U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARMELLA R. MUSIAL and U.S. POSTAL SERVICE,
POST OFFICE, Buffalo, NY

Docket No. 98-1604; Submitted on the Record;
Issued June 15, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability commencing May 16, 1997 due to her accepted December 15, 1995 left medial meniscus tear; and (2) whether the Office of Workers' Compensation Programs, by its November, 1997 decision, abused its discretion by refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a).

On August 3, 1993 appellant, then a 45-year-old distribution clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that she injured her left knee on August 1, 1993 when she tripped over some materials on the floor.[1] The Office accepted the claim for left prepatellar bursitis.

Appellant filed a claim for a recurrence of disability starting December 15, 1995.

On March 19, 1996 appellant filed a traumatic injury claim alleging that she injured her left knee on December 15, 1995 when she tripped over a banding machine.[2]

Appellant filed a recurrence of disability claim on March 19, 1996 alleging that her disability was due to her December 15, 1995 injury.

On September 20, 1996 the Office accepted appellant's December 15, 1995 claim for a left medial meniscus tear and paid appropriate compensation.[3]

---

[1] This was assigned claim number A02-666567.

[2] This was assigned claim number A02-709858.

[3] The Office combined claim number A02-666567 into A02-709858 with the latter claim number as the controlling number.

On December 24, 1996 and February 20, 1997 the Office referred appellant, together with a list of questions, medical records and statement of accepted facts to Dr. Thomas E. Pastore a Board-certified orthopedic surgeon, for a second opinion examination on the extent of appellant's disability.

In a report dated March 10, 1997, Dr. Pastore, based upon a physical examination, review of the medical records and employment injury history, diagnosed preexisting degenerative arthritis of the right knee aggravated by the December 15, 1995 employment injury and acute tear of the meniscus due to the December 15, 1995 employment injury. Dr. Pastore concluded that appellant's disability was permanent and partial due to the underlying degenerative arthritic changes and that she could not perform her date-of-injury position.

By letter dated April 1, 1997, the Office asked Dr. Pastore whether appellant was capable of performing light duty part time or full time and enclosed a light-duty job offer for his review.

In a letter dated April 13, 1997, Dr. Pastore opined that appellant was capable of performing the proposed light-duty position full time.

In an April 20, 1997 work capacity evaluation (Form OWCP-5c), Dr. Pastore indicated that appellant had reached maximum medical improvement as of March 11, 1997 and that she could work eight hours per day with limits on her kneeling, climbing stairs or ladders and squatting. He opined that she could occasionally climb stairs once an hour, sit two to four and one-half hours at a time and stand for one-half hour to one hour.

On May 1, 1997 the Office offered appellant the limited-duty position of distribution clerk modified with the duties including verifying mail trays in a sitting position with appellant able to change position and elevate her knee as needed. The employing establishment advised appellant that the position did not require that she do any squatting, bending, kneeling or climbing.

By letter dated May 8, 1997, the Office advised appellant that the position offered had been determined to be suitable as it was within her physical limitations. Appellant was advised that she had 30 days to accept the job offer or provide reasons why she was refusing the offer and informed her of the consequences of failing to accept the job offer or to provide acceptable reasons for her refusal.

Appellant accepted the position on May 12, 1997 when she returned to work eight hours per day.

On May 16, 1997 appellant filed a recurrence claim for intermittent time lost since that date.

In a note dated May 16, 1997, Dr. Frank A. Luzi, Jr., a Board-certified orthopedic surgeon, diagnosed left knee arthritis and low back degnerative joint disease due to the December 15, 1995 employment injury. Dr. Luzi opined that appellant was only capable of working four hours per day with the restriction of no standing, walking continuously and that she be able to elevate her knee and use ice as needed.

By report dated July 16, 1997, Dr. Luzi noted that appellant had returned to her light-duty position on May 19, 1997 working four hours per day with restrictions and indicated that appellant believed she could work five hours per day.

By decision dated September 8, 1997, the Office denied appellant's claim for a recurrence of disability. In the attached memorandum, the Office noted that appellant returned to her limited-duty position working four hours per day on May 19, 1997. The Office found that Dr. Luzi's report failed to provide any reason as to why she could not perform her limited-duty position for eight hours although he noted that she could work five hours per day.

Dr. Luzi, on September 15, 1997, opined that appellant could work six hours per day with restrictions.

Appellant, through her counsel, requested reconsideration in a letter dated October 27, 1997 and indicated that a medical report would be submitted once it had been received.

By nonmerit decision dated November 7, 1997, the Office denied her request as she failed to provide either relevant evidence or any legal arguments not previously considered.

By letters dated November 24 and December 3, 1997, appellant requested reconsideration and submitted a November 18, 1997 report by Dr. Luzi. Dr. Luzi, in his November 18, 1997 report, noted that appellant had returned to her limited-duty position working initially four hours per day, worked up to six hours per day and hoped to increase working her job to eight hours per day. Appellant informed Dr. Luzi that her job duties allowed her to sit and stand alternately, but that she had problems going to the bathroom, walking to and from the parking lot and walking to the cafeteria. Lastly, Dr. Luzi opined that appellant was incapable of performing her limited-duty job full time as the "[p]ain and swelling was too significant due to the standing and walking required for activities of the job, as well as walking to and from the bathroom, parking lot, cafeteria and breakroom." Dr. Luzi concluded that these activities caused appellant to have "increase discomfort in her left knee and low back" and that as her stamina has increased she has been able to now work six hours per day.

Dr. Luzi, in a letter dated December 2, 1997, opined that as of November 24, 1997 appellant could try working eight hours per day in her limited-duty position and that if she was unable to tolerate working full time that she would go back to working six hours per day.

By merit decision dated January 30, 1998, the Office found the evidence insufficient to warrant modification of the prior decision. In the attached memorandum, the Office noted that appellant had not submitted any rationalized medical evidence establishing that she was unable to perform her limited-duty position and, thus, had not established a recurrence of disability. The Office also noted that appellant had returned to her limited-duty position on May 19, 1997, but that she was only working four hours per day.[4]

[4] The Board notes that appellant had filed for a schedule award, which was granted on April 20, 1998 for a 10 percent loss of the left lower extremity. On April 28, 1998 appellant's counsel appealed the decision and requested a hearing before an Office hearings representative. In her notice of appeal, appellant noted that she was appealing the Office's decision denying her intermittent hours of lost wages which was part of her recurrence of disability

The Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability commencing May 16, 1997, causally related to her accepted December 15, 1995 left medial meniscus tear

Where 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.[5]

In the instant case, appellant sustained a left medial meniscus tear due to her December 15, 1995 employment injury. She returned to work in a light-duty position on May 12, 1997 working eight hours per day. Appellant alleged a recurrence of disability on May 16, 1997 and commenced working four hours per day on May 19, 1997, which was gradually increased to eight hours per day. In support of her claim for a recurrence of disability, appellant submitted reports dated May 16, July 16, September 15, November 18 and December 2, 1997 by Dr. Luzi.

In his May 16, 1997 report, Dr. Luzi indicates that appellant was capable of working only four hours per day provided there was no continuous walking, no standing and that she was able to elevate her knee and use ice as required. In a report dated July 16, 1997, Dr. Luzi stated that appellant thought she could work five hours per day with restrictions and in his September 15, 1997 report increased the hours of work to six. Dr. Luzi indicated that as of November 24, 1997 appellant could attempt working eight hours per day in her light-duty position and if she was unable to tolerate it, that she was to return to working six hours per day. The reports dated May 16, July 16, September 15 and December 2, 1997 are insufficient to meet appellant's burden of proof as Dr. Luzi does not provide an opinion that appellant's disability was causally related to her accepted employment injury. On December 2, 1997, Dr. Luzi stated that appellant was capable of working four hours per day with restrictions, which he increased to eight hours per day effective November 24, 1997. Dr. Luzi offers no opinion on the causal relationship between appellant's disability and her accepted employment injury in these reports and, thus, these reports are insufficient to establish that appellant had a recurrence of disability.

Similarly, the November 18, 1997 report by Luzi is also insufficient to meet appellant's burden of proof as the reason he gave for appellant's inability to perform the light-duty position eight hours per day, the "walking to and from the bathroom, parking lot, cafeteria and break-room" are not part of appellant's job duties. Dr. Luzi also opined that appellant could not perform her light-duty position eight hours per day due to the standing and walking required of the position, but the job duties did not include that appellant do any standing or walking. The

---

claim.

[5] *Terry R. Hedman*, 38 ECAB 222 (1986).

reasons given by Dr. Luzi for appellant's inability to perform her light-duty position are insufficient to establish a change in her accepted employment injury or a change in the nature and extent of her light-duty requirements. Furthermore, Dr. Luzi seems to be unaware of appellant's job duties as they do not require standing or walking as noted by Dr. Luzi. As appellant has failed to submit any rationalized medical opinion evidence to support a recurrence of disability, appellant has failed to meet her burden of proof to establish her recurrence claim.

Next, the Board finds that, in its decision dated November 7, 1997, the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of her claim on the merits under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or a fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[6] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[7]

In her October 27, 1997 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did she advance a point of law or a fact not previously considered by the Office. Appellant also did not submit any new evidence in support of her request.

As appellant's October 27, 1997 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying that request.

[6] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

[7] 20 C.F.R. § 10.138(b)(2).

The decisions of the Office of Workers' Compensation Programs dated January 30, 1998 and November 7 and September 8, 1997 are hereby affirmed.

Dated, Washington, D.C.
June 15, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member