

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY L. ROCK and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Columbia, SC

*Docket No. 01-592; Submitted on the Record;
Issued January 24, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability on April 13, 1998 causally related to her 1995 employment injury.

On January 1, 1995 appellant, then a 40-year-old nursing assistant, sustained employment-related back and left shoulder sprains and intervertebral disease.¹ She began working light duty, which she continued until December 1995 when she returned to full duty. On October 30, 1996 appellant filed a recurrence claim, stating that her pain had increased since her return to full duty. On November 11, 1996 she accepted a temporary light-duty assignment as a clerk.

On January 7, 1998 the employing establishment informed appellant that she was to return to light duty on a medical ward. On April 2, 1998 the employing establishment informed appellant that the light-duty assignment would no longer be available after April 14, 1998. On April 10, 1998 appellant filed a claim for compensation, to begin April 30, 1998.

By letter dated May 7, 1998, the Office informed appellant that she needed to furnish a detailed medical report explaining why her current disability was caused by the 1995 employment injury. In a May 3, 1998 decision, the Office found that appellant had no disability after April 13, 1998 causally related to the 1995 employment injury. On October 6, 1998 appellant, through counsel, requested reconsideration and submitted additional medical evidence. In an April 26, 1999 decision, the Office denied modification of the prior decision. Appellant's counsel again requested reconsideration and submitted additional medical evidence. Following an Office request for information, on August 18, 2000 the employing establishment advised that appellant had been reinstated as a file clerk on December 19, 1999 and had resigned effective March 11, 2000. By decision dated September 20, 2000, the Office denied modification of the prior decision. The instant appeal follows.

¹ The record also indicates that appellant sustained an employment-related left shoulder strain on July 23, 1993.

Initially, the Board notes that on appeal, appellant's counsel is contending that the Office improperly solicited *ex parte* communication from the employing establishment. Counsel, however, does not indicate a specific incident other than to state that neither he nor appellant were copied or were privy to any communication that occurred. The Board, therefore, is unable to make a finding in regard to this matter.

The Board finds that this case is not in posture for decision regarding whether appellant established that she sustained a recurrence of disability.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable probative and substantial evidence a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.²

The relevant medical evidence includes³ a magnetic resonance imaging scan of the cervical spine dated March 21, 1995, which demonstrated cervical spondylosis with canal stenosis and cord effacement at the C5-6 level with a very mild degree of cervical spondylosis to the left of midline at the C6-7 level without cord compression, canal stenosis or significant neural foraminal stenosis. There was no evidence of soft disc herniation or other significant abnormality. Electromyography of the upper extremities on March 22, 1995 was normal. Computerized tomography scan of the cervical spine on April 11, 1995 revealed cervical spondylosis at C5-6 with ventral compression of the thecal sac but not the cord and mild changes at C6-7.

In a December 20, 1996 report, Dr. Victoria Samuels, appellant's treating Board-certified neurosurgeon, diagnosed cervical spondylosis at C5-6 with cervical radiculopathy and nerve root irritation. She checked the "yes" box, indicating that appellant's condition was employment related, stated that permanent effects were undetermined and extended light duty for six weeks.

In a report dated August 18, 1997, Dr. Joel R. Graziano, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office, noted the history of injury and appellant's complaints of pain. He diagnosed cervical pain of undetermined etiology, stating:

"[Appellant] at this time shows only some tenderness in the posterior right cervical area. This is more of a subjective than an objective finding but it is the

² *Mary A. Howard*, 45 ECAB 646 (1994); *Terry A. Hedman*, 38 ECAB 222 (1986).

³ Appellant also submitted numerous treatment notes dating from 1995 and 1996 and notes completed by a nurse practitioner. The former are not relevant to her condition in 1998. A medical report signed by a nurse does not constitute probative medical evidence as it is not the report of a "physician" as defined in section 8101(2) of the Federal Employees' Compensation Act; see *Diane Williams*, 47 ECAB 613 (1996). Finally, appellant submitted a number of unsigned treatment notes dated January 21 through April 9, 1998, which indicated that findings of cervical tenderness on examination. None of these notes included an opinion regarding the cause of appellant's condition or her ability to work.

only pathology demonstrated at this time. Otherwise there are no other objective findings other than the hyperactive reflexes ... which I do not feel ... are a consequence of the injury of January 31, 1995."

In an attached work capacity evaluation, Dr. Graziano advised that appellant could work 8 hours per day, provided restrictions on heavy pulling, lifting or reaching and stated that she could repetitively lift up to 15 pounds for several hours at a time. He concluded that with a proper exercise program, appellant could return to full duty.

A work capacity assessment completed March 26, 1998, advised that appellant demonstrated inconsistent effort on 5 of 13 tests with a subjective report of significant increased symptoms with testing, which would indicate the minimal physical capability. It was recommended that she continue to work in the light physical demand category.

Dr. Samuels provided an attending physician's report dated April 17, 1998, in which she reiterated her diagnosis and indicated that appellant was able to resume regular work on May 26, 1997. In an August 7, 1998 report, Dr. Samuels advised that appellant had been seen on June 30, 1998, at which time surgery was recommended. She stated that "any further work restrictions must be determined by [appellant's] regular family physician."

In an August 27, 1999 report, Dr. James McInnis, a general practitioner, noted stress x-ray findings of unstable motion segments at C3-4 and C4-5, adjacent to the spondylosis at C5-6. He stated that this was not the result of the January 1995 employment injury but then concluded that appellant had a 33 percent impairment of the spine as a result of the employment injury and that she was "restricted" from returning to work. By report dated October 27, 1999, Dr. McInnis advised that appellant's impairment involved damage to the ligaments in the cervical spine "with the resulting necessity for the neck and shoulder muscles to take over the work" which caused "intolerable" pain. He advised that she should lift nothing heavier than 20 pounds and could not push, pull or climb. Dr. McInnis concluded that she had a 33 percent impairment of the upper extremities due to injury in the cervical spine region.

In this case, on October 30, 1996 appellant filed a recurrence claim. The employing establishment then offered her a light-duty assignment on November 11, 1996, and appellant continued working this light duty until April 14, 1998 when it was no longer available.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁴

⁴ *Mary G. Allen*, 50 ECAB 103 (1998).

The medical evidence indicates that appellant's treating Board-certified neurosurgeon, Dr. Samuels, advised that she should continue in light-duty work during 1996 and 1997. In a report dated August 18, 1997, Dr. Joel R. Graziano, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office, provided restrictions to appellant's activity and indicated that she could not return to full duty at that time. In 1999 reports, Dr. McInnis, appellant's treating general practitioner, advised that she could not work.

Although the medical evidence of record indicates that appellant remained at least partially disabled for work, the employing establishment no longer made light work available to appellant after April 14, 1998.

While these reports are insufficient to discharge appellant's burden of establishing that her condition and disability on or after April 30, 1998 was causally related to the January 1, 1995 employment injury, the reports constitute sufficient evidence in support of appellant's claim to require further development of the record by the Office.⁵ It is well established that proceedings under the Act⁶ are not adversarial in nature,⁷ and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁸ Only in rare instances where the evidence indicates that no additional information could possibly overcome one or more defects in the claim is it proper for the Office to deny a case without further development.⁹ On remand the Office should compile a statement of accepted facts and refer appellant, together with the complete case record and questions to be answered, to a Board-certified specialist for a detailed opinion on the relationship of appellant's condition and the January 1, 1995 employment injury and any period of disability therefrom. After such development as the Office deems necessary, a *de novo* decision shall be issued.

⁵ See *John J. Carbone*, 41 ECAB 354 (1989).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ See, e.g., *Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

⁸ See *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.800.5c (April 1993).

The September 20, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
January 24, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member