

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIEDRE L. CHANEY and U.S. POSTAL SERVICE,
POST OFFICE, Danville, CA

*Docket No. 98-756; Submitted on the Record;
Issued October 19, 1999*

DECISION and ORDER

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

The issue is whether appellant established that she sustained a recurrence of disability on or after June 17, 1997 causally related to the accepted employment injury.

On August 9, 1993 appellant, then a 39-year-old distribution clerk, was injured at work when she went to sit down on a chair that rolled out from under her, causing her to land on the floor.¹ Appellant was treated at a local medical center where she was diagnosed with lumbar strain and a dorsiflexion injury to the right wrist. She was subsequently treated by Dr. John D. Warbritton, a Board-certified orthopedic surgeon, for continued back pain. The Office of Workers' Compensation Programs accepted the claim for herniated nucleus pulposus. The Office authorized a lumbar laminotomy, physical therapy and pain management therapy.² Appellant was totally disabled from work for the period September 14 to October 25, 1993 and April 12 to November 3, 1994, when she returned to a light-duty position working five hours a day and attending physical therapy for three hours a day. Appellant was approved to work an eight-hour shift on May 4, 1995.

In a report dated September 20, 1993, Dr. Warbritton noted that appellant's wrist symptoms had stabilized. He reported that an examination of the lower back revealed a moderately severe lumbar paraspinal muscle spasm. Dr. Warbritton also reported that lumbar spine x-rays revealed moderately severe degenerative joint disease at L5-S1.

¹ Appellant sustained an injury to her right extremity on September 28, 1989.

² Appellant submitted medical evidence suggesting that she suffers from carpal tunnel syndrome but that evidence is not relevant to the issue in the instant case which is whether appellant has established a recurrence of disability based on her accepted back injury. The Office only accepted the August 9, 1993 claim for a back injury and not a wrist condition. The Board further notes that appellant has an emotional condition claim pending before the Office.

A magnetic resonance image scan dated November 3, 1993 revealed L4-5 degenerative disc disease with 3 to 4mm central protrusion and slight downward extrusion of the disc with minimal theamal compression; chronic lumbosacral degenerative disc disease with 7 to 8mm central disc protrusion.

Appellant underwent a double-level laminectomy and discectomy on April 14, 1994.

Following her recovery from surgery, the employing establishment offered appellant a permanent light-duty position as a modified clerk on August 19, 1994, which she accepted.

In an August 23, 1995 report, Dr. Warbritton noted that appellant was capable of working but indicated that she still complained of back pain.

In a decision dated October 20, 1995, the Office determined that the light-duty position of modified clerk fairly and reasonably represented appellant's wage-earning capacity.

In a report dated July 26, 1996, Dr. Warbritton noted that appellant might require additional temporary disability in the future due to psychological stress resulting from her job as opposed to any orthopedic problems.

On September 5, 1997 appellant filed a claim alleging that she sustained a recurrence of disability on June 17, 1997. Therein, she stated, "I have been working 8:45 to 5:15 since May 1995. At that time I performed all duties listed in job description. Within 2 months my blood pressure went so high I am now on medicine. I wrote a list of duties ... I performed when I went on vacation [in] March 1995. Now I only answer phones, do nixie work and sometimes 2nd notices on certified mail. All other duties are being done by others."

She also submitted a June 17, 1997 work capacity report (Form CA-17) signed by Dr. Warbritton which stated that appellant was capable of working only six hours a day.

Appellant submitted a September 19, 1997 report from Dr. Warbritton which stated:

"First, [appellant] has experienced a significant increase in her level of pain. Her subjective complaints have increased dramatically, particularly with reference to the lower back, but also with reference to her right upper extremity. [Appellant's] right arm pain is aggravated by any type of repetitive or forceful manual activities. She also has difficulty performing any type of overhead reaching, pushing, pulling and lifting activities. With regard to her lower back, she now experiences pain if she sits or stands for prolonged or continuous periods of time. She experiences increased back pain if she attempts to perform any type of vigorous lifting, stooping or bending activities or if she attempts to perform these activities on a repetitive basis. [Appellant] has been provided with numerous medications and she continues to receive medication management for her chronic pain syndrome by Dr. Peter Koo, Associate Professor of Pharmacy at the University of California, San Francisco."

* * *

“With regard to a ‘well rationalized’ medical opinion, the vast majority of her symptoms appear to be related to progressive psychological dysfunction associated with progression of her chronic pain syndrome. [Appellant] experiences significant residuals as a result of the documented spondylolisthesis and degenerative disk disease and she clearly has a postlaminectomy syndrome with evidence for epidural fibrosis. However, there is no evidence for dramatic progression in her level of nerve damage with respect to her lower extremities and she has certainly not developed and ‘new’ herniated disks. She has experienced only a slight progression in the level of her degenerative disk disease.”

* * *

“In summary, [appellant] has ‘gone downhill’ significantly over the last several years. I would attribute this to her weight gain and to progressive psychological dysfunction, which is likely related to the stresses of her employment at the [employing establishment]. Some of the worsening is also likely due to ‘the ravages of time,’ as I can certainly relate to the fact that she is not getting any younger because I feel the same way sometimes. From the point of view of objective orthopedic pathology, however, [appellant] has not experienced any sort of dramatic increase. Rather, her situation is characterized by a slow but rather relentless and progressive downhill course and at least part of the problem is due to the fact that the *chronicity of her pain* makes it progressively harder for her to psychologically adapt, adjust and ‘deal with’ the fact that she simply does experience pain on a virtually constant basis throughout the day.” (Emphasis in the original.)

In a decision dated October 2, 1997, the Office denied appellant’s claim for recurrence of disability on the grounds that the medical evidence of record was insufficient to establish that appellant’s condition on or after June 19, 1997 was causally related to her accepted work injury of August 9, 1993.

The Board finds that appellant has submitted sufficient evidence to require the Office to further develop this claim for a recurrence of disability.³

When an employee who is disabled from the job she held when injured because of employment-related residuals returns to a light-duty position, or the medical evidence of record establishes that she can perform the light-duty job, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability that prevents him or her from performing such light duty.⁴ As part of this burden, the employee

³ Appellant submitted evidence to the Office subsequent to the October 2, 1997 decision. She also submitted new evidence on appeal. The Board, however, cannot consider this evidence, since the Board’s review of the case is limited to the evidence of record which was before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office with a formal request for reconsideration; *see* 20 C.F.R. § 501.7(a).

⁴ *Richard E. Konnen*, 47 ECAB 388 (1996).

must show a material 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 Thus, the employee must submit rationalized medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the current disabling condition is causally related to the accepted employment-related condition⁶ and supports that conclusion with sound medical reasoning.⁷

In the instant case, the Office accepted that appellant sustained a herniated disc on August 3, 1993. Following surgery, appellant returned to work in a modified position which was deemed to fairly and reasonably represent appellant's wage-earning capacity. Appellant alleged in her notice of recurrence of disability that her job duties had changed and that she currently answer telephones, do nixie work and sometimes second notices on certified mail. She alleged that and other duties in her job description are currently done by other employees. The Office did not make findings of fact regarding these allegations.

In addition, Dr. Warbritton reported that pain was a significant concomitant of appellant's back condition which he described. He also noted the chronicity of her pain affected her psychological condition inasmuch as appellant experienced pain on a virtually constant basis throughout the day. Dr. Warbritton noted significant residuals as a result of the documented spondylolisthesis and degenerative disc disease and postlaminectomy syndrome with evidence for epidural fibrosis.

From a careful review of the total evidence of record, the Board is persuaded that appellant has submitted sufficient evidence to require the Office to further develop the record.⁸

In this connection, the Office should prepare a statement of accepted facts to include findings as to appellant's duties she was performing at the time she filed her recurrence claim. The Office should then further develop the record by sending appellant, together with her medical records and a statement of accepted facts, to a second opinion physician or physicians to determine whether pain as a residual of her back condition and surgery disable her for her limited-duty position or whether pain or her pain syndrome coupled with her nonaccepted work-related condition prevent her from performing her limited-duty position.

After such further development as the Office deems necessary, the Office should render a *de novo* decision.

⁵ *Mary A. Howard*, 45 ECAB 646 (1994), quoting *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *Kevin J. McGrath*, 42 ECAB 109 (1990).

⁷ *Lourdes Davila*, 45 ECAB 139 (1993).

⁸ *See John J. Carlone*, 41 ECAB 354 (1989).

The decision of the Office of Workers' Compensation Programs dated October 2, 1997 is hereby set aside and the case is remanded for further development consistent with this decision of the Board.

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

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member