

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FAITH NEVELS and DEPARTMENT OF VETERANS AFFAIRS,  
BATTLE CREEK VETERANS ADMINISTRATION HOSPITAL,  
Battle Creek, MI

*Docket No. 98-1400; Submitted on the Record;  
Issued June 23, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained a recurrence of disability on April 29, 1993, causally related to her July 29, 1991 employment injury, such that she can no longer perform her light-duty job; and (2) whether appellant established that she sustained an emotional condition that was causally related to factors of her federal employment or her accepted employment injury.

On July 29, 1991 appellant, then a 44-year-old nursing assistant, filed a notice of traumatic injury alleging that on that day she injured her back while assisting a patient in the course of her federal employment. The Office of Workers' Compensation Programs accepted her claim for lumbar strain with lumbar radiculopathy on August 15, 1991. Appellant stopped work until October 19, 1992, when she returned to a limited-duty job as a clerk typist, four hours a day. She gradually increased her work hours and returned to full-time duty in mid January 1993.

Appellant filed a notice of recurrence of disability (Form CA-2a) on April 30, 1993 alleging she was unable to work due to her January 29, 1991 employment injury beginning on April 29, 1993. She stated that her injury-related back pain had never entirely resolved and that recent stress had caused her pain to increase to incapacitating levels. In a letter dated May 30, 1993, appellant additionally stated that she had developed depression as a result of her back condition. In a letter dated June 28, 1993, her counsel explained that appellant's recurrence was partially due to her injury-related chronic back pain and partially due to the stress and anxiety incurred by appellant when trying to perform her job duties while in chronic pain.

By decision dated August 4, 1993, the Office denied appellant's claim for failure to establish a causal relationship, through rationalized medical opinion evidence, between her recurrence of disability and her July 29, 1991 accepted employment injury. Appellant requested reconsideration and submitted additional medical evidence in support of her claim. In a decision

dated November 10, 1993, the Office found that the evidence neither established that appellant sustained a worsening of her accepted back condition such that she could no longer perform her light-duty job, nor that she has an emotional condition causally related to her July 29, 1991 back injury and that between her January 1993 return to work and her April 30, 1993 work stoppage, that emotional condition worsened to the point to which she was unable to perform her light-duty job. Therefore, the Office found the evidence insufficient to modify the prior decision. Appellant again requested reconsideration and by decision dated March 28, 1994, the Office found the newly submitted evidence insufficient to warrant modification of the prior decision. She again requested reconsideration and submitted additional medical evidence and by decision dated August 31, 1995, the Office denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to present clear evidence of error. On appeal to the Employees Compensation Appeals Board, in a decision dated February 19, 1998, the Board found that appellant's reconsideration request had been timely filed and remanded the case for the Office to reconsider the merits of the claim. On remand, by decision dated February 19, 1998, the Office found the evidence submitted on reconsideration insufficient to warrant modification of the prior decision.

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained a recurrence of disability on April 29, 1993, causally related to her July 29, 1991 employment injury, such that she can no longer perform her full-time light-duty job.

An employee returning to light duty or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of substantial, reliable and probative evidence and to show that he or she cannot perform the light duty.<sup>1</sup> As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.<sup>2</sup>

Appellant does not allege and the record does not establish, that the claimed recurrence of total disability was caused by a change in the nature or extent of appellant's light-duty job requirements. With respect to her injury-related back condition, appellant submitted medical reports from each of her treating and evaluating physicians. Appellant submitted disability slips dated May 11 and June 7, 1993, from Dr. L.W. Waite, an osteopath. In his initial slip, Dr. Waite indicated that appellant was totally disabled for work from April 30 to June 8, 1993 due to probable cervical stenosis. In his follow-up slip, Dr. Waite stated that appellant continued to be disabled for work from June 7 through 13, 1993, due to an L4-5 injury and that she was being evaluated to determine whether she had any disc herniation in that region. In a letter dated June 30, 1993, Dr. Waite explained that while appellant had been unable to work, there was a "strong suggestion that her weight gain, noncompliance with therapy and specific patient request for [n]eurosurgical [e]valuation at the Cleveland Clinic" precluded her return to work. Dr. Waite did not give any specific diagnosis of appellant's condition and did not discuss the connection, if

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<sup>1</sup> *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>2</sup> *Id.*

any, between her current condition and her July 29, 1991 employment injury.<sup>3</sup> The record indicates that Dr. Waite subsequently dismissed appellant from care as he did not treat workers compensation patients.

Dr. David S. Smith reported in a June 9, 1993 treatment note that appellant presented at his office, shuffling and almost nonambulatory and that she reported intense pain, immobilizing to the point where she could hardly get out of bed. Appellant also reported that she had been prescribed anti-depressant medication by Dr. David N. Vigor, Jr., her treating Board-certified psychiatrist, but that she did not always take her medication as directed. Dr. Smith referred appellant to Dr. Kenneth S. Merriman, a Board-certified orthopedic surgeon, for a complete orthopedic evaluation. Dr. Smith did not offer any specific diagnosis or conclusions with respect to appellant's back condition.

In a report dated June 15, 1993, Dr. Merriman discussed appellant's injury and employment history and listed the results of his examination and testing. Dr. Merriman noted that appellant did not appear to have any operable orthopedic conditions and stated:

"I discussed with [appellant] and her husband in a kind but direct manner the fact that I believe that there is a significant psychological component to her illness. That is not to say that she does not have discomfort since many people have some sciatica but it is her response to that degree of discomfort and to other stresses in her life that is making it difficult for her to recover at this time. That is not to say that she was not injured when this accident occurred and it is possible that she has injured her back. Her recovery seems delayed by several factors. One of them is her obesity and poor general physical condition. The other is a high degree of anxiety and some psychological/psychiatric factors. I told [appellant] that I could not physically disable her specifically at this point although I knew she was having some discomfort but with appropriate modification in her work situation I would like to be able to see her return to work in the near future. Apparently she is off at the request of Dr. Vigors at this point. I think that is appropriate."

As Dr. Merriman concluded that he could not find appellant totally disabled from an orthopedic standpoint and that her principle problem appeared to be psychological, his report does not support a finding that appellant suffered a worsening of her back condition such that she could no longer perform her light-duty job.

Dr. Elaine C. Kountanis, a neurologist, also examined appellant and submitted a report dated July 22, 1993, in which she concluded that appellant had possible radiculopathy at either the L4-5 or S1 level, but that the examination had not been optimal due to appellant's high level of anxiety. Dr. Kountanis stated that she would reserve further comments until she had reviewed the results of the prior testing and did not discuss appellant's April 30, 1993 work stoppage.

In a report dated August 27, 1993, Dr. Gregory P. Graziano, a Board-certified orthopedic surgeon, and Dr. Andrew G. Urquart, an orthopedic surgeon, reviewed the results of magnetic

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<sup>3</sup> *Vicky L. Hannis*, 48 ECAB 538 (1997); *Linda I. Sprague*, 48 ECAB 386 (1997).

resonance imaging (MRI), x-rays and electrodiagnostic nerve studies performed at their request and listed their findings on physical examination. The physicians stated that electromyography revealed the possibility of mild impingement or slight pressure on one of appellant's nerve roots at the L4-5 area and that surgical decompression was discussed with appellant. The physicians stated:

“We told her that if her pain was bad enough that it bothered her on a daily basis and/or it was bothering her significantly, we might recommend a surgery. She said that this was not the case and she decided not to have the surgery today, but might think about it.”

Drs. Urquart and Graziano did not indicate that appellant's condition, which was accepted as lumbar strain with lumbar radiculopathy, had worsened and did not discuss appellant's ability to perform her light-duty job.

In a report dated September 26, 1993, Dr. M. Rafi discussed his diagnosis and proposed treatment of appellant's iron deficiency anemia. Although he noted that appellant sustained a back injury in 1991, he did not otherwise discuss her orthopedic condition.

As there are no medical opinions of record which establish that appellant was disabled from her light-duty position due to a change in the nature or extent of her accepted July 29, 1991 employment-related lumbar strain with radiculopathy, and as appellant did not allege, and the record does not indicate, any change in the nature and extent of her light-duty job requirements, appellant has failed to establish that, from an orthopedic standpoint, she sustained a recurrence of disability causally related to her accepted employment injury.

The Board further finds that the issue of whether appellant sustained an emotional condition casually related to her employment is not in posture for decision.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>4</sup> has the burden of establishing the essential elements of his or her claim including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup>

To establish appellant's claim that she has sustained an emotional condition in the performance of duty appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.<sup>6</sup> Rationalized medical opinion evidence is medical evidence

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>6</sup> *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>7</sup>

In this case, appellant attributed her emotional condition to her accepted employment-related back injury and the resulting changes in her ability to do her work. In support of her claim, appellant submitted numerous reports from Dr. Vigor, her treating Board-certified psychiatrist, dating from July 21, 1992 to June 27, 1994. In his deposition on November 29, 1993, Dr. Vigor stated that when he first saw appellant on July 21, 1992 his diagnoses were major depressive disorder, single episode, moderate without psychotic features and chronic pain syndrome, but that appellant later developed recurrent depression with psychotic features and severe elements of feeling worthless and hopeless. He stated that when appellant first came to him, she did not have a history of depression or treatment by a psychiatrist and had been relatively symptom free. Dr. Vigor opined that the roots of appellant's depression lay in the initial back injury and that the resultant necessity that she give up her nursing career caused a severe loss of self-esteem, disappointment and feelings of worthlessness. He stated that after the initial back injury, appellant's depression was moderate and that she was coping fairly well, but that after she returned to work her emotional coping mechanisms began to collapse and she was no longer able to deal with the pain from the back injury. In his most recent medical report of record dated June 27, 1994, Dr. Vigor continued to opine that appellant's emotional condition was at least in part due to the fact that her career was interrupted by her employment-related back injury.

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 employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct. The subsequent injury "is compensable if it is the direct and natural result of a compensable injury."<sup>8</sup> Although the medical evidence submitted by Dr. Vigor is not sufficient to meet appellant's burden of proof, this medical evidence raises an uncontroverted inference of causal relationship between appellant's emotional condition and her accepted employment injury and is sufficient to require further development of the case record by the Office as to whether appellants emotional condition is a consequential injury of her accepted employment-related back condition.<sup>9</sup>

On remand, the Office should further develop the medical evidence by referring appellant and a statement of accepted facts to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant's emotional condition is causally related to her

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<sup>7</sup> *Id.*

<sup>8</sup> *Frank Barone*, 30 ECAB 1119 (1979).

<sup>9</sup> *John J. Carlone*, 41 ECAB 354 (1989).

accepted employment injury. After such development of the case record as the Office deems necessary, the Office should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated February 19, 1998 is hereby affirmed in part and set aside in part and remanded for further development consistent with this opinion.

Dated, Washington, D.C.  
June 23, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member