

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHEREE L. BATSON and DEPARTMENT OF VETERANS AFFAIRS,  
NORTHPORT VETERANS HOSPITAL, Northport, NY

*Docket No. 99-1516; Submitted on the Record;  
Issued July 24, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether appellant has established that she sustained a recurrence of disability commencing November 29, 1993, causally related to her April 14, 1992 employment-related cervical and lumbosacral sprain injuries.

This is appellant's second appeal before the Board on this issue. In the prior appeal, the Board remanded the case to the Office of Workers' Compensation Programs for further development.<sup>1</sup> The facts and circumstances of the case are set out in the prior Board decision and are hereby incorporated by reference.

Following remand, by letter dated October 1, 1997, the Office requested that Dr. Sanford A. Ratzan, appellant's treating Board-certified orthopedic surgeon, review the attached statement of accepted facts and respond to the enclosed questions regarding whether appellant sustained a recurrence of disability.<sup>2</sup> No response to this letter was received from Dr. Ratzan, however, two unsigned addendums dated September 15 and November 3, 1997, were received which noted, respectively "Lumbosacral spine essentially unchanged. Limited motion -- also with lateral trochanteric tendinitis. She had changes on MRI [magnetic resonance imaging]. She will be scheduled for a CT [computerized tomography] myelogram for further evaluation" and "[Appellant's] spine is the same. There is limited motion. Lateral trochanteric tendinitis on the left.... [Appellant] has disability causally related. She is not improved."

By decision dated December 4, 1997, the Office denied modification of its prior determinations finding that the evidence submitted in support was insufficient to warrant

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<sup>1</sup> Docket No. 95-619, issued August 25, 1997.

<sup>2</sup> The Office asked specifically what medical evidence supported that, when appellant stopped working on November 29, 1993, it was due to a worsening of her employment injury and why was appellant unable to perform her limited duties at that time. A medical narrative including objective findings addressing these questions was requested.

modification. The Office found that the evidence submitted failed to address the questions posed and failed to establish a change in the nature or extent of the employment injury.

On December 2, 1997 the Office received a November 14, 1997 narrative report from Dr. Ratzan, which noted that he had been treating appellant since September 3, 1992 for “dorsal lumbar sacral sprain and possible herniated lumbar discs.” Dr. Ratzan noted that “she was not able to do the usual duties of her regular job.” He noted that an MRI revealed a “central HNP [herniated nucleus pulposus] at L4-5 with possible change on the right at L3-4,” and that appellant “had intermittent exacerbations without new injury.” Dr. Ratzan noted: “In November of 1993 she had increasing difficulty and had more difficulty with her job and was given further restrictions as to the kind of work she was able to do. It was noted [that] she could not do anything which would involve any stress to the dorsal lumbosacral spine and also overhead work and also limited bending and stooping.” He further noted that “there has been no new injury but progression of both her disability and her low back derangement which is a herniated lumbar disc over the past four years.” Dr. Ratzan noted that appellant “also has evidence of disability and inability to do her regular job,” that she had “marked limitation of motion, spasm, pain with rotation, extension, positive straight leg raising bilaterally with negative neurological examination,” and “[appellant’s] disability is causally related.”

Two further unsigned medical progress notes were submitted dated December 29, 1997 and March 2, 1998, which noted respectively “[O]n approximately December 14, 1997 [appellant] got up and had feeling of twisting in her low back with giving way and fell to the floor with trauma to the lumbosacral spine. She had an x-ray of her lumbosacral spine which had no fracture. She is now back to her same status with evidence of persistent significant lumbosacral disability, evidence of HNP.... She has not been able to do her usual job activities all this time.... She has disability causally related. She is totally disabled from her regular job,” and “[Appellant] is unchanged. She has disability causally related.... She is totally disabled.”

By unsigned progress notes dated April 27 and June 8, 1998 Dr. Ratzan noted, respectively, “[Appellant’s] low back is unchanged. She has persistent symptoms with disability causally related.... She has also had aggravation of a lateral trochanteric tendinitis which is also related,” and “[Appellant] is unchanged.... She still has some left lateral trochanteric tendinitis which is slightly improved. Her back is unchanged with limited motion, spasm, tenderness and sciatic notch tenderness. Motor is intact.... She has disability causally related.” July 27 and September 3, 1998 unsigned progress notes indicated that appellant was unchanged.

In a narrative report dated July 31, 1998, Dr. Ratzan noted: “[O]n November 29, 1993 [appellant] stopped work noting that she had a worsening of her work-related condition without any intervening injury.” He noted that at that time appellant was “doing 12-hour shifts at a time, working increasing hours which she could not tolerate. It is also noted that she was doing excessive bending, stooping and increase [sic] handling of patients which based on history definitely aggravated her situation with her conditioning worsening.” Appellant was noted to have increasing sciatic notch tenderness particularly on the right, increased restricted motion of the lumbosacral spine with positive straight leg raising bilaterally, greater on the right, increased

spasm with lateral bending and hyperextension of the dorsal lumbar spine and increased sciatic symptoms. Dr. Ratzan noted:

“Review of my records and your reports indicate that from her physical exam[ination] of November 1, 1993 to her December 13, 1993 examination [appellant] had increased objective findings as noted above and increased symptoms with evidence of a worsening condition....

“Review of records indicates that [appellant’s] job situation with longer shifts of duty, persistently doing excessive bending, stooping and lifting and increasing work with patients at her job caused [appellant] to stop work on November 29, 1993.

“As her back condition worsened, she was then unable to do her job and also because of her worsening condition was unable to even return to even a truly limited restricted duty situation.”

A December 4, 1998 medical progress note indicated that appellant had become pregnant and that “pregnancy may aggravate her back condition.”

On December 23, 1998 the Office referred appellant’s records to an Office medical adviser for review. The Office medical adviser noted that Dr. Ratzan’s report did not establish that appellant’s condition had worsened as of November 29, 1993 such that she was no longer able to perform the modified duties of a respiratory therapist, because he had no idea what her condition was like on November 29, 1993 and a week or so prior to that date, as Dr. Ratzan last saw her on November 11, 1993 and did not see her again until December 13, 1993. The Office medical adviser further noted that the orthopedist who saw appellant most contemporaneous with her alleged recurrence was Dr. Richard S. Goodman, a Board-certified orthopedic surgeon and Office second opinion specialist, who found her examination on November 15, 1993 to be within normal limits and who opined that she was capable of full active duty. The Office medical adviser also opined that appellant’s herniated discs were not related to her original injury as “the early reports only speak of cervical strain [and] no mention was made of a [lumbosacral] injury until ... June 17, 1992.”

By decision dated February 1, 1999, the Office denied modification of the prior decisions, finding that the evidence submitted in support was insufficient to warrant modification. The Board finds that this case is not in posture for decision.

An employee returning to light duty or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he or she cannot perform the light duty.<sup>3</sup> As part of this burden, the employee must show a change in the nature

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<sup>3</sup> *Terry R. Hedman*, 38 ECA 222, 227 (1986).

and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.<sup>4</sup>

In the prior appeal, the Board found that medical reports from Dr. Ratzan submitted prior to 1997, which opined that appellant could no longer work and had a positive MRI, were sufficient to warrant further development by the Office. Following the remand, Dr. Ratzan submitted further reports treating appellant for dorsal lumbar sacral sprain, herniated lumbar discs at L4-5 and possibly at L3-4 and trochanteric tendinitis, which he indicated were all causally related to her employment. Dr. Ratzan opined that appellant was not able to perform the usual duties of her assigned position, that she had intermittent exacerbations without new injury, that her condition was a progression of her disability and her low back derangement and that in November 1993 she had increasing difficulty with her job and was given further restrictions on the type of work she could perform. He noted upon examination that appellant had marked limitation of motion with spasm and sciatic notch tenderness, pain with rotation and extension, positive straight leg raising bilaterally and aggravation of a lateral trochanteric tendinitis, which he opined were causally related to her employment.

In a July 31, 1998 narrative, Dr. Ratzan also reported that on November 29, 1993 appellant stopped work due to a worsening of her work-related condition. He noted that appellant was working 12-hour shifts and increasing hours, which she could not tolerate and was performing excessive bending, stooping and lifting and increased handling of patients, which Dr. Ratzan opined aggravated her worsening condition. Objective findings at that time were noted as including increasing sciatic notch tenderness, particularly on the right, increased restricted motion of the lumbosacral spine with positive straight leg raising bilaterally, greater on the right, increased spasm with lateral bending and hyperextension of the dorsal lumbar spine and increased sciatic symptoms. He noted that between his examinations of appellant on November 1 and December 13, 1993 she had increased objective findings as noted above and increased symptoms with evidence of a worsening condition. Dr. Ratzan reported that activity changes in appellant's light-duty job situation with longer shifts caused her work stoppage on November 29, 1993, at which time she became totally disabled due to her worsening back condition.

However, the Office medical adviser disagreed with Dr. Ratzan, opining that he could not know what appellant's condition was like on November 29, 1993 or a week or so prior to that date as he did not see her until December 13, 1993. The Office medical adviser noted that the orthopedist who saw appellant most contemporaneous with her alleged recurrence, Dr. Goodman, found that on November 15, 1993 her examination was within normal limits and that she was capable of full active duty. The Office medical adviser also opined that appellant's herniated discs were not related to her original injury as the early reports addressed only cervical sprain and did not mention a lumbosacral injury until June 17, 1992.

As the reports from Dr. Ratzan are in disagreement with the report of the Office medical adviser, a conflict in medical opinion evidence exists on the issue of whether appellant

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<sup>4</sup> *Id.*

experienced a change in the nature or extent of her injury-related conditions resulting in a recurrence of total disability.<sup>5</sup>

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

Consequently, the case will be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an examination and a rationalized medical opinion to resolve the medical conflict regarding whether appellant sustained a recurrence of disability commencing November 29, 1993, causally related to her April 14, 1992 accepted employment injuries.

Accordingly, the February 1, 1999 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, DC  
July 24, 2001

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>5</sup> The Board also notes that Dr. Ratzan's reports suggest that there was a change in the nature or extent of appellant's light-duty job requirements on or around November 29, 1993 and that the Office did not further develop this issue to ascertain whether such changes were indeed factual.