U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE M. HACKNEY and U.S. POSTAL SERVICE,
POST OFFICE, Hobart, Ind.

Docket No. 96-1078; Submitted on the Record;
Issued March 19, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant's current condition is causally related to the May 21, 1975 employment injury; and, (2) whether the Office of Workers' Compensation Programs properly refused to modify its determination of appellant's loss of wage-earning capacity.

The facts in this case indicate that on May 21, 1975 appellant, then a 28-year-old letter carrier, sustained an employment-related left ankle sprain and tear of the medial collateral ligament for which she received appropriate compensation. By decision dated June 27, 1978, the Office determined that appellant had the wage-earning capacity of a general clerk and reduced her compensation accordingly. On October 17, 1983 the Office vacated the June 27, 1978 decision, finding that appellant had the wage-earning capacity of a telephone solicitor.[1] She returned to work on February 21, 1984 in a limited-duty capacity. On August 9, 1994 appellant stopped work.[2] By letter dated December 9, 1994, she claimed that her current condition was a consequence of the May 21, 1975 employment injury. By decision dated June 5, 1995, the Office denied appellant's consequential injury claim. Following appellant's request for reconsideration, by decision dated September 19, 1995, the Office modified the prior decision to indicate that agoraphobia was an accepted condition but that this condition had ceased on

[1] In the October 17, 1983 decision, the Office further denied modification of a July 20, 1976 schedule award which granted appellant a 40 percent permanent loss of use of the left lower extremity. The Office further found that, due to the modification of appellant's wage-earning capacity, an overpayment in compensation had been created. This was, however, waived by the Office.

[2] The Board notes that appellant has three appeals before the Board: (1) The instant claim, adjudicated by the Office under claim number A9-160624; (2) Docket No. 97-289, adjudicated by the Office under claim number A9-393137, in which appellant alleged that employment factors on August 9, 1994 caused her to have a panic attack; and (3) Docket No. 98-909, adjudicated by the Office under claim number A9-404796, in which she alleged that her return to work on July 6, 1995 aggravated her employment-related condition.

July 21, 1984.[3] Appellant again requested reconsideration, contending that the medical evidence established that her current condition was a recurrence of the employment-related agoraphobia and that, because agoraphobia was now an accepted condition, the wage-earning capacity decision dated October 17, 1983, was in error. In a January 25, 1996 decision, the Office denied modification of the prior decision. Appellant appealed to the Board, and by order dated June 8, 1998, the Board remanded the case to the Office for consolidation of Office file numbers A9-160624 and A9-393137, to be followed by a *de novo* decision. On July 6, 1998 appellant filed a petition for reconsideration, stating that, as Office file number A9-393137 was also docketed before the Board as Docket No. 98-289, the Board should review the cases together. By order dated January 11, 1999, the Board granted appellant's request.

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

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.[4]

As an employee who has returned to light duty is not considered to have fully recovered from his work-related injury, in claiming a recurrence of total disability, the employee's burden of proof is to show that the change in the injury-related condition was still due to the accepted injury, rather than another cause.[5] This burden of proof may be met if appellant's total disability is consequential to the accepted injury. The Board has previously held that the fact that a condition worsens to cause total disability, without establishment of causal relationship, is not sufficient to establish entitlement to total disability. The burden of proof can be met, however, if the employee demonstrates a change in the injury-related condition, which is now totally disabling and that the decompensation of the condition was a natural consequence arising from the accepted employment injury.[6]

It is an accepted principle of workers' compensation law, and the Board has so recognized, that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the

[3] The Board notes that Office's decisions dated June 5 and September 19, 1995 adjudicated claim numbers A9-160624 and A9-393137.

[4] *See Mary A. Howard*, 45 ECAB 646 (1994).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500 (January 1995).

[6] *See Dana Bruce*, 44 ECAB 132 (1992).

employment, unless it is the result of an independent intervening cause.[7] As is noted by Professor Larson in his treatise: "[O]nce the work-connected character of any injury, has been established the subsequent progression of the condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause."[8]

In the instant case, the relevant medical evidence includes a December 7, 1994 report, from Bernard T. Leonelli, Ph.D., who diagnosed panic disorder with agoraphobia, simple phobia, major depression, severe, in partial remission and post-traumatic stress disorder. He opined that appellant's psychological reaction to the May 21, 1975 employment injury resulted in post-traumatic stress disorder and concluded:

> "Because of the severity of her anxiety disorders (simple phobia and panic disorder with agoraphobia), it is believed that any change in [appellant's] routine that may expose her to stimuli that are the objects of her anxieties exacerbates her level of discomfort. It is believed that on August 9, 1994 when presented with the change in scheduling, [appellant's] level of discomfort elevated to a degree that resulted in her inability to maintain a gainful employment schedule precipitating a regression manifested in an exacerbation of her anxiety conditions."

Proceedings under the Federal Employees' Compensation Act[9] 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 and the Office has an obligation to see that justice is done.[10] This holds true in recurrence claims and consequential injury claims, as well as in initial traumatic and occupational disease claims. In the instant case, although Dr. Leonelli's December 7, 1994 report, does not contain details and rationale sufficient to completely discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that she sustained a recurrence of total disability on August 9, 1994 causally related to the accepted employment injuries, the Board finds that this evidence raises an uncontroverted inference of causal relationship between appellant's current condition and the accepted employment injury, agoraphobia. It is, therefore, sufficient to require further development of the case by the Office.[11]

The Board further finds that the Office has not properly evaluated whether the wage-earning capacity determination dated October 21, 1978, based upon the selected position of telephone solicitor was erroneous.

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[7] Larson, *The Law of Workers' Compensation* § 13.00; *see also Stuart K. Stanton*, 40 ECAB 859 (1989); *Charles J. Jenkins*, 40 ECAB 362 (1988).

[8] Larson, *The Law of Workers' Compensation* § 13.11(a).

[9] 5 U.S.C. §§ 8101-8193.

[10] *See Lourdes Davila*, 45 ECAB 139 (1993).

[11] *See John J. Carlone*, 41 ECAB 354 (1989). The Board notes that, for ease of adjudication, the Office may wish to consolidate the instant case with its case files numbered A9-160624 and A9-393137; *see* FECA Bulletin No. 97-10 (issued February 15, 1997).

The general test for determining loss of wage-earning capacity is whether injury-related impairment prevents the employee from performing the kind of work he or she was doing when injured.[12] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing his or her employment, he or she is entitled to compensation for any loss of wage-earning capacity resulting from such capacity.[13] Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocational rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.[14]

In the January 25, 1996 decision, in which the Office declined to modify appellant's wage-earning capacity, the Office noted that agoraphobia had been accepted but that treatment had been completed when she returned to work in 1984, stating that while Dr. Leonelli's December 1994 report contained the same diagnosis as previously diagnosed, this did not establish that there was "a firm cause and effect relationship between the 1984 diagnosis and the current diagnosis" and for that reason the wage-earning capacity decision could not be modified. The Office continued:

> "During the period of the wage-earning capacity, any medical treatment or suggestion of the condition claimed is silent. The medical evidence demonstrates that the employee's disability for work was largely due to secondary gain as the employee did not want [to] return to work."

The Office, however, did not determine if, during the period covered by the October 17, 1983 wage-earning capacity decision, appellant was capable of performing the telephone solicitor position, in light of the accepted employment-related agoraphobia.

Upon remand, therefore, the Office should further develop the medical evidence by referring appellant and an updated statement of accepted facts to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant's emotional condition on and after July 6, 1995 was causally related to employment.[15] The Office should also evaluate whether the evidence of record now substantiates that the October 17, 1983 wage-earning capacity determination was in error and should be modified. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.[16]

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[12] *See Donald Johnson*, 44 ECAB 540 (1993).

[13] *See Lyle E. Dayberry*, 49 ECAB ___ (Docket No. 95-3065, issued March 2, 1998).

[14] *See Gregory A. Compton*, 45 ECAB 154 (1993).

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d)(6) (June 1995). (A claim for an emotional condition must be supported by an opinion from a psychiatrist or clinical psychologist before the condition can be accepted.)

[16] In view of the Board's disposition of the merits of appellant's claim, the issue of whether the Office abused its

The decisions of the Office of Workers' Compensation Programs dated January 25, 1996 and September 19 and June 5, 1995 are hereby vacated and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, D.C.
March 19, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

discretion in denying merit review is moot.