

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KABITA SHAW and U.S. POSTAL SERVICE,
JAMES A. FARLEY BUILDING, New York, NY

*Docket No. 98-2413; Submitted on the Record;
Issued November 15, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained a recurrence of total disability on or after March 3, 1995 causally related to her June 7, 1993 employment injury.

The Board has duly reviewed the case record in the present appeal and finds that this case is not in posture for a 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 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

On June 7, 1993 appellant, then 47-year-old clerk, filed a claim for a traumatic injury to her right upper arm, shoulder and neck when she tripped and fell. The Office of Workers' Compensation Programs accepted her claim for a cervical sprain. She returned to work on December 6, 1993 in a light-duty capacity. In a notice of recurrence of disability dated May 5, 1995, appellant alleged that she sustained a recurrence of disability on March 3, 1995, which she attributed to her June 1993 employment injury. In an accompanying statement, appellant related that after she returned to work following her 1993 employment injury she had pain in her arms, neck and lower back. She stated that she stopped work on March 3, 1995 when the low back pain prevented her from standing or walking for any significant amount of time.

By decision dated November 27, 1995, the Office denied appellant's claim for a recurrence of total disability. By letter dated December 20, 1995, appellant requested an oral

¹ See *Cynthia M. Judd*, 42 ECAB 246 (1990); *Stuart K. Stanton*, 40 ECAB 859 (1989).

hearing, which was held on August 28, 1996. By decision dated November 6, 1996, the Office hearing representative vacated the Office's November 27, 1995 decision and remanded the case for further development. By decision dated March 18, 1997, the Office denied appellant's claim for a recurrence of total disability. By decision dated May 11, 1998, the Office denied modification of its March 18, 1997 decision.

In a form report dated June 8, 1993, Dr. Ernest D. Abeles, appellant's attending Board-certified orthopedic surgeon, diagnosed a cervical spine sprain.

In a disability certificate dated November 30, 1993, Dr. Abeles stated that appellant could return to light-duty work on December 6, 1993 with restrictions of no lifting, pushing or pulling over five pounds. On March 8, 1994 he added the restrictions of no sweeping, keying or reaching overhead.

In a disability certificate dated May 12, 1995, Dr. Abeles indicated that appellant was totally disabled through June 27, 1995 due to low back pain.

In a report dated May 22, 1995, Dr. Abeles diagnosed cervical radiculitis, which had persisted since the 1993 employment injury. He related that appellant complained of pain in the right upper extremity and neck between 1993 and 1995 and that she started to complain of pain in the low back in 1995. He stated, "[Appellant] originally was on a light[-]duty status but has not been able to continue on this.... This undoubtedly is related to the original injury."

In a note dated July 18, 1995, Dr. Abeles stated that appellant had low back pains one day after her June 7, 1993 employment injury but "these [pains] have now become the outstanding feature of her condition."

In a report dated February 27, 1996, Dr. Marc K. Ross, a Board-certified physiatrist, stated that he first saw appellant on July 19, 1995 and related that she had a two-year history of low back pain which she attributed to her June 7, 1993 employment injury. He stated:

"Based on my initial physical examination on July 19, 1995, I felt that [appellant's] symptoms were consistent with a[n] S1 radiculopathy as well as a component of mechanical lower back pain. She also had multiple areas of tenderness throughout her back consistent with a fibromyalgia."

* * *

"My assessment is of an L4-5 grade I spondylolisthesis, as well as a[n] L5-S1 radiculopathy based on the examination.... In my opinion the initial injury of June 7, 1993 may have contributed to her symptoms (radiation of pain in her leg) [of] which she is currently complaining...."

In a report dated September 25, 1996, Dr. German Shapiro, a Board-certified neurosurgeon, provided findings on examination and a summary of the medical records and diagnosed chronic cervical and lumbosacral musculoligamentous strain, chronic bilateral sacroiliac arthritis, cervical and lumbar radiculopathy, degenerative changes in the spine with

Grade I spondylolisthesis at L4-5, herniation of the L4-5 disc and left foraminal and mild central lumbar stenosis. He stated his agreement with Dr. Abeles' opinion that appellant's clinical symptoms were related to her 1993 employment injury. Dr. Shapiro stated:

"In my opinion, at the time of accident [in 1993], [appellant] may not have acknowledged pain in all injured areas. Treatment could have temporarily relieved the low back pain. However, with the progression of chronic degenerative changes, caused by the trauma and adding to the preexisting structural changes in the spine, the pain syndrome increased in intensity and resulted in the clinical picture observed today. [Appellant] is totally disabled now."

In a report dated March 14, 1997, Dr. Leo A. Green, a Board-certified orthopedic surgeon and Office referral physician, provided a history of appellant's condition and detailed findings on examination and diagnosed postoperative status laminectomy of the lumbar spine and stated that there were no objective findings to indicate residual problems in the cervical spine causally related to the June 7, 1993 employment injury. He stated:

"On the basis of my review of the file and my examination it is my opinion that there is causal relationship of the injury of June 7, 1993 to a temporary cervical spine strain and low back strain. In my opinion, based on my examination and review of the record, there are no causally related objective findings to indicate that there is any persistent condition in the cervical spine or lumbar spine that [was] caused by the accident of June 7, 1993. In my opinion, based on my examination and my general knowledge of orthopedic surgery of the spine, an independent and separate incident occurred in either late February or early March 1995 that precipitated an acute low back episode which eventually resulted in the surgeries she had in late 1996 and early 1997² and from which she appears to be fairly well recovering."

* * *

"There is no prognosis with respect to the cervical spine since she had fully recovered from the effects of the injury of June 7, 1993 in the neck region. With respect to the low back condition, she has a chronic low back condition which was briefly exacerbated in the accident of June 7, 1993, ... which cleared up in the interim sufficient to enable her to return to work. Chronic back conditions such as she had, including spondylolisthesis, tend to give pain with or without injury. In her case, it is my opinion that the transient symptoms that she may have had from time to time between her resuming activities and stopping activities were a normal accompaniment of the chronic low back condition and not the direct cause of the injury of June 7, 1993. With respect to the prognosis following the episode that occurred early in 1995 toward the end of February or early March, the prognosis is for continued improvement postoperatively. With

² The Board notes that there are no operative reports of record regarding these surgeries.

respect to the structural changes in her spine, these are permanent and are unrelated to any accident that she has had at any time within the knowledge of the records that are available to me. At the present time there is no indication for further surgery nor is further surgery anticipated in the near future.”

In a report dated October 7, 1997, Dr. George V. DiGiacinto, appellant’s attending Board-certified neurosurgeon, related that he first examined appellant on May 15, 1996 for neck and low back discomfort and found the neck problem resolved but the low back problem persisting. He provided findings on examination and a summary of the medical evidence and stated:

“At this time, [appellant] continues to have significant lower extremity pain as well as back pain and carries a diagnosis of probable lumbar instability.

“I do not feel at this time [appellant] ... had a total disability secondary to lumbar instability. The only event which is of medical significance is the injury of June 7, 1993. There is no history of any other injury and it is clear that the current disability which [appellant] suffers is directly causally related to the incident of June 7, 1993. This I base on the historical fact of back injury, findings of a herniated disc superimposed on degenerative changes.

“The herniated disc which was found at the time of the first operation³ made the more longstanding lateral stenosis symptomatic. By history, there was no symptomatology prior to the fall of June 7, 1993. The back problems never resolved after this and the clinical exacerbation was one of a course of continued herniation which was started in June of 1993.

“Even on light duty, [appellant] was required to sit in a position which was rather uncomfortable. The tilting chair which she used and was placed at maximum tilt did not support her back properly and with a high degree of medical certainty contributed to progression of her lumbar disc disease.”

The Board finds that this case is not in posture for a decision due to an unresolved conflict in the medical opinion evidence as to whether appellant sustained a recurrence of total disability on March 3, 1995 causally related to her June 7, 1993 employment injury.

In this case, appellant sustained a cervical sprain in the performance of duty on June 7, 1993 and returned to work in a light-duty capacity on December 6, 1993. She subsequently alleged that she sustained a recurrence of total disability on March 3, 1995.

In notes and reports dated May 12 and 22 and July 18, 1995, Dr. Abeles, appellant’s attending Board-certified orthopedic surgeon, opined that she was totally disabled due to her June 7, 1993 employment injury, although he did not provide sufficient medical rationale in support of his opinion.

³ As noted above, there are no operative reports of record.

In reports dated February 27 and September 25, 1996, Dr. Ross, a Board-certified psychiatrist, and Dr. Shapiro, a Board-certified neurosurgeon, also opined that appellant's back condition was causally related to her 1993 employment injury but did not provide sufficient rationale in support of their opinions.

In a report dated October 7, 1997, Dr. DiGiacinto, appellant's attending Board-certified neurosurgeon, provided a history of appellant's condition, findings on examination and a summary of the evidence and provided medical rationale in support of his opinion that appellant's claimed recurrence of total disability in 1995 was causally related to a change in the nature and extent of her June 7, 1993 employment-related back condition.

In a report dated March 14, 1997, Dr. Green, a Board-certified orthopedic surgeon and Office referral physician, provided a history of appellant's condition and findings on examination and stated that there were no objective findings to indicate that appellant had any residual disability or medical condition causally related to her June 7, 1993 employment injury. He attributed appellant's back condition in 1995 to an independent and separate incident which occurred in February or March 1995.

Section 8123(a) of the Federal Employees' Compensation Act provides, in pertinent part, "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."⁴

Due to the conflict in medical opinion between Dr. Green and Dr. DiGiacinto, this case will be remanded to the Office for referral of appellant to an appropriate Board-certified specialist for an examination and evaluation in order to resolve the conflict as to whether appellant sustained a recurrence of total disability on or after March 3, 1995 causally related to her June 7, 1993 employment injury.

⁴ 5 U.S.C. § 8123(a); see *James P. Roberts*, 31 ECAB 1010 (1980).

The May 11, 1998 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
November 15, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member