

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD M. MAXYMUIK and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

*Docket No. 99-1473; Submitted on the Record;
Issued July 20, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue for determination is whether appellant had a recurrence of disability on April 29, 1997, causally related to his accepted work injury.

On July 10, 1987 appellant, then 28-year-old mail carrier, sustained an injury in the performance of duty when he was attacked by a dog while delivering mail. The claim was accepted for puncture wounds, low back strain and herniated disc. Appellant was able to return to work for a brief period of time, but was put on temporary total disability in October 1988 and began receiving compensation on the periodic rolls for wage loss.

Appellant was treated for his work injuries by Dr. Joseph Comoy, a Board-certified neurosurgeon, who has continually submitted reports finding appellant to be permanently disabled from work. He noted that a myelogram on December 6, 1995 demonstrated a herniated disc.

The Office of Workers' Compensation Programs referred appellant for a second opinion evaluation with Dr. E. Balasubramanian, an orthopedic surgeon. In a report dated October 17, 1995, he agreed that appellant continued to suffer from a herniated disc. Dr. Balasubramanian opined that appellant could not return to his usual job but that he was capable of working within certain medical restrictions.

In order to resolve the conflict in the medical record between Drs. Comoy and Balasubramanian, the Office referred him to Dr. Martin Blaker, a Board-certified orthopedic surgeon, for an impartial medical evaluation on December 16, 1996. In a report dated December 20, 1996, Dr. Blaker performed a review of the medical evidence and questioned the diagnosis and the degree of disability as noted by previous physicians of record. He reported that appellant controlled his reflex reaction during his physical examination, but that when his attention was diverted, he had appropriate reflex action. Dr. Blaker found no muscle wasting or atrophy and stated that the neurologic evaluation, although limited, was essentially negative. His diagnosis included a history of dog bites, history suggestive of lumbosacral strain and a history

suggestive of marked functional overlay. Dr. Blaker opined that appellant could work 8 hours a day on limited duty with restrictions of lifting limited to once per hour and not over 20 pounds.

On February 14, 1997 the employing establishment offered appellant a job as a letter carrier in a modified position for eight hours per day. The job was described as requiring appellant to “case residual/curtailed/standard mail as directed, intermittent standing and sitting, answer telephones as directed, perform carrier case maintenance on strips-carrier books as directed, deliver individual pieces of mail. The job was noted as being within appellant’s medical restrictions of limited bending, twisting, standing and walking for 90 days, semisedentary activities with a lifting restriction of 20 pounds.

The Office determined that the job offer was suitable and within appellant’s restrictions by letter dated March 4, 1997. When he refused to accept the job offered, he was advised by the Office on April 7, 1997, that he had 15 days to accept the position or have his compensation terminated. Appellant agreed to accept the position under protest and returned to work for one day on April 26, 1997. He then went out on sick leave for every day thereafter.

On May 5, 1997 appellant filed a claim for a recurrence of disability, alleging that, when he returned to work the pain and weakness in his legs intensified.

In a May 6, 1997 treatment note, Dr. Comoy reported that appellant was seen for complaints of severe pain on May 5, 1997 which was worse than before. He criticized Dr. Blaker and said he did not take the time to review appellant’s x-rays before rendering his disability opinion. Dr. Comoy recommended that appellant be seen by a Board-certified neurosurgeon.

Appellant had an magnetic resonance imaging (MRI) scan performed on May 1, 1997, which was interpreted as showing a slightly smaller disc mass at the L4-5 interspace than seen on the computerized tomography (CT) scan. The L5-S1 disc was moderate, but no longer involved the right lateral recess of L5 as was seen on the previous examination.

The Office wrote to Dr. Comoy on May 14, 1997, asking for clarification on the claimant’s condition and disability. He responded:

“I believe [appellant’s] condition has slightly worsened over the past four months and his pain is quite severe. He is barely able to sit because of the severity of his pain, and he has put his left hand underneath his buttocks in order to be comfortable. Basically, there has not been any change in his CAT [computerized axial tomography] scan. [Appellant] has a large L5-S1 disc. In answer to your second question, I do not believe he is able to sit long enough to be able to perform any of the duties that would be required of him. [Appellant] does not want to undergo surgery because he is afraid of surgery. It may afford him some relief of pain, but at the present time he refuses to have it done because of his fear. As stated above, I do not think he can sit long enough to be able to do two hours of work a day. Hopefully, this may change in the future, but I am not optimistic. Unless pressure is removed from the nerve, I do not see him getting any better.

Disc surgery has been offered to him on many occasions, but he does not want to have it.”

Appellant was sent for another examination with Dr. Blaker to ascertain whether appellant experienced a recurrence of disability and whether appellant could return to his modified position. An electromyogram (EMG) report was provided for the file. In a report dated September 19, 1997, he noted that appellant as showing abnormalities indicative of an S1 radiculopathy of the right, mild to moderate. Additionally, there was also a RAD Orbits report of May 2, 1997, provided to the file, which was indicative of normal orbits with no evidence of radiopaque foreign body within or about either orbit.

Dr. Blaker reviewed the May 1, 1997 MRI scan and opined that it did not correspond with Dr. Comoy’s own interpretation. He further opined that appellant’s return to work for one day was not indicative of his ability to perform the duties.

In a report dated September 25, 1997, Dr. Blaker advised that the lumbar curve was normal. He noted that appellant had no difficulty in dressing and undressing. There was subjective tenderness. Dr. Blaker again diagnosed history suggestive of lumbosacral strain, functional overlay, history of dog bites and reports of bulging discs not clearly related to the work injury. He stated:

“It is my opinion that [appellant] is not fully disabled at the present time. I note with interest that in the interim since he stopped working, that he has been able to attend classes at Temple University and LaSalle University for the purpose of gaining additional training and higher degrees in the subject of American History, which he apparently intends to teach at sometime. It is my opinion that if he is able to attend college classes, that he is also able to do light[-]work duties.”

In a decision dated November 21, 1997, the Office denied appellant’s claim for compensation based on a recurrence of disability on the grounds that the evidence failed to establish a change in his medical condition or a change in his light-duty assignment.

Appellant subsequently requested an oral hearing.

In a July 9, 1998 decision, an Office hearing representative vacated the Office’s November 21, 1997 decision. On remand, the Office hearing representative directed the Office to refer appellant for an impartial medical evaluation with a different Board-certified specialist, as he did not consider Dr. Blaker’s opinion to be sufficiently reasoned.

On September 4, 1998 the Office referred appellant for an impartial medical evaluation with Dr. M. Richard Katz, a Board-certified neurosurgeon, scheduled for September 29, 1998.¹ In his report dated September 29, 1998, Dr. Katz noted appellant’s symptoms which included radiating right leg pain, throbbing in his left foot, recurrent back spasms and low back pain after

¹ The Board initially scheduled appellant for an examination with a Board-certified orthopedic specialist but that examination was canceled due to the fact that the Office hearing representative had specified an examination by a Board-certified neurosurgeon.

sitting and standing. He discussed appellant's history of injury and the medical records provided by the Office. On physical examination, Dr. Katz noted that appellant stood fairly erect with sloped shoulders and that he would not comply with flexion at the waist greater than 30 degrees as he feared he would experience back pain. Extension at the waist, later bending and twisting was performed approximately 15 to 20 degrees maximally, for the same reason. Straight leg raising was also noted as causing pain on the right side at only 10 degrees extension. Dr. Katz further noted that appellant was able to walk on heels and toes and could do a deep knee bend unrestricted. He also observed that appellant was able to dress and change with no apparent difficulty. The diagnosis was listed as herniated lumbar disc L5-S1 on the right side. Dr. Katz noted that findings of mild decreased right ankle jerk and discomfort in the right buttock was consistent with the diagnosis and the MRI scan findings. However, he opined that appellant's symptoms were "mild and magnified in terms of limitation of activity. Dr. Katz concluded that appellant was not disabled for modified employment.

In an (OWCP 5) work evaluation form completed by Dr. Katz on September 29, 1998, he reported that appellant was physically unable to work for eight hours a day. The work restrictions were listed as intermittent sitting for four hours. Appellant was limited to intermittent walking, standing, twisting, pushing and pulling for two hours per day. A 20-pound lifting restriction was imposed and the possibility of a lumbar corset was also noted.

In a decision dated December 17, 1998, the Office denied compensation for the reason that the evidence failed to demonstrate that appellant's recurrence of disability was causally related to the work injury of July 10, 1987 or that appellant was unable to work the suitable light-duty job provided by the employing establishment.

The Board finds that the case is not in posture for decision.²

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 and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.³

In this case, the Office referred appellant for an impartial medical specialist, Dr. Katz, who opined that appellant could perform light-duty work but he specifically limited appellant's hours at work to four and not eight hours per day. His light-duty job, which was deemed suitable by the Office required work for eight hours per day. Appellant filed her recurrence of disability alleging that she could not perform the duties of his job because the pain and weakness in his legs intensified on the one day that he worked. Although he did not submit any evidence to establish a change in her medical condition, Dr. Katz's opinion is supportive of a finding of a

² The Board only has jurisdiction to review decisions of the Office that were issued within one year of the date of appellant's appeal on March 11, 1999; *see* 5 U.S.C. §§ 501.2(c), 501.3(d)(2).

³ *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

recurrence of partial disability for which appellant may be entitled to compensation. The Office did not specifically ask Dr. Katz to address whether appellant was capable of working the modified job she held for eight hours a day and did not inquire of him whether appellant's condition changed on or after April 26, 1997 when she stopped working.

The Office procedures indicate that the Office must advise appellant of the defects of his claim and if the medical evidence establishes disability, the Office must further develop the claim.⁴ It is well established that proceedings under the Act are not adversarial in nature⁵ and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁶ Because the Office has not fully developed the issue of recurrence of disability, the Board remands the case for further consideration. The Office should undertake further medical development including a request for a supplemental report from Dr. Katz.

The decision of the Office of Workers' Compensation Programs dated December 17, 1998 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
July 20, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Occupational Illness*, Chapter 2.808.6 (April 1991).

⁵ See e.g., *Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

⁶ See *Shirley A. Temple*, 48 ECAB 404 (1997); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).