

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA A. WERESZYNSKI and DEPARTMENT OF THE AIR FORCE,
GRIFFISS AIR FORCE BASE, NY

*Docket No. 99-112; Submitted on the Record;
Issued July 11, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant established a recurrence of total disability on and after May 9, 1995 causally related to her accepted October 15, 1993 employment injury.

On October 18, 1993 appellant, then a 43-year-old office automation clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured her lower back on October 15, 1993 when she lifted a box of computer paper. The Office of Workers' Compensation Programs accepted the claim for a lumbosacral strain. Appellant returned to light duty working five hours per day on January 24, 1994. She received appropriate compensation for her wage loss.

Appellant filed a claim for a recurrence of total disability starting May 9, 1995 due to her October 15, 1993 employment injury.

In a letter dated May 9, 1995, Dr. Andrew C. Zaleski¹ noted that appellant stated she had difficulty working part time due to a back problem.

In an attending physician's supplemental report (Form CA-20a) dated May 22, 1995, Dr. Zaleski diagnosed right sciatica and low back pain and indicated that appellant was totally disabled as of May 9, 1995 due to her injury. He supported causal relationship between appellant's condition and her employment injury by checking the box "yes."

In a letter dated June 20, 1995, the Office advised appellant as to the information required to support a recurrence of disability from her light- or limited-duty work.

In a disability note dated July 6, 1995, Dr. Zaleski indicated that appellant was disabled from working until after her next appointment on August 8, 1995.

¹ Appellant's attending Board-certified orthopedic surgeon.

By decision dated August 1, 1995, the Office denied appellant's claim for a recurrence of disability. In the attached memorandum, the Office found Dr. Zaleski's May 9, 1995 report insufficient to support appellant's burden of proof as he failed to explain why appellant could not longer perform her light-duty work or discuss how the recurrence of disability was causally related to her accepted employment injury.

In a letter dated August 24, 1995, Dr. Zaleski advised the Office to read his May 9, 1995 letter which indicated that appellant had difficulties working half a day due to her back problems. He also opined that appellant had no recurrence of disability, but "only a degree of disability that changed."

By letter dated August 24, 1995, appellant's counsel request an oral hearing.

In a decision dated February 9, 1996, the hearing representative remanded the case for further development of the record and instructed that appellant be sent to a second opinion physician to determine whether she had any continuing disability due to her accepted October 15, 1993 employment injury and whether she has been disabled since May 9, 1995 from performing her light-duty work due to her accepted injury.

On remand, the Office referred appellant, together with a statement of accepted facts and medical records, to Dr. Zafer Termanini² for a second opinion. He, in a work capacity evaluation form (Form OWCP-5c) dated March 27, 1996, indicated that appellant should restrict certain activities such as lifting and kneeling and that maximum medical improvement should be reached in six months. Dr. Termanini noted appellant's limitations were due to her back and lumbar spine and that she had no limitations "due to preexisting or nonwork[-]related conditions." In a report dated April 7, 1995, he diagnosed healed lumbosacral sprain and preexisting degenerative disease of the lumbosacral spine. Dr. Termanini concluded that appellant had sustained a soft tissue injury on October 15, 1993 which caused a "mild, causally related orthopedic disability." He noted that the objective evidence did not substantiate appellant's subjective complaints which appeared "to be aggravated by her preexisting degenerative disease of the spine." Dr. Termanini recommended a psychiatric consultation to assist appellant with her underlying symptoms and opined that she "does have a degenerative disease of her lumbosacral spine which was aggravated by the accident of October 15, 1993." Lastly, he concluded that appellant could return to her usual position provided she not lift anything over 20 pounds for the next six weeks and "then she can resume her date[-]of[-]injury job without restrictions."

By decision dated May 30, 1996, the Office denied appellant's claim for a recurrence of disability.

Appellant's counsel requested a hearing before an Office hearing representative by letter dated June 13, 1996.

² A Board-certified orthopedic surgeon.

By decision dated June 23, 1997, the Office hearing representative set aside the May 30, 1996 decision and remanded the case for the Office to obtain a supplemental opinion from Dr. Termanini. In his decision, the hearing representative noted that he failed to specifically address the issue of whether appellant sustained a worsening of her condition on May 9, 1995 such that she was disabled from her light-duty job. Furthermore, the hearing representative noted that Dr. Termanini failed to provide any medical rationale explaining why appellant's degenerative lumbosacral disease of her spine had been aggravated by the October 15, 1993 employment injury or whether the aggravation was permanent or temporary.

By letter dated July 28, 1997, the Office requested Dr. Termanini to provide a supplemental report. In the letter, the Office specifically asked him to address whether the October 15, 1993 lumbosacral sprain had resolved at the time of his examination and if not provide medical reasoning as to factors delaying appellant's recovery, whether the medical evidence established that at the time of appellant's recurrence of disability on May 9, 1995 that her condition worsened such that she was unable to perform her light-duty position and to provide medical reasoning in support of his opinion, whether appellant's aggravation was temporary or permanent and to explain the inconsistency in his report and his work evaluation form regarding appellant's physical limitations.

In a supplemental report dated September 8, 1997, Dr. Termanini noted that appellant's lumbosacral sprain was caused by the October 15, 1993 injury and that appellant's recovery was delayed by her preexisting degenerative disease of the lower lumbar spine. Next, he opined that appellant's "preexisting lower back condition was worsened at the time of her recurrence to a point where she was not able to perform her light-duty assignment. Regarding appellant's soft tissue injury, Dr. Termanini noted they are "benign injuries in nature and should heal and improve within six to eight weeks. Therefore the aggravation was temporary in nature and should have ceased within six to eight weeks." Lastly, at the time of his physical examination, Dr. Termanini noted that appellant's subjective complaints were not supported by the objective evidence. He concluded that appellant's "physical limitations due to the soft tissue injuries of this file were temporary, as mentioned above" and that due to appellant's preexisting degenerative disease, "which also predisposes her for reinjury, I felt she had a mild orthopedic disability."

In a decision dated September 23, 1997, the Office denied appellant's claim for a recurrence of disability and relied upon Dr. Termanini's September 8, 1997 supplemental report to find that there was not a change in the nature or extent of her employment-related disability or in her light-duty position.

By letter dated October 10, 1997, appellant's counsel requested a hearing before an Office hearing representative which was held on June 22, 1998. At the hearing, appellant alleged that her work restrictions with regard to lifting were not honored by the employing establishment.³

³ A February 28, 1995 work restriction evaluation from Dr. Zaleski indicated that appellant was restricted to lifting up to 10 pounds on an occasional basis.

In a decision dated August 19, 1998, the Office hearing representative affirmed the September 23, 1997 decision finding that a recurrence of disability had not been established. In the decision, the Office hearing representative relied upon Dr. Termanini's opinion to find that appellant had not established a change in the extent or nature of her accepted employment injury or that there was a change in her light-duty position such that she could not perform it.

The Board finds that the case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that 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 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 With respect to her medical condition, an employee must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.⁵

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.⁶

In the present case, appellant's treating physician, Dr. Zaleski, opined that appellant was totally disabled as of May 9, 1995 due to her lumbosacral strain and that she could not perform her light-duty job. However, the Office referral physician, Dr. Termanini, offered a second opinion that appellant could perform the duties of an office automation clerk, appellant's date-of-injury position, with initial lifting restrictions for six weeks. The Board finds that the reports of Drs. Zaleski and Termanini are of approximately equal value and are in conflict on the issue of whether appellant had a recurrence of total disability due to her 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 this issue. After such further development deemed necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated August 19, 1998 is hereby set aside and the case remanded for further development consistent with the above opinion.

⁴ *Richard E. Konnen*, 47 ECAB 388 (1996); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

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

Dated, Washington, D.C.
July 11, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member