U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELLA R. DIXON and DEPARTMENT OF AGRICULTURE, OK FOODS, Fort Smith, Ark.

Docket No. 96-1923; Submitted on the Record;
Issued November 5, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether appellant has met her burden of proof in establishing that she was disabled for light-duty work as of February 5, 1995 as a result of her accepted January 18, 1994 lower back injury.

On January 18, 1994 appellant, a 54-year-old food inspector, sustained an injury to her lower back when she slipped and fell on the lunchroom floor. Appellant filed a Form CA-1 claim for benefits based on traumatic injury on January 18, 1994.

On January 31, 1994 appellant was examined by Dr. Munir Zafari, a Board-certified general surgeon and specialist in endocrinology, who indicated in an undated Form CA-20 that appellant had employment-related low back pain, a compression fracture of the thoracic vertebrae, and that a computerized axial tomography (CT) scan showed narrowing in the lumbar spine area. Dr. Zafari placed appellant off work as of February 20, 1994 and referred appellant to Dr. Douglas W. Parker, Jr., a Board-certified orthopedic surgeon.[1] Appellant stopped working at the employing establishment due to her employment-related back injury as of February 21, 1994 and has never returned to work on a full-time basis since that time.

Dr. Parker stated in a April 27, 1994 treatment note that appellant had posterior lateral herniation at C4-5, with central right posterior disc protrusion at T12-L1 and degenerative disc disease wedging at L1 vertebral body. The Office of Workers' Compensation Programs accepted appellant's claim for herniated lumbar and cervical disc.

In letters dated September 7, 1994, the Office scheduled a second opinion examination for appellant with Dr. Joe P. Alberty, a Board-certified orthopedic surgeon, on September 22, 1994. In a report dated September 22, 1994, Dr. Alberty opined that while appellant was unable to return to a food inspector position, she was able to do light-duty work,

[1] In a April 28, 1994 letter to the employing establishment, Dr. Zufari stated that appellant had been unable to work since February 20, 1994, and that the compression fracture of the thoracic vertebrae had been demonstrated by x-rays.

although he was unsure as to her motivation. Accompanying the report was a work capacity evaluation form outlining her work restrictions. Dr. Alberty recommended limited stair-climbing, no lifting in excess of 20 pounds, no prolonged sitting or standing and advised that she could work an 8-hour day.

In a letter dated November 1, 1994, the Office forwarded Dr. Alberty's report to Dr. Parker for his review and requested his opinion as to whether he agreed with Dr. Alberty's assessment of appellant's work capacity. In response, Dr. Parker submitted a letter dated December 5, 1994 stating that "his evaluation was very close to [Dr. Alberty's] assessment and I have no problem with his evaluation whatsoever."[2]

By letter dated January 20, 1995, the employing establishment offered appellant a suitable light-duty job as a poultry slaughter inspector based on Dr. Alberty's work capacity evaluation, to commence on February 5, 1995. The employing establishment asserted that the job was within her physical restrictions and would accommodate her limitations on prolonged sitting or standing, as the inspection stands at the job site were fully adjustable.

By letter dated January 25, 1995, the Office indicated that appellant had accepted the position during a conference call between the claims examiner, the employing establishment and appellant.

Appellant reported for work at the light-duty position as scheduled on February 5, 1995, but quit working after only two hours. On February 13, 1995 appellant filed a Form CA-8, seeking total disability from February 5 through 18, 1995.[3] Appellant alleged that when she attempted to return to work on February 5, 1995, she was forced to quit because the job required her to climb up and down 130 steps, resulting in pain in her lower back and left leg and hip joint; appellant therefore alleged that there was no light duty available at the employing establishment.

In an interoffice memorandum dated February 20, 1995, the employing establishment stated that appellant spent most of the two hours at the work site on February 5, 1995 sitting in an office or attempting to purchase skid-resistant footwear from the plant. The employing establishment also calculated the total amount of steps at the plant, 31, but did not indicate the exact number of steps appellant was required to ascend and/or descend on the day she appeared at the work site.

By letter dated February 24, 1995, the Office advised appellant that she needed to submit medical evidence supporting her claim that she was unable to perform the job located by the employing establishment on February 5, 1995. The Office requested that appellant submit a report from a physician, including a diagnosis of her work-related condition, dates of disability, a medical opinion as to the relationship between her current condition or disability and the

[2] Dr. Parker also submitted a treatment note dated November 10, 1994 stating that appellant had reached a "treatment plateau," with a permanent physical impairment rating to her back of 10 percent. Dr. Parker advised that appellant could not return to a job requiring heavy lifting, pushing, pulling or repetitive bending.

[3] This Form CA-8 was the first of three such claims for total disability appellant would file based on her alleged inability to perform the job located by the employing establishment. The Office treated the claim as one for continuing total disability beginning on February 5, 1995.

accepted employment injury, and the objective findings on which the opinion was based. The Office advised appellant that she needed to respond to the request within 15 days.

In response, appellant submitted 2 Form CA-20a from Dr. Parker, dated February 16 and 27, 1995; 3 treatment notes from Dr. Parker dated February 13, 27 and March 8, 1995; 2 Form CA-20a's from Dr. Zafari dated January 26, 1995; 2 letters from Dr. Zafari dated January 26 and February 24, 1995; and a treatment note from Dr. Zafari dated February 24, 1995. In his February 13, 1995 treatment note, Dr. Parker stated that appellant attempted to return to work but was unable to do so, and indicated that she was having severe pain in her back and hips. Dr. Parker's subsequent notes indicated appellant was experiencing continuing pain in her back and in her knee. In one of the 2 Form CA-20a's Dr. Zafari completed on January 26, 1995, he indicated that appellant was having severe back pain radiating down into her legs bilaterally and that she was totally disabled for her usual work. The other documents Dr. Zafari submitted essentially reiterated this opinion.

In a decision dated March 20, 1995, the Office denied appellant additional compensation, finding that the medical evidence of record indicated she was able to perform the suitable job located by the employing establishment and that therefore she was not disabled for work. In a memorandum to the Director, the claims examiner noted appellant's assertion that she could not work because she was in too much pain and because the job required climbing 130 stairs, but did not discuss whether this allegation was credible or supported by any other evidence of record. The claims examiner stated that Dr. Parker failed to provide an explanation for his opinion, which the claims examiner advised was needed "especially when he initially said that her disability was due to a colonoscopy."[4] The claims examiner also noted that Dr. Parker had agreed with Dr. Alberty's opinion that appellant could return to work with restrictions. The claims examiner further stated that Dr. Zafari failed to provide a diagnosis or explanation to support his opinion.

In a letter dated April 5, 1995, appellant, by her attorney, requested a review before an Office hearing representative.

At the hearing held on September 12, 1995, appellant testified that she had attempted to return to work on February 5, 1995, but had to quit after 2 hours after having to climb 130 steps. Appellant also submitted some additional medical records from Drs. Parker and Zafari, some of which she had previously submitted. Dr. Parker indicated in a medical report dated March 15, 1995 that if appellant were to return to work at that time she could only increase her pain state. The other medical reports appellant submitted essentially reiterated earlier findings and conclusions.

In a decision dated May 8, 1996, an Office hearing representative affirmed the Office's March 20, 1995 decision, finding that appellant had not established that there was a change in the nature and extent of her light-duty job requirements or provided medical evidence showing that she could not perform the light-duty position. The hearing representative stated that while

[4] This statement by the claims examiner is in error. First, it was not Dr. Parker who indicated appellant was undergoing a colonoscopy, but Dr. Zafari, who made this assertion in one of his Form CA-20a's dated January 26, 1995. Second, Dr. Zafari merely made a notation that appellant was scheduled to undergo the procedure on January 27, 1995. Dr. Zafari never indicated, in the form or anywhere else in the record, that appellant's claimed disability beginning February 5, 1995 was due to the colonoscopy.

the medical evidence submitted by Drs. Parker and Zafari indicated appellant was totally disabled, they failed to provide medical rationale to support their opinions. The hearing representative further found that appellant had accepted the modified food inspector job at the employing establishment and returned to work on February 5, 1995, but had only worked at the position for two hours. The hearing representative found that at the time appellant stopped working the employing establishment was accommodating her medical restrictions, and that appellant had not presented any detailed medical evidence to show she was unable to perform the light-duty job. The hearing representative therefore concluded that the evidence submitted by appellant was not sufficient to establish she was totally disabled as of February 5, 1995.

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 the present case, appellant asserted on her February 13, 1995 Form CA-8 and testified at the hearing that the light-duty work she was assigned to perform was not suitable and exceeded Dr. Alberty's work tolerance limitations because it required her to climb and descend more than 130 stairs. This evidence, which indicates that the requirements of the light-duty job may have exceeded her work tolerance limitations of limited stair climbing and aggravated her condition, was unrefuted. Based on this unrefuted information, the hearing representative should have developed the record and determined what the precise light job requirements were at the

[5] *Terry R. Hedman*, 38 ECAB 222 (1986).

employing establishment's facility, what they required appellant to do, and whether they exceeded her work limitations as outlined by Dr. Alberty.[6] Only by knowing this information could the hearing representative have determined the light-duty job requirements and whether they were in accordance with appellant's medical restrictions. The employing establishment made no determination regarding the number of steps appellant was required to climb or descend, the frequency with which she was required to climb or descend them, and whether climbing and/or descending that number of steps complied with her medical restrictions. The hearing representative should have remanded the case for the Office to develop this necessary evidence to make this determination.

Therefore, because the evidence in this case record has not been adequately developed, the Office's May 8, 1996 decision is set aside, and the case is remanded for further development and a *de novo* decision. On remand, the Office must determine whether appellant met her burden of establishing that on February 5, 1995, the date she was slated to return to employment at the poultry inspection job, a change had occurred in the nature and extent of the light-duty job requirements, rendering her unable to perform the job and entitling her to continuing compensation for total disability. The Office must specifically require the employing establishment to determine the precise number of steps appellant is required to climb or descend at the worksite, the frequency with which she is required to climb or descend them, and whether climbing and/or descending that number of steps is in accordance with her medical restrictions.

The May 8, 1996 decision of the Office of Workers' Compensation Programs' is hereby set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
November 5, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] *See Cloteal Thomas*, 41 ECAB 310 (1989); *see also Carl W. Putzier*, 37 ECAB 691 (1986). (The Board found that appellant had not refused suitable work where he submitted affidavits, disputed by the employing establishment, that his actual job duties exceeded those described in the job offer.)