U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOLLINE E. MILLER and U.S. POSTAL SERVICE,
POST OFFICE, Merrifield, VA

Docket No. 99-882; Submitted on the Record;
Issued May 24, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant established that she was disabled from work for certain periods on and after February 2, 1996 as a result of her accepted employment injury; (2) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective January 4, 1997; (3) whether appellant is entitled to a schedule award; and (4) whether appellant sustained an emotional condition as a consequence of her accepted work injury.

On August 8, 1988 appellant, then a 30-year-old distribution clerk, filed a notice of traumatic injury alleging that she pulled a muscle in her right buttock while throwing mail into an APC in the performance of duty. Appellant was treated at the employing establishment health unit for a mild buttock strain and was released to light duty. She did not miss any time from work, therefore, the employing establishment did not forward the notice of injury to the Office for adjudication.

On December 12, 1989, appellant filed a notice of traumatic injury, stating that she experienced right leg pain as she stood up from a training console. Appellant again sought treatment at the employing establishment's health unit, where she was diagnosed with tendinitis and released to limited duty. Appellant continued to work until she was sent home with pain and swelling in her leg on January 5, 1990.[1] The Office accepted appellant's claim for an aggravation of a preexisting lumbar strain and she received compensation for total disability

[1] An Office medical adviser reviewed appellant's case and indicated that appellant had work-related lumbar strain on August 18, 1989 and an aggravation of a preexisting strain on December 12, 1989.

through March 9, 1990.[2] Thereafter, she began working limited duty for four hours per day and received compensation for disability. Appellant filed two subsequent claims for recurrences of disability beginning on July 15, 1990 and July 19, 1991. She was also off work on maternity leave for the births of two children on January 26, 1991 and August 4, 1992

The record indicates that appellant was seen at the Arlington Hospital emergency room on December 15, 1989 for complaints of right knee pain and was diagnosed with tendinitis and prescribed medication. She then came under the care of Robert P. Nirschl, a Board-certified orthopedic surgeon, who treated her for postural lumbar lordosis and lumbar disc syndrome. It was Dr. Nirschl's opinion that appellant's lumbar disc syndrome originated with the August 18, 1988 work injury and was further complicated by appellant's pregnancies and the December 12, 1989 employment incident.

Appellant had magnetic resonance imaging (MRI) scans of the lumbar spine performed on March 2, 1990 and September 18, 1992, which were interpreted as normal. An electromyogram (EMG)/nerve conduction study performed on October 13, 1992 likewise showed no evidence of local nerve entrapment, neuropathy or radiculopathy.

In a report dated March 4, 1993, Dr. Ian D. Gordon, a Board-certified orthopedic surgeon and appellant's treating physician, responded to questions posed by the Office with respect to appellant's back condition. He stated:

> "As you know, her diagnostic studies have not demonstrated any abnormality such as a disc herniation, but certainly [they] are not inconsistent with a possible internal disc derangement. I think that it is recognized that not every patient with serious back pain problems have pain arising from a ruptured disc and yet myelograms, [computerized tomography] (CT) scans, MRI and an EMG evaluations (sic) will only be positive in the presence of a ruptured disc. If a disc is damaged internally with tears in the annulus these tests will actually be quite poor in determining the diagnosis."

In a July 22, 1994 report, Dr. Gordon further stated:

> "[Appellant] began to see me only in 1992 and her injury originally occurred on August 18, 1988. As related to me by the patient this injury was a lifting injury in the mail department. This occurred while moving mail containers and essentially was a lumbar strain injury at first, but eventually became more consistent with an internal disc derangement. In fact there was no new injury on December 12, 1989, only a progression of the patient's symptoms wherein she began to develop giving way of her right leg. [Appellant] relates that her symptoms were persistent

[2] In a decision dated August 10, 1994, the Office denied appellant's December 12, 1989 claim on the grounds that appellant suffered no new traumatic injury on that date but rather that she suffered an exacerbation of her August 18, 1988 injury. The decision instructed appellant to refile her claim based on the original injury. Appellant located a copy of the original CA-1 form she had filed with the employing establishment and submitted it to the Office on September 27, 1994. On October 7, 1994 the Office accepted the August 18, 1989 claim for a mild right buttock strain, under case file A25-454324. The December 12, 1989 claim was, therefore, treated as a recurrence of disability.

> from August 18, 1988 through December 12, 1989 and in fact to this date and there has been no lapse in her symptoms or resolution of the problem. This is a condition which has been present ever since August 18, 1989 except for exacerbations along the way. Her diagnosis remains the same as of December 12, 1989, that is lumbar strain, internal disc derangement, lumbar radiculitis."

On January 6, 1996 appellant submitted CA-8 claims for total disability for the following periods: February 2 through 5, 1996, February 16 through 20, 1996, March 8 through 12, 1996 and March 22 through 24, 1996. In support of these claims, appellant submitted a series of disability slips signed by Dr. Gordon, which included only a diagnosis of lumbar pain. Appellant last worked on September 10, 1996.

In an April 2, 1996 office note, Dr. Gordon stated that appellant was "genuinely disabled in the true sense of the word." He noted that appellant continued to suffer from "significant lumbar disc degeneration" with complaints of severe back and leg pain." Dr. Gordon suggested that a diet and possible spinal fusion surgery could improve appellant's symptoms of pain.

In a June 11, 1996 office note, Dr. Gordon noted that a bat had gotten into appellant's home and that she "had to do some extensive house work, which has severely aggravated her pain."

The Office subsequently referred appellant for a second opinion evaluation with Dr. Louis E. Levitt, a Board-certified orthopedic surgeon.[3] In an October 3, 1996 report, he discussed appellant's history of work injuries, her symptoms and course of medical treatment. Dr. Levitt indicated that appellant's physical examination was entirely normal and that there was "no evidence of active pathology in this patient and no evidence of residuals that can be tied to a work injury that occurred eight years ago." According to Dr. Levitt, appellant's symptomology revolved around her perception of being disabled. He reported that, if she committed herself to a home program of stretching, strengthening and conditioning exercises and also lost considerable weight, she could alleviate her back discomfort altogether. He specifically opined that appellant retained the capacity to work as a postal clerk, working full time without limitations on her work activities. Dr. Levitt concluded that there was no evidence of an active disease requiring further medical treatment. He also opined that appellant's muscle strain would have completely resolved within 8 to 12 weeks of her work injuries.

On June 25, 1996 appellant was examined by Dr. Abraham A. Cherrick, a Board-certified physician in physical medicine and rehabilitation. He assessed appellant's condition as chronic low back pain, bilateral sacroiliac joint dysfunction and right piriformis syndrome, for which he prescribed a course of physical therapy.

[3] The Board notes that this referral was in conjunction with appellant's request for a schedule award. On December 15, 1995 appellant filed a request for a schedule award. She submitted a report from Dr. Gordon indicated that she had a 20 percent impairment of the right lower extremity. In a March 14, 1996 decision, an Office hearing representative directed the Office to refer appellant for a second opinion evaluation and the Office subsequently scheduled appellant for an examination with Dr. Levitt.

In a report dated October 8, 1996, Dr. Cherrick noted that appellant had been to his office on September 10, 1996. He indicated that, although appellant requested that he approve her disability from September 10 to October 2, 1996, he did not receive adequate information regarding her level of pain from which to conclude that she was unable to work.

In a report dated October 16, 1996, Dr. Gordon reiterated his opinion that appellant suffered from internal disc derangement related to her work injuries.[4] He noted that appellant complained of chronic back pain from 1989 through 1996 and that she might require an anterior spinal disectomy and fusion for elevation of her pain in the near future. According to Dr. Gordon, although appellant sustained an exacerbation of her pain trying to remove a bat from her apartment, that incident did not change her diagnosis or permanently aggravate her pain. He opined that appellant was still disabled by her employment injuries.

On October 30, 1996 the Office issued a notice of proposed termination of compensation. The Office noted that the weight of the medical evidence, residing with an opinion from Dr. Levitt, established that appellant was no longer disabled from work and that she no longer had any residuals causally related to her employment injuries. Appellant was given 30 days to submit additional evidence if she disagreed with the Office's proposal.

In a December 27, 1996 decision, the Office terminated appellant's compensation effective January 4, 1997.

In a decision dated January 29, 1997, the Office determined that appellant was not totally disabled from work for the periods March 22 to May 23, 1996 and from June 10, 1996 to January 4, 1997.

Appellant requested a hearing, which was held on April 15, 1997.

At the hearing, appellant submitted a May 12, 1997 report by Dr. Gordon, which indicated that appellant had undergone a discography that showed an abnormal 5-1 level, with severe pain on passage of the needle to the 4-5 annulus and "a ruptured disc at that level confirmed by the leakage of dye at L4-5."[5] He discussed appellant's symptoms of antalgic gait, limited lumbar motion, muscle spasm and diagnosed that she suffered from painful disc syndrome with radiculopathy in the right leg of the L5 nerve root. He stated:

> "The patient does have preexistent degenerative disc disease. I do believe that her lordosis is within normal limits based on her race. She has suffered from myofascial pain syndrome and emotional distress and depression arising out of pain limitations posed by her injuries.
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> "It is my opinion to a reasonable degree of medical certainty that the above diagnosed conditions are directly and proximately caused by the on-the-job injury

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[4] Dr. Gordon explained that the initial diagnoses of lumbar strain and lumbar disc syndrome by Dr. Nirschl were consistent and compatible with the diagnoses he had made of discogenic back pain and internal disc derangement.

[5] Appellant submitted a copy of the March 26, 1997 discogram report, which listed under Impression, "Tender L4-5 annulus. The L3-4 disc is normal."

of August 18, 1988 and aggravation on December 12, 1989. It is further my opinion ... that [appellant's] condition worsened after she returned to permanent restricted four hours per day work and that the worsened condition is directly and proximately related to the original injury of August 18, 1988 and aggravation of December 12, 1989."

Appellant also submitted an April 14, 1997 report from Dr. Lisa R. Herrick, a clinical psychologist, who noted that she began treating appellant in couples' counseling with her husband in October 1994, but then started treating appellant on a weekly basis beginning June 1996 for depression and anxiety related to chronic pain. Dr. Herrick noted that appellant was upset by the adversarial nature of the workers' compensation process and that she perceived the postal staff to be rude and insensitive. Dr. Herrick further stated:

> "The physical limitations of her injury had made it hard for [appellant] to do a variety of things that are very important to her, from playing with her children in any physically active way, to driving, to feeling attractive to her husband. All of these limitations cause her distress and occasionally deep sadness and anger.... I believe that her injury and the limits in strength mobility and independence to which it has led, has made [appellant] particularly vulnerable to reexperiencing all of the feelings she had as a child when she was controlled in an intrusive, abusive manner by adults in her life and felt so helpless and angry as a result. The injury and disability it has caused has made [appellant's] attempts to develop a healthy sense of self-esteem and confidence very difficult."

In a July 21, 1997 decision, the Office hearing representative affirmed the Office's decisions dated January 29, 1997 and December 27, 1996. The Office hearing representative further determined that appellant failed to establish that she sustained an emotional condition causally related to her employment injuries.

On July 21, 1998 appellant filed a request for reconsideration. She submitted a July 1, 1998 report from Dr. Herrick, which diagnosed that appellant suffered from adjustment reaction and dysthymic disorder. A history of the onset of appellant's condition was provided. Dr. Herrick opined that appellant could take care of her own finances.

Appellant also submitted physician notes from Dr. Ian D. Gordon dated July 8, August 18 and September 23, 1997, February 10 and April 28, 1998. He noted that workers' compensation had declined appellant's request for surgery and that she remained status quo, ambulating with a cane and complaining of severe pain. Dr. Gordon specifically stated in the April 28, 1998 report that appellant's condition was at maximum medical improvement without further surgery and that she was able to perform sedentary work on a part-time basis 2 to 3 hours per week.

In a decision dated October 9, 1998, the Office denied modification of the prior Office decision following a merit review.

Initially, the Board notes that following her return to part-time limited duty, the Office paid compensation based upon submission by appellant of Forms CA-8 for continuing disability. As such appellant, maintained the burden of establishing entitlement to continuing compensation

related the employment injury based upon submission of supporting medical evidence.[6] On January 16, 1996 appellant submitted (Form CA-8) claims for total disability, claiming compensation for eight hours of wage loss versus four hours of wage loss, for the following periods: February 2 through 5, February 16 through 20, 1996, March 8 through 12 and March 22, 1996. In support of her CA-8 claim forms, appellant submitted various disability slips by Dr. Gordon, which concluded only that appellant is totally disabled from work. He did not address why appellant's condition in relation to why she was no longer capable of working at least part-time sedentary work during the time frames in question, nor did he note any findings on physical examination. This evidence is therefore found by the Board to be insufficient to carry appellant's burden of proof in establishing her entitlement to continuing compensation benefits.

When appellant next stopped work on June 10, 1996, she filed a CA-8 claim for disability and submitted a June 11, 1996 office note from Dr. Gordon in support of her claim. Dr. Gordon's statements, however, indicates that on June 11, 1996 appellant was treated for an aggravation of her back pain due to the fact that she performed extensive housework only two days before her appointment with Dr. Gordon.

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.[7] In discussing how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment, Professor Larson states:

> "When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of 'direct and natural results' and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury."[8]

Thus, it is accepted that, once the work-connected character of any condition is established, the "subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause."[9] In this case, because appellant's claim for total disability on or after June 10, 1996 is attributable to back pain related to "extensive housework" and not a spontaneous and natural consequence that flowed from her work injury, the Office properly refused to pay compensation for that period of wage loss.

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[6] *See Donald Leroy Ballard*, 43 ECAB 876 (1992).

[7] Larson, *The Law of Workmen's Compensation* § 13.00.

[8] *Id.* at § 13.11.

[9] *Id.* at § 13.11(a); *see also Stuart K. Stanton*, 40 ECAB 859 (1989); *Robert R. Harrison*, 14 ECAB 29 (1962).

The Board, however, finds that the Office failed to meet its burden of proof in terminating appellant's compensation effective January 4, 1997.

Once the Office accepts a claim it has the burden of proof of justifying modification or termination of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.[10]

The Office has accepted that appellant sustained a right buttock strain on August 18, 1988 and an aggravation of a preexisting low back strain on December 12, 1989. Although appellant has been working only four hours day a since her employment injuries, the Office properly referred appellant for a second opinion evaluation as to whether she had any continuing disability or residuals related to her low back or right buttock strain. Appellant was examined by Dr. Levitt, who noted surprised at the fact that the Office was continuing to pay benefits for a soft tissue injury that he felt would have resolved within weeks of the December 12, 1989 employment injury. He opined that appellant had no active pathology or permanent impairment from the work injuries and stated that appellant had fully recovered from them to the extent that she was capable of working full time without medical restrictions.

In contrast, appellant's treating physician has consistently opined that appellant is partially disabled by the August 18, 1988 work injury. Dr. Gordon believes appellant's condition at the time of injury consisted not only of a lumbar strain but also included internal disc derangement or a torn annulus with discogenic disc pain. He believes that the later diagnoses more fully explain why appellant has continued to complain of back pain since her work injury. He further notes that appellant's preexisting condition of lumbar lordosis did not contribute to her disability.

Inasmuch as the opinions of Drs. Gordon and Levitt are in conflict on the issue of whether or not appellant has any disability or permanent or continuing residuals as a result of the either the August 18, 1988 or the December 12, 1989 work injuries, they did not satisfy its burden of proof in terminating appellant's benefits.

The Board also finds that the case is not in posture for a decision on the issue of a schedule award.

Because the Board finds a conflict in the medical record as to whether appellant has any continuing disability or residuals related to her work injury, it is premature to determine a schedule award for permanent impairment related to the right lower extremity.

Additionally, the Board remands the case for consideration of whether appellant sustained an emotional condition as a consequence of her employment injury.

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[10] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

When this case was before the Office hearing representative, it was noted that the Office had not considered the issue of consequential injury.[11] The Office hearing representative undertook a *de novo* review and determined that appellant had failed to establish that her depression and anxiety disorders were causally related to her work injury. The Board, finds, however, that the opinion from Dr. Herrick entitles appellant to further consideration and development of this issue by the Office. In her April 14, 1997 report, Dr. Herrick opined that appellant was being treated for depression and anxiety due to pain and immobility caused by appellant's work injury of August 18, 1988. Although her opinion is not sufficiently reasoned[12] to carry appellant's burden of proof, it is uncontradicted in the record and is sufficient to require medical development by the Office.[13]

The decisions of the Office of Workers' Compensation Programs dated October 9, 1998 and July 21, 1997 are hereby reversed with respect to the termination of benefits and the case is remanded for further consideration as to whether appellant sustained an emotional condition causally related to her employment injuries.

Dated, Washington, DC
May 24, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

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[11] The Board has held that, "when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant's own intentional conduct." *See Larson, Workers' Compensation Law,* sections 13.00 and 13.11 pertaining to the basic rule regarding consequential injuries; *see also Frank Barone,* 30 ECAB 1119, 1125-126 (1979).

[12] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[13] It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence, particularly in a case such as the instant case where the record indicates that appellant has sustained two employment injuries and has been on limited duty. *Mary A. Barnett,* 17 ECAB 187 (1965).