U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REBECCA A. GRENFELL-DELIS and U.S. POSTAL SERVICE, POST OFFICE, Denver, CO

Docket No. 00-2230; Submitted on the Record; Issued September 4, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind its acceptance of appellant's claim for a recurrence of her severe right wrist strain and of a partial right scapholunate ligament tear.

On January 25, 1991 appellant, then a 33-year-old letter carrier, filed a claim for a traumatic injury alleging that on January 24, 1991 she lifted a tray of flats to load onto the front tray of the vehicle and felt her right wrist snap.

In a duty status report dated August 30, 1991, Dr. Fry stated that appellant could perform simple grasping and fine manipulation with only her left hand and could not lift or carry any weight. On March 29 and September 3, 1991 the employing establishment made appellant a limited-duty job assignment which did not require her to use her right hand or lift any weights. The work involved, in part, answering telephones, filing forms and helping at the customer window.

The Office accepted appellant's claim for a severe right wrist strain. Dr. Fry stated that appellant reached maximum medical improvement on February 8, 1993.

By decision dated October 15, 1993, the Office issued a schedule award for a one percent permanent loss of use of the right arm.

On July 13, 1997 appellant filed a claim for a recurrence of disability on June 12, 1997 of the January 24, 1991 employment injury. She stated that she was cutting bread when her wrist collapsed. Appellant stated that because of the original injury her wrist had been very weak and she had continued to use the brace. Previously, she stated that she had been on work restrictions not to use her right hand or perform lifting.

In a progress note dated June 16, 1997, Dr. Fry stated that appellant came in that day for a "new problem." He stated that she was slicing bread at home and felt a "popping in her wrist"

and had extreme pain. Dr. Fry stated that appellant had swelling and pain on "the 12th." He diagnosed that she had a possible acute ganglion cyst and secondary tendinitis. Dr. Fry stated that the pisotriquetral joint showed a small amount of crepitance intermittently which was uncomfortable but not severely painful. In a progress note dated July 10, 1997, he stated that the swelling was gone but appellant continued to have significant pain especially in the volar radial aspect of the wrist. Dr. Fry prescribed work restrictions, a splint and therapy, although in his July 23, 1997 progress note, he stated that appellant had not received therapy because of disputes over responsibility among the insurance companies.

In a report dated August 18, 1997, Dr. Fry stated that appellant originally injured herself on January 24, 1991 when she was carrying an 80-pound tray of magazines at work and "felt and heard a pop" in her right wrist. He reiterated that he saw appellant on June 16, 1997 when she had a "popping" in her wrist while slicing bread at home. Dr. Fry stated that it was "the same kind of pain and popping she previously had." He stated that her examination was normal except for the pain. Dr. Fry stated:

> "Patient's original injury was felt to be a scapholunate ligament tear, partial. Her current pain and symptoms are in the area of the proximal scaphoid (same area). Without a mass or generalized condition the most likely etiology of this patient's condition is a repeat injury of her previously partially torn scapholunate ligament. Location and symptoms are unchanged form her previous problems although she did have a long period without symptoms."

He stated that appellant had work restrictions as of July 10, 1997 not to use her right hand and that in the interim time frame, there were no changes in her permanent restrictions.

In his progress note dated July 23, 1997, Dr. Fry stated that appellant continued to have discomfort at the flexor radial aspect of the wrist. He stated that "[w]ithout a significant mass to indicate ganglion is developing, I think this is probably actually a flare-up and recurrence of her original problem at the scapholunate juncture." Dr. Fry advised appellant to continue with the splint and stated that appellant's therapy was "a direct result of the flare of her previous underlying condition even though this has done reasonably well for four years."

In a statement dated August 24, 1997, appellant stated that she last worked for the employing establishment on May 30, 1992. She attended school from June 1992 to June 1994 and from June 1994 through December 1995. Appellant worked at different jobs almost continuously from May 1993 through June 1997 performing duties related to accounting, general office work and telemarketing. She stated that in the past month her condition had deteriorated to the extent that use of her right hand had become very limited. Appellant stated that she could no longer work at her business because she could not type or write for prolonged periods. She stated that she could not do telemarketing because of the loss of finger dexterity for writing and extended telephone dialing. Appellant stated that she had not worked since June 12, 1997. She stated that at home she could not prepare meals without assistance from her husband and children because she could not open cans, jars and lift pots or frying pans and she was unable to stir, mix or grasp utensils. Appellant stated that housework such as vacuuming, sweeping and mopping floors, wiping and cleaning counters and doing laundry had "become impossible" and she required help to perform these tasks.

By decision dated October 2, 1997, the Office denied appellant's claim for a recurrence of disability, stating that the evidence of record failed to establish that the claimed recurrence is causally related to the approved injury.

By letter dated June 3, 1998, appellant requested reconsideration of the Office's decision and submitted additional evidence. She contended that the accepted injury should include a partial, right scapholunate ligament tear. In a progress note dated February 6, 1998, Dr. Fry stated that appellant's original mechanism of her injury and her current symptoms and examination were consistent with scapholunate ligament instability in the right wrist. He stated that it was possible to have scapholunate ligament instability with a negative arthrogram as some scar tissue healed across the interval after the injury but there was extra motion between the scaphoid and lunate. In his progress note dated February 16, 1998, Dr. Fry stated that the "question remains of the exact etiology of her pain." He stated that the "possibility of a partial or complete scapholunate ligament tear with adhesions which were blocking flow of the dye was a distinct possibility." Dr. Fry recommended diagnostic arthroscopy of the radiocarpal and intercarpal joint to examine the stability of the scapholunate joint.

By decision dated July 20, 1998, the Office denied appellant's request for modification regarding her claim for a recurrence of disability but modified the decision in part to additionally accept a partial right scapholunate ligament tear.

By letter dated October 1, 1998, appellant requested reconsideration of the Office's decision. Among other arguments, she contended that the Office never made a determination of the suitability of the limited job it offered appellant. Appellant also contended that, when appellant returned to work, the physical requirements exceeded her work restrictions of not using her right hand, not performing any lifting and carrying and no driving. In one witness statement dated September 4, 1998, appellant's coworker, Kary L. Price, stated that she saw appellant perform express mail delivery work which required that she lift and carry up to 70-pound packages and drive various employment establishment vehicles. She stated that management required appellant to drive as a part of her "regularly and specially assigned job duties" even though she was not suppose to drive at work. Ms. Price stated that appellant usually drove a Ford Pinto provided by the employing establishment but occasionally drove the long-life vehicles. She stated that one day she heard appellant and the supervisor, Phyllis Preston, having an argument because appellant told Ms. Preston that the express mail work exceeded her limitations and that she was not supposed to do that work and Ms. Preston said, "If you do n[o]t do this, then you are fired. If you do n[o]t do it then you go home. I am giving you a direct order." Ms. Price stated that appellant complied with Ms. Preston's order.

Ms. Price stated that appellant needed both hands to perform the express mail work and if appellant told Ms. Preston and other supervisors that she was not supposed to work with both hands, Ms. Preston would tell her "to do it anyway." She stated that she observed appellant carrying tubs of mail weighing up to 40 pounds on a regular basis. Ms. Kary stated that she observed appellant casing mail and when appellant used only one hand, the supervisors, Vic DeLauro and Ms. Preston yelled at her to case faster and appellant would respond by using two hands. Ms. Price stated that she saw appellant lifting 20-pound trays from the floor to the case, that she had to use both hands for that task and Ms. Preston, Mr. DeLauro and the supervisors, Ken Gerect and Jim Fuqua, observed her performing that work.

In a witness statement dated September 9, 1998, a coworker, Kimberly A. Wood, stated that she observed appellant casing mail and if she used only one hand, Mr. DeLauro and Mr. Fuqua would yell at appellant to case the mail faster. She stated that, in response to them, appellant would start casing mail with both hands. Ms. Wood stated that supervisors would see appellant working with both hands, and if she told Mr. DeLauro or Mr. Fuqua that she was not supposed to work with both hands, they would tell her to do it anyway. She stated that Ms. Preston, Mr. DeLauro, Mr. Gerect and Mr. Fuqua saw appellant casing mail and using both hands to lift trays weighing 20 pounds and binding handfuls of mail. Ms. Wood stated that she also saw appellant "pull down mail" everyday, that the task required continuous grasping, pulling and twisting with both hands, and she saw appellant try to do it with only her left hand but could not.

By letter dated November 10, 1998, the employing establishment indicated that appellant resigned from the employing establishment on May 29, 1992, and stated that her reason for resigning was that she wanted to further her education and planned to return to school full time.

By decision dated November 23, 1998, the Office denied appellant's request for modification.

By letter dated March 31, 1999, appellant requested reconsideration of the Office's decision. She additionally contended that Mr. Gerect pressured her into stating that she was resigning to return to school instead of lack of accommodation because it would be difficult for him to explain to upper management that she had not been accommodated. Appellant stated that she feared that, if she put the true reason, she would be harassed.

By decision dated May 14, 1999, the Office denied appellant's request for reconsideration.

By letter dated August 10, 1999, appellant requested reconsideration of the Office's decision. She submitted copies of her income tax returns from 1992 through 1998 with her W-2 forms for those years.

By decision dated August 13, 1999, the Office denied appellant's request for reconsideration. The Office found that the Office did not err in failing to make a suitability determination since appellant accepted the offered job and four factors listed in the Federal (FECA) Procedure Manual did not apply: that the job did not involve working less than four hours a day, the job was not permanently seasonal, the job was not temporary and the medical evidence did not document a new condition arose since the compensable injury which disabled appellant from performing the job.[1] The Office further found that appellant did not establish a recurrence of disability because appellant did not seek medical treatment from 1993 through

[1] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (December 1993). The manual states that a formal finding of suitability need not be made if appellant has accepted the job and the following factors do not apply: (1) the job involves less than four hours of work per day and appellant is capable of performing more than four hours per day; (2) the job represents permanent seasonable employment; (3) the job is temporary unless appellant was a temporary employee when injured and the job reasonably represents appellant's wage-earning capacity; and (4) the medical reports on record document a condition has arisen since the compensable injury which would disable appellant from the offered job.

1997, she attended school and worked jobs approximately from June 1992 through June 1997, and there was no probative evidence to support that appellant was working outside of her restrictions. The Office found that the witness statements appellant submitted were made by individuals who were not in a position to evaluate a limited-duty position or the physical requirements of the position, and did not have medical knowledge of appellant's conditions and her restrictions. The Office concluded that the lack of medical treatment for a four-year period, the intervening incident of slicing the bread and feeling a popping pain, the history of extraneous work activities without any description of the off-the-job activities broke the chain of causal relationship.

By decision dated December 30, 1999, the Office vacated the prior decisions and found that appellant was entitled to compensation for a recurrence of disability. The Office found that the witness statements appellant submitted supported that appellant "was worked" outside her medical restrictions and therefore there was a change in the light-duty assignment which supported a recurrence. The Office noted that appellant felt a popping in her wrist on June 16, 1997 when she was slicing bread which Dr. Fry stated was the same pain and popping as previously noted by appellant. The Office considered that, in his July 23, 1997 report, Dr. Fry stated that the incident was a flare-up and recurrence of the original injury, and he gave appellant additional restrictions of not using the right hand and wearing a splint. The Office stated that, because appellant was working outside her restrictions, the Office did not make a suitability or wage-earning capacity determination on the job offer from the employing establishment and there was sufficient evidence to establish there was a recurrence.

On March 4, 2000 on Form CA-7, appellant requested compensation from May 30, 1992 through March 4, 2000.

By letter dated March 7, 2000, the employing establishment challenged appellant's request for compensation on the Form CA-7.

By letter dated April 3, 2000, the employing establishment further challenged the Office's decision awarding appellant benefits.

By decision dated April 18, 2000, the Office rescinded the December 30, 1999 decision, stating that appellant did not establish that she sustained a recurrence of disability. The Office found that appellant did not present medical evidence showing her current condition resulted from a recurrence of the January 24, 1991 employment injury. The Office stated that the lack of medical treatment for four years from 1993 through 1997, the history of appellant's work activities during that time period, the intervening incident of appellant's feeling a popping in her wrist while cutting bread, and the absence of evidence showing that appellant exceeded her work restrictions broke "the chain of causal relationship." Further, the Office found that it was not required to make a suitability determination on the job it offered appellant.

The Board finds that the Office did not meet its burden of proof to rescind its acceptance of appellant's claim for a recurrence of her severe right wrist strain and of a partial right scapholunate ligament tear.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[2] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[3] Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decided that it erroneously accepted a claim.[4] To satisfy its burden, the Office cannot merely second guess the initial set of adjudicating officials but must establish through new evidence, legal arguments or rationale, that its acceptance was erroneous.[5]

In the present case, the Office rescinded its acceptance of appellant's recurrence of disability mainly because it felt the "chain of causation was broken" by the lapse of time in appellant's medical treatment between 1993 and 1997, appellant's attending school and performing work during that time period, the bread slicing incident on June 16, 1997 and the failure of appellant to show that the light-duty work she performed exceeded her restrictions. Dr. Fry's medical opinion is of diminished probative value in this case because whenever he addressed causation, his words were speculative and tentative, and he was speculative in his diagnosis.[6] In his June 16, 1997 report, he stated that appellant had a "possible" acute ganglion cyst and secondary tendinitis. In his August 16, 1997 report, he stated that "the most likely etiology" of appellant condition was repeat injury of her previously partially torn scapholunate ligament. In his July 23, 1997 report, Dr. Fry stated that appellant's condition as "probably" a flare-up and recurrence of the original problem at the scapholunate juncture. Dr. Fry also did not provide an adequate medical rationale explaining how the bread cutting incident on June 16, 1997 constituted a recurrence of disability and was not an intervening cause.[7] Medical reports not containing the adequate medical rationale are not probative.[8]

Nonetheless, despite the diminished probative value of Dr. Fry's opinion, in rescinding its prior acceptance of appellant's recurrence of disability, the Office did not provide any new evidence, legal arguments or rationale that its acceptance was erroneous. The arguments it made in its rescission, that the chain of causation was broken by the four-year lapse in appellant's medical treatment between 1993 through 1997, appellant's attending school and working various jobs during that time period, the bread slicing incident on June 16, 1997 and the absence of probative evidence showing that appellant exceeded her work restrictions were identical to the

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[2] *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

[3] *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993).

[4] *Gareth D. Allen*, 48 ECAB 438 (1997); *Alfonso Martinisi*, 33 ECAB 841 (1982).

[5] *John W. Graves*, 52 ECAB ___ (Docket No. 98-511, issued December 7, 2000); *Gareth D. Allen*, *supra* note 4; *Alfonso Walker*, 42 ECAB 129 (1980).

[6] *Wendell D. Harrell*, 49 ECAB 289 (1998); *Jacquelyn L. Oliver*, 48 ECAB 232, 237 (1996).

[7] *See Stuart K. Stanton*, 40 ECAB 859 (1989).

[8] *See Ronald C. Hand*, 49 ECAB 113, 118 (1997).

Office's arguments and reasoning in its August 13, 1999 decision. Further, in the August 13, 1999 decision, as in its rescission decision, the Office found that it was not required to make a suitability determination of the job it offered appellant. Thus, the Office did not comply with the requirements for rescinding a decision in that it did not provide any new factual or legal basis for rescinding its acceptance and denying appellant's claim. All the medical evidence of record was submitted prior to the acceptance of appellant's claim. Further, contrary to the Office's statement in its rescission, the statements by the witnesses, Ms. Wood and Ms. Price, that each of them saw certain supervisors telling appellant to perform work exceeding her restrictions establishes that management compelled appellant to work outside her restrictions. The Office has not met its burden to show that the rescission of its acceptance of appellant's claim for a recurrence of disability was proper.

The decision of the Office of Workers' Compensation Programs dated April 18, 2000 is reversed.

Dated, Washington, DC
September 4, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member