

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RENEE S. CLEVELAND and U.S. POSTAL SERVICE,
POST OFFICE, Chester, PA

*Docket No.01-1694; Submitted on the Record;
Issued September 5, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability commencing August 15, 2000, causally related to her August 10, 1994, left ankle sprain and left tarsal tunnel syndrome.

The Office of Workers' Compensation Programs accepted that on August 10, 1994 appellant, then a 30-year-old part-time flexible carrier, sustained left ankle sprain and left tarsal tunnel syndrome requiring subsequent surgery, when she stepped off some steps to get away from a dog. Appellant worked intermittently thereafter and received appropriate compensation benefits.

Appellant's treating physician, Dr. David Tabby, an osteopathic neurologist, provided ongoing reports, which indicated that appellant was unable to work due to Complex Regional Pain Syndrome (CRPS) of her left foot, stage II, following ankle trauma and tarsal tunnel release. Dr. Tabby also opined that she had a spread of sympathetic hyperactivity, diffusely and lumbar pain due to altered walking mechanics with L4-5 and L5-S1 disc herniations. A functional capacity evaluation was performed at Dr. Tabby's request on September 16, 1999 and was determined to be invalid due to pain intolerance and poor effort.

The Office determined that a second opinion evaluation was required and it referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Steven Valentino, a Board-certified osteopathic orthopedic surgeon.

By report dated July 29, 1999, Dr. Valentino noted appellant's subjective complaints of discomfort around the left ankle and pain in both hands. He reviewed appellant's factual and medical history, reported her range of motion and sensory testing results and noted no evidence of bursitis or knee synovitis, effusion or internal derangement. Dr. Valentino indicated that Allen's, Wright's Ross', Phalen's, reverse Phalen's, ulnar stretch, Fabere's and Tinel's signs were all negative, as were femoral stretch tests, sitting and supine straight leg raising tests, augmentative neuromeningeal tension signs and classic and modified Spurling's maneuvers and

noted that there was no increased sensitivity or any dystrophic findings compatible with a diagnosis of reflex sympathetic dystrophy (RSD). He diagnosed history of left ankle strain with history of left tarsal tunnel release. Dr. Valentino opined that appellant's symptoms were significantly out of proportion to the objective findings and he indicated that appellant could return to work with restrictions. Dr. Valentino indicated that these restrictions were due to her work injuries.

The Office then determined that there arose a conflict in medical evidence between appellant's treating physician, Dr. Tabby and the Office second opinion specialist, Dr. Valentino and referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. M. Richard Katz, a Board-certified neurosurgeon, for an impartial medical examination to resolve the existing conflict.

By report dated April 5, 2000, Dr. Katz noted appellant's subjective complaints of pain in her left ankle, spasms in the right arm and shoulder, back pain, headaches and pain in her hands. He reviewed appellant's factual and medical history, including the statement of accepted facts and the previous diagnostic testing results and performed a complete physical and neurological examination. Dr. Katz noted that appellant had evidence of left tarsal tunnel syndrome, which was compression of the distal tibial nerve at the flexor retinaculum above the maleolus, status postoperative and found that some evidence of a mild calcaneal sensory deficit and mild irritability to percussion of the lateral plantar branch. He found no evidence to suggest hypersensitive pain syndrome related to sympathetic nerve mediation or CRPS. Dr. Katz also noted that there were none of the expected findings of cold sensitivity in the left foot or hands and no evidence of hyperactive sympathetic activity, such as increased sweating and no protective mechanisms were evident such as guarding and hyperpathic pain. Concerning a diffuse spread of sympathetic hyperactivity CRPS as was diagnosed by Drs. Tabby Katz found no evidence of such in the upper extremities. While he felt that she had symptoms of muscular ligamentous pain (myofascitis) in the lumbar area, there were no findings to suggest any nerve root pathology. Appellant was found to be inactive and deconditioned in terms of the musculature of her back, shoulders and arms and Dr. Katz noted that her multiple complaints were not related to any "demonstrable pathology." He stated: "[Appellant] continues to complain of residuals of the accepted injury to her ankle. However, these do not appear, at least clinically, to be as severe as her subjective complaints. Further, diagnostic studies to refine appellant's diagnoses were suggested. Regarding the other complaints of her low back, neck, shoulders and headaches these are not directly related to an injury to her left ankle." Dr. Katz opined that appellant could return to work in a sedentary position with minimal walking and the capability of changing positions as needed.

A June 25, 2000 Quantitative Somatosensory test conducted for Dr. Tabby reported a diagnosis of sympathetic maintained pain in the left hand and foot and in the right hand due to heat and cold allodynia. Allodynia progression was diagnosed.

With the assistance of a rehabilitation counselor, appellant was offered a sedentary position as a carrier, which required minimal walking and would allow appellant the ability to change positions as needed. The employing establishment advised appellant of the offered position's suitability and it indicated that refusal to accept suitable work when offered could affect further entitlement to compensation. By letter dated July 25, 2000, the Office advised

appellant that she had been offered a position, which had been found by the Office to be suitable to her partially disabled condition, it advised appellant that she had 30 days within which to accept the position or to provide an explanation for her refusal and it advised her of the provisions of 5 U.S.C. § 8106(c)(2).

On July 26, 2000 Dr. Tabby provided a statement claiming that appellant was unable to fulfill the duties of the assigned sedentary position and remained totally disabled.

On July 27, 2000 appellant, indicated that she accepted the position that was offered, but stated that she would not accept the casing duties as were enumerated in the proposal.

Appellant, however, returned to work on August 14, 2000, worked a full shift on August 14, 2000 and two hours on August 15, 2000, but then stopped work, complained of pain and on August 17, 2000 she filed a Ca-2a claim for recurrence of disability. Appellant alleged that, after working two hours in a seated position, she began having pain in her left foot, arch and ankle.

Dr. Tabby provided a report dated August 17, 2000, noting that appellant was forced to return to work and had to stamp mail, write and carry handfuls of mail to a case. He indicated that appellant was in severe pain in her legs and arms by mid-day, but finished the day, had severe pain at home, forced herself to return the following day, but had to leave after two and one half hours. Dr. Tabby continued to diagnose CRPS of the left foot, stage II; spread of sympathetic hyperactivity, diffusely; and lumbar pain from altered walking mechanics with L4-5 and L5-S1 disc herniations. He noted that he evaluated her that date on an emergent basis and found her unable to fulfill the duties of the assigned sedentary position and opined, therefore, that she remained totally disabled. Dr. Tabby opined that appellant's preexisting condition of CRPS that was caused by her tarsal tunnel syndrome was exacerbated by her forced return to work. He also indicated that, because of appellant's intense depression due to her pain and disability, he was referring her to a psychiatrist, Dr. Clancy D. McKenzie, a Board-certified psychiatrist of professorial rank.

The Office advised appellant that a psychiatric referral would not be authorized as the impartial medical examiner, Dr. Katz, did not find that appellant's subjective complaints were supported by clinical evidence or were related to the work injury.

By letter dated September 1, 2000, the Office advised appellant that the evidence was not sufficient to accept a recurrence of disability and it gave her an additional 30 days within which to submit any evidence she felt supported her recurrence claim. The Office advised appellant that an employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that she cannot perform the light duty.¹ It advised that, as part of this burden, the employee must show a change in the nature

¹ *Terry R. Hedman*, 38 ECA 222 (1986).

and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.²

By report dated September 5, 2000, Dr. McKenzie noted that he initially saw appellant on August 16, 2000 and diagnosed her as having “very severe major depression that is directly caused by her work injury, by her inability to work, by her chronic pain from the work injury and by the overwhelming demands placed upon her to return to work in her condition.” Dr. McKenzie noted his findings upon examination and indicated that appellant met all nine criteria for diagnosing major depression. Dr. McKenzie opined that “this is a very severe depression, melancholic-type -- and directly related to the work injury,” stated that appellant was unable to do any type of work at that time and opined that it was doubtful that she would ever be able to function in a work capacity again.

An additional report from Dr. Tabby dated September 20, 2000, indicated that appellant met all accepted diagnostic criteria for CRPS, that she had typical-type burning pain, exacerbated by muscular activity, that she had associated signs of sympathetic hyperactivity, including sweating and color changes of the skin and that she showed trophic changes in the connective tissue, including longitudinal ridging of the finger and toenails. Dr. Tabby stated that he disagreed with Dr. Katz in that appellant did have tenderness of her ankle scars. He also disagreed with Dr. Katz in that he did believe appellant had cold intolerance and that this was supported on clinical examination as well as QST testing. Dr. Tabby agreed that appellant was deconditioned but he opined that this was due to her inability to exercise. As a result, Dr. Tabby opined, appellant developed depression as a result of her pain and disability. Again, he opined that appellant was totally disabled and unable to return to work.

Appellant, through her representative, argued that there were major differences between the findings of Drs. Tabby and Katz and that one of them had to be wrong. Appellant claimed that Dr. Katz did not examine her subsequent to the claimed recurrence of disability and that, therefore, his opinion could not be used with regard to the recurrence of disability claim and that she was also totally disabled due to a consequential emotional condition.

By decision dated October 11, 2000, the Office rejected appellant’s recurrence claim finding that the evidence submitted was not sufficient to meet her burden of proof. The Office found that the impartial medical report from Dr. Katz remained the weight of the medical evidence and established that appellant could perform sedentary duty. The Office found that appellant had failed to demonstrate a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.

Appellant disagreed with the Office’s decision and requested a review of the written record. In support of her request, appellant submitted a videotape of a September 25, 2000 medical session she had with Dr. McKenzie, in which she noted her complaints and feelings with regard to her diagnosed depression. Appellant stated that she believed that she was depressed as a result of her pain and the way she had been treated by the employing establishment and the Office. Dr. McKenzie noted on this tape that he felt appellant met all the criteria for major

² *Id.*

depression. A November 2, 2000 report, from Dr. Tabby was also submitted which repeated his earlier findings and assertions.

A review of the written record was conducted on March 29, 2001, and by decision that date, the hearing representative found that appellant had failed to establish a change in the nature or extent of her injury-related condition or a change in the nature or extent of her light-duty job requirements, such that a recurrence of disability had not been demonstrated.

The hearing representative further found that the opinion of Dr. Katz constituted the weight of the medical evidence and that Dr. Tabby's reports subsequent to the alleged recurrence of disability stated the same as those before, such that no change in her condition was identified. The hearing representative also found that the report of Dr. McKenzie with his findings of major depression was insufficient to establish that appellant sustained a consequential emotional injury causally related to her accepted diagnoses. She noted that Dr. McKenzie supported his causal relationship opinion by indicating that appellant's depression was caused by her work injury, her inability to work, her chronic pain and by the demands placed upon her to return to work. The hearing representative found that the facts did not support that appellant was unable to work and in fact supported that she was capable of performing sedentary duty. Accordingly, the hearing representative found that any reactions she may have had to being returned to work could not be compensable. Addition, Dr. Katz had opined that there were no objective findings to support appellant's complaints of chronic pain, such that Dr. McKenzie's opinion was insufficient to establish that appellant had a consequential depressive condition, causally related to her work-related injuries.

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

An individual who claims a recurrence of disability due to an accepted employment injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury. 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 the employment injury and supports that conclusion with sound medical reasoning.³ Causal relationship is a medical issue and can be established only by medical evidence.⁴

Further, an employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he or she cannot perform the light duty.⁵ As part of this burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the

³ *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

⁴ *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

⁵ *Terry R. Hedman*, *supra* note 1.

light-duty requirements.⁶ In this case, appellant has submitted new medical evidence in support of her recurrence allegations.

Following appellant's return to light-duty sedentary work on August 14, 2000, she worked one full day and two and one half hours, stopped work on August 15, 2000 and claimed that the pain she was experiencing was too great for her to continue working. Appellant submitted new medical evidence from Dr. Tabby stating as history that she was forced to return to work and perform several unapproved duties and reporting that she developed severe pain in her legs and arms by mid-day, but finished the day, had severe pain at home, forced herself to return the following day, but had to leave due to pain after two and one half hours. He diagnosed CRPS of the left foot, stage II; spread of sympathetic hyperactivity, diffusely; and lumbar pain from altered walking mechanics with L4-5 and L5-S1 disc herniations, noted that Dr. Tabby evaluated her that date on an emergent basis and found her unable to fulfill the duties of the assigned sedentary position and opined, therefore, that she remained totally disabled. Dr. Katz opined that appellant's preexisting condition of CRPS that was caused by her tarsal tunnel syndrome was exacerbated by her forced return to work and also indicated that, because of appellant's intense depression due to her pain and disability, Dr. Tabby was referring her for a psychiatric examination.

In this case, the Office did not seek an additional postrecurrence report from Dr. Katz or any other specialist, to evaluate appellant's postrecurrence physical or psychiatric condition, but rather relied upon the special weight given to the prerecurrence report of Dr. Katz.

The Board notes that, with regard to any claimed consequential psychiatric condition, in the case of *John R. Knox*,⁷ the Board stated:

"It is an accepted principal of workers' compensation law and the Board has so recognized, that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct. As is noted by Professor Larson in his treatise: '[O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.... [S]o long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable [under] the circumstances. A different question is presented, of course, when the triggering activity is itself rash in the light of claimant's knowledge of his condition.'"⁸

⁶ *Id.*

⁷ 42 ECAB 193 (1990).

⁸ *Id.* at 196.

The Board notes that, in this case, the Office did not attempt to obtain a second opinion psychiatric report regarding appellant's consequential injury claim, or addressing whether appellant's recurrence of disability had a consequential injury component.

Because appellant returned to light-duty sedentary work, attempted to perform the duties of the position, but stopped work again contending that she was unable to carry out the light duties and, therefore, had sustained a recurrence of disability, the Office has an obligation to appropriately evaluate and develop the medical evidence submitted in support of the recurrence claim. In this regard, the Board notes that the impartial medical specialist, Dr. Katz, did not examine appellant subsequent to her return to work in a light-duty capacity and her alleged recurrence of disability, such that his opinion would not be relevant or probative in adjudicating her recurrence claim.⁹

Therefore, the case must be remanded to the Office for further development including referrals to appropriate neurologic and psychiatric specialists for opinions as to whether appellant sustained a recurrence of disability due to a change in the nature or extent of her injury-related condition and on whether she sustained a consequential emotional condition.

Accordingly, the March 29, 2001 and October 11, 2000 the decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, DC
September 5, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ See *Brady L. Fowler*, 44 ECAB 343, 353 (1992).