U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CASTELLA F. PICKNEY and U.S. POSTAL SERVICE,
POST OFFICE, Capitol Heights, MD

Docket No. 01-257; Submitted on the Record;
Issued April 9, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met her burden of proof to establish that the February 10, 1999 decision of the Office of Workers' Compensation Programs, which reduced her compensation based on her actual earnings as a modified distribution clerk, should be modified.

On September 20, 1982 appellant, then a 32-year-old clerk, injured her back and neck at work after becoming entangled with her chair, causing her to fall. She stopped work that day and was treated at the emergency room, where she was diagnosed with lumbosacral strain. On December 13, 1982 Dr. Gerald D. Schuster, appellant's attending physician, diagnosed acute cervical strain and acute mechanical lumbar strain with evidence of spondylitic defect at the pars bilaterally. The Office accepted appellant's claim for low back and cervical strains. On January 5, 1983 Dr. Schuster advised appellant that she would have permanent difficulty with her back due to her preexisting spondylitic defect at the L5 level bilaterally.

On December 2, 1985 appellant was hospitalized for severe low back pain with a tingling sensation in her right leg. X-rays were taken and appellant was treated with traction and released. A magnetic resonance imaging (MRI) study was obtained on January 24, 1986. The Office referred appellant to Dr. James C. Cobey, a Board-certified orthopedic surgeon, who evaluated appellant on May 20, 1986.

The Office also referred appellant to Dr. Kenneth Gaarder for a psychiatric evaluation. Dr. Gaarder reported his findings on June 25, 1986. The Office expanded its acceptance of appellant's claim for aggravation of depression.

On January 13, 1987 appellant returned to Dr. Schuster for evaluation, who recommended a rehabilitation program.

The Office determined that a conflict in medical opinion existed on the issue of continuing physical residuals of the accepted employment injury. To resolve the conflict, the

Office referred appellant to Dr. Louis Levitt, a Board-certified orthopedic surgeon, who reported his findings on March 19, 1987.

On December 29, 1989 the Office notified appellant that it proposed to terminate her compensation because the back conditions she sustained as a result of the September 20, 1982 employment incident no longer existed, based on the medical evidence of record.[1] In a decision dated February 16, 1990 and issued on February 20, 1990, the Office found that appellant was no longer disabled because of the accepted back injuries; she was disabled because of her preexisting condition. The Office terminated compensation for medical treatment of appellant's back condition.

On January 30, 1991 the Branch of Hearings and Review affirmed the Office's termination of compensation for appellant's low back and cervical conditions. The hearing representative found that appellant remained entitled to continuing compensation for the accepted aggravation of depression.

In a March 31, 1992 decision, the Board affirmed the hearing representative's January 30, 1991 decision.[2]

On April 22, 1998 Dr. Stephen E. Faust, an orthopedist, reported that appellant had ongoing back pain since her original injury on September 20, 1982. Dr. Faust felt that this injury was not simply a lumbar strain but an injury to the L4-5 disc and that appellant's current advanced degenerative disc disease at the L4-5 level with mechanical low back pain was a direct result of that original injury.

On June 10, 1998 Dr. Faust reported that appellant was capable of performing a light-duty occupation, such as duty to include driving but to avoid bending, lifting or twisting. He reported that it would be in the Office's best interest to find some such job category for her.

On October 31, 1998 as a result of vocational rehabilitation services, appellant returned to work for four hours a day as a modified distribution clerk. On January 19, 1999 appellant's vocational rehabilitation case file was closed, as she had secured and continued employment for over 60 days.

In a decision dated February 10, 1999, the Office determined that appellant had the wage-earning capacity of a modified distribution clerk based on her actual wages in that position. The Office found that the duties of her position reflected the work tolerance limitations established by the weight of the medical evidence. The Office also considered her training,

[1] When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[2] *See* Docket No. 91-1292 (issued March 31, 1992).

education and work experience in determining the suitability of the position. The Office reduced appellant's compensation to reflect her capacity to earn actual wages.[3]

Appellant disagreed with the Office's decision and requested for reconsideration. She noted that she had submitted detailed medical information from her doctors stating that she was no longer able to work because her physical and mental situations had deteriorated to the point that she filed for disability retirement.[4] "This is all due to the injury I received at work on September 9, 1982," she stated. Appellant also noted that when she was brought back to work the medical information used was almost two years old. She stated that no one had bothered to request updated medical information from her doctor before returning her to work and that her condition had steadily worsened.

In a report dated March 22, 1999, Dr. Nicholette M. Martin, an associate of Dr. Faust, related the following:

> "The patient has been under my care for some time for treatment of an injury that happened on September 20, 1982. The patient has been under my care for less than two years, but has gone to physical therapy, as well as a stretching and strengthening program with minimal to no improvement. She started water therapy, which has also not helped. The patient has a history of degenerative disc disease and a discogram did confirm that she has discopathic pain mechanisms emanating from the L4-5 intervertebral level. However, due to severe degenerative changes in this disc, she is not a candidate for, what is known as, the IDET procedure. She is a candidate for surgery, however, due to the patient's psychological state at this time, I would not recommend it. The patient has a history of depression and I do not feel that she is a good candidate for surgery at this time. She is currently under the care of a psychiatrist, Jyoti Behl, M.D., who has her on specific medications.
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> "According to the patient's job description, at this time, I do not feel that the patient is able to fulfill her requirements as a distribution clerk. Therefore, I am recommending that this patient receive 100 percent disability for severe and incapacitating low back pain and that she be allowed to continue with her psychiatric care."

On May 4, 1999 Dr. Jyoti Behl, appellant's attending psychiatrist since November 1990, related appellant's history of psychiatric illness. Dr. Behl noted that, on March 11, 1999, in view of worsening depression, inability to handle work-related stress and severe physical limitations

[3] An appeal to the Board must be mailed no later than one year from the date of the Office's final decision. 20 C.F.R. § 501.3(d) (time for filing); *see id*. § 501.10(d)(2) (computation of time). Because appellant mailed her October 30, 2000 appeal more than one year after the Office's February 10, 1999 decision, the Board has no jurisdiction to review that decision.

[4] Appellant stated that she stopped working on March 31, 1999.

due to chronic back pain, she recommended that appellant not go back to work. She diagnosed major depression, recurrent type, severe without psychotic symptoms. Dr. Behl reported:

> "Keeping in view of patient current condition and severe decompensation of her illness her inability to handle job stress my recommendation for her is to go on full term disability at present keeping in view of chronicity of her illness it seems to be full-term permanent disability."

On September 3, 1999 Dr. Faust reported that appellant had obvious, progressive radiologic evidence of progressive degenerative disc disease at L4-5, which had now reached severe proportions. He stated that on March 17, 1999 appellant underwent provocative discometry, which conclusively proved that her disabling low back pain was in fact originating from the damaged L4-5 disc. Dr. Faust reported that appellant was completely disabled and that this was the same injury for which she had been treated for 17 years. He noted: "She certainly is no less disabled than she has been for years."

On October 6, 1999 Dr. Behl reported that appellant's depressive symptoms remained worse secondary to chronic pain due to trauma she sustained at work in 1982. She also reported that recent stress of dealing with her workers' compensation case had caused a serious decompensation of her depression that resulted in her hospitalization. Dr. Behl stated that it was her opinion that appellant was permanently totally disabled.

On October 8, 1999 Dr. Faust noted that there was overwhelming medical evidence indicating that appellant had severe degenerative disc disease at L4-5 with discogenic low back pain originating at that level. He also noted that there was a clear record of coverage of appellant's treatment for a disc injury at that level in 1982.

On January 14, 2000 Dr. Faust reported that appellant's discogenic low back pain was the primary source of her incapacitation. He stated that, as time went on, the original injury led to a further deterioration of her disc with a subsequent increase in her symptoms. Appellant was experiencing increased symptoms, forcing a decline in her physical capacity in early 1999, due to her progressive L4-5 disc deterioration.

On January 24, 2000 Dr. Behl reported that appellant continued to remain depressed secondary to trauma she sustained at work in 1982. She noted that on December 1, 1998 appellant was happy about going back to work but that she became anxious at the end of the day: "She could not handle long confinement." On January 14, 1999 appellant was in severe back pain and was worried about having a car accident and nervous about driving in bad weather. Dr. Behl reported that the employing establishment did not follow her recommendation for a change in work schedule based on the weather or for flexible hours.[5] Appellant became severely depressed: "The stress of dealing with workers' comp[ensation] caused such severe decompensation of her illness that she had to be hospitalized at Montgomery General hospital from September 24 to 28 1999 with diagnosis of major depression with suicidal ideation."

[5] The employing establishment advised the Office that appellant's work hours were changed on her request because of a transportation problem that she was having.

On April 24, 2000 Dr. Faust reported that the term "strain" is understood to mean an injury to the soft tissues of a particular structure with respect to the lumbar spine. The structure injured, he stated, was almost always a disc:

> "At the time of [appellant's] original injury, diagnostic studies were insufficiently precise to specifically document that connection; however, [appellant] has had continued low back pain ever since the original injury. Serial x-rays and other studies have made it abundantly clear as time has gone on that the injured structure was the L4-5 disc. This has shown a progressive deterioration over this entire period, [appellant's] symptoms have been consistent and uninterrupted, but gradually worsening, in step with the objective deterioration of her L4-5 disc. I think that, if you will refer this matter to any unbiased orthopedic spine expert, that you will receive verification of this mechanism, and also verification of the concept that a traumatic injury can lead to degenerative disc disease. There is an unbroken chain of evidence which connects [appellant's] current status to the original injury of September 20, 1982."

In a decision dated August 3, 2000, the Office denied modification of its February 10, 1999 wage-earning capacity determination.

The Board finds that this case is not in posture for decision. Further development of the evidence is warranted.

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.[6]

Appellant has the burden to establish a material change in the nature and extent of her injury-related condition such that she was unable to continue working as a part-time modified distribution clerk. She has the burden to establish her degenerative disc disease at the L4-5 level is causally related to the accepted employment injury, and her accepted condition of depression has materially worsened.

The reports of Dr. Faust stated that appellant's September 20, 1982 injury was not simply a lumbar strain but an injury to the L4-5 disc and that appellant's current advanced degenerative disc disease at the L4-5 level with mechanical low back pain was a direct result of the employment injury. He conceded that at the time of appellant's original injury diagnostic studies were insufficiently precise to specifically document a connection. Nonetheless, appellant had exhibited low back pain since the original injury. Serial x-rays and other studies made clear that the injured structure was the L4-5 disc. And appellant's symptoms were consistent and uninterrupted, but gradually worsening, in step with the objective deterioration of her L4-5 disc.

[6] *Daniel J. Boesen*, 38 ECAB 556 (1987).

Dr. Faust's opinion is uncontradicted. Indeed, he and Drs. Martin and Behl all report that appellant is totally disabled for work. For this reason the Board finds that the evidence submitted by appellant is sufficiently supportive of her claim that further development of the evidence is warranted.[7] The Board will set aside the Office's August 3, 2000 decision and remand the case for further development and an appropriate final decision on whether the Office's February 10, 1999 wage-earning capacity determination should be modified.

The August 3, 2000 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.[8]

Dated, Washington, DC
April 9, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] *See John J. Carlone*, 41 ECAB 345, 358 (1989) (finding that the medical evidence was not sufficient to discharge the claimant's burden of proof but remanding the case for further development of the medical evidence given the uncontroverted inference of causal relationship raised).

[8] The record on appeal is lacking documents prior to 1996, such as appellant's initial claim form and the hearing representative's January 20, 1991 decision, to name only two. Most of the relevant history and procedure of the case can reliably be found in later documents; however, the Office should attempt to reconstruct the record to the extent it can reasonably do so and reassemble the record.