

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEGGY MILLER and SOCIAL SECURITY ADMINISTRATION,
OFFICE OF HEARINGS & APPEALS, Cleveland, OH

*Docket No. 00-2117; Submitted on the Record;
Issued August 9, 2001*

DECISION and ORDER

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

The issues are: (1) whether appellant sustained a recurrence of disability commencing March 10, 1999 due to the accepted work injury of January 27, 1998; and (2) whether appellant required further treatment of the accepted condition or developed any other conditions causally related to the employment injury.

The Office of Workers' Compensation Programs accepted that on January 27, 1998 appellant, then a 40-year-old hearing office clerk sustained a lumbosacral strain in the performance of duty. Appellant stopped work that day and returned to light duty on February 19, 1998.

Appellant stopped work again on March 10, 1999 and did not return. On March 23, 1999 appellant filed a notice of recurrence of disability alleging that she was unable to work due to a worsening of back pain related to the accepted work injury.

In support, appellant submitted a June 28, 1999 report from Dr. Mirza Baig, a Board-certified internist, who diagnosed chronic low back pain since the employment injury on January 27, 1998 and indicated that on March 10, 1999 appellant had intense, radiating pain in her left leg for which she sought treatment. Appellant also submitted disability slips dated March 15 and 18, 1999, signed by Dr. Baig, which indicated that appellant was disabled from March 11 to April 25, 1999. Appellant further submitted a medical report dated March 26, 1999 from Dr. Kenneth Grimm, an osteopath from the Cleveland Clinic Foundation for pain management. Dr. Grimm discussed appellant's history of injury, her diagnosed low back pain and subsequent depression and stated that appellant worked until March 1999 but had been off work due to pain complaints. He further indicated that appellant's pain was aggravated by prolonged sitting and standing and physical activity.

Appellant further submitted a psychiatric pain management evaluation dated April 26, 1999 from Dr. Judith Scheman, a psychologist, who also discussed the employment injury,

appellant's continual complaints of low back pain and complaints of anxiety and depression, which had not been accepted as employment-related conditions by the Office. Dr. Scheman reported that appellant had not worked since March 10, 1999.

By decision dated July 13, 1999, the Office denied appellant's claim on the grounds that appellant failed to meet her burden of proof that she sustained a recurrence of disability beginning March 10, 1999 causally related to the injury of January 27, 1998.

Following the decision, the Office notified appellant in a letter dated July 15, 1999, that although the claim was closed, she remained eligible for medical benefits of her accepted condition of lumbosacral strain for 180 days.

Also on July 15, 1999, the Office scheduled appellant for a second opinion evaluation with Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, to determine whether appellant required further treatment of the accepted condition or developed any other conditions related to the January 27, 1998 injury. Dr. Kaffen was further requested to determine the extent of appellant's injuries, treatment recommendations and work tolerance limitations.

In his report, Dr. Kaffen determined that although appellant had subjective complaints of pain, there were no objective physical findings to indicate the presence of ongoing residuals of the accepted condition. He reported that appellant was capable of performing her date-of-injury occupational duties with restrictions and opined that a pain management program as recommended by her attending physicians would not be necessary.

On August 9, 1999 the Office determined that a conflict existed between the opinion of appellant's attending physician and the second opinion as to whether appellant required further treatment of the accepted condition or developed any other conditions related to the employment injury. By letter dated August 9, 1999, the Office advised appellant that a referee examiner would evaluate her to resolve the conflict.

Prior to the Office's determination that a conflict in the medical evidence existed, appellant, through counsel on August 2, 1999 requested an oral hearing. Appellant was never referred to a referee examiner to address the opposing opinions of record.

An oral hearing was held on January 24, 2000. During the hearing, appellant testified that prior to the alleged recurrence of disability, she had been copying files and lifting mail bins containing medical files. She further testified that, although the employing establishment considered her position sedentary, she was required to move heavy mail, lift items weighing in excess of 10 pounds and perform copying duties. Appellant further testified that she did not feel that she could work any longer and after March 1999 she became depressed.

Following the hearing, the employing establishment reviewed appellant's testimony and responded by letter dated February 16, 2000. The employing establishment indicated that it had complied with each of appellant's work restrictions of lifting no more than 10 pounds; no bending or stooping; sitting or standing no longer than 20 minutes and no reaching or pulling as outlined by her physician. The employing establishment also indicated that appellant was

sufficiently accommodated with a variety of work equipment so that she could appropriately carry out her light duties.

Appellant, thereafter, responded to the Office's comments in a letter dated March 13, 2000, in which she stated that the employing establishment complied with work restrictions for approximately three to four weeks and then she performed her duties without accommodation of a cart to carry files and a stool.

By decision dated April 21, 2000, an Office hearing representative determined that the medical evidence was insufficient to support a recurrence of disability on March 10, 1999 related to the accepted work injury and affirmed the prior decision. The Office hearing representative did not address the conflict in medical evidence previously noted by the Office regarding whether appellant required further treatment of the accepted condition or developed any other conditions related to the employment injury.

Initially, the Board finds that appellant has not established that she sustained a recurrence of disability beginning March 10, 1999 due to her January 27, 1998 employment injury.

When 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.¹ As part of this burden, appellant must furnish rationalized medical opinion evidence, based on a complete and accurate factual and medical history, showing a causal relationship between the claimed recurrence of disability and an accepted employment injury.² Causal relation and disability are medical issues that must be resolved by competent medical evidence.³

In this case, appellant returned to light-duty work on February 19, 1998 with restrictions outlined by Dr. Baig, her attending physician. Appellant alleged that she continued to work within designated work restrictions for approximately 3 to 4 weeks but that she began lifting more than 10 pounds, moving heavy mail and performing copying duties and that her lower back pain returned and then worsened. There is no evidence in the record that appellant's light-duty job requirements changed after February 19, 1998. The employing establishment provided that it complied with work restrictions outlined by appellant's physician and she has not submitted any evidence to the contrary.

Dr. Baig's June 28, 1999 report addresses appellant's employment injury, her continual symptoms of back pain since January 27, 1998 and her condition on the date of the claimed

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² *Armando Colon*, 41 ECAB 563 (1990).

³ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990); *Ausberto Guzman*, 25 ECAB 362 (1974).

recurrence; however, it does not provide an opinion on the causal relationship between appellant's diagnosed condition and her accepted employment injury. Dr. Baig also failed to explain in the report why appellant was no longer able to perform her light-duty position and how or why her condition worsened. Therefore, this report is insufficient to establish appellant's claim for a recurrence of disability due to this injury. The disability slips submitted in support of the claim are also insufficient as they do not provide any explanation as to why appellant was unable to work during the designated time period. Dr. Grimm's report dated March 26, 1999, which discussed appellant's injury, her diagnosed condition and missed work due to pain did not specifically indicate that appellant was disabled beginning March 10, 1999 as a result of her work injury or that she could no longer perform her light duties. The psychiatric pain management evaluation dated April 26, 1999 from Dr. Scheman discussed the employment injury, appellant's continual complaints low back pain and complaints of anxiety and depression and that appellant had not worked since March 10, 1999. However, she did not discuss the cause of appellant's disability commencing March 10, 1999 and, therefore, her report is insufficient to establish that appellant was disabled due to the accepted employment injury.

As appellant has not submitted competent medical evidence showing that she was disabled beginning March 10, 1999 due to her accepted January 27, 1998 employment injury, she has not met her burden of proof to establish a recurrence of disability commencing that date.

The Board further finds that the case is not in posture for a determination regarding whether appellant required further treatment of the accepted condition or developed any other conditions related to the employment injury.

The Office in an August 9, 1999, memorandum to the file determined that a conflict in the medical evidence existed between appellant's attending physician and the second opinion physician regarding whether appellant required further treatment of the accepted condition or developed any other conditions related to the employment injury. A determination of the conflict was short-circuited by appellant's appeal of August 2, 1999 and an independent medical specialist never evaluated appellant to resolve the conflict. The Office hearing representative in her decision dated April 19, 2000, did not address the conflict in the medical evidence but simply held that appellant failed to meet her burden of proof in establishing a recurrence of disability.

The medical evidence of record is, therefore, in conflict with regard to whether appellant required further treatment of the accepted condition or developed any other conditions related to the employment injury. Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁴ Accordingly, the case will be remanded to the Office for resolution of the conflict. On remand the Office should refer appellant, along with a statement of accepted facts and the medical records, to an appropriate specialist for impartial evaluation and report including a rationalized opinion as to whether appellant required further treatment of the accepted condition, or developed any other conditions related to the employment injury. After such further development as the Office deems necessary, it should issue an appropriate decision.

⁴ *Joseph D. Lee*, 42 ECAB 172 (1990).

The July 13, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed. The decision of the Office dated April 19, 2000 is set aside and remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
August 9, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member