

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENISE M. MARINO and U.S. POSTAL SERVICE,
POST OFFICE, Bohemia, NY

*Docket No. 97-1012; Submitted on the Record;
Issued September 16, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that she sustained a recurrence of disability from October 26, 1994 through January 23, 1996 causally related to her accepted March 27, 1990 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for authorization for surgery.

On March 27, 1990 appellant, then a 37-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured her lower back while lifting a tray of flats on to a shelf in a truck. The Office accepted the claim for lumbar strain and placed appellant on the periodic compensation rolls for disability effective October 21, 1990. Appellant returned to a light-duty position working four hours per day on February 10, 1992.

Appellant filed a claim on March 9, 1992 alleging that she sustained a recurrence of disability on March 4, 1992.

The employing establishment referred appellant to Dr. Stanley Feingold, a Board-certified orthopedic surgeon, for a fitness-for-duty examination. In a report dated August 2, 1994, Dr. Feingold opined that appellant had recovered from her employment injury and required no further medical or orthopedic care. He also opined that appellant was capable of performing her position as a letter carrier without restrictions.

Appellant filed a claim for a recurrence of disability commencing October 26, 1994.

In a letter dated February 22, 1995, Dr. David L. Hsu, appellant's treating physician, requested permission to perform a lumbar laminectomy at L4-5 and possible L5-S1 for decompression and discectomy based upon a January 25, 1995 computerized axial tomography (CAT) scan and a February 3, 1995 electrodiagnostic (EMG) report. Dr. Antonio Flores, a neurologist, diagnosed a left L5 radiculopathy probably due to a herniated disc at L4-5. The

CAT scan indicated minimal degenerative changes “consisting of slight generalized annular disc bulging at L3-4 and L4-5 levels.” The CAT scan also noted a “possibility of a subtle herniated nucleus pulposus (HNP) at the L4-5 level is difficult to exclude.”

By letter dated March 24, 1995, Dr. Hsu submitted his office notes from September 6, 1990 to February 15, 1995 and indicated that appellant was totally disabled from October 26, 1994. Dr. Hsu, in his letter, diagnosed an L5 radiculopathy, multilevel hypertrophic facet joint which is worse over L4-5 with lateral canal stenosis and a broad base disc protrusion. In his most recent office notes, Dr. Hsu stated that the EMG showed a radiculopathy and the CAT scan showed multilevel hypertrophic facitisis. He noted that appellant’s symptoms had been persistent since 1990 and gotten progressively worse. Dr. Hsu recommended a lumbar laminectomy and possible discectomy.

The Office medical adviser on April 11, 1995 opined that surgery was not indicated as there were no physical findings of HNP and the CAT scan indicated no herniation.

In a letter dated April 11, 1995, the Office denied authorization for surgery on the basis that the Office medical adviser indicated there were no physical findings of HNP and the CAT scan did not show any herniation of the lumbar spine.

By letter dated May 8, 1995, Dr. Hsu again requested permission to perform a lumbar laminectomy and possible discectomy. He noted that both the CAT scan and EMG reports confirm his diagnosis of L5 radiculopathy and that he never mentioned a lumbar herniation in his reports.

By decision dated May 16, 1995, the Office found the evidence of record insufficient to establish a recurrence of disability. In the attached memorandum, the Office noted that Dr. Hsu’s treating notes did not contain a rationalized opinion explaining why appellant was disabled from performing her light-duty position nor did it explain how her recurrence of disability was causally related to her accepted employment injury. The Office also found that appellant was not entitled to further medical treatment.

By letter dated June 6, 1995, appellant requested review by a hearing representative and submitted a June 2, 1995 report from Dr. Hsu in support of her request. In his report dated June 2, 1995, Dr. Hsu stated that he had been treating appellant since September 6, 1990 for her bulging lumbar disc which was confirmed by a magnetic resonance imaging (MRI) test dated May 24, 1990. He noted that appellant had been having increasing symptoms in her lower back and left leg. Dr. Hsu stated that the January 25, 1995 CAT scan “showed definite L4-5 with prominent hypertrophic facet joint disease creating a lateral canal stenosis” and that appellant’s current disability is “compatible with the natural history of a herniated lumbar disc.” He opined that based upon appellant’s condition her current disability was due to her original injury and suggested a laminectomy and discectomy.

By decision dated September 5, 1995, the hearing representative affirmed the Office’s decision that appellant failed to establish a recurrence of disability commencing October 1994. The hearing representative, however, found that the Office erroneously terminated her

entitlement to medical treatment and remanded the case for the Office to obtain a second opinion as to whether appellant's surgical request should be authorized.

In a letter dated October 3, 1995, Dr. Hsu opined that appellant was totally disabled to work due to her L5 radiculopathy and that he was still waiting for authorization to perform surgery.

By letter dated October 10, 1995, the Office referred appellant, together with a statement of accepted facts, to Dr. Donald Holzer, a Board-certified neurologist, for a second opinion on appellant's authorization request for surgery.

By report dated October 25, 1995, Dr. Holzer, based upon a physical examination, review of the record, work history and statement of accepted facts, diagnosed lumbar myofascial pain dysfunction syndrome with minimal herniated disc at L4-5. He opined that appellant was capable of performing her light-duty position working four hours per day with restrictions. Dr. Holzer also opined that the surgical intervention was not warranted.

By decision dated February 13, 1996, the Office denied her request for a laminectomy and discectomy based upon the opinion of Dr. Holzer.

By letter dated August 28, 1996, appellant requested reconsideration of the Office's February 13, 1996 decision denying her request for authorization of surgery.

In a letter dated August 22, 1996, appellant, through her counsel requested reconsideration of the September 5, 1995 hearing representative's decision dated August 19, 1996 and submitted evidence in support of her request.

By letter dated August 28, 1996, appellant requested reconsideration of the February 13, 1996 Office decision denying authorization for surgery.

In an August 8, 1996 report, Dr. Hsu, based upon appellant's medical history, the results of the objective evidence, her work history and his treatment, opined that appellant "sustained a recurrent symptom of an established back injury dating back to March 27, 1990 with lumbar radiculopathy of L4-5. This incident is causally related to her original injury." Dr. Hsu also opined:

"During the course of 55 months, [appellant's] symptoms of pain and disability have been persistent. She has persistent back pain, limited movement of lumbar spine and sciatic pain radiating to her left leg. Her complaints were verified by the repeated positive MRI and CAT scans of her lumbar spine. The MRI repeatedly showed a bulging L4-5 disc protrusion. A significant protrusion of disc material impinging on the nerve root has the exact effect of a herniated disc. This is borne out by the fact that the subsequent EMG study by Dr. Antonio Flores showed nerve root deficit after continuous compression (sic) on the nerve by the protruding disc for 4+ years. To deny the fact that the [October 26, 1994] injury is independent of her past symptoms is unthinkable and clinically wrong."

In conclusion, Dr. Hsu opined that appellant had a recurrence of total disability from October 26, 1994 through January 24, 1996 causally related to her accepted employment injury. He also opined that appellant should continue working four hours per day with restrictions.

In a duty status report (CA-17) dated October 10, 1996, Dr. Hsu checked that appellant did sustain a recurrence of her lumbar disc injury on October 2, 1996 which was due to her March 27, 1990 employment injury. In a CA-17 form dated October 24, 1996, he diagnosed a herniated disc and indicated that appellant could work four hours per day five days per week.

On October 28, 1996 appellant filed a claim for recurrence of disability commencing October 2, 1996 causally related to her accepted March 27, 1990 employment injury.

By letter dated November 12, 1996, the Office advised appellant of the evidence necessary to establish a recurrence of disability.

In a decision dated November 13, 1996, the Office vacated its September 5, 1995 decision and issued a *de novo* decision. In the attached memorandum, the Office found that medical evidence supported a recurrence of disability occurred on October 24, 1994. The Office, however, found that appellant was capable of performing her light-duty position on October 24, 1994 based upon the second opinion specialist, Dr. Holzer. The Office found that the opinion of Dr. Hsu that she was totally disabled through January 23, 1996 was not well rationalized as he failed to give any medical rationale and, thus, the weight of the evidence rested with Dr. Holzer.

By decision dated November 14, 1996, the Office affirmed its February 13, 1996 decision denying appellant's request to authorize surgery and rejected appellant's argument that there was a conflict in the medical evidence.

By decision dated December 19, 1996, the Office found the evidence insufficient to establish that there was a change in appellant's light-duty position or that she sustained a recurrence of disability on or after October 2, 1996 causally related to her accepted March 27, 1990 employment injury.

The Board finds that the case is not in posture for decision on the issue of whether appellant sustained a recurrence of disability from October 26, 1994 through January 23, 1996 causally related to her accepted March 27, 1990 employment injury.

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

¹ *Gus N. Rodes*, 46 ECAB 518 (1995); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

Section 8123 of the Federal Employees' Compensation Act provides that if there is disagreement between the physician, making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.²

In the present case, appellant's treating physician, Dr. Hsu opined that appellant was disabled from October 26, 1994 due to a L5 radiculopathy. He also indicated that appellant has had persistent symptoms since 1990 which had gotten progressively worse. The Office referred appellant to Dr. Holzer for an evaluation as to whether surgery was required and the Office did not ask him to provide an opinion as to whether appellant was disabled. However, the Office referral physician, Dr. Holzer, offered a second opinion that appellant was capable of performing her light-duty position four hours per day with restrictions. The Board finds that there is a conflict between Dr. Hsu and Dr. Holzer regarding whether appellant had a recurrence of total disability due to her accepted employment injury. Upon remand, therefore, the case shall be referred to an appropriate Board-certified specialist accompanied by a statement of accepted facts and the complete case record, for a rationalized medical opinion addressing the issue. After such further development as deemed necessary, the Office shall issue a *de novo* decision.

Next, the Board finds that the case is not in posture for decision on the issue of whether the Office properly denied appellant's request for authorization for surgery.

Section 8103 of the Federal Employees' Compensation Act provides for the furnishing of "services, appliances, and supplies prescribed or recommended by a qualified physician" which the Office, under authority delegated by the Secretary, "considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation."³

In the present case, appellant has submitted evidence supporting the need for surgery as a result of her March 27, 1990 employment injury. Dr. Hsu recommended a lumbar laminectomy and discectomy based upon the physical examination, CAT scan and EMG. On the other hand, the Office medical adviser and Dr. Holzer both opined that surgery was not indicated. The medical evidence is therefore in conflict with regard to the need for lumbar laminectomy and discectomy.

As noted previously, section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁴ Accordingly, the case will be remanded to the Office for resolution of the conflict. On remand, the Office should refer appellant, along with a statement of accepted facts and the medical records, to an appropriate specialist for an impartial medical examination and

² 5 U.S.C. § 8123; see *Shirley L. Steib*, 46 ECAB 309 (1994).

³ 5 U.S.C. § 8103.

⁴ *Joseph D. Lee*, 42 ECAB 172 (1990).

report as to whether shoulder surgery is appropriate in the present case. After such further development as the Office deems necessary, it should issue an appropriate decision.

The decisions of the Office of Workers' Compensation Programs dated December 19, November 14 and February 13, 1996, are set aside and the case remanded for action consistent with this decision of the Board.

Dated, Washington, D.C.
September 16, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member