U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY STROMBERG-KELLY and U.S. POSTAL SERVICE,
NEW JERSEY INTERNATIONAL BULK MAIL CENTER, Jersey City, NJ

Docket No. 99-1827; Submitted on the Record;
Issued October 27, 2000

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability on June 6, 1997 causally related to her accepted lumbar sacral sprain with sciatica.[1]

On December 16, 1993 appellant, then a 50-year-old clerk, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that "because she was not used to picking up such heavy sacks one right after the other" she sustained a lumbosacral strain and sciatic neuritis in the performance of duty.

By letter dated June 8, 1994, the Office of Workers' Compensation Programs accepted appellant's claim for lumbar sacral sprain with sciatica.

On January 22, 1996 appellant accepted a limited-duty assignment as a parcel post distribution machinist with flexible hours. The letter from the employing establishment making the offer stated, "This limited[-]duty position will remain in effect as long as medical evidence confirms that you have partially disabling physical restrictions which resulted from a compensable on-the-job injury." The physical requirements of the job were to account for appellant's physical requirements of no bending, kneeling, twisting, lifting, pushing or pulling; squatting, climbing and walking limited to one hour a day; and sitting limited to two hours a day. By decision dated October 21, 1996, the Office issued an award of compensation based on appellant's actual earnings.

In a medical report dated June 13, 1997, Dr. Henry Clay Irving, III, a Board-certified orthopedic surgeon, recommended that appellant undergo a decompressive laminectomy and

[1] The Board notes that appellant raised as an issue whether the Office erred in failing to provide a decision regarding appellant's request for lumbar surgery as outlined in Dr. Irving's reports. On June 13, 1997 Dr. Irving requested that appellant receive decompressive laminectomy and lumbar disc excision. By decision dated July 1, 1997, this request was denied by the Office, with the notation that Dr. Irving must submit diagnostic tests showing that the procedure was warranted. Therefore, contrary to appellant's contentions, the issue of lumbar surgery was addressed by the Office's 1997 decision. The July 1, 1997 decision is outside the Board's jurisdiction as the present appeal was not filed until May 11, 1999. *See* 20 C.F.R. § 501.2(c).

lumbar disc excision at this level. On July 1, 1997 the Office denied appellant's request for decompressive laminectomy and lumbar disc excision.

In an undated letter, the employing establishment advised appellant that her job would expire on June 5, 1997.

On June 18, 1997 appellant filed a claim for continuing compensation on account of disability, commencing June 5, 1997, noting that she was "laid off."

In an attending physician's supplemental report (Form 20a) dated June 18, 1997, Dr. Irving gave appellant's diagnosis as "lumbar disc herniation L5-S1 with bilateral lumbar myelopathy." He opined that appellant was totally disabled from her usual work and he recommended surgical intervention.

By letter dated July 1, 1997, the Office found that a decompressive laminectomy and lumbar disc excision was not authorized by the Office.

On October 14, 1997 appellant submitted a notice of recurrence (Form CA-2a), alleging that she sustained a recurrence on June 6, 1997, noting that during the period prior to June 6, 1997 she was in constant pain and was undergoing physical therapy. She further stated that she was terminated effective June 6, 1997 because her services were no longer required, that she is in need of back surgery and that she was never released from restrictive duty and/or medical treatment.

The employing establishment submitted a routing slip dated November 15, 1997 wherein it stated that appellant was able to perform her limited job duties up until the time of separation. The employing establishment stated that appellant "was terminated due to a mandate which required that we reduce the number of [temporary employees] which were on the rolls. Several other [temporary employees] were terminated at the same time." The employing establishment further submitted a facsimile stating that appellant was hired as a transitional employee and that when she was hired, she was made aware that the term of her employment was 359 days.

In a work restriction evaluation dated November 21, 1997, Dr. Irving stated that appellant needed surgery for lumbar disc excision and was still waiting for authorization.

In a medical report dated November 24, 1997, Dr. Irving stated:

> "My impression on [appellant] is that as of her most current examination, November 21, 1997, that she has lumbar spinal stenosis at L5-S1; and that this is producing her right-sided neurologic change in terms of the absence of her reflex and her bilateral myelopathy with regard to stance and walking. The condition has not substantially progressed over the last year. However, I do feel that she is limited in her activities of daily living, particularly as regards walking where she is limited to two blocks standing, where she is limited to 15 to 30 minutes and repetitive bending or lifting activities. I believe that she is capable of activities in sitting, but this is the extent of her findings that would be consistent with inability

to function in a workplace. Standing, walking and bending would be difficult for her on any protracted basis."

In a decision dated February 6, 1998, the Office denied appellant's claim for recurrence on June 6, 1997, finding that the record did not establish either a change in the nature or extent of injury-related disability or the nature and extent of light-duty position and that the reduction-in-force did not qualify for recurrence.

In a medical opinion dated March 30, 1998, Dr. Irving stated:

"My feelings are [appellant] has changes most consistent with lumbar spinal stenosis, and this is secondary to her congenitally small disc at L5-S1 and her hypertrophy of her ligaments along with her increasing changes in her facet joints. Given her history of having been symptom free for radicular pain until the date of her injuries in October of 1993, it is my sense that these are clearly causally related. [Appellant] had no lumbar radiculopathy prior to that date and she denies having received any treatment for said disease prior to that date. Since that time, she has undergone extensive treatment including epidural corisoteroids, and her findings have been unremitting. For this reason, I believe that [appellant's] condition is permanent and that her only option medically speaking would be to consider lumbar decompression and possible fusion."

A hearing was held on October 28, 1998, wherein appellant testified that she started working for the employing establishment in June 1992, that she was hired as a transitional employee, that she would work for two years then get a six-day lay-off but then be rehired, that after her injury she was never able to go back to her full-duty job but rather worked limited duty and that she had no other injuries to her back since June 1997.

In a February 6, 1998 decision, the Office found that appellant had not established that she sustained a recurrence of disability on June 6, 1997.

The Board finds that the evidence of record is insufficient to establish that appellant sustained a recurrence of disability on June 6, 1997 causally related to her accepted employment injuries.

An employee who claims benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim.[3] 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

[2] 5 U.S.C. §§ 8101-8193.

[3] *Richard E. Konnen*, 47 ECAB 388, 389 (1996).

and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[4]

In this case, appellant has not shown a change in the nature and extent of her modified-duty job requirements, nor has she submitted sufficient medical evidence to show a change in the nature and extent of her injury-related condition. In support of her claim, appellant submitted a June 18, 1997 medical report by Dr. Irving, wherein he indicated that appellant was totally disabled from her usual work and recommended surgical intervention. However, in his medical report dated November 24, 1997, Dr. Irving noted that her condition "had not substantially progressed over the last year." He listed restrictions for appellant's employment which do not differ substantially from the earlier restrictions he set and which were met with the limited-duty job. Therefore, Dr. Irving's report does not meet appellant's burden in that he does not explain how her injury had worsened since June 6, 1997, that appellant could not physically perform her duties at the time she was terminated, nor provide persuasive evidence that the nature of her duties in the limited-duty position increased so as to be outside of her restrictions. Dr. Irving's March 30, 1998 report notes only that appellant was symptom free prior to October 1993. However, this opinion is focused on a spinal stenosis and congenitally small disc at L5-S1, conditions which have not been accepted by the Office as employment related.

Appellant claims a recurrence of disability because her limited-duty position was terminated on June 6, 1997. However, the Office procedure manual states that a recurrence of disability does not include a work stoppage caused by, *inter alia*, the termination of a temporary appointment, if the claimant was a temporary employee at the time of the injury.[5] The term disability is defined as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.[6] In the instant case, the evidence establishes that appellant was a temporary (or transitional) employee as of the date of the injury and accordingly, the termination of her temporary appointment on June 6, 1997 does not indicate, without supportive medical evidence, that appellant sustained a recurrence of disability, especially in light of the fact that other temporary employees were terminated at the same time.[7]

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[4] *Robert G. Morris*, 48 ECAB240, 242 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[5] The Office procedure manual defines a recurrence of disability to include a work stoppage caused by the following: (1) a spontaneous material change, demonstrated by objective findings, in the medical condition which resulted from a previous injury or occupational illness without an intervening injury or new exposure to factors causing the original illness; (2) a return or increase of disability due to an accepted consequential injury; or (3) withdrawal of a light-duty assignment, made specifically to accommodate the claimant's condition due to the work-related injury, for reasons other than misconduct or nonperformance of job duties. A recurrence of disability does not include a work stoppage caused by the following: (1) termination of a temporary appointment, if the claimant was a temporary employee at the time of the injury; (2) cessation of special funding for a particular position or project (*e.g.*, "pipeline" grants); (3) true reduction-in-force where employees performing full duty as well as those performing light duty are affected; (4) closure of a base or other facility; or (5) a condition that results from a new injury, even if it involves the same part of the body previously injured, or by renewed exposure to the causative agent of a previously suffered occupational disease. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997).

[6] *Id.*

[7] The other medical reports referred to in appellant's brief predate the alleged recurrence and therefore are not persuasive in resolving the issue at hand.

Accordingly, as appellant has not submitted rationalized medical evidence justifying her claimed recurrence, she has not met her burden of proof in establishing her claim.[8]

The decision of the Office of Workers' Compensation Programs dated February 6, 1998 is affirmed.

Dated, Washington, DC
October 27, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] *See Glenn Robertson*, 48 ECAB 344 (1997).