

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. BAKER and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Biloxi, MS

*Docket No. 02-806; Submitted on the Record;
Issued July 24, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained a recurrence of disability causally related to her work-related back injury.

Appellant's claim filed on July 15, 1992 was accepted by the Office of Workers' Compensation Programs for a lumbar strain after she slipped on a wet floor and fell.¹ Appellant began working half time in a light-duty nursing position in June 1993, based on a 10-pound lifting restriction and the opinion of Dr. Joseph L. Faison, a family practitioner. The Office accepted that this assignment resulted in bilateral carpal tunnel syndrome as of May 4, 1994. Appellant underwent surgery on her right hand on August 12, 1999, and was released to return to her half-time, light-duty position on February 10, 2000.

On March 29, 2000 the Office referred appellant for a functional capacity evaluation to assess the extent of her physical restrictions based on her accepted work injuries. On May 1, 2000 appellant asked the Office to schedule a second opinion examination for her right hand because she disagreed that the surgery had resolved her problem. She also described the two-day functional capacity evaluation as an "ordeal" with "verbal and physical abuse" that resulted in a visit to a hospital emergency room because of severe pain and elevated blood pressure.

On June 4, 2000 appellant claimed total disability from April 17, 2000 and ongoing. She submitted a June 12, 2000 report from Dr. Faison, who diagnosed an acute exacerbation of lumbosacral and cervical radiculopathy and acute hypertension, noting that appellant had completed her functional capacity evaluation and was seen in the emergency room the next day. On October 11, 2000 the Office suggested that appellant file a claim for a recurrence of disability, which she did on January 1, 2001.

¹ Appellant was involved in a car accident on September 4, 1992, hurting her neck.

On April 17, 2001 the Office denied appellant's claim on the grounds that, although the evidence showed that she had residuals of the 1992 back injury, it failed to establish a material worsening of her back condition that prevented her from performing the duties of her half-time nursing position.

Appellant requested a review of the written record. On November 6, 2001 the hearing representative denied appellant's claim on the grounds that the evidence failed to establish a worsening of her accepted back injury or a change in her light-duty requirements.

The Board finds that this case is not in posture for decision and must be remanded for further evidentiary development.

When an employee, who is disabled from the job he or she held when injured, returns to a light-duty position or the medical evidence establishes that the employee can perform the duties of such a position, the employee has the burden to establish by the weight of reliable, probative and substantial evidence, a recurrence of total disability.² As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the injury-related condition.³

However, proceedings under the Federal Employees' Compensation Act⁴ are not adversarial; while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁵ The Office has an obligation to see that justice is done.⁶

In this case, appellant completed the functional capacity evaluation on April 14, 2000 and went to the emergency room the next day because she could barely walk. Dr. Faison, her treating physician since 1992, diagnosed acute exacerbation of her cervical and lumbar radiculopathy resulting from the rigors of the functional capacity testing. In a report dated February 15, 2001, he stated that appellant's radiculopathy, muscle atrophy and bursitis were related to the 1992 injury and had worsened since the April 2000 testing.

Dr. Faison reviewed appellant's account of what physical exercises she was required to do, and concluded that appellant exceeded the recommended physical restrictions imposed by Dr. Victor T. Bazzone,⁷ a neurological surgeon, particularly the static pushing and pulling, the

² *Terry R. Hedman*, 38 ECAB 222 (1986).

³ *Glenn Robertson*, 48 ECAB 344, 352 (1997).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Mary A. Wright*, 48 ECAB 240, 242 (1996).

⁶ *Claudia A. Dixon*, 47 ECAB 168, 170 (1995).

⁷ Although Dr. Bazzone treated appellant for her bilateral carpal tunnel syndrome, he diagnosed significant cervical spondylosis at C4-5 and C5-6 as well as a small disc protrusion at L5-S1, which was "only intermittently symptomatic," based on a magnetic resonance imaging scan dated March 15, 1996. In returning appellant to work, he imposed a 10-pound lifting restriction and no bending, squatting, climbing, kneeling or twisting.

lifting limitation and the prohibition against squatting or kneeling. Dr. Faison added that appellant required multiple doses of analgesics, anti-inflammatory agents and muscle relaxants after the testing. Previously, she had been able to work four hours a day and delay her medication until after work. Dr. Faison opined that appellant was totally and permanently disabled to maintain gainful employment because of the severity of the pain related to the diagnosed conditions and the side effects of the medications she required daily.

The Board finds that Dr. Faison's report and other medical evidence demonstrated a worsening of appellant's back condition following the April 2000 functional testing.⁸ While not rationalized sufficiently to establish whether this worsening was causally related to the accepted lumbar strain and prevented appellant from performing the duties of her half-time position, this evidence requires the Office to develop the record further, particularly in the absence of any contravening evidence.⁹

Therefore, the Board will set aside the Office's denial of appellant's recurrence of disability claim and remand the case.¹⁰ On remand the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for a second opinion evaluation regarding appellant's work capacity based on both her accepted injuries. After such development of the case as the Office deems necessary, a *de novo* decision shall be issued.

⁸ The physical therapist administering the functional capacity testing stated that appellant's self-limited performance, poor effort and numerous inconsistencies made it impossible to make accurate recommendations regarding her true work capabilities and indicated symptom magnification behaviors.

⁹ *John J. Caralone*, 41 ECAB 354, 358 (1989).

¹⁰ See *Shirley A. Temple*, 48 ECAB 404, 409 (1997) (finding that medical reports insufficiently rationalized to meet appellant's burden of proof are sufficient to require the Office to develop the claim further, especially absent any contravening medical evidence).

The November 6 and April 17, 2001 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
July 24, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas, Alternate Member, dissenting:

Appellant herein was directed to undergo functional capacity evaluation by the Office of Workers' Compensation Programs. Appellant claimed total disability commencing April 17, 2000 due to the two-day functional capacity evaluation which she characterized as an ordeal with verbal and physical abuse. Appellant's notice of recurrence of disability was denied by the Office on April 17, 2001 and the hearing representative on November 6, 2001.

Appellant, who was only working four hours per day due to residuals of a previously accepted injury submitted medical reports by Dr. Joseph L. Faison, her treating physician, who reported that appellant completed the functional capacity evaluation on April 14, 2000 and had to go to the hospital emergency room the following day because she could barely walk. He diagnosed acute exacerbation of the cervical and lumbar radiculopathy resulting from the functional capacity evaluation. Dr. Faison reported in this February 15, 2001 report that appellant's radiculopathy, muscle atrophy and bursitis were related to appellant's 1992 injury but had been made worse by the functional capacity testing. He concluded that the physical exercises of the physical functional testing exceeded the recommended restrictions imposed by Dr. Bazzone, a neurological surgeon and that appellant required multiple doses of medications and muscle relaxants. Dr. Faison opined that appellant's current condition prevented her from maintaining gainful employment.

Because appellant was required by the Office to undergo this functional capacity evaluation and was rendered totally disabled by this evaluation, she has met the requirements for establishing a recurrence of total disability. I would reverse the decisions of the Office dated November 6 and April 17, 2001 and award benefits.

For the foregoing reasons, I must dissent.

Willie T.C. Thomas
Alternate Member