

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLYDINE HERNANDEZ and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Portland, OR

*Docket No. 99-1058; Submitted on the Record;
Issued February 27, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has established that she sustained recurrences of disability beginning April 12, 1996 and August 6, 1997.

The Office of Workers' Compensation Programs accepted that appellant's March 23, 1992 employment injury sustained while moving a patient in the performance of her duties as a licensed practical nurse resulted in a low back strain and in a laminectomy at L4-5 she underwent on September 2, 1993. The Office which had paid compensation for prior periods of disability, resumed payment of compensation for temporary total disability beginning August 30, 1993, when appellant stopped work.

On October 6, 1995 the employing establishment offered appellant a full-time position as a medical secretary trainee. The position description stated that work would be completed primarily at a desk and that some walking, standing and bending were required. Appellant accepted the offer and worked four hours per day on October 30 and 31 and November 1, 1995. She then used previously scheduled annual leave from November 2 to 17, 1995 and returned to work for four hours per day on November 20, 1995. Appellant again stopped work from November 30 to December 4, 1995 and on December 4, 1995 filed a claim for compensation for the period from October 29 to December 4, 1995, which the Office paid. Appellant filed a claim for an injury to her neck on November 29, 1995 but the Office rejected this claim. Appellant worked sporadically from December 5, 1995 until February 9, 1996, when she again stopped work.

On July 7, 1997 appellant filed a claim for a recurrence of disability beginning April 12, 1996. Appellant noted that she was not at work at the time of this recurrence. Appellant returned to work on July 21, 1997. On September 3, 1997 appellant filed a claim for a recurrence of disability on August 6, 1997, stating that her lower back became very sore and swollen due to sitting and bending at work. Appellant stopped work on August 7, 1997 and returned to work on August 12, 1997.

By decision dated November 20, 1997, the Office found that the evidence failed to establish that appellant's claimed recurrence of disability beginning April 12, 1996 was causally related to her March 23, 1992 employment injury. Appellant requested a hearing, which was held before an Office hearing representative on September 24, 1998. By decision dated December 30, 1998, this Office hearing representative found that the evidence did not establish that appellant became totally disabled beginning April 12, 1996 due to her March 23, 1992 employment injury. By decision dated February 10, 1999, the Office found that the evidence did not establish that appellant's disability from August 7 to 12, 1997 was causally related to her March 23, 1992 employment injury.

The Board finds that the case is not in posture for a decision on the issue of whether appellant sustained a recurrence of disability beginning April 12, 1996.

At a hearing held before an Office hearing representative on September 24, 1998 appellant testified that on April 12, 1996 she was walking up the stairs at home when "all of the sudden [her] back went out," that she went to bed, that the next day she could not walk and that her symptoms were in the same area and of the same type as when she injured her back in 1992. In a report dated November 26, 1997, appellant's attending physician, Dr. Michael C. Bower, stated:

"I feel that the prior surgeries on her back have left her with some probable instability in the lumbar area as well as some chronic discomfort. I feel this set her up to have some rather significant increased back pain with the minor injury that she suffered in April of 1996, that is, twisting of the back while going up some stairs. The minor nature of the injury of April 1996 and her acute discomfort following this, which is very similar to the pain she had prior to her surgeries, makes me feel that there is a causal relationship between the intensity of the discomfort she experienced afterward and her prior injuries."

This report from Dr. Bower supports that appellant may have sustained a consequential injury at home on April 12, 1996. If a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury. If further complication flows from the compensable injury, *i.e.*, so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that in itself would not be unreasonable under the circumstances, the condition is compensable.¹ In an office note dated April 16, 1996, he stated that appellant was generally getting better until she twisted her back going up some stairs, after which she developed increasing low back discomfort, with numbness and tingling radiating down both legs. Dr. Bower diagnosed "Acute exacerbation of her chronic back discomfort." This report contrasts with the report of appellant's April 1, 1996 visit, which addressed only her slowly resolving cervical strain and indicates that the disabling condition on April 16, 1996 which he stated would last at least two to three weeks, was the low back condition and not the neck which Dr. Bower stated was better.

¹ *Sandra Dixon-Mills*, 44 ECAB 882 (1993); *Robert W. Meeson*, 44 ECAB 834 (1993).

The Board finds that Dr. Bower's reports are not sufficient to meet appellant's burden of proving a recurrence of disability related to her March 23, 1992 employment injury,² given that, in a May 30, 1997 report, Dr. Bower stated that the relationship of appellant's April 12, 1996 injury to her work was "unclear at this time," because it was "unclear ... whether she was walking up stairs at work or whether this occurred at home." The Board finds, however, that Dr. Bower's November 26, 1997 report addressing a consequential injury, which is not contradicted by medical evidence from any other physician, is sufficient to require that the Office further develop the medical evidence by referring the case to an appropriate physician for a second opinion evaluation.³

The Board further finds that appellant has not established that she sustained a recurrence of disability on August 6, 1997.

In a report dated August 6, 1997, Dr. Bower stated that appellant began developing mild low back pain after her return to work on July 21, 1997 that she attributed to bending at work. He stated that this "became particularly bad yesterday and into today," but that on examination she did "not appear to be in excruciating discomfort." Dr. Bower stated that he "strongly encouraged the patient to continue her efforts at returning to work," and that he wrote a note "for her to continue at four hours per day at work." A copy of this note, also dated August 6, 1997, noted a flare of back discomfort and recommended that appellant continue working four hours per day. These reports show that Dr. Bower did not consider appellant disabled for her part-time position on August 6, 1997. Although he stated, in a report dated August 15, 1997, that appellant was unable to work on August 7 and 8, 1997 secondary to back pain, Dr. Bower did not provide any explanation for the change in his opinion on appellant's ability to work. The report more contemporaneous with the occurrence of the alleged disabling event is considered more probative.⁴

² 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. *Terry R. Hedman*, 38 ECAB 222 (1986).

³ See *John J. Carlone*, 41 ECAB 354 (1989).

⁴ *Robin L. Brainard*, 43 ECAB 329 (1991).

The decision of the Office of Workers' Compensation Programs dated February 10, 1999 is hereby affirmed. The Office's decision dated December 30, 1998 is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
February 27, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member