

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DIANA M. DELGADO and U.S. POSTAL SERVICE,  
POST OFFICE, Edison, NJ

*Docket No. 99-2222; Submitted on the Record;  
Issued March 20, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
BRADLEY T. KNOTT

The issue is whether appellant sustained a recurrence of disability, commencing February 3, 1997, causally related to the September 18, 1996 employment injury.

The Office of Workers' Compensation Programs accepted appellant's claim for low back pain. After the original September 18, 1996 employment injury, appellant returned to light-duty work. On February 14, 1997 appellant filed a recurrence of disability, Form CA-2a, alleging that on January 25, 1997 she felt "the same lower back pain" and even felt "worst" since she "came back."

In a report dated January 29, 1997, Dr. Frederick W. Brandt, one of appellant's treating physicians and a Board-certified internist, considered appellant's history of injury, noting that appellant stated that repeated lifting of heavy objects caused her back pain. He stated that appellant might have days she could work. Dr. Brandt stated:

"There is no one work incident that began her symptoms. [Appellant] just reported repeated incidents of pain after lifting, each incident gradually worsening her condition. It is impossible to predict at what point in her life that the disc began degenerating. Although it is clear that her job aggravated the condition and still does aggravate the condition, it is possible that the original injury may have occurred years ago. However, she did not, according to her history, become symptomatic until approximately June of 1996. These symptoms (pain) occurred at work and were worsened by repeatedly lifting heavy objects at work."

In an attending physician's report dated February 5, 1997, Form CA-20, Dr. Brandt diagnosed degenerative disc disease with disc herniation and checked the "yes" box that the condition was work related and stated that lifting heavy objects aggravated appellant's symptoms.

By letter dated March 11, 1997, the Office requested additional information including a narrative report from her treating physician explaining how her present condition is causally related to the September 11, 1996 employment injury.

Appellant submitted another report from Dr. Brandt dated April 7, 1997, which was identical to the January 29, 1997 report except that the date had been changed.

In a report dated April 28, 1997, appellant's treating physician, Dr. Thomas R. Peterson, a Board-certified neurological surgeon, considered appellant's history of injury, performed a physical examination and reviewed a magnetic resonance imaging (MRI) scan dated October 9, 1996, which showed degenerative disc disease at L5-S1 and at L4-5 and to a lesser degree at L3-4. He stated that appellant had back and bilateral leg pain and left leg paresthesias causally related to the September 11, 1996 employment injury. Dr. Peterson recommended a two-level diskectomy and fusion with interbody cage and stabilization or instrumentation.

On August 22, 1997 a lumbar spine myelogram showed mild disc bulges at L3-4 and at L4-5 and a moderately large central, right-sided disc protrusion at L5-S1 with truncation of the right S1 nerve root sleeve.

In a report dated November 4, 1997, a referral physician, Dr. Harry Merliss, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed the results of a three-level discogram at L3-4 and L4-S1 and the October 1996 MRI scan. He diagnosed that "from events that may have occurred at work in September 1996," appellant had a strain of the lumbar musculature and that pathology "probably not related to events that may have occurred at work in September 1996" was degenerative osteoarthritis of the lumbar spine with degenerative disc disease at the lower several intervertebral regions. Dr. Merliss stated that there were no objective findings attributable to the possible September 1996 employment injury. He noted inconsistencies in appellant's physical examination consisting of her partly flexing forward in one instance and partially raising her legs in the straight leg raising test but, at another time, showing that, while sitting, she could fully extend her legs and fully flex forward to touch her fingers to the floor. Dr. Merliss stated:

"If one were to consider only the organic aspect related to events or activities that may have occurred at work in September 1996, then permanent disability in comparison to the abilities that yet remain, attributable to those events or activities, would be considered very minimal, if any."

He also stated that there was no reason "from the organic point of view" that the results of the possible September 1996 employment injury would prevent appellant from functioning normally either at work or outside work.

By decision dated February 14, 1998, the Office denied the claim, stating that the evidence of record did not establish either a change in the nature or extent of appellant's injury-related disability or a change in her light-duty position.

By letter dated March 30, 1998, appellant requested reconsideration of the Office's decision and submitted two pages of transcript testimony from Dr. Merliss showing that two-

thirds of his practice was examining people for defendants. Appellant also cited the reports of Dr. Bernard P. Newman, a Board-certified orthopedic surgeon, dated November 21, 1997 and Dr. Peterson, dated November 11, 1997. In his November 21, 1997 report, Dr. Newman stated that appellant had undergone an extensive work-up including an MRI scan, a myelogram and discogram, all of which showed multiple disc level abnormalities. He stated that correcting these level disc problems in a patient of appellant's age was inadvisable. In his November 11, 1997 report, Dr. Peterson stated that he talked to Dr. Newman about his opinion that surgery was not advisable on appellant and agreed with him. He recommended lumbar epidural steroids.

Appellant resubmitted the August 22, 1997 myelogram and submitted the results of the October 28, 1997 discogram showing abnormal discography with a posterior annular fissure identified at L3-4 and L4-5 and a central and right-sided protrusion at L4-5.

By decision dated June 26, 1998, the Office denied appellant's request for modification.

By letter dated September 29, 1998, appellant requested reconsideration of the Office's decision and submitted a personal statement dated September 18, 1998 in which she stated that she never had a back problem prior to the September 11, 1996 employment injury, that she worked on and off in February 1997 but on February 3, 1997 she had to lie down on the floor at work and stopped working as of that date. Appellant noted that the myelogram and discogram were positive. She stated that she had difficulty performing light duty due to the pain in her back, that she returned to work in April 1998 to try to work despite her pain and she sought disability compensation from February 3, 1997 until April 23, 1998.

By decision dated December 23, 1998, the Office denied appellant's reconsideration request.

By letter dated February 1, 1999, appellant requested reconsideration of the Office's decision and submitted a report from Dr. Newman dated December 17, 1998. In his report, Dr. Newman diagnosed degenerative discopathy and herniated nucleus pulposus at L5-S1 on the right although discrepant with her left-sided pain. He stated that he did not have appellant's original history to tell him how her condition occurred and noted that, according to one of the other doctors, appellant had eight months of low back pain after having lifted some trays filled with mail in September 1996. Dr. Newman opined that appellant would not benefit from surgery but it was likely that she would have some permanent disability.

By decision dated March 30, 1999, the Office denied appellant's reconsideration request.

The Board finds that the case is not in posture for decision.

An individual who claims a recurrence of disability, due to an accepted employment-related injury, has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.<sup>1</sup> When an employee, who is disabled from the job she held when injured on

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<sup>1</sup> *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

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.<sup>2</sup> 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 requirements.<sup>3</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>4</sup>

In the present case, a conflict exists between the opinion of appellant's treating physician, Dr. Peterson, that appellant's current conditions of back and bilateral leg pain and left leg paresthesias were causally related to the September 11, 1996 employment injury and Dr. Merliss' opinion that appellant had no residuals from the September 1996 employment injury. Although Dr. Peterson opined that appellant's current condition was work related, Dr. Merliss' November 4, 1997 report stated that appellant's medical condition "may have occurred" as a result of his employment injury. Further, Dr. Merliss stated that appellant had a strain of the lumbar musculature and that appellant's degenerative osteoarthritis of the lumbar spine with degenerative disc disease at the lower several intervertebral regions was probably not related to the possible September 1996 employment injury.

Section 8123(a) of the Federal Employees' Compensation Act provides that where there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.<sup>5</sup> The case, therefore, requires remand for an impartial medical specialist to resolve the conflict between Dr. Peterson's and Dr. Merliss' opinions. On remand, the Office should refer the case record with a statement of accepted facts to an appropriate medical specialist pursuant to section 8123(a) of the Act. Following this and such further development as the Office deems necessary, it shall issue a *de novo* decision.

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<sup>2</sup> *George DePasquale*, 39 ECAB 295, 304; *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>3</sup> *Carlos A. Marrero*, 50 ECAB \_\_\_\_ (Docket No. 96-2186, issued October 19, 1998).

<sup>4</sup> *See Nicolea Bruso*, 33 ECAB 1138 (1982).

<sup>5</sup> 5 U.S.C. § 8123(a); *Esther Velasquez*, 45 ECAB 249, 252-53 (1993).

The decisions of the Office of Workers' Compensation Programs dated March 30, 1999, June 26 and December 23, 1998 are hereby set aside and the case is remanded in accordance with this decision.

Dated, Washington, D.C.  
March 20, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Bradley T. Knott  
Alternate Member