

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHERINE T. ATON and U.S. POSTAL SERVICE, NORTH TEXAS
MAIL PROCESSING FACILITY, Coppell, Tex.

*Docket No. 95-2453; Submitted on the Record;
Issued April 20, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established that she sustained a recurrence of disability, causally related to her December 19, 1990 accepted employment-related lumbar strain.

On February 8, 1991 the Office of Workers' Compensation Programs accepted that appellant sustained an employment-related lumbar strain, and noted that concurrent disability at that time, not due to the employment injury, included obesity and spondylolisthesis at L5-S1. Appellant returned to modified, sedentary duty for four hours a day on January 9, 1993.

On March 1, 1994 appellant filed several claims (Form CA-8) for intermittent periods of total disability due to back and leg pain beginning September 23, 1994. On March 5, 1994 appellant stopped work altogether and on March 8, 1994 she filed a claim for recurrence of disability related to her December 21, 1990 accepted employment-related lumbar strain. Appellant stated that following her return to work she continued to experience increasing pain, and could barely walk by the time her four-hour shift ended each day. Appellant further explained that she had been in physical therapy through June 1993, and that her physical capabilities steadily decreased following cessation of the therapy. She described her symptoms as being the same as she experienced with her original employment injury, and added that although she returned to work, her condition never fully improved.

In a letter dated April 18, 1994, the Office advised appellant that if she had stopped work due to a worsening of her employment-related condition, she needed to submit a complete narrative medical report from her physician, describing the objective findings that convinced him that her condition had worsened and explaining why she could no longer perform the duties she was performing when she stopped work.

In support of her claim for recurrence of disability, appellant submitted a March 16, 1994 medical report from her attending physician Dr. James L. Hill, a specialist in pain medicine. In

his report, Dr. Hill related the history of appellant's original injury and recurrence of disability stating that appellant first presented on December 28, 1990 stating that she had been injured at work on December 21, 1990 when she was struck in the back by a stack of falling mail trays. He noted that at the time of his initial examination, his diagnoses were: (1) acute lumbar strain/sprain; (2) acute cervical strain/sprain; (3) bilateral lumbar radiculitis; and (3) lumbar somatic dysfunction. The physician reported that between December 28, 1990 and March 4, 1994 he saw appellant more than 160 times for treatment and therapy, and noted that during these four years of disability appellant developed fibromyalgia as a result of her employment injury and additionally became very depressed. By January 1993, Dr. Hill continued, although still suffering from severe muscle spasms, neck and low back pain, and fibromyalgia, he felt appellant was able to perform very light duties four hours a day and returned her to work. The physician noted that around January 1994 appellant learned she was pregnant, but she continued to work light duty until February 25, 1994, at which time she returned to his office in tears complaining that she was in a lot of pain and that due to her pregnancy was unable to take effective pain medication. Dr. Hill stated that he encouraged appellant to continue working, but that on March 1, 1994 she called him and reported that she had stopped work. Dr. Hill noted that he had instructed appellant to stay home until April 1, 1994 and to perform low impact exercises. He added that his previous request that appellant be allowed to return to physical therapy had been denied, and that had she been allowed to continue her therapy, she possibly would not have had to stop work on March 1, 1994. Dr. Hill concluded that at the time of his report, appellant was essentially bedridden with severe pain, and that her condition was not related to her pregnancy but to her 1990 employment injury.

In brief follow-up letters dated April 1 and 22, 1994, Dr. Hill again requested that appellant be allowed to return to physical therapy and reiterated his earlier conclusion that appellant's disabling condition was unrelated to her pregnancy.

By decision dated May 23, 1994, the Office denied appellant's claim for recurrence of disability on the grounds that the evidence of record failed to establish a causal relationship between appellant's claimed recurrent disability and her work-related muscular strain injury. The Office specifically stated that Dr. Hill failed to explain how appellant's condition worsened to the point that she could no longer perform her modified clerk position and did not describe objective findings which convinced him that appellant could no longer perform her light-duty job.

On June 6, 1994 appellant requested an oral hearing before an Office representative and in support she submitted additional medical records.

Appellant submitted a June 2, 1994 report from Dr. Hill, in which the physician responded to the Office's statement that he had not provided objective findings for his diagnoses. Dr. Hill reiterated that appellant had constant back pain, muscle spasms, limitation of lumbar spinal movement, leg and back weakness, post-traumatic depression and fibromyalgia and stated that x-rays, magnetic resonance images and electromyograms contained in the record confirmed the presence of degenerative changes in the L5 disc, bulging disc at L5 with dural sac flattening, spinal stenosis at L4 and L5, and chronic lumbar radiculopathy/radiculitis. Dr. Hill stated that although appellant gained weight after becoming pregnant, prior to her pregnancy she was

already overweight due in part to her inability to exercise due to her back impairment. The physician concluded that the medical conditions resulting from her 1990 and 1991 employment injuries had not improved, that appellant additionally suffered from depression and fibromyalgia, and that all of appellant's disabilities, in spite of her pregnancy, were causally related to her injury.

Appellant also submitted a June 17, 1994 report from her obstetrician, Dr. Gregory A. Pappas. In his report, Dr. Pappas noted that appellant was approximately 38 weeks pregnant and had been his patient since December 29, 1993. Dr. Pappas stated that physical examination revealed exquisite tender points of the soft tissue over her lower and middle back, consistent with fibromyalgia, and that while injections initially relieved this pain sometimes for as long as two weeks, eventually, they failed to provide any significant pain relief. Dr. Pappas additionally explained that the pain medication appellant had initially been taking caused excessive nausea after appellant became pregnant and had to be discontinued. The physician prescribed another pain reliever and noted that although the combination of pain medication and injections seemed effective between December 29, 1993 and mid-April 1994, subsequently appellant had failed to receive significant pain relief from these methods and discontinued their use. Dr. Pappas conceded that while he could not attest to the cause of appellant's pain, he believed it to be severe, to have been present prior to her pregnancy, and not to have been made appreciably worse by the pregnancy itself.

In a letter dated June 13, 1994, Dr. Hill provided an addendum to his June 2, 1994 report. He stated that appellant could not drive the thirty miles to and from her employment due to joint swelling and stiffness and loss of mobility, and could not walk the distances required of her, including the distance from the parking lot to the office and back, and from her duty station to her break area, due to spinal and joint swelling, stiffness and weakness of the legs and hips. He added that appellant could not sit in a chair for any length of time because of stiffness of the lumbar spine and hip joints, and could not reach, lift, bend, squat or stand because of stiffness, swelling and weakness in her dorso lumbar spine, neck, shoulders, hips and legs. Dr. Hill stated that appellant's physical therapy had helped her degree of mobility, but that he took her out of therapy because, at that time, she had been helped as much as she could. He explained that she discontinued therapy during the summer months, which are normally less painful for persons with chronic injuries because they can stay warmer and be more physically active. He added that although she had been removed from therapy, she never "fully recovered." Dr. Hill reiterated his earlier diagnoses of: (1) lumbar (L5-S1) radiculopathy; (2) bulging lumbar disc; (3) dorso lumbar strain (chronic); (4) resultant fibromyalgia; and (5) post-traumatic stress disorder resulting in anxiety and depression. He stated that when appellant became pregnant she had to be taken off her pain and anti-inflammatory medication and that as soon as this medication was discontinued her muscles and joints began to swell again, and that the mild medications allowable by her obstetrician were insufficient to reduce the swelling or pain. Dr. Hill stressed his opinion that not being able to take the requisite medication was the only way appellant's pregnancy impacted on her condition, that he had fully expected appellant to continue to work up until her delivery date, but that the bad weather and lack of medication and therapy had prevented this. He concluded that appellant had no recourse but to stop work due to the recurrence of her previous symptoms and her physicians' inability to deal with it.

At the hearing held on November 17, 1994, appellant, representing herself, testified and submitted a narrative statement, additional factual information and copies of previously submitted medical reports. Subsequent to the hearing, appellant submitted two undated reports from Dr. Gunda Kirk, an osteopath who had assumed Dr. Hill's practice upon his retirement.

In her first report Dr. Kirk summarized Dr. Hill's earlier diagnoses and stated that with adequate physical therapy and work hardening appellant could return to the workforce. In an addendum to her initial report, Dr. Kirk stated that appellant had stopped working in March 1994 because she could no longer sit for the required four hours a day due to severe pain, stiffness and swelling in her low back, legs, shoulders and hips and could not reach for the monitor to push the necessary buttons due to severe pain and stiffness in her arms, shoulders and back. The physician additionally noted that appellant could not walk to the front counter to help pass out time cards, a duty assigned to her after she returned to work, due to severe pain and stiffness in her legs and lower back. Dr. Kirk concluded that appellant remained constantly in pain all throughout her body due to the myofascial post-traumatic fibromyalgia, and her other diagnoses, and that although she tried to work, the flare-up she suffered in late February and early March 1994 was more than she could handle.

In a decision dated March 29, 1995, the Office hearing representative denied appellant's claim for recurrence of disability finding that the medical evidence was insufficiently rationalized to establish that the effects of the December 1990 accepted injury rendered her totally disabled from even her very sedentary duties. The hearing representative specifically noted that the record contained an early report from Dr. Hill dated May 16, 1991, in which the physician stated that appellant had been suffering from preexisting back problems for at least a year prior to her December 21, 1990 employment injury. The hearing representative found that Dr. Hill had indicated that appellant could not perform duties that were not associated with her light-duty job, and that while Dr. Kirk did specifically state that appellant could not perform several identified factors of her employment, neither physician provided any rationale for their opinions that appellant's inability to perform the sedentary duties stemmed from the accepted injury of 1990. The representative concluded that the record contained evidence that appellant had numerous physical problems unrelated to her lumbar strain of 1990 and the physicians of record seemed to ignore the fact that upon her return to work, appellant performed her duties with little difficulty for more than a year, that she was pregnant, that she was very overweight and had long-standing preexisting problems.

The Board finds that this case is not in posture for decision, and must be remanded for further development.

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 or the medical evidence of record establishes that he or 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 he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.¹ The burden of showing a change

¹ *Gus N. Rodes*, 46 ECAB ____ (Docket No. 93-950, issued February 14, 1995); *Cynthia M. Judd*, 42 ECAB

in the nature and extent of the injury-related condition 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.² Causal relationship is a medical issue and can be established only by medical evidence.³ However, proceedings under the Federal Employees' Compensation Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.⁴

In the present case, appellant submitted multiple reports from Dr. Hill, and two reports from Dr. Kirk, his successor, stating that appellant's cessation of physical therapy, the onset of cold weather and her inability to take necessary pain and anti-inflammatory medication due to her pregnancy combined to cause a disabling recurrence of the symptoms associated with her original accepted employment injury. Although, neither Dr. Hill nor Dr. Kirk adequately explain what role, if any, appellant's preexisting back injury, noted in Dr. Hill's letter of May 16, 1991 or her obesity played in her disabling condition beginning in March 1994, and did not specifically explain why appellant's pregnancy was thought to have played no significant role in her recurrence of disability, and therefore the reports are insufficiently rationalized to discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that her March 1994 recurrence of disability was causally related to her accepted 1990 employment injury, they raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.⁵ Additionally, the Board notes that in this case the record contains no medical opinion contrary to appellant's claim and further notes that the Office did not seek advice from an Office medical adviser or refer the case to an Office referral physician for a second opinion.

Therefore, upon remand the Office should refer appellant, together with a statement of accepted facts, questions to be answered and the complete case record, to an appropriate medical specialist for an evaluation and a rationalized medical opinion on whether appellant's claimed March 1994 recurrence of disability was in any way causally related to her accepted employment injury. After such further development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

² *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).

³ *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

⁴ *William J. Cantrell*, 34 ECAB 1223 (1983).

⁵ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

Consequently, the decisions of the Office of Workers' Compensation Programs dated March 29, 1995 and May 23, 1994 are hereby set aside and the case is remanded for further development in accordance with this decision.

Dated, Washington, D.C.
April 20, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member