U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY L. WAGNER and U.S. POSTAL SERVICE,
POST OFFICE, Mishawaka, IN

Docket No. 01-1380; Submitted on the Record;
Issued July 16, 20002

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant met his burden to establish that he sustained a recurrence of disability beginning December 10, 1999 causally related to his 1973 and 1976 employment injuries.

Appellant, a 60-year-old modified distribution clerk, slipped and fell on some icy stairs on February 28, 1973. He filed a claim for benefits on June 19, 1973, which the Office of Workers' Compensation Programs accepted for aggravation of preexisting back condition manifested by low back pain and left sciatic neuritis. Appellant sustained another injury on March 3, 1976, when he tripped while ascending a flight of stairs. He filed a claim for benefits on March 3, 1976, which the Office accepted for lumbar strain and aggravation of preexisting sciatica neuritis and herniated disc at L4-5. The Office subsequently expanded its acceptance to include the conditions of chronic pain syndrome and disc herniation at L4-5. Appellant missed work for intermittent periods and the Office paid appropriate compensation for periods of total disability.

Appellant returned to work at a modified distribution clerk position on April 26, 1999 for four hours a day, five days a week.

The Office referred appellant for a second opinion examination with Dr. Magdi Gabriel, a Board-certified orthopedic surgeon, who opined, in a September 20, 1999 report, that he was capable of working light duty, primarily sedentary, with occasional standing and walking, but no repetitive bending, twisting and stooping and no lifting over five pounds. In a work capacity evaluation dated September 20, 1999, Dr. Gabriel indicated that appellant could work for four hours a day provided he could take ten-minute breaks as needed, for two to three times a day.

In a report dated November 3, 1999, Dr. Gabriel stated that he thought it was a very good idea for appellant to try to work five hours a day for six weeks with the same work restrictions and that he expected he would do well. Dr. Gabriel advised that, if this worked out, appellant should increase his workday by one hour every six weeks in an attempt to reach eight hours a day.

Appellant worked four hours a day until his work hours were increased to five hours a day, five days a week on December 6, 1999.

On December 20, 1999 appellant filed a claim for recurrence of disability, claiming that he had sustained a recurrence of disability due to his 1973 and 1976 employment injuries on December 10, 1999.

Appellant submitted reports dated December 13 and 20, 1999, January 10 and February 28, 2000 from Dr. Thomas F. Mertins, Board-certified in family practice. In his December 13, 1999 report, Dr. Mertins stated:

> "[Appellant has] been back to work at [the employing establishment] for four hours [a day], [barely] getting through the week. [Dr. Gabriel] recommended recently that they try and increase him to one hour every six weeks to try to get him back up to working full time. [Appellant] started working five hours [a day] on December 6, 1999 and only lasted less than a week, when he had increasing back pain and difficulty even getting through the five hours [a] day.... I suggested at this point that we go back to four hours [a] day over the next month to find out whether or not he can get through working 20 hours [a] week. I do think with documented degenerative disease and the [rheumatoid arthritis] that it may be difficult to even maintain that and certainly increasing it at this point has exacerbated the [rheumatoid arthritis] and the back problem."

In his December 20, 1999 report, Dr. Mertins stated:

> "We [have] had [appellant] off work over the past week, the reason being, when he did go back to work [at the employing establishment] working five hours a day he had an exacerbation of his symptoms to the point that he had a great amount of back pain and difficulty moving.... [Appellant] has no neurological findings at this point but does have weakness in the lower extremities and persistent back pain. I do think in light of the herniated disc, underlying [rheumatoid arthritis] and chronic nature of this problem that at least another three weeks of rest would be warranted to see whether or not at that point it might be possible for him to resume work."

In his January 10, 2000 report, Dr. Mertins stated:

> "We [have] had [appellant] at rest since December 20, 1999, although, he [has] been off work since December 10, 1999 with this. The rest essentially has not helped and he still can only be on his feet about 10 [to] 15 minutes before he has back pain with radiation that is essentially unchanged in spite of the number of weeks of rest. It [i]s well documented on [the magnetic resonance imaging] MRI [scans] and x-rays, [that this is a chronic problem] and I do think in light of the fact that three weeks of essential rest has not made any difference that we need to consider total disability in light of the work up that's been extensively done in terms of MRI's [and] x-rays…. [This] problem is chronic and it [i]s not going to change and I do think at this point [appellant is] unable to work and total disability should be considered."

Finally, Dr. Mertins, in an opinion dated February 28, 2000, stated:

> "[Appellant] suffered an exacerbation of his symptoms after he began working five hours [a] day. Prior to [his] beginning to work five hours [a] day he was able to walk into my office and climb up onto my exam[ination] table for examination. After he began to work five hours [a] day after a number of weeks, he came into [my] office in a wheelchair, was unable to climb from the wheelchair up onto the exam[ination] table. [Appellant] was able to walk short distance around the house but getting from the parking lot of my office, into my office and into my exam[ination] room was virtually impossible because of the back pain. I would certainly say that [i]s an exacerbation of his symptoms since he began working five hours [a] day.
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> "[Appellant] was able to walk into my office, do the things he needed to do with regard to activities of daily living which became very limited after he began to work five hours [a] day. [His] worsening of injury was directly related to the five hours [a] day that he was working and cannot be related to anything else. [Appellant], as per [his] medical records ... has documented low back disc disease. He [has] had this for years. In my opinion, [appellant is] disabled."

By decision dated March 24, 2000, the Office denied appellant's claim for a recurrence of disability on December 10, 1999.

In a letter received by the Office May 10, 2000, appellant requested a review of the written record. In support of his request, he submitted an October 18, 2000 report from Dr. Jeffrey K. Kachmann, a specialist in neurosurgery, who stated findings on examination and opined that appellant was in need of a bilateral laminectomy.

By decision dated November 28, 2000, an Office hearing representative affirmed the March 24, 2000 decision denying appellant's claim for benefits based on a recurrence of disability.

The Board finds that the case is not in posture for decision.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he 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 show that he 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.[1]

In this case, appellant has submitted medical evidence, consisting of four reports from Dr. Mertins, which demonstrate both a change in the nature and extent of his injury-related condition and a change in the nature and extent of the light-duty job requirements. In his

[1] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

December 13, 1999 report, Dr. Mertins indicated that, although appellant was back working light duty for four hours a day, he was having difficulty performing his duties. He stated that after appellant increased his work shift to five hours a day on December 6, 1999, pursuant to Dr. Gabriel's recommendation, he began experiencing increasing back pain and was able to continue working for only one more week at that schedule. Dr. Mertins believed that this increase in appellant's work hours exacerbated both his well-documented degenerative disc disease and his rheumatoid arthritis. In his January 10, 2000 report, Dr. Mertins advised that in light of the fact that appellant's condition was unchanged since December 13, 1999, he was most likely totally disabled from working. Finally, in his February 28, 2000 report, he stated conclusively that appellant had experienced an exacerbation of his symptoms after he began working five hours a day. He noted that appellant's low back condition had progressed from where, prior to his working five hours a day, he was able to walk into his office and climb up onto the examination table without assistance, to where he now required the aid of a wheelchair and was unable to climb from the wheelchair up onto the examination table. Based on this scenario, Dr. Mertins opined that the worsening of appellant's work-related back condition was directly related to the five hours a day that he began working on December 6, 1999 and that he had become totally disabled as a result of this increase in work hours.

The Board finds that the evidence submitted by appellant, which contains a history of the development of the condition and a medical opinion that the condition found was consistent with the history of development, given the absence of any opposing medical evidence, is sufficient to require further development of the record.[2] Although the medical evidence submitted by appellant is not sufficient to meet his burden of proof, the medical evidence of record raises an uncontroverted inference of causal relationship between appellant's 1973 and 1976 employment injuries and his alleged December 10, 1999 recurrence of disability and is sufficient to require further development of the case record by the Office.

On remand, therefore, because the evidence in this case record has not been adequately developed, the Office must determine whether appellant met his burden of establishing that on December 10, 1999, the date he allegedly experienced a recurrence of his employment-related disability, a worsening had occurred in the nature and extent of his injury-related conditions, rendering him unable to perform the light-duty job and entitling him to continuing compensation for total disability. The Office should refer appellant to a Board-certified orthopedic specialist to submit a rationalized medical opinion on whether he sustained a recurrence of disability on December 10, 1999 due to the increase in his work hours and whether this recurrence was causally related to his 1973 and 1976 employment injuries. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

[2] *John J. Carlone*, 41 ECAB 354 (1989).

The decision of the Office of Workers' Compensation Programs dated November 28, 2000 is hereby set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
July 16, 20002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member