U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TAMARA S. MURRAY and U.S. POSTAL SERVICE,
POST OFFICE, Coppell, TX

Docket No. 99-2036; Submitted on the Record;
Issued September 14, 2001

DECISION and ORDER

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

The issue is whether appellant had any disability during the period March 13, 1995 to September 14, 1996, causally related to her April 30, 1994 lumbosacral strain employment injury.

On May 5, 1994 appellant, then 34 years old, filed a claim alleging that on April 30, 1994 she slipped on a wet, algae-covered sidewalk and landed on her right hip.

The Office of Workers' Compensation Programs accepted that appellant sustained lumbosacral strain and a very mild upper plate compression fracture at L1. Appropriate benefits for wage loss beginning May 12, 1994 and medical expenses were paid. On July 9, 1994 x-rays of the lumbar spine were noted as revealing previously noted levoscoliosis but no interval change, no evidence of pars defect, and no other significant abnormality.[1]

On August 5, 1994 appellant's treating physician, Dr. Cynthia L. Shughrue, an osteopathic family practice physician, opined that appellant was capable of returning to light duty on August 8, 1994 for four hours per day performing office work with no lifting over 15 pounds. Appellant returned to part-time light duty on August 9, 1994; magnetic resonance imaging (MRI) of appellant's lumbar spine on August 31, 1994 was reported as showing no significant abnormalities. Further diagnostic evaluation of appellant's spine revealed a normal thoracolumbar spine.

An electromyogram (EMG) on September 8, 1994 was reported as showing no signs of radiculopathy and normal nerve conduction studies and reflexes. By report dated September 13,

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[1] The rehabilitation nurse noted that appellant returned to restricted duty on July 11, 1994, but due to increased low back and right leg pain she was taken off duty, and returned again on August 1, 1994 for four hours per day until September 3, 1994 when she stopped completely. The nurse noted that a light-duty release was given on November 14, 1994.

1994, Dr. Louis M. Dyll, a neurologist, opined that appellant had depression and fibromyalgia.[2] A September 27, 1994 discogram report revealed normal disc architecture at L3-4, L4-5 and L5-S1 with discordant symptoms. On October 6, 1994 "lumbar syndrome" was diagnosed. Dr. John A. Handal, a Board-certified orthopedic surgeon, noted appellant's persistent complaints of right hip pain in the S1 joint area and a positive Trendelenburg, noted her normal discography at L3-4 and L4-5 but noted an abnormal disc at L5-S1 with plus/minus concordant pain, opined that the L5-S1 annular tear was not the source of appellant's pain and she recommended a right S1 joint block. On October 11, 1994 Dr. Dyll opined that appellant's problem was more orthopedic than neurologic, that she was still not able to do much in the way of physical activity, that ordinary activity was well tolerated, and that she had a 14 percent disability. Dr. Dyll diagnosed fibromyalgia. Causal relation was not discussed.

Appellant underwent a work capacity assessment on November 3, 1994. On November 11, 1994 Dr. Shughrue completed a work capacity evaluation indicating that appellant could work for 4 hours per day with restrictions on lifting more than 15 pounds,[3] and on bending, twisting, reaching and climbing stairs. She noted that appellant could sit for four hours per day with occasional bending and squatting. No opinion on causal relation was included. A work hardening program was recommended.

The Office sought a second opinion specialist's examination and referred appellant, together with a statement of accepted facts, questions to be addressed, and the relevant case record, to Dr. Bernie L. McCaskill, a Board-certified orthopedic surgeon. By evaluation dated November 18, 1994, Dr. McCaskill reviewed appellant's factual and medical history, reported her present complaints, provided physical examination results, and opined that there were no neurological abnormalities noted in either upper extremity. Dr. McCaskill noted that examination revealed no abnormal neurological findings in either lower extremity, that there was no obvious swelling, atrophy, deformity, or other objective evidence of injury in either lower extremity, that appellant had full passive range of motion of all major joints in both lower extremities which did not caused appellant significant discomfort, that anterior and posterior pedal pulses were full and intact, that strength in all motor muscle groups in both lower extremities were normal and that reflexes were symmetrical bilaterally. Dr. McCaskill reviewed appellant's diagnostic studies and opined that they were unremarkable, and he diagnosed "spondylogenic lumbosacral spine pain, chronic, anatomic etiology undetermined." Dr. McCaskill stated that, although appellant claimed that she was unable to return to any type of work, she had no abnormal physical findings consistent with any significant injury of any type, and that all of her diagnostic studies were completely normal. He noted that appellant had full range of lumbar spine motion, unremarkable straight leg raising, and unrestricted tightest supine straight leg raising, and opined that he saw no objective of significant injury consistent with appellant's subjective complaints. Dr. McCaskill opined that there were significant emotional

[2] Causation was not discussed.

[3] Functional testing revealed that appellant was then lifting in the sedentary-light category of work as demonstrated by her occasional floor to knuckle lift of 18 pounds, knuckle to shoulder lift of 18 pounds, and carry of 23 pounds 100 feet with pivoting. During positional tolerance testing, appellant demonstrated tolerance of walking, overhead reaching, stair climbing, forward reaching and pushing and pulling on an occasional basis. Progressive, daily work hardening for four weeks was recommended.

and motivational factors responsible for appellant's continued difficulties, that no further diagnostic evaluation was indicated nor was surgical treatment warranted. He opined that appellant had reached maximum medical improvement, and should continue with an active exercise program of her own, and that no further treatment was indicated. Dr. McCaskill opined that there was no objective basis on which to claim that appellant was unable to return to regular work, and that appellant had no permanent physical impairment resulting from her injuries on April 30, 1994. Dr. McCaskill completed a work capacity evaluation form indicating that appellant could work eight hours per day without restrictions.

On December 6, 1994 the employing establishment offered appellant a modified-duty position for four hours per day, which she accepted on December 12, 1994. The Office that the job offer became effective December 31, 1994. Appellant accepted the position and reported for limited-duty work on January 3, 1995 for six hours per day.

On a January 21, 1995 CA-20 attending physician's report, Dr. Shughrue diagnosed "compression fracture," described the nature of appellant's impairment as "back pain," and checked "yes" to the question of whether the condition found was due to the claimed injury. No further explanation was provided. On a work restriction form of that date Dr. Shughrue indicated that appellant could work six hours per day with limitations on sitting for more than two hours at a time and with no bending, stooping, pushing or pulling. No driving a postal vehicle was also advised.

On February 8, 1995 the Office proposed termination of appellant's compensation finding that appellant no longer had any residuals from the April 30, 1994 injury. The Office based its determination on the thorough and well-rationalized November 18, 1994 second opinion report of Dr. McCaskill, who found no objective evidence of any significant neurological or musculoskeletal injury of any type, and that appellant could work eight hours per day. Dr. McCaskill diagnosed "spondylogenic lumbosacral spine pain, chronic anatomic, etiology undetermined."

On February 16, 1995 appellant filed a CA-8 claim for compensation for the additional hours, as she had been working only six hours per day as of January 23, 1995.

In response appellant submitted another CA-20 attending physician's report dated February 18, 1995 from Dr. Shughrue which essentially repeated her January 21, 1995 report. She noted subjective pain symptomatology and checked "yes" as to causal relation.

However, Dr. Shughrue also provided a February 21, 1995 narrative report which detailed appellant's history of a fall causing right hip and coccyx pain, noted that a contemporaneous x-ray suggested an L1 compression fracture, and noted that when returned to work appellant complained of increasing pain and increasing muscle sprains. Dr. Shughrue noted that due to failure to respond to conservative measures appellant was referred to Dr. Handal who opined that appellant suffered from a possible annular tear at the L5-S1 junction, but that surgical intervention was not required. Dr. Shughrue noted that appellant continued with complaints of hip and not lumbar pain which were entirely consistent with her initial injury. She noted that the lumbar and low back complaints had resolved but opined that appellant still suffered from muscle strain in the area of the gluteal and psoas muscles on the right and would

benefit from a work conditioning program. Dr. Shughrue opined that appellant should be able to resume her normal duties within six to eight weeks. Further orthopedic evaluation was also recommended.

Dr. Handal provided a February 28, 1995 report in which he noted that appellant returned with her same back complaints of pain, but also with pain now more localized to her hip area of the S1 joint, and she described a sacrococcygeal-type pain. He diagnosed "lumbar syndrome" and opined after examination that he felt appellant's problem was probably lumbar disc in origin, and he recommended further MRI evaluation.

By decision dated March 13, 1995 the Office terminated appellant's monetary compensation entitlement on the grounds that the medical evidence of record established that she had no further disability, causally related to her April 30, 1994 injury.

On a CA-20 attending physician's report appellant was diagnosed on March 25, 1995 by Dr. Shughrue as having acute lumbar sacral strain and was found to be only partially disabled and able to perform some work on March 26, 1995 with restrictions on lifting more than 20 pounds. Permanent effects were noted as "chronic back pain." However, she also checked "yes" indicating that appellant was advised that she was able to resume regular work on March 18, 1995.

On March 29, 1995 appellant filed a CA-8 claim for compensation for the period March 24 to 26, 1995. On the reverse side the employing establishment seemed to indicate that appellant received remuneration from it for the period March 18 through March 31, 1995.

On March 29, 1995 appellant filed a claim for recurrence of disability commencing March 24, 1995, causally related to the April 30, 1994 injuries. Appellant claimed that, even though she was limited to carrying things under 20 pounds, as she walked she began to feel weakness, muscle spasms and tingling around the tailbone area which got worse over 5 days. Appellant denied any fall or trip or any intervening factor, but claimed that the weight of the bag and walking up and down over a period of time caused her recurrence consisting of hip joint, right leg, low back and tailbone numbness. Appellant stopped working on March 24, 1995 but returned on March 27, 1995. The employing establishment indicated that appellant had been performing limited duty at the time of her claimed recurrence.

On April 4, 1995 appellant filed a claim for injury occurring on March 29, 1995 at 8:00 a.m. Appellant claimed that as she was bending over to get a tub of mail it felt like a shock hit her around her back right hip in the main nerve to the right of the tailbone vertically about eight inches down. Pay sheets demonstrated that appellant worked from March 13 through April 4, 1995 when appellant stopped work and took leave without pay. Of those days worked, appellant worked eight hours on March 18, 20, 21, 23, 27 and April 1, 1995. She took total leave without pay on March 25, 1995, and beginning April 5, 1995 and continuing thereafter, and had taken partial leave without pay on March 24, 28, 29, 31 and April 3 and 4, 1995 The employing establishment controverted appellant's claim arguing that since her previous claim had been closed she had been trying ways to avoid performing her duties since her return to work.

On April 4, 1995 appellant also filed a claim for injury occurring on March 29, 1995 at 9:30 a.m. when she was lifting a bundle into a tray and felt a "pop" either in her hip or her low back near her tailbone, and it hurt to walk. Appellant stopped work on April 4, 1995 and the employing establishment controverted appellant's claim indicating that the claimed injury appeared to be willful and highly suspicious.

In support of her claims, including her request for reconsideration of the March 13, 1995 termination decision, appellant submitted an April 14, 1995 report from Dr. Shughrue who noted date of original injury as April 30, 1994, date of recurrence injury as March 24, 1995 and two new injuries on March 29, 1995. Dr. Shughrue noted that on the CA-20 dated March 25, 1995 but actually, she claimed, dated March 24, 1995, appellant was released to work on her understanding that the Department of Labor insisted that she return to work. However, Dr. Shughrue stated that in her discussion with appellant they decided that appellant was to remain working six hours per day as noted on her work capacity evaluation forms. Dr. Shughrue repeated that she released appellant to full duties due to the recommendations of Dr. McCaskill that no objective physical findings were evident and due to appellant's belief that if she did not return to full duty she would lose her employment.

In support of her claims, appellant also submitted some medical notes signed by Dr. William H. Wisner, a Board-certified orthopedic surgeon, which indicated that an April 18, 1995 EMG demonstrated irritability right and left at the L5-S1 distribution which was compatible with facet irritation, degenerative disc or disc disruption. Dr. Wisner noted that with normal peripheral nerve conduction, abnormal dermatomal response indicated L5-S1 involvement. He noted that this problem was, at that time, one year in duration, and that she was asymptomatic prior to her April 30, 1994 injury. Dr. Wisner further noted that the discogram demonstrated a partial right posterior paracentral annular tear and a linear horizontal posterior annular fissure, which he opined, disabled appellant from working at that time.

However, an April 24, 1995 lumbar MRI ordered by Dr. Wisner was reported as showing normal lumbar lordosis, no lumbar vertebral body collapse or spondylolisthesis, no herniated nucleus pulposus, normal disc spaces, patent lumbar central canal and neural foramina, no paraspinal soft tissue masses, and a negative conus medullaris region at the L1 level.

On May 16, 1995 Dr. Wisner noted, after complete review of the records and examining appellant, that the fissure in the disc did allow for nerve endings to grow into this disc and become painful. He opined that this was the situation with appellant; it was not herniated but there were nerve fibers into that space, which could only be adequately managed by a laminectomy and a discectomy at that level or probable infiltration with chymopapain.

On May 24, 1995 the employing establishment offered appellant a modified-duty position which she accepted on June 1, 1995 with the proviso "I am protesting because: (1) I don't know if I'm able to work eight hours a day or not; [and] (2) I am emotionally unstable because of what I've been through with these injuries."

On July 20, 1995 the Office received an undated report from Dr. Shughrue which related Dr. Wisner's findings and opined that these nerves were aggravated when appellant bent,

stooped, twisted or squatted which was causing her radicular and low back pain. Dr. Shughrue opined that appellant's subjective complaints were entirely consistent with her clinical diagnosis.

By letter dated July 24, 1995, the Office advised appellant that her recurrence claim was inappropriate since her claim was denied on March 13, 1995 as it was determined that she was no longer disabled as a result of her April 30, 1994 injury.[4] The Office also advised that appellant's claim for new injury on March 29, 1995 was denied on June 1, 1995.[5]

By decision dated August 28, 1995, the Office denied modification of the March 13, 1995 decision finding that appellant had failed to submit evidence sufficient to warrant modification of that decision. The Office found that neither Drs. Shughrue nor Wisner provided a rationalized opinion relating the conditions found to appellant's employment injury, and that Dr. Wisner did not provide a certain diagnosis. It found that the weight of the medical evidence still rested with Dr. McCaskill.

By report dated February 2, 1996 Dr. Daniel Shalev, a Board-certified anesthesiologist specializing in pain management, noted appellant's history of injury, examined her, reviewed her subjective symptoms and diagnosed "Rule out bilateral quadriceps tendinitis, on the right greater than the left, [p]ossible psoas strain bilaterally, on the left greater than the right, [r]ule out adductor tendinitis, on the left greater than the right, [p]ossible right piriformis syndrome, [r]ule out sacroiliac joint dysfunction [and] [m]ild reactive depression." He proposed further treatment modalities, but did not provide a rationalized discussion of causal relation with the fall of April 30, 1994.

However in a follow up report Dr. Shalev argued that his reports were not speculative in nature nor lacked medical rationale, and that, since he treated appellant, he could state that based upon appellant's explanation of the fall, that muscle and tendon injury occurred. He opined that appellant's current complaints were related to her April 30, 1994 injury noting that there was little doubt that the reoccurring pain would not have become a problem if the initial injury had not occurred. He noted that her complaints were in remission for a period of time while she was on light duty, but when she returned to regular duty, her pain began to return, which was not uncommon with chronic pain.

By decision dated May 28, 1996, the Office denied modification of the prior August 28, 1995 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that the medical evidence submitted did not contain any rationale relating appellant's present condition to the injury of April 30, 1994.

On September 14, 1996 appellant filed a claim alleging that, as she was delivering mail on that date, while trying to avoid a bee flying around her, she tripped on a flower bed and fell, landing in the bed scratching and bruising both her lower legs and left arm and buttock. Appellant was also stung on the nose by the bee.

[4] This was not a formal final decision on the recurrence claim and no appeal rights were given.

[5] A copy of that June 1, 1995 decision was not provided for the record.

Appellant received compensation for wage loss beginning September 14, 1996.[6]

Appellant was released to return to work on September 17, 1996 on light duty.

On October 29, 1996 the Office accepted that appellant sustained multiple contusions, lumbar strain, and an aggravation of an emotional condition.[7] Compensation for wage loss was authorized.

Dr. Allen J. Meril, a Board-certified orthopedic surgeon, opined that appellant was totally disabled from September 17, 1996 through November 5, 1996. However, following a functional capacity evaluation (FCE) on December 3, 1996, Dr. Meril indicated that appellant could work 4 hours per day with restrictions including sitting and walking for 2 hours, climbing and kneeling for 1 hour per day, no bending, squatting or twisting and no lifting over 20 pounds.

On November 14, 1996 the Office referred appellant to Dr. Charles D. Mitchell, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated December 8, 1996, Dr. Mitchell reviewed appellant's factual and medical history, including the reports of Drs. Shughrue, Meril and McCaskill, reported physical examination results, and opined that appellant's problems had probably not ever completely resolved as of March 13, 1995 and that she had nondisabling injury residuals at that time. He opined that the episodes on March 24 and March 29, 1995 were just periods of aggravation related to the initial injury underlying problem. Dr. Mitchell agreed with Dr. McCaskill's opinion about appellant's return to work. Dr. Mitchell detailed his examination results from appellant, noting that she had excellent flexion of the hip joints to 110 to 120 degrees and full extension, abduction and adduction of the hip joints, and full flexion of the knee and ankle joints without crepitation, and he diagnosed probably sacroiliac dysfunction. Dr. Mitchell opined that appellant should have gone back to her regular work in March 1995. He found that, based on his physical examination results, there was no reason appellant should not have gone back. Dr. Mitchell opined that as far as her April 30, 1994 injury was concerned, it has clearly resolved as of September 1996. He opined that the incident of September 14, 1996 constituted a new injury

By decision dated April 2, 1997, the Office modified the March 13, 1995 decision to the extent that medical benefits would continue as the weight of the medical evidence of record established that appellant had continuing residuals of her accepted employment injury. The Office accepted appellant's claim for payment of medical benefits only under claim No. 16-0241644.

By letter dated April 9, 1997, appellant requested reconsideration of the April 2, 1997 decision. Appellant claimed that Dr. McCaskill did not consider any impairment evaluation in his report, and she alleged that she was incapable of returning to her job. In response the Office advised appellant that the injury claimed on March 29, 1995 was considered to be a new injury.

[6] At this point appellant had four claims before the Office: No. 16-241644, date of injury (DOI) April 30, 1994, lumbosacral strain; No. 16-258245, DOI March 29, 1995, tailbone injury; No. 16-281410, DOI June 26, 1996, right leg condition; and No. 16-285431, DOI September 14, 1996, lumbar sprain.

[7] This case was assigned the No. 16-0285431.

By letter dated July 15, 1997, the Office explained that since the medical evidence of record supported that prior to her "new injury" of March 29, 1995 she was released to return to regular work and further established that therefore her residuals were not disabling, the disability she claimed subsequent to her return to work on March 15, 1995 must be attributed to a new injury.

On August 22, 1997 appellant underwent a consultation with Dr. Mahmood Akhavi, a Board-certified neurologist, for a possible seizure disorder. Dr. Akhavi reviewed appellant's factual and medical history, performed a mental status examination, and diagnosed intermittent tremor-like movements of the right upper extremity, rule out focal motor seizure and its causes, questionable dyskinesia, questionable drug reaction, generalized weakness-like quadriparesis, legs more than arms and status post fall with the back and leg injury and chronic pain.

By note dated August 28, 1997, Dr. Meril opined that appellant was having severe emotional distress.

On September 5, 1997 Dr. C.M. Schade, a Board-certified anesthesiologist and pain management specialist, reported appellant's progress during her in-patient therapy, noted that a large part of her problem with ongoing disability was psychosocial, diagnosed lumbar radicular syndrome with bilateral sciatica with secondary depression and recommended that appellant undergo an FCE and return to work in a sedentary position based upon FCE results.

Appellant received compensation for wage loss due to temporary total disability through September 12, 1997.

On October 24, 1997 the employing establishment offered appellant a modified job consistent with her medical restrictions. Physical requirements included intermittent walking, standing and sitting, no lifting over 12 pounds, driving a postal vehicle and using hands and arms.[8] Her assignment included casing mail, delivery within her medical restrictions, miscellaneous carrier duties, fueling vehicles, writing up second notices, sorting box section mail and any other duties within her medical restrictions.

By letter dated October 29, 1997, appellant requested reconsideration of the Office's April 2, 1997 decision terminating compensation for wage loss after March 13, 1995 until September 14, 1996.

Appellant accepted a modified job assignment on October 30, 1997 with the following notation: "With delivery of express mail only. Limitation of casing mail. Start at 4 hours times 2 weeks then progress to 6 hours then to 8 hours, carry/lift intermittent 10 pounds (nothing over). Limitation reaching above shoulder."

[8] Restrictions included no lifting from floor to waist, lifting waist to overhead 0 to 10 pounds frequently; 0 to 12 pounds occasionally; carrying up to 8 pounds frequently, 12 pounds occasionally; pushing up to 21 pounds frequently, up to 24 pounds occasionally; pulling up to 22 pounds frequently, up to 24 pounds occasionally; walking 1-hour intervals 4 hours per day; sitting supported 15 to 30-minute intervals 4 hours per day; sitting unsupported 15-minute intervals 2 hours per day; standing 10-minute intervals 2 hours per day; driving 1 hour per day, no hand restrictions; and limited squatting.

The employing establishment noted that appellant's acceptance was effective November 8, 1997, and that she returned to duty effective that date.

Appellant returned to work four hours per day and requested a special chair with extra support. She was to increase her work hours to six and then to eight as tolerated.

By Form CA-8 appellant claimed compensation for wage loss based upon her part-time schedule for the period November 16 through December 5, 1997.

By letter dated December 19, 1997, the employing establishment asked Dr. Meril what the expected recovery date for appellant was when she could return to full duty. It noted that, if appellant's medical impairment was permanent, a work restriction evaluation must be completed.

By report dated January 8, 1998, Dr. Meril noted appellant's diagnosis as "chronic pain and depression," noted that she would not return to full duty, and noted that her condition was permanent.

By decision dated January 22, 1998, the Office denied modification of the April 2, 1997 decision, finding that the evidence submitted in support was insufficient to warrant modification. The Office found that appellant had provided no new evidence which supported that appellant had a disabling medical condition, causally related to the April 30, 1994 injury. It noted that appellant was evaluated by two specialists who found no objective evidence to support a disabling medical condition or to suggest a permanent impairment after March 13, 1995.

Appellant underwent a functional capacity evaluation on January 26, 1998.

By decision dated March 3, 1998, the Office determined that appellant's reemployment position as a full-time modified city carrier, effective December 6, 1997, fairly and reasonably represented her wage-earning capacity, and it terminated her compensation entitlement in accordance with 5 U.S.C. § 8115. The Office found that appellant's actual wages working eight hours per day met or exceeded the wages of the job she held when injured. The Office noted that payment of medical expenses would not be affected by this decision.

By report dated March 10, 1998, Dr. Brett A. Gabriel, a podiatrist, noted that appellant was discharged from his care on December 30, 1997 as her right foot fracture was completely healed without residuals.

On March 11, 1998 appellant filed a claim for recurrence of disability commencing March 5, 1998, causally related to her September 14, 1996 employment injury, which caused work stoppage effective March 5, 1998 for four hours per day.[9] Appellant noted the original date of injury as September 14, 1996 and indicated that while working eight hours per day over a period of time she experienced increasing back, hip and leg pain, even with her ergonomic chair and foot stool.

[9] Dr. Meril indicated that appellant was seen on March 5, 1998 and could return to work on light duty for four hours per day starting that date.

On March 18, 1998 appellant requested reconsideration of the January 22, 1998 decision.

On March 23, 1998 the Office rehabilitation specialist noted that appellant had indicated that her hours had been reduced to four hours per day.

By letter dated March 24, 1998, the Office acknowledged receipt of appellant's claim for recurrence of disability for four hours per day, and it requested further information about the duty she was performing and why she ceased. The Office also advised that, once a wage-earning capacity had been determined, it would not be changed unless she could establish a material change in her condition.

In support of her recurrence claim, appellant submitted an April 10, 1998 report from Dr. Meril which stated that appellant's objective findings were from a September 1994 computerized axial tomography (CAT) scan and showed a partial right posterior paracentral annular tear with a lineal horizontal posterior annular fissure at L5-S1, that an EMG from April 18, 1995 demonstrated nerve root irritability in the right and left L5-S1 nerve root distribution without denervation compatible with facet irritation, degenerative disc disease or internal disc disruption, and that a lumbar MRI scan on March 23, 1998 showed one to two millimeter posterior disc bulges/protrusions at L1-2, L2-3, L3-4, L4-5 and L5-S1, slightly more focal centrally at the L5-S1 level. Dr. Meril opined: "Because of these findings and [appellant's] complaints of pain when working longer than four hours per day it is again recommended that [appellant] be returned to light duty four hours per day."

Appellant also submitted a Form CA-20 attending physician's report dated April 10, 1998 from Dr. Meril which noted findings as "chronic lumbar pain," diagnosed lumbar sprain/strain, lumbar radiculopathy, and depression associated with pain, and indicated that appellant was partially disabled for the period from October 27, 1997 until the present.

By report dated April 24, 1998, Dr. Shalev opined that appellant had tendinitis of the right quadriceps tendon and the adductor tendons, and was treated with local steroid injections.

By decision dated April 28, 1998, the Office denied review under section 8128(a) of the Federal Employees' Compensation Act of the January 22, 1998 decision finding that the evidence submitted in support was repetitious and was not sufficient to warrant reopening appellant's case for further review on its merits.[10]

On April 29, 1998 appellant filed a Form CA-7 claim for compensation for four hours per day for the period April 25 through May 22, 1998.

By decision dated June 25, 1998, the Office rejected appellant's March 11, 1998 recurrence claim finding that she had failed to establish a material change in her condition, or establish that the March 3, 1998 wage-earning capacity determination was in error. The Office found that Dr. Meril's report stating that appellant was not able to work longer than four hours per day due to pain was insufficient to establish a material change in her injury-related condition.

[10] Claim No. 16-0241644.

By letter dated July 29, 1998, appellant requested an oral hearing on the denial of her recurrence claim.

By decision dated September 17, 1998, the Branch of Hearings and Review noted that appellant was not entitled by right to an oral hearing as her request was not made within 30 days of the June 25, 1998 decision, and it denied her request finding that the matter could be equally well addressed by requesting reconsideration by the Office and by submitting new evidence or argument in support of her claim.

On December 1, 1998 appellant filed a claim alleging that on September 14, 1996 she became aware that she had developed severe depression, causally related to her lumbar pain syndrome.[11] Appellant claimed that this lumbar pain syndrome was causally related to her April 30, 1994 accident, but that she did not become aware of its relationship to her employment on September 14, 1996. She alleged that now she experienced employment-related lumbar syndrome, injury to her tailbone, pain in her hip, severe psychomotor retardation, severe depression with ruminations and obsessive thoughts, and she claimed that she hurt so badly trying to work.

In support appellant submitted a January 6, 1999 report from a clinical psychologist, Dr. Pladziewicz, which noted that appellant's records suggested a history of depressive symptoms related to her injury as early as August 23, 1994.

By letter dated January 7, 1999, appellant requested reconsideration of the January 22, 1998 decision.

On January 20, 1999 the Office doubled appellant's claims under No. 16-285431.

By letter dated February 23, 1999, the Office noted that appellant's work hours had been reduced from eight to four, and it requested that appellant provide supportive medical evidence addressing why she could no longer perform eight hours of duty.

By decision dated March 23, 1999, the Office denied modification of the January 22, 1998 decision, finding that the evidence submitted was insufficient to warrant modification. The Office found that Dr. Manju R. Goyal, a Board-certified psychiatrist, did not actually examine appellant, and that Dr. Pladziewicz's psychological report was equivocal and internally inconsistent. This was the most recent decision appealed to the Board.

In response dated April 10, 1999 Dr. Meril noted that appellant's disco CAT scan in September 1994 showed "at L5-S1 there is a partial right posterior paracentral annular tear and a linear horizontal posterior annular fissure demonstrated." Dr. Meril stated that the EMG of April 18, 1995 showed "nerve root irritability in the right and the left L5-S1 nerve root distribution without denervation compatible with facet irritation, degenerative disc disease or internal disc disruption." He further noted that the March 23, 1998 lumbar MRI demonstrated disc bulges at al levels, more focal at L5-S1. Dr. Meril opined that, because of these findings

[11] This claim was assigned No. 16-0344424.

and appellant's complaints of pain when working longer than four hours per day, it was recommended that she be returned to light duty four hours per day.

By report dated May 11, 1999, Dr. Shalev reported his findings on examination and opined that appellant continued to be disabled and unable to work at that time.

By report dated June 17, 1999, Dr. Shalev diagnosed "mild-to-moderate sacroiliac joint dysfunction, minimal tendinitis of the quadriceps tendon [and] residual depression and anxiety -- mildly improved." He indicated that appellant's current treatment should consist of psychiatric and psychological care.

By decision dated November 9, 1999, the Office denied appellant's request for further review of appellant's case on its merits, finding that a limited review of the evidence submitted in support revealed that it was repetitive and irrelevant on the issue of a March 1998 recurrence and therefore insufficient to warrant reopening the case for further review on its merits. As this decision was rendered after the Board had taken jurisdiction of the case, it is not now before the Board on this appeal.[12]

On November 16, 1999 the Office accepted that appellant sustained depression due to chronic lumbar pain, and authorized payment for appropriate medical expenses. Thereafter the Office combined this case with No. 16-0285431. This decision is also not before the Board on this appeal.[13]

The Board finds that appellant had no disability during the period March 13, 1995 to September 14, 1996, causally related to her April 30, 1994 lumbosacral strain employment injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[14] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[15]

In this case, the Office met its burden of proof to terminate appellant's compensation benefits for the period beginning on March 13, 1995.

As early as August 5, 1994 appellant's treating physician opined that appellant was only partially disabled, and was capable of returning to light duty on August 8, 1994 for four hours per day with restrictions. Appellant did return to part-time light duty on August 9, 1994 and her

[12] *See* 20 C.F.R. § 501.2(c).

[13] *Id.*

[14] *Harold S. McGough*, 36 ECAB 332 (1984).

[15] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

lumbar MRI showed no significant abnormalities. Further diagnostic testing revealed a normal thoracolumbar spine. EMG testing revealed no radiculopathy and normal nerve conduction, and a discogram revealed normal disc architecture. Therefore, objective testing failed to reveal any ongoing injury-related pathology. Neither Dr. Handal nor Dr. Dyll identified any work injury-related pathology, with Dr. Handal diagnosing an L5-S1 annular tear[16] and Dr. Dyll diagnosing fibromyalgia, both conditions which were not accepted as being work related. A November 11, 1994 work capacities evaluation indicated that appellant could work four hours per day with certain restrictions, and work hardening was recommended.

Dr. Shughrue, in her January 21, 1995 form report, diagnosed a compression fracture and back pain, but indicated that appellant could work six hours per day with restrictions. She opined that appellant continued with complaints of hip pain, which was not an accepted condition and she checked "yes" to questions on causal relation of appellant's back pain to the accepted employment incident, which allegedly prevented appellant from working a full eight-hour day. The Board notes that Dr. Shughrue supported her causal relationship opinion only by checking a box that appellant's condition was work related. However, the Board has held that such a report has little probative value where there is no explanation or rationale supporting the opinion on causal relationship between the diagnosed condition and the employment-related injury.[17] Therefore, this report has diminished probative value. However, Dr. Shughrue also provided a February 21, 1995 narrative report, in which she implicated a right hip injury in appellant's ongoing disability and a possible annular tear at L5-S1, neither of which conditions had been accepted by the Office as being injury related. Dr. Shughrue implicated gluteal and psoas muscle strain injuries in appellant's ongoing problems, which also had not been accepted by the Office as being injury related. As none of these conditions were accepted as being injury related, no continuing disability due to any of them would be compensable under the Act. Moreover, the Board notes that Dr. Shughrue opined that appellant could resume her normal duties within six to eight weeks, which does not support appellant's contentions on ongoing disability.

Dr. Handal also provided another report dated February 28, 1995 in which he diagnosed "lumbar syndrome" and speculated that appellant's "problem" was probably lumbar disc in origin. As noted above, no disc-related condition, beyond the mild compression fracture of L1, had been accepted as being employment related, and no explanation of how a lower back "sacrococcygeal-type pain" resulted from an upper L1 compression fracture was provided.

Therefore, no ongoing disability causally related to appellant's April 30, 1994 lumbosacral muscular soft tissue strain injury or her very mild upper plate compression fracture at L1 was identified or explained by Dr. Shughrue, Dr. Handal or Dr. Dyll.

Dr. McCaskill, however, with a complete and accurate factual and medical background, and after completing a thorough physical examination, determined that there were no abnormal diagnostic studies, no neurological abnormalities, no obvious symptomatology, no range of motion problems, no discomfort and no strength or reflex manifestations that could be causally

[16] The lumbar disc compression fracture was at L1, not even near the L5-S1 area.

[17] *See Lillian M. Jones*, 34 ECAB 379, 381 (1982).

related to the April 30, 1994 soft tissue muscular strain injury or L1 compression fracture, which were causing any disability on or after March 13, 1995. Dr. McCaskill diagnosed spondylogenic lumbosacral spine pain with its etiology undetermined, noted that appellant had reached maximum medical improvement, and opined that no further diagnostic evaluation or treatment was warranted. He opined that there was no objective basis on which to claim that appellant could not return to regular work full time.

As appellant's treating physicians had all indicated that appellant could return to work to some extent and have attributed any remaining partial disability to conditions not accepted by the Office as being employment related, they have not provided any rationalized medical opinion supporting that appellant has any remaining disability causally related to the April 30, 1994 soft tissue muscular strain injury or L1 mild compression fracture. Therefore, none of her physicians support injury-related ongoing disability after March 13, 1995.

However, Dr. McCaskill, in a detailed and well-rationalized report, based upon a complete factual and medical background, and predicated upon his negative physical examination findings and testing results, determined that appellant had no further disability after March 13, 1995, causally related to her accepted lumbosacral strain injury. As Dr. McCaskill's report is the only report of record with a proper foundation and is supported by examination findings and medical rationale, it constitutes the weight of medical opinion evidence on the issue of whether appellant had any continuing injury-related disability after March 13, 1995, and establishes that she had no such continuing disability. Therefore, the Office met its burden of proof to terminate appellant's compensation for partial disability.

Following the termination of appellant's compensation for partial disability on March 13, 1995, appellant continued to submit medical reports from Dr. Shughrue of the nature previously provided, and she alleged a recurrence of disability on March 24, 1995 and two new injuries occurring on March 29, 1995. Appellant stopped working her limited duty on March 24, 1995 but returned on March 27, 1995. The record does not seem to contain the Office's disposition of each of these claims but from references contained elsewhere in the present case record it becomes apparent that the recurrence claim was denied as were the two new injury claims. As neither/none of these claims were specifically appealed to the Board, and estimating the approximate date of their rendition, the Board would not have jurisdiction over these dispositions such that their omission from the case record does not now prejudice appellant's case before the Board.

In subsequent reports, Dr. Shughrue claimed that she released appellant to return to work full time based upon the fear that, if she did not, appellant would lose her employment altogether. Dr. Shughrue opined that appellant could, in reality, work six hours per day.

Also submitted were reports from Dr. Wisner, an orthopedic surgeon, who identified EMG irritability at the L5-S1 distribution that was compatible with facet irritation, degenerative disc or disc disruption. The Board notes, however, that no condition or injury involving the L5-S1 discs or the interspace has been accepted by the Office as having occurred, causally related to the April 30, 1994 soft tissue muscular strain injuries or to the mild L1 compression fracture. Therefore, Dr. Wisner's conclusions regarding the occurrence of a partial right posterior paracentral annular tear at L5-S1 with nerve endings growing in to a fissure are irrelevant to this

case. Further, Dr. Shughrue's concurrence with Dr. Wisner's opinions about appellant's radicular and low back pain is not relevant as his conclusions do not address how the condition hypothesized was causally related to the April 30, 1994 work injuries.

With her request for a reconsideration of the termination decision, appellant submitted some reports from Dr. Shalev which diagnosed multiple muscular conditions, including strain and tendinitis, which have not been related to the April 30, 1994 work incident or injuries, and an emotional condition not established as being consequentially related in any way. Dr. Shalev opined that more conditions occurred than were accepted by the Office as being causally related to the April 30, 1994 incident, but his reports lack sufficient rationale to meet appellant's burden of proof in expanding her claim to cover further muscle and tendon injury that what has already been accepted.

On May 28, 1996 the Office therefore, rejected appellant's request for modification of the August 28, 1995 decision which affirmed the March 13, 1995 termination of compensation.

On September 14, 1996 appellant sustained a new injury which was accepted for lumbar strain, multiple contusions and an aggravation of an emotional condition. She received compensation beginning September 14, 1996, and was released to return to light duty on September 17, 1996.

However, the Office authorized compensation for wage loss thereafter.

Dr. Meril opined that appellant was totally disabled from September 17 through November 5, 1996, and indicated that she could return to work for four hours per day following a December 3, 1996 FCE. Causation of appellant's partial disability, however, was not discussed.

The Office sought another second opinion examination with Dr. Mitchell, an orthopedist. Dr. Mitchell reviewed appellant's factual and medical history including all of the preceding medical reports of record; he opined, based upon his physical examination findings, diagnostic testing results and reasoned medical opinion, that appellant's April 30, 1994 injuries probably had not ever completely resolved as of March 13, 1995, but her residuals at that time were nondisabling. Dr. Mitchell opined that the episodes on March 24 and 29, 1996 were merely periods of aggravation related to the initial April 30, 1994 injuries. He opined that appellant should have returned to her regular duties in March 1995, and noted that the record contained to evidence that would contradict that opinion. Dr. Mitchell opined that the April 30, 1994 injuries had clearly resolved as of September 1996 and that the September 14, 1996 incident constituted a new injury.

The Office thereafter modified its March 13, 1995 decision to allow for payment of medical benefits until September 1996. Appellant continued to receive compensation for wage loss through September 12, 1997.

Thereafter Drs. Akhavi and Schade discussed appellant's ongoing neurologic and radicular problems and their possible emotional components but did not provide opinions on causal relation with either the April 30, 1994 accepted employment injuries or the September 14, 1996 injuries.

The employing establishment offered appellant a modified-duty position, which she eventually accepted, and returned to work in a sedentary position with an orthopedic chair. Appellant, however, continued to request modification of the March 13, 1995 termination decision, which the Office continued to deny, finding that appellant had presented no new evidence that she had a disabling medical condition, causally related to her April 30, 1994 employment injuries. After undergoing an FCE on January 26, 1998 appellant was returned as a full-time modified city carrier for eight hours per day. The Office then found on March 3, 1998 that appellant's position as a full time modified city carrier fairly and reasonably represented her wage-earning capacity, as her current wages exceeded the current wages in her date-of-injury job, such that there was no loss of wages.

On March 11, 1998 appellant filed another recurrence claim, this time claiming disability commencing March 5, 1998 for four hours per day, causally related to her September 14, 1996 injuries.

Appellant also again requested modification of the termination decision.

In support of her recurrence claim, appellant submitted report from Dr. Meril which noted the objective changes in her spine dating from 1994 and then concluding that because of these changes appellant should not work longer than four hours per day. The Office, however, declined to reopen appellant's case for further review on its merits finding that the evidence submitted was repetitious and was not sufficient to warrant reopening of the case.

By decision dated June 25, 1998, the Office rejected appellant's newest recurrence claim finding that she had failed to demonstrate a change in the nature or extent of her injury-related condition or in the nature or extend to her light-duty job requirements. The Office found that Dr. Meril's conclusory statement that appellant was not able to work more than four hours per day was not rationalized.

Consequently, on December 1, 1998 appellant filed another claim alleging that on September 14, 1996 she became aware that she had developed severe depression, causally related to her lumbar pain syndrome. Appellant claimed that the lumbar pain syndrome was directly related to her April 30, 1994 soft tissue muscular strain injuries or mild vertebral compression fracture at L1. Appellant proceeded to submit a variety of medical reports regarding her emotional condition, however, as the Board took jurisdiction of this case on June 21, 1999 the final disposition on the psychiatric claim is not now before the Board on this appeal.

The most recent decision before the Board on this appeal is the March 23, 1999 decision which denied modification of the termination decision on the grounds that the psychological evidence submitted was not probative regarding appellant's musculoskeletal conditions.

As the Office met its burden of proof to demonstrate through medical opinion evidence that appellant had no further disability for work during the period March 13, 1995 to September 14, 1996, causally related to her accepted April 30, 1994 employment-related conditions, and as appellant has not submitted any probative, rationalized medical evidence

sufficient to create any further conflict with the well-rationalized reports of record, the termination of compensation due to disability resolution was proper and will be upheld.

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 23, 1999 is hereby affirmed.

Dated, Washington, DC
September 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member