

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LONNA K. BLATH and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER,
Grand Island, Nebr.

*Docket No. 96-186; Submitted on the Record;
Issued April 21, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of total disability on August 25, 1993 causally related to her June 17, 1993 employment injury.

On June 17, 1993 appellant, then a 44-year-old licensed practical nurse, sustained a lumbosacral strain in the performance of duty. On August 16, 1993 appellant returned to limited-duty work consisting of distributing medication and taking vital signs of hospital patients.

In a medical restrictions form dated July 6, 1993, Dr. Marjorie J. Mellor, a Board-certified family practitioner, indicated that appellant should not walk for extended periods of time, that she was unable to bend or stoop, required frequent changes in position and could not perform lifting or twisting.

In a form report dated August 5, 1993, Dr. Mellor diagnosed low back strain with disc syndrome symptoms and checked the block marked "yes" indicating that the condition was causally related to her June 17, 1993 employment injury. She indicated that appellant was totally disabled from June 17 to August 15, 1993, but was able to return to work in a limited-duty capacity on August 16, 1993.

In a disability certificate dated August 25, 1993, Dr. Mellor stated that appellant could return to work for one week with no restrictions and that her condition would be reassessed after one week.

In a disability certificate dated August 28, 1993, Dr. Mellor wrote "No work due to apparent violation of physician recommendations for physical activity exacerbating brittle diabetes mellitus [and] back injury."

In a claim form dated September 9, 1993, appellant alleged that she sustained a recurrence of disability on August 25, 1993, which she attributed to her June 17, 1993 employment injury. She attributed her alleged recurrence of disability to being transferred to a hospital ward, where her duties included increased amounts of walking and standing.

In a form report dated September 20, 1993, Dr. Steven S. Mahnke, a Board-certified family practitioner, diagnosed lumbar disc syndrome and indicated that appellant was unable to work from that date through October 15, 1993.

In clinical notes dated October 4, 1993, Dr. Mahnke related that appellant had returned to work on August 16, 1993 and initially did "O.K." but that she was changed to a different ward and that her duties there required more lifting. He provided findings on examination, diagnosed lumbar disc syndrome and indicated that appellant was totally disabled.

In a form report dated October 7, 1993, Dr. Gordon D. Bainbridge, a Board-certified orthopedic surgeon, diagnosed severe low back sprain and recommended that appellant have a magnetic resonance imaging (MRI) scan. He indicated that appellant was totally disabled.

In a form report dated October 18, 1993, Dr. Bainbridge diagnosed a disc herniation at D7-8 and a minor bulging disc at L2-3 and indicated by checking the block marked "yes" that the condition was causally related to the June 17, 1993 employment injury. He indicated that appellant was totally disabled.

By letter dated February 25, 1994, the Office of Workers' Compensation Programs referred appellant to Dr. John G. Yost, a Board-certified orthopedic surgeon, along with a statement of accepted facts and copies of medical records, for an examination and evaluation of appellant in order to determine if she had sustained any condition or disability causally related to her June 17, 1993 employment injury.

In a report dated March 10, 1994, Dr. Yost provided a history of appellant's condition, findings on examination and the results of tests. He stated that with physical therapy to rehabilitate her back and motivation appellant "should be able to" return to work, but might have to be limited from a great amount of continuous lifting.

By letter dated July 21, 1994, the Office requested that Dr. Yost provide additional information, regarding the relationship of appellant's condition to her June 17, 1993 employment injury and her ability to perform her light-duty job.

In a report dated August 1, 1994, Dr. Yost stated that myofascial back pain, was a soft tissue type of back pain that "we can assume is secondary from residuals from a strain or sprain to her lower back." He stated that appellant had a history of previous back trouble in 1990 and that individuals with one back episode were more inclined to have repeat episodes. Dr. Yost stated:

"On an historical basis, [appellant] had adequate history to account for a strain or sprain to her back at the time of injury. I feel that on an historical basis, her current symptoms are secondary to her episode of June 17, 1993...."

“The opinion that was offered as far as her being able to return to work four hours per day on the date of my examination, I feel is valid. Not having examined her and only having to go by her history, it would be difficult to tell what her condition was in August of 1993, but on an historical basis, her symptoms were then no greater than what they were on the day of my examination. Therefore, she should have been able to do some activities then if she had been motivated.”

By decision dated October 21, 1994, the Office denied appellant’s claim for compensation benefits for a recurrence of total disability commencing on August 25, 1993.

By letter dated November 2, 1994, submitted through her attorney, appellant requested a review of the written record.

By decision dated February 6, 1995, the Office hearing representative affirmed the Office’s October 21, 1994 decision, on the grounds that the medical evidence of record failed to establish that appellant had any change in the nature and extent of her employment injury or a change in the nature and extent of her light-duty job requirements rendering her totally disabled.

By letter dated June 5, 1995, submitted through her attorney, appellant requested reconsideration of the denial of her claim.

In a report dated May 30, 1995, Dr. Bainbridge stated his opinion that appellant’s June 17, 1993 employment injury, caused a herniated disc which was the cause of all the pain and discomfort that appellant was experiencing. He stated “It is my opinion based on a reasonable degree of medical certainty, that the accident on June 17, 1993, did result in a herniated disc.”

By decision dated September 8, 1995, the Office denied appellant’s request for further merit review of her claim on the grounds that the evidence she submitted was found to be insufficient to warrant review of the prior decision.

The Board finds that this case, is not in posture for a decision due to an unresolved conflict in the medical opinion evidence.

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 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 record shows that appellant sustained a lumbosacral strain on June 17, 1993, in the performance of duty and returned to work on August 16, 1993 in a light-duty capacity. Appellant subsequently claimed a recurrence of total disability on August 25, 1993 and

¹ See *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Stuart K. Stanton*, 40 ECAB 859, 864 (1989).

submitted evidence in support of her claim. She attributed her alleged recurrence of disability to being transferred to a hospital ward with increased amounts of walking and standing.

In clinical notes dated October 4, 1993, Dr. Mahnke, a Board-certified family practitioner, related that appellant had returned to work on August 16, 1993 and initially did "O.K." but that she was changed to a different ward and that her duties there required more lifting and she had a recurrence of back pain. He provided findings on examination, diagnosed lumbar disc syndrome, and indicated that appellant was totally disabled. In a form report dated October 7, 1993, Dr. Bainbridge, a Board-certified orthopedic surgeon, diagnosed severe low back sprain and recommended that appellant have a MRI scan. He indicated that appellant was totally disabled.

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"The opinion that was offered as far as her being able to return to work four hours per day on the date of my examination, I feel is valid. Not having examined her and only having to go by her history, it would be difficult to tell what her condition was in August of 1993, but on an historical basis, her symptoms were then no greater than what they were on the day of my examination. Therefore, she should have been able to do some activities then if she had been motivated."

In a report dated May 30, 1995, Dr. Bainbridge stated his opinion that appellant's June 17, 1993 employment injury, caused a herniated disc which was the cause of all the pain and discomfort that appellant was experiencing. He stated "It is my opinion based on a reasonable degree of medical certainty, that the accident on June 17, 1993, did result in a herniated disc."

The Board finds that there exists in this case, an unresolved conflict in the medical opinion evidence between appellant's attending Board-certified orthopedic surgeon,

Dr. Bainbridge and the Office referral physician, Dr. Yost, as to whether appellant sustained a recurrence of total disability on August 25, 1993, causally related to her June 17, 1993 employment injury. Section 8123(a) of the Federal Employees' Compensation Act provides, in pertinent part, "If there is disagreement between the physician making the examination for the United States and that physician of the employee, the Secretary shall appoint a third physician who shall make an examination."²

On remand, the Office should prepare a statement of accepted facts and refer appellant, along with copies of the medical evidence, to an appropriate Board-certified specialist for a resolution of the conflict in medical opinion as to whether appellant sustained an employment-related recurrence of total disability.

The decisions of the Office of Workers' Compensation Programs dated September 8 and February 6, 1995 and October 21, 1994 are set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
April 21, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

² 5 U.S.C. § 8123(a); *see James P. Roberts*, 31 ECAB 1010 (1980).