours per week, gradually increasing to 40 hours per week with a permanent lifting limitation of 10 to 15 pounds lifting, alternating sitting and walking.

In a report dated August 11, 1994, Dr. Pierce stated that he had examined the employee on July 21, 1994, at which time he had subjective complaints of left-sided leg pain, which was improving, in addition to back pain. He further stated:

> "Objectively, [the employee's] neurological examination is within normal limits. His prognosis is good. Course of treatment to be followed is continued rest until [the employee's] fusion is completely solid at which time he will begin a course of physical therapy. I would estimate January 1, 1995 as his [probable] date of full recovery."

On August 26, 1994 the employing establishment offered the employee a light-duty job as a modified mailhandler, in which he would begin working 20 hours per week, then increase his hours to 40 per week in accordance with his physician's instructions.[1] In a report dated August 27, 1994, Dr. Archambault stated that he had reviewed the job offer and believed that the employee was capable of performing the duties of the position.

The employee rejected the job offer on September 6, 1994. In a letter to the Merit Systems Protection Board, received by the Office on September 20, 1994, he stated that he rejected the offer because Dr. Pierce, his treating physician, had told him he should not return to work until his spinal fusion was completely healed, after which he needed to undergo a course of physical therapy.

By decision dated November 4, 1994, the Office terminated the employee's compensation on the grounds that he refused an offer of suitable work. The Office stated that Dr. Archambault's opinion, in which he stated that the job was within the employee's physical restrictions, represented the weight of the medical evidence.

Dr. Pierce, the employee's treating physician, indicated in a Form CA-17 duty status report dated November 14, 1994 that the employee could work a four-hour day in a job which involved alternating sitting, standing and walking, with no climbing, kneeling, bending, stooping, twisting, pulling or pushing.

Subsequent to the termination of compensation, the employee accepted the limited-duty offer on November 16, 1994 and returned to work, after which he received compensation based on his actual earnings for four hours per day.

The employee stopped working as of February 6, 1995. On March 31, 1995 he submitted another Form CA-8 claiming continuing compensation for four hours per day from February 1995 through "indefinite." The employee stated on this form that he was "working only four hours a day, which was against my physician's better judgment and medical orders. I had no other choice but to return to work especially when my benefits were cut. Even while I was at work, I was having problems medically, mostly due to the cement floors, improper seating arrangements, etc. etc. Recently I was involved in an auto[moble] accident which currently medically leaves me totally disabled."

In a report dated April 28, 1995, Dr. Pierce stated:

> "[The employee] was seen in my office for follow up. As of February 5, 1995, it was my opinion that he should continue four hours a day of light duty, as he was doing. Unfortunately, [the employee] after that date was involved in two major motor vehicle accidents and has been completely disabled from that point to the present."

[1] The job description indicated that the employee would patch up or rewrap damaged letters, magazines and small parcels; stand and take mail, with assistance if necessary, from a cart, hamper or gurney and place it on a desk or table; and sit on a chair with or without a back at a desk or table, repair/mend letter-sized mail, magazines or small parcels and place mail in proper trays or containers for forwarding.

By decision dated June 14, 1995, an Office hearing representative affirmed the November 4, 1994 Office decision.

In a report dated October 31, 1995, Dr. Michael J. Jawitz, a Board-certified family practitioner stated that he had been treating the employee since 1993, at which time he was suffering from a chronic pain syndrome relating to his lower back. Dr. Jawitz noted that the employee had a history of previous back surgeries which have prevented him from working for "several years." He noted that the employee was involved in two motor vehicle accidents in early 1995, but advised that the accident had no impact on his underlying condition; he stated that neither of his automobile accidents caused any new problems or contributed to his present condition. Dr. Jawitz concluded that the employee was 100 percent totally disabled due to his "previous injury."

By letter to the Office dated January 31, 1996, the employee requested that the Office change his disability pay status from four hours per day to eight hours per day, retroactive to February 1995.

In a report dated April 3, 1996, Dr. Jawitz stated that he believed the employee could be back at work, but related that the employee was experiencing chronic back pain. He stated that the employee saw him in January regarding pain control, but he did not know if the employee was working at that time since "it was never my responsibility or capability to take [the employee] out of work … nor to return him to work."

The Office referred the employee to Dr. Cyril S. Shea, a Board-certified orthopedic surgeon, who examined him on October 2, 1996. Dr. Shea diagnosed a lumbosacral strain stemming from the September 3, 1982 injury and disc bulging of L4-5; status postoperative disc excision L4-5 and fusion L4 to sacrum; degenerative disc disease L4-5 and question of epidural fibrosis; and recent low back strain with aggravation of preexisting degenerative disc disease and epidural fibrosis. He stated:

> "In regard to causal relationship, I believe that the first three diagnoses related to the original injury and that the last diagnosis related to the motor vehicle accidents. Since it would appear from [the employee's] history that he has had an exacerbation of symptoms as a result of the motor vehicle accident, I would think that further investigation with further imaging as suggested by Dr. Pierce would be appropriate, but that it would relate to diagnosis #4 rather than to the original injury. In my opinion, this is supported by the fact that he was working regularly up to the time of the motor vehicle accidents and then went out of work with marked symptoms following these motor vehicle accidents and that he has, in fact, gone on to a new program of pain control subsequent to those motor vehicle accidents."

By decision dated January 27, 1997, the Office denied the employee's claim for total disability compensation from February 6, 1995 and continuing, in addition to his request for further diagnostic testing and a rehabilitation pain program. The Office found the employee did not submit sufficient medical evidence to support temporary total disability for the period claimed and noted that the employing establishment had agreed to pay him compensation for loss

of wages based on his ability to perform light duty for four hours per day from November 16, 1994 to February 5, 1995, at which time he went off work due to a nonwork-related automobile accident. The Office stated that this was the total amount of compensation to which the employee was entitled during this period, finding that the employee's alleged total disability as of February 6, 1995 was not causally related to his accepted September 3, 1982 employment injury. The Office also found that Dr. Shea's opinion represented the weight of the medical evidence.

The employee died on January 26, 1998.[2] The Office, by letter dated November 17, 1998, advised the employee's widow that it was authorizing payment of total disability compensation from November 12, 1994 the date it terminated disability compensation, through November 15, 1994, the date prior to the employee's return to light duty.

By letter dated December 29, 1999, appellant's attorney requested reconsideration of the Office's decision to deny compensation for total disability subsequent to February 5, 1995. The letter requested compensation based on an additional four hours per day from February 6, 1995, the date the employee stopped working, until January 26, 1998, the date of his death.

By decision dated March 27, 2000, the Office denied reconsideration.

The Board finds that appellant did not met her burden to establish that the employee was entitled to compensation from February 6, 1995 through January 26, 1998 based on a recurrence of disability.

When an employee, who is disabled from the job he 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 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.[3]

In the instant case, the record does not contain any medical opinion showing a change in the nature and extent of the employee's injury-related condition. Indeed, appellant has failed to submit any medical opinion containing a rationalized, probative report which relates the employee's condition or disability as of February 6, 1995 to his employment injury. For this reason, appellant has not discharged her burden of proof to establish that the employee sustained a recurrence of disability as a result of his accepted employment injury.

The only medical evidence which appellant submitted consisted of the reports from Drs. Pierce and Jawitz. These reports provided a history of injury and a diagnosis of the condition, indicated very generally that the employee complained of disabling pain as of

[2] In a prior appeal dated July 23, 1998, the Board reversed the Office's November 4, 1994 termination decision, finding that the Office did not meet its burden to terminate the employee's compensation based on a conflict existed between the opinions of Drs. Archambault and Pierce.

[3] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

February 6, 1995 and imposed physical restrictions on certain work activities, but did not constitute a probative, rationalized medical opinion sufficient to establish that the employee's disability as of February 6, 1995 was causally related to his accepted September 3, 1982 employment injury.

The reports from Drs. Pierce and Jawitz do not constitute sufficient medical evidence demonstrating a causal connection between the employee's employment injury and his alleged lower back condition and disability. Causal relationship must be established by rationalized medical opinion evidence. The reports in the record failed to provide an explanation in support of appellant's claim that the employee was totally disabled as of February 5, 1995. Dr. Pierce, the employee's treating physician, had stated in his November 14, 1994 CA-17 duty status report that the employee could work a four-hour day within the restrictions previously outlined. He specifically stated in his April 28, 1995 report that as of February 5, 1995 the employee should continue four hours a day of light duty, as he was doing, but that the employee subsequently became involved in two major motor vehicle accidents, from which time he had been totally disabled. Dr. Jawitz related in his October 31, 1995 report that the employee's previous back surgeries had prevented him from working for several years and that although the employee was involved in two motor vehicle accidents in early 1995, these had no affect on his underlying condition. In his April 3, 1996 report, Dr. Jawitz stated that he did not know if the employee was working at that time since it was never his responsibility or capability to take him out of work or return him to work. Thus, his opinion was based on an incomplete medical history[4] and he explicitly eschewed any role in placing the employee on disability or in determining his work status. Thus, the reports from Drs. Pierce and Jawitz do not establish a worsening of appellant's condition and, therefore, did not constitute a probative, rationalized opinion demonstrating that a change occurred in the nature and extent of the injury-related condition.

In addition, the Board finds that the evidence fails to establish that there was a change in the nature and extent of the employee's limited-duty assignment such that he no longer was physically able to perform the requirements of his light-duty job. The record demonstrates that the employee returned to work November 16, 1994 on light duty within the restrictions outlined by his treating physician, Dr. Pierce, who subsequently expressed no objection against the employee working at the light-duty job for four hours per day. Further, there is nothing in the record indicating that the modified job as mailhandler ever required him to exceed these restrictions. Although the employee stopped working on February 6, 1995, he has submitted no additional factual evidence to support a claim that a change occurred in the nature and extent of his limited-duty assignment during the period claimed. Accordingly, as appellant has not submitted any factual or medical evidence supporting the employee's claim that he was totally disabled from performing his light-duty assignment on February 6, 1995 as a result of his employment, appellant failed to meet his burden of proof. Thus, the Office properly found, in its January 27, 1997 decision, that the employee was not entitled to compensation based on a recurrence of his employment-related disability. The Board therefore, affirms the March 27, 2000 Office decision.

[4] *Geraldine H. Johnson*, 44 ECAB 745 (1993).

As there is no medical evidence addressing and explaining why the claimed condition and disability as of February 6, 1995 was caused or aggravated by his employment injury, appellant has not met her burden of proof in establishing that the employee sustained a recurrence of disability. The Board therefore, affirms the Office's March 27, 2000 decision affirming the January 27, 1997 decision denying benefits based on a recurrence of his work-related disability.

The decision of the Office of Workers' Compensation Programs dated March 27, 2000 is hereby affirmed.

Dated, Washington, DC
September 23, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member