

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNETTA K. WILCOX and U.S. POSTAL SERVICE,
POST OFFICE, Dayton, OH

*Docket No. 97-1801; Submitted on the Record;
Issued December 29, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant was totally disabled from June 18 to July 2, 1990, from August 13 to 15, 1990 and from September 25, 1990 to February 13, 1993.

This case has previously been on appeal before the Board. A decision and order dated February 16, 1995, sets forth the facts of the case up to that point in time.¹ In that decision, the Board reversed a decision of the Office of Workers' Compensation Programs dated February 18, 1993, that reduced appellant's compensation based on a finding that she could perform the duties of a telephone solicitor. The Board also set aside a May 11, 1993 Office decision refusing to reopen appellant's case for further review of the merits of the Office's decision denying appellant's claims for recurrences of disability from June 18 to July 2, 1990, from August 13 to 15, 1990 and from September 25, 1990 to February 13, 1993. The Board noted that appellant's attending physician, Dr. William M. Connors, an osteopath, "presented medical reasons and objective evidence in support of a medical opinion that appellant was totally disabled for work." The Board then directed the Office to have Dr. Connors' report "reviewed by another physician to determine whether it shows objective evidence in support of appellant's claim of increased disability due to the effects of the accepted employment injuries," to be followed by "a review of appellant's case on the merits to determine whether she was totally disabled for all periods claimed after June 18, 1990 due to her employment injuries."

On April 14, 1995 the Office referred appellant, a statement of accepted facts and the prior medical evidence to Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon. By letter dated August 8, 1995, the Office asked Dr. Fisher to review the medical evidence and provide a

¹ Docket No. 93-1888.

reasoned medical opinion whether appellant was totally disabled at any time during the period from June 1990 to February 1993. In a report dated August 22, 1995, Dr. Fisher stated:

“I reviewed the records you forwarded to me as well as my own original report to you on this patient and it is m[y] feeling that [appellant] was not totally disabled during the period from June 1990 and February 1993. I feel that during this period of time the patient was not totally disabled from employment at the [employing establishment]. I feel that she would have been able to perform jobs of a sit-down nature for a period of four to five hours per day during that three-year period of time.”

By decision dated October 11, 1995, the Office found that the evidence was insufficient to establish that appellant was totally disabled from June 18, 1990 to February 13, 1993.

By letter dated February 16, 1996, appellant’s representative requested reconsideration, and submitted a report dated December 18, 1995 from Dr. Connors, stating that appellant was required to lift trays of mail weighing 17 to 25 pounds in her light-duty position as a manual distribution clerk and that she was totally disabled for this position. By letter dated February 26, 1996, the Office requested the employing establishment to comment on appellant’s representative’s request for reconsideration. In a letter dated March 15, 1996, an injury compensation specialist at the employing establishment stated that Dr. Connors was “in error when he stated that [appellant] was required to lift trays of mail weighing 17 to 25 pounds despite her weight restriction of 10 pounds. The modified job offered to [appellant] clearly states that she would have a 10-pound weight limit.” In a letter dated March 20, 1996, appellant stated that she returned to a modified letter sorting machine clerk position, the one offered to her by the employing establishment on July 22, 1988, for about one week before she was transferred to a position as a manual distribution clerk for third class mail. In this position, appellant alleged, she was required to lift trays weighing 17 to 25 pounds, which she did until she no longer could, due to pain.

By decision dated May 20, 1996, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

By letter dated December 2, 1996, appellant requested reconsideration and submitted reports from Dr. Thomas F. Goodall, an osteopath, stating that appellant was totally disabled from September 1990 to February 1993, as she was unable to lift 25 pounds repetitively.

By decision dated February 25, 1997, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

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 establishes that the employee 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 to show that he or 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.²

The Board finds that the case is not in posture for a decision.

Appellant was offered a position as a modified letter sorting machine clerk on July 22, 1988 with a lifting restriction of 10 pounds; she accepted this offer on September 12, 1988. Shortly thereafter, however, she was transferred to a position as a distribution clerk, as acknowledged by the employing establishment on a December 28, 1989 form and in a later note. For the first time on March 20, 1996, appellant has alleged that in her position as a manual distribution clerk, she was required to lift trays of mail weighing up to 25 pounds exceeding her physical restrictions on lifting.

Further development on this point is required. The employing establishment did not submit a position description with physical requirements for the position of manual distribution clerk and also did not submit a statement from any supervisor or other person with knowledge of appellant's duties in this position.³ On remand, the Office should attempt to obtain a statement from someone with knowledge of the duties appellant performed as a manual distribution clerk from late 1988 to June 1990.⁴ Appellant should be given an opportunity to address the amount of lifting she performed in this position during this period. The Office should then make a finding of fact on the physical requirements of the position of manual distribution clerk actually performed by appellant.

The case is also not in a posture for decision due to a conflict of medical opinion on appellant's degree of disability from June 18, 1990 to February 13, 1993.

As pointed out in the Board's decision and order on the prior appeal, appellant's attending physician, Dr. Connors, "presented medical reasons and objective evidence in support of a medical opinion that appellant was totally disabled for work." The Office's referral physician, Dr. Fisher, reviewed the medical evidence and concluded that appellant was not totally disabled during the period June 18, 1990 to February 13, 1993. After the Office determines the physical requirements of the position appellant performed during this period, it should resolve this conflict of medical opinion.

² *Terry R. Hedman*, 38 ECAB 222 (1986).

³ *See Cloteal Thomas*, 41 ECAB 310 (1989) (the Board stated that an Office hearing representative should have either further developed the record regarding appellant's allegation that her duties exceeded her work tolerance limitations or accepted appellant's allegations as true).

⁴ The Office's procedure manual states: "If the claim for recurrence of disability for work is based on modification of the claimant's duties, or on the physical requirements of the job, the claimant should be asked to describe such changes, and the employing establishment should be asked to comment." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7a(3) (May 1997).

The decisions of the Office of Workers' Compensation Programs dated February 25, 1997 and May 20, 1996 are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
December 29, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member