

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELIA J. STEPHENS and U.S. POSTAL SERVICE,
AIRPORT MAIL CENTER, Houston, TX

*Docket No. 02-2353; Submitted on the Record;
Issued May 5, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative; and (2) whether appellant met her burden of establishing that she had a recurrence of disability commencing April 28, 1997, causally related to her July 18, 1996 employment injury.

On July 18, 1996 appellant, then a 35-year-old postal clerk, was lifting heavy sacks of mail when she developed back pain. She stopped work that day. The Office accepted appellant's claim for a lumbar sprain and, subsequently, a herniated L5-S1 nucleus pulposus. Appellant received continuation of pay for the period July 19 to August 31, 1996. The Office began payment of temporary total disability compensation effective September 1, 1996.

Appellant returned to limited-duty work on February 6, 1997. On April 28, 1997 she stopped working. Her pay stopped on May 16, 1997. On May 28, 1997 she filed a claim for a recurrence of disability commencing April 28, 1997. Appellant noted that, when she returned to work, she was under a physician's observation to determine if she could perform the limited duties assigned to her. She stated that the back pain made it very uncomfortable to sit and perform her duties. Appellant experienced pain in her leg, which she attributed to a herniated lumbar disc that she related to the employment injury.

In a May 28, 1997 note, appellant's supervisor indicated that appellant returned to work on February 12, 1997 and was assigned to the primary line. He noted that, after a day and a half, appellant stated that she could not perform those duties due to back pain. Appellant was then assigned to the uncoded section to case uncoded mail; that was also painful for appellant, so she was assigned to modified cases for distributing mail. He noted that appellant worked there until she signed out on April 28, 1997.

In an August 14, 1997 decision, the Office denied appellant's claim for recurrence of disability on the grounds that the evidence of record failed to establish that it was causally

related to the July 18, 1996 employment injury. In a separate decision of the same date, the Office found that appellant's limited-duty position fairly and reasonably represented her wage-earning capacity and, therefore, further found that she had no further loss of wage-earning capacity.

Appellant requested a hearing before an Office hearing representative, but subsequently changed her request to a request for reconsideration. In an April 17, 1998 merit decision, the Office denied appellant's request for modification of the April 14, 1997 decision. In a May 6, 1998 letter, appellant again requested reconsideration. In a June 5, 1998 decision, the Office denied appellant's request for reconsideration because she did not submit new and relevant evidence nor raise substantive legal questions.

In a June 29, 1998 letter, appellant requested a hearing before an Office hearing representative. In an August 28, 1998 decision, the Office found that appellant was not entitled to a hearing because she had previously requested reconsideration. The Office considered appellant's request under its discretionary authority and concluded that she could submit additional evidence on reconsideration.

In a September 20, 1998 letter, appellant again requested reconsideration. In an October 14, 1998 decision, the Office denied appellant's request on the grounds that the arguments offered were irrelevant and immaterial and, therefore, insufficient to warrant review of the prior decision. In an April 15, 1999 letter, appellant requested reconsideration. In a July 20, 1999 merit decision, the Office denied modification of the prior decisions. In a July 6, 2000 letter, appellant requested reconsideration. In a May 7, 2001 merit decision, the Office denied modification of the prior decisions. In an April 10, 2002 letter, appellant requested reconsideration. In a May 10, 2002 merit decision, the Office denied modification of the prior decision. In a June 1, 2002 letter, appellant requested a hearing before an Office hearing representative. In a July 19, 2002 decision, the Office found that appellant was not entitled to a hearing as a matter of right because she had previously requested reconsideration. The Office considered appellant's request and found that the claim could be equally well addressed by submitting additional evidence and requesting reconsideration.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act¹ dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." The Board has noted section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings..."² In this case, appellant had made numerous requests under section 8128(a) of the

¹ 5 U.S.C. § 8124(b)(1).

² *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

Act.³ She, therefore, was not entitled to a hearing as she had not requested one prior to her first request for reconsideration.

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing; when the request is made after the 30-day period established for requesting a hearing; or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent. In this case, the Office considered appellant's request for a hearing and found that her case could equally be considered by requesting reconsideration and submitting new evidence. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken, which are contrary to both logic and probable deductions from known facts.⁴ There is no evidence that the Office abused its discretion in denying appellant's request for a hearing.

With respect to the remaining issue, the Board finds that the case is not in posture for decision.

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 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.⁵

In an August 19, 1996 report, Dr. Susan W. Fan, a Board-certified radiologist, indicated that a magnetic resonance imaging (MRI) scan showed a desiccated disc at L5-S1 with a prominent posterocentral disc herniation, resulting in moderate compression of the anterior thecal sac.

In a January 27, 1997 work restriction evaluation report, Dr. Andrew Jones, a Board-certified internist, stated that appellant should limit lifting, bending, stooping, crawling, kneeling and sitting. Dr. Jones indicated that appellant could lift up to 15 pounds, sit 10 minutes an hour, walk 30 minutes an hour and stand 40 minutes an hour. He noted that appellant could stoop 10

³ 5 U.S.C. § 8128(a)

⁴ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁵ *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

times an hour and bend 10 times an hour. He concluded that appellant could work eight hours a day under those restrictions.

In an October 16, 1997 report, Dr. Jones stated that he examined appellant on April 24, 1997 who complained of increased pain in her back. He noted that appellant had been off medications for several months but he had to restart her on an analgesic for the first time since November 1996. Dr. Jones stated that appellant's condition was not a result of any medication but represented a deterioration of her work injury. He indicated that appellant returned on May 1, 1997 with exacerbation of pain to the extent that she developed radicular pain well above and beyond the prior pain delineation, with pain extending down to appellant's left foot in an S1 nerve distribution. Dr. Jones stated that this was a profound change symptomatically from appellant's earlier examinations, placing back to her condition at the time of the July 18, 1996 employment injury. He noted that appellant's condition was consistent with the diagnosis of a herniated lumbar disc. He diagnosed a deteriorating herniated L5-S1 disc and exacerbation of lumbar pain. In a September 16, 1998 report, Dr. Jones stated that appellant was totally disabled after May 1, 1997, due to her July 18, 1996 employment injury.

In a February 18, 2000 report, Dr. William F. Donovan, a Board-certified physiatrist, stated that a lumbar discogram showed evidence of herniated nucleus pulposus at L4-5 and L5-S1. Dr. Donovan reported that an electromyogram (EMG) showed left L5 radiculopathy. He concluded that appellant was totally disabled.

Dr. Donovan referred appellant to Dr. Mark F. McDonnell, a Board-certified orthopedic surgeon, for an examination. In a March 8, 2000 report, Dr. McDonnell noted that an August 19, 1999 MRI scan, showed vertebral desiccation, torn annulus and disc bulge at L5-S1. He noted that a post discogram computerized tomography (CT) scan showed torn annulus from L4 to S1. He diagnosed displacement of the L5-S1 disc, post-traumatic internal disc derangement from L4 to S1 and post-traumatic instability at L4-5. He recommended a spinal fusion.

In an April 10, 2000 report, Dr. Donovan recommended that appellant undergo a spinal fusion. He stated that appellant had been unable to work since May 1997, due to the herniated disc and spinal instability caused by the July 18, 1996 employment injury. In an April 18, 2000 report, Dr. Donovan stated that appellant was incapable of returning to work as a postal clerk because of the two herniated lumbar discs and spine instability. He indicated that appellant was incapable of providing sedentary, light, medium or heavy work because of the inability to sit more than one hour a day in an eight-hour workday and inability to stand in one place for more than one hour in an eight-hour day. He concluded that appellant was incapable of even sedentary work. Dr. Donovan stated that appellant was developing scar tissue adjacent to the herniated disc and the longer surgery was delayed, the more scar tissue would develop. He stated that appellant had a significant permanent medical impairment of the July 18, 1996 employment injury.

In a July 25, 2000 report, Dr. Paul C. Larson, a Board-certified radiologist, stated that a myelogram of the lumbar spine and a postmyelogram CT scan showed some diffuse bulging of discs, more prominent at the L4-5 level, but without any associated spinal canal compromise and no herniated nucleus pulposus.

In a February 25, 2002 report, Dr. Donovan diagnosed herniated L4-5 and L5-S1 discs and lumbar spine instability. He stated that appellant was incapable of working at a postal clerk due to lumbar spine instability. He again indicated that appellant could not stand or sit for more than one hour during the workday. Dr. Donovan again requested authorization for spinal fusion surgery. He noted that appellant had been totally disabled since he had been treating her since January 28, 2000.

Dr. Jones, in his October 16, 1997 report, identified a change in appellant's employment-related condition, with increased back pain and the development of radiculopathy. He stated that appellant's back condition had deteriorated due to the effects of the July 18, 1996 employment injury. He had previously indicated that appellant could work limited duty but changed his opinion to indicate that appellant was disabled for work as of May 1997. Dr. Donovan, in his reports, stated that appellant could only sit for one hour a day and stand one hour a day due to lumbar instability. He concluded that appellant was incapable of performing the duties of a postal clerk due to the effects of the employment injury and, therefore, was totally disabled for work. The reports of Drs. Jones and Donovan demonstrate a change in appellant's employment-related condition to the extent that she was unable to perform the limited-duty position she began when she returned to work in February 1997. Dr. Larson, in his report, indicated that appellant only had a disc bulge and no herniated nucleus pulposus. However, his report was contradicted by two MRI scans and a separate CT scan, as well as an EMG. His report, therefore, has reduced probative value when compared with the medical evidence of record. The reports of Drs. Jones and Donovan lacked sufficient rationale to establish that appellant had a recurrence of disability commencing April 28, 1997. Their reports, however, are sufficient to require further development of the medical record.⁶

On remand the Office should refer appellant, together with a statement of accepted facts and the case record, to an appropriate specialist for an examination and a second opinion on whether appellant had a recurrence of disability commencing April 28, 1997, due to the effects of the July 18, 1996 employment injury. After further development as it may find necessary, the Office should issue a *de novo* decision.

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

The decisions of the Office of Workers' Compensation Programs, dated July 19 and May 10, 2002, are hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC
May 5, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member