

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JALEH R. FRIEDMAN and DEPARTMENT OF THE ARMY,
SILAS B. HAYS ARMY COMMUNITY HOSPITAL, Fort Ord, Calif.

*Docket No. 97-2713; Submitted on the Record;
Issued July 9, 1999*

DECISION and ORDER

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

The issue is whether appellant has established that she sustained an increase of disability, causally related to her accepted neck and shoulder conditions.

On April 24, 1992 the Office of Workers' Compensation Programs accepted that appellant sustained employment-related strains of her neck and right shoulder girdle, as well as right elbow epicondylitis. On August 15, 1995 appellant filed a claim for a recurrence of disability and on January 4, 1996 the Office expanded the acceptance of her claim to include cervical disc herniation at C5-6 and C6-7. Except for brief periods, appellant has continued to work limited duty.

On October 28, 1996 appellant filed a claim for compensation (Form CA-7) for three hours per day from November 1 to December 31, 1996. In response to a request by the Office, on December 5, 1996, appellant filed a claim for a recurrence of disability and an accompanying narrative statement, in which she indicated that increased pain and symptoms had made it difficult for her to work more than five hours a day. She further stated that her treating physician had restricted her to working five hours a day while undergoing osteopathic treatment, but added that she had not yet been able to schedule this treatment.

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 medical reports dated October 8 and 30, 1996 from her attending physician Dr. Christopher Carver, a Board-certified neurosurgeon. In these reports Dr. Carver indicated that appellant was able to work five hours a day and explained that appellant had advised him that working for more than five hours a

day had become exceptionally difficult and that he had restricted her hours on that basis. In a report dated December 18, 1996, submitted in response to the Office's request for additional information, Dr. Carver reiterated that appellant continued to suffer from residuals of her originally accepted condition and that she was capable of working five hours a day.

By letter dated January 8, 1997, the Office requested that Dr. Carver provide a supplemental report, with objective findings, addressing whether appellant's disability had increased to the point where she was no longer capable of working for eight hours a day at her light-duty job. In a response dated January 24, 1997, Dr. Carver stated:

"Other than the objective findings already outlined in my communications, I am unable to provide any new objective findings causing an increase in disability. She simply became spontaneously more symptomatic with more neck and arm pain.

"Now, what we have not done is repeated her magnetic resonance imaging (MRI) scan which was last done on October 13, 1995. We could do that ... to identify if there has been any change on those. That may help you to decide whether there had been any change in the MRI but the issues are blurred. There is no question about it. I wish I could be more clear."

In a follow-up report dated February 19, 1997, Dr. Carver stated:

"I really do not feel there is any increased disability beginning November 1, 1996 in terms of objective findings. It simply became at that point so aggravating that a nonoperative way to manage her cervical spine problems I recommended restricting her work to 5 hours per day. Disability factors based on objective findings include all of the objective abnormalities noted on exam[ination], a C5-6 and C6-7 disc herniation as noted on October 13, 1995 MRI [scan] of her cervical spine."

On February 28, 1997 the Office contacted Dr. Carver and asked whether the MRI scan findings or upper extremity nerve conduction studies might augment his ability to explain appellant's increased disability. The Office informed Dr. Carver that it was authorizing those studies and that if he could not perform additional testing before the Office issued its decision, appellant would be able to submit additional information after the decision in accordance with her appeal rights.

By decision dated March 11, 1997, the Office denied appellant's claim for an additional three hours of compensation per day on the grounds that the evidence of record failed to establish an increase in disability. The Office emphasized that additional medical testing remained authorized and that the decision did not affect appellant's entitlement to continued compensation or medical treatment in connection with her accepted injury.

On April 24, 1997 appellant requested reconsideration of the Office's prior decision and submitted additional medical evidence in support of her request. In a report dated March 7, 1997, Dr. Gerald F. Wahl, a treating physician, stated that the results of appellant's

electromyogram were normal and that nerve conduction studies revealed a mild sensory conduction block of the right medial nerve consistent with right carpal tunnel syndrome. Appellant also submitted the results of a recent MRI scan, performed on February 26, 1997, which revealed three level disc disease with abnormalities at C4-5, C5-6 and C6-7. In a narrative report dated April 2, 1997, Dr. Carver stated:

“I’ve reviewed the MRI [scan] of her cervical spine dated February 26, 1997. This has worsened when compared to a prior study of October 13, 1995, in that here is now three-level disc disease at C5-6 and 6-7, as well as a small abnormality at C4-5.”

In a decision dated May 28, 1997, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted in support of her request was cumulative and immaterial in nature and therefore, insufficient to warrant merit review of the prior decision.

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 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, in support of her request for reconsideration, appellant submitted an MRI report and a report from Dr. Carver stating that the MRI scan revealed that appellant’s

¹ *Gus N. Rodes*, 46 ECAB 518 (1995); *Cynthia M. Judd*, 42 ECAB 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 CFR § 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).

cervical condition had worsened. Although, Dr. Carver did not address whether the new objective findings revealed by the MRI scan could account for appellant's increased disability and further did not explain the causal relationship, if any, between appellant's originally accepted cervical condition and her current worsened cervical condition and therefore his report is insufficiently rationalized to discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that her alleged increase in disability is causally related to her accepted cervical conditions, his report raises 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 request a supplemental report from Dr. Carver addressing the significance of the February 26, 1997 MRI scan findings and, if necessary, 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 November 1, 1996 increased 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.

Consequently, the decision of the Office of Workers' Compensation Programs dated March 11, 1997 is affirmed and the decision dated May 28, 1997 is hereby set aside and the case is remanded for further development in accordance with this decision.

Dated, Washington, D.C.
July 9, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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