

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTORIA G. TAN-GATUE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION OUTPATIENT CLINIC, Los Angeles, Calif.

*Docket No. 96-1188; Submitted on the Record;
Issued May 21, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established that she sustained a recurrence of disability from May 15 through July 11, 1995 causally related to her accepted condition of aggravation of degenerative disc disease.

On June 13, 1993 appellant, then a 53-year-old pharmacy technician, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging problems with her low back.

Appellant did not immediately stop work. She submitted various medical reports from Dr. Homer L. Williams, an orthopedic surgeon, in support of her claim. In a report dated June 25, 1992, Dr. Williams noted appellant's history of injury and performed an evaluation which included x-rays of the lumbar spine and left knee. He diagnosed chronic lumbar strain/sprain syndrome, degenerative disc disease at L5-S1, and a medial meniscus tear, left knee. Dr. Williams opined that appellant's low back and left knee injuries were a direct result of the cumulative injuries sustained during the course of employment. He further opined that the repetitive motions of lifting and bending that appellant is required to perform have also aggravated her elbow causing a mild tendinitis. Dr. Williams continued submitting reports noting appellant's status and indicating that her continuing back condition was work related.

The Office of Workers' Compensation Programs accepted appellant's claim for aggravation of degenerative disc disease and compensated her for intermittent periods from August 11 through October 21, 1994. Appellant was released to return to light duty on October 31, 1994. Appellant worked until May 15, 1995.

On June 23, 1995 appellant filed a claim for continuing compensation (CA-8) for the period May 15 through June 13, 1995. Contained within the record are medical reports from Dr. Williams, concerning appellant's back condition which he diagnosed as being degenerative disc disease, L5-S1, radiculopathy, right lower extremity, with a six mm herniated nucleus

pulposus, L5-S1. In a June 12, 1995 medical report, Dr. Williams noted appellant last worked on May 15, 1995 and that she denied any new injuries since her last evaluation. Dr. Williams stated that appellant's physical examination was "relatively unchanged" from his last report and opined that appellant was temporarily totally disabled for one month. He further noted that appellant had performed light duty since 1992 and that when appellant resumed work, she would be precluded from standing, lifting, and repetitive bending.

By letter dated June 26, 1995, the Office advised appellant to file a notice of recurrence of disability (Form CA-2a).¹

Appellant underwent a second opinion evaluation by Dr. Behrooz Broukhim, a Board-certified orthopedic surgeon, on June 23, 1995. In a report dated June 23, 1995, Dr. Broukhim set forth his evaluation of appellant and reviewed various medical reports from Dr. Williams. Dr. Broukhim diagnosed chronic musculoligamentous strain of the lumbar spine, herniated disc, L5-S1, and chronic internal derangement, left knee with torn medial meniscus. On the basis of the subjective complaints, objective findings, x-ray findings, and magnetic resonance imaging findings, Dr. Broukhim opined that the diagnosed conditions were the result of the industrial accident dated April 30, 1984. He opined that as a result of appellant's residual findings, appellant had permanent functional limitations to avoid very heavy lifting and repetitive bending and stooping. He reviewed the physical demands of appellant's job and opined that appellant was capable of performing her regular work as a pharmacy technician so long as she did not lift anything heavier than 25 pounds, which according to the reports he reviewed, appellant's modified work duties were compatible with the restrictions he imposed.

In a July 10, 1995 medical report, Dr. Williams noted that appellant denied any new injuries and that she had not worked since May 15, 1995. He recommended that appellant return to light-duty work on July 12, 1995 and imposed restrictions on appellant's movements, including a two pound lifting restriction.

By letter dated September 1, 1995, Dr. Broukhim responded to the Office's inquiry regarding appellant's disability status from the period May 15 through July 11, 1995. He stated that it was his impression that if modified duties were available during this period of time, with appellant lifting no more than 25 pounds, appellant could have been able to work such that she was not disabled during this period.

By decision dated September 22, 1995, the Office denied appellant's recurrence claim on the grounds that the evidence was insufficient to establish that appellant sustained a recurrence of disability from May 15 through June 13, 1995 causally related to the original work injury. The Office further noted that appellant failed to provide any supportive medical evidence.

By letter dated October 22, 1995, appellant requested reconsideration. In support of her request, appellant submitted an August 7, 1995 medical report from Dr. Williams. Dr. Williams noted appellant's history, present complaints and examination findings. Dr. Williams opined

¹ The record does not actually contain a CA-2a form although the Office chose to develop the claim as a recurrence of disability claim.

that appellant was totally disabled from May 15 through July 11, 1995 as she had muscle spasms due to the increasing demands on her back. Dr. Williams noted that muscle spasms were not previously present and that a program of physical therapy and medication had ameliorated her symptoms. He indicated that appellant could work within certain restrictions. A Form CA-20a dated June 7, 1995 from Dr. Williams was also submitted in which he stated that appellant was totally disabled from her usual work for the period May 15 through June 13, 1995. Dr. Williams indicated that appellant's disability was due to her employment injury.

In a decision dated October 26, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant modification of the prior decision. The Office concluded that Dr. Broukhim's reports represented the weight of the medical evidence and that appellant had not established that her disability from May 15 through July 11, 1995 was due to her employment injury.

The Board finds that this case is not in posture for a decision due to a conflict in medical opinion necessitating referral to an impartial medical examiner pursuant to Section 8123(a) of the Federal Employees' Compensation Act.

Dr. Williams, an orthopedic surgeon and appellant's treating physician, diagnosed appellant's back condition as being causally related to her original injury of April 30, 1984 and opined that appellant was temporarily totally disabled for the period May 15 through June 13, 1995. An Office referral physician, Dr. Broukhim, agreed that appellant's back condition was causally related to her employment injury of April 30, 1984, but opined that appellant was capable of performing her regular work so long as she did not lift anything heavier than 25 pounds, which were compatible with appellant's modified work duties. The Board finds that the reports of Dr. Williams and Dr. Broukhim provide conflicting medical opinions on whether appellant was capable of returning to her modified duties within the time period in question. In situations where there exists opposing medical reports the Office should refer the case to an impartial medical examiner for the purpose of resolving the conflict. Section 8123(a) provides in pertinent part, "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."²

To resolve the conflict in this case, the Office should refer appellant, the case record, a statement of accepted facts including the duties performed by appellant when she stopped work on May 15, 1995, and a list of specific questions to an appropriate medical specialist for an impartial evaluation and a rationalized medical opinion regarding whether appellant was totally disabled and unable to perform her modified duties position from May 15 through July 11, 1995. After this and such further development as it deems necessary, the Office shall issue an appropriate merit decision.

² 5 U.S.C. § 8123(a).

The decisions of the Office of Workers' Compensation Programs dated October 26 and September 22, 1995 are hereby set aside and the case remanded for further development consistent with this opinion.

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

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member