U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERRY GOLDSBY and DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, Oklahoma City, OK

Docket No. 01-916; Submitted on the Record;
Issued May 29, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that her chronic lumbar pain syndrome on and after April 22, 1998 was causally related to an accepted June 27, 1989 lumbosacral strain; (2) whether appellant has established that she sustained a recurrence of disability from April 22 to May 5, 1998; and (3) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a treadmill.

The Office accepted that on June 27, 1989 appellant, then a 25-year-old aircraft freight loader, sustained a left-sided lumbosacral strain while sweeping and painting a catwalk. Appellant had intermittent work absences, including periods of accepted recurrence of disability, through 1997.[1] Beginning in 1995, appellant worked eight hours per day and at times four hours per day, as a secretary at the employing establishment, with sedentary, clerical duties.

Dr. William N. Harsha, an attending Board-certified orthopedic surgeon, submitted periodic reports from June 27, 1989 through 1995. In a June 21, 1995 report, Dr. Harsha attributed a "flare up" of appellant's lumbar muscular pain to "using a computer all day." In a July 12, 1995 report, he noted recent signs of sciatica and "progressive" degenerative changes. In a September 28, 1995 report, Dr. Harsha explained that the 1989 injury caused a "change in her structure of her back such that she is more vulnerable to recurrent flare-ups of pain…." He attributed appellant's chronic lumbar pain to either discogenic or myofascial causes but could not identify the specific mechanics of causation. Dr. Harsha opined that appellant's current back condition was related to the June 27, 1989 accepted lumbar strain as her pain was in the same

[1] The Office initially denied by October 17, 1991 and December 4, 1992 decisions, then accepted by January 11, 1993 decision, a recurrence of disability from May 21 to October 30, 1991. The Office also accepted a recurrence of disability beginning August 6, 1997. By decision dated August 25, 1995, the Office denied appellant's claim for a recurrence of disability beginning June 15, 1995, which appellant attributed to sitting for prolonged periods at work. Appellant requested an oral hearing pursuant to this decision, which was denied by decision dated December 23, 1996. These decisions are not before the Board on the present appeal.

location, but that several subsequent "on-the-job incidents … further aggravated or accelerated her condition."[2]

In a June 26, 1996 emergency room report, Dr. Ann Campbell, an internist specializing in emergency medicine, noted appellant's complaints of back pain under the left scapula. Dr. Campbell diagnosed a "[m]uscular spasm" and prescribed medications. Appellant also sought emergency treatment for lumbar pain on August 30, 1996, but was not diagnosed with a specific condition.

Dr. Philip Palmer, an attending Board-certified orthopedic surgeon, submitted periodic reports from March through December 1997 diagnosing a chronic thoracolumbar pain syndrome and "persistent lumbar strain." On June 2, 1997 Dr. Palmer prescribed a "treadmill for daily walking program" to treat diagnosed low back pain, which had "worsened since losing access to regular treadmill." He administered lumbar nerve root injections on June 12, 1997, which did not relieve appellant's symptoms. Dr. Palmer released appellant from care on December 31, 1997, commenting that the physical therapy and other conservative treatment should have nearly resolved her symptoms and that he had "nothing further to offer her."

On November 12, 1997 appellant purchased a treadmill at a department store for $764.98. At the Office's request, she submitted three price quotes for similar treadmills ranging in price from $600.00 to $800.00.

Appellant sought emergency room treatment on February 17, April 14 and 22, 1998 and was given discharge instructions regarding "low back pain." The hospital forms do not contain a specific diagnosis.

On May 20, 1998 appellant filed a notice alleging that she sustained a recurrence of disability from April 22 to May 5, 1998, causally related to her accepted back condition.[3] She attributed her low back pain to "stress" regarding her compensation claim. Appellant also requested that the Office reimburse her for the treadmill.[4]

In a March 8, 1999 report, Dr. Palmer noted appellant's complaints of increased "recurrent lower back pain," as she had to discontinue her walking program several weeks before due to left knee pain. On examination, he found "significant tenderness to palpation through the

[2] Dr. Harsha reiterated this opinion in a September 4, 1996 report.

[3] In an August 20, 1998 letter, the Office advised appellant of the type of medical and factual evidence needed to establish her claim for the claimed recurrence of disability. In a December 10, 1998 letter, the Office noted its receipt of appellant's notice of recurrence of disability. The Office explained that a "recurrence of disability is defined as an inability to continue to perform [her] current duties (light duty four hours per day) due to a worsening in [her] work-related conditions. Needing to be off work for a few days due to an 'acute flare-up' does not constitute a recurrence of disability. A recurrence has not occurred because [appellant] returned to work within a few days and continue[d] to work as before." The Office therefore concluded that "no further action [would] be taken on [her] CA-2a form."

[4] In a March 18, 1998 letter, the Office advised appellant that further information from Dr. Palmer was necessary in order to authorize purchase of the treadmill.

lumbar spine and paraspinous musculature" with mild spasm, left more than right, and positive straight leg raising tests bilaterally. Dr. Palmer diagnosed "[p]ersistent chronic musculoligamentous low back pain" with "[n]ew findings of sciatica."

In an April 19, 1999 chart note, Dr. Palmer released appellant from treatment as a March 22, 1999 lumbar magnetic resonance imaging (MRI) scan was completely "normal." He recommended continuing physical rehabilitation, noting that appellant had attained maximum medical improvement.

The Office then referred appellant for a second opinion evaluation to Dr. Houshang Seradge, a Board-certified orthopedic surgeon. In an April 28, 1999 report, Dr. Seradge obtained a history of injury, reviewed the medical record and obtained lumbar x-rays which showed no abnormality. In a June 11, 1999 follow-up report, he noted that a June 8, 1999 functional capacity evaluation and low back assessment demonstrated a "sedentary" functional level, but indicated a submaximal, invalid performance.

In a July 26, 1999 report, Dr. Seradge stated that appellant showed no objective evidence of a lumbosacral strain and did not require a treadmill. He explained that nonoccupational chondromalacia of the left knee prevented appellant from resuming her date-of-injury position, which required frequent bending, stooping and lifting up to 75 pounds. However, Dr. Seradge limited lifting to five pounds due to appellant's "back condition … which is an accepted medical condition for her.… [Appellant] has a combination condition which is partially related to her accepted medical condition and partially related to the other medical condition that will prevent her from returning to work as a flight loader." In an accompanying work capacity evaluation, Dr. Seradge recommended full-time sedentary work, but provided a lifting limit of 72 pounds as opposed to the 5 pounds stated elsewhere in the report.

Appellant sought emergency room treatment for lumbar pain on July 28 and August 1, 1999, but was not diagnosed with a specific condition.

By notice dated August 12, 1999, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that her work-related condition and any related disability had ceased. Appellant was afforded 30 days in which to present evidence or argument as to why her benefits should not be terminated.

In an August 25 and 26, 1999 letters, appellant asserted that she was disabled for work, noting Dr. Seradge's July 26, 1999 opinion that her current condition was attributable in part to the July 1989 lumbar strain and was unable to return to her preinjury position.[5] She asserted that she sustained chondromalacia of the left patella from walking 20 to 30 minutes per day on concrete, because the Office had not provided her with a treadmill.

By decision dated September 20, 1999, the Office terminated appellant's compensation benefits effective that day and denied her claim for a recurrence of disability beginning April 22,

[5] Appellant noted that her secretarial position paid $14.75 per hour, but her current pay rate for her date-of-injury job as an aircraft freight loader would be $16.82 per hour.

1998, on the grounds that the accepted 1989 lumbosacral strain had ceased, based on Dr. Seradge's reports as the weight of the medical evidence. The Office found that appellant did not require a treadmill as she had no residuals of the accepted lumbar condition. The Office also found that appellant's left knee condition related to her current lumbar complaints and not the accepted lumbosacral strain which had resolved without residuals.

Appellant disagreed with this decision and in an October 18, 1999 letter requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held March 22, 2000. At the hearing, she again requested reimbursement for the treadmill. Appellant asserted that Dr. Seradge did not examine her and that his opinion was therefore deficient.[6]

By decision dated and finalized June 15, 2000, the Office hearing representative found that appellant had not established the claimed recurrence of disability as she submitted insufficient rationalized medical evidence explaining how her back pain was related to the accepted 1989 lumbosacral strain. The hearing representative also found that as Dr. Seradge did not provide findings on examination, his reports were insufficient to meet the Office's burden of proof in terminating appellant's compensation benefits. Therefore, the hearing representative directed that appellant be referred back to Dr. Seradge for a physical examination.

On August 3, 2000 the Office referred appellant, the record and a statement of accepted facts back to Dr. Seradge. In a September 18, 2000 report, Dr. Seradge found no objective signs of radiculopathy. He noted that appellant did not appear to be in pain during the interview, ambulated normally and was able to bend over to pick up her purse from the floor. Dr. Seradge found a negative tripod examination, submaximal effort on grip strength testing, and symptom magnification. He concluded that there was no objective sign that appellant's condition had worsened or that the accepted lumbosacral strain was in any way active or disabling. Dr. Seradge obtained lumbar x-rays which showed no change from previous studies. He stated that appellant was medically able to resume work as an aircraft freight loader. Regarding the treadmill, Dr. Seradge opined that appellant could obtain the same exercise benefit by walking on flat ground, noting that appellant's lumbosacral strain "certainly [did] not necessitate use of a treadmill."

By decision dated October 12, 2000, the Office denied appellant's claims for compensation for continuing disability, continuing medical treatment and her request for a treadmill, based on Dr. Seradge's September 18, 2000 report.

The Board finds that appellant has not established that her chronic lumbar pain syndrome on and after April 22, 1998 was causally related to the accepted June 27, 1989 lumbosacral strain.

In this case, the Office accepted that appellant sustained a left-sided lumbosacral strain on June 27, 1989. The Office also accepted recurrences of disability from May 21 to October 30, 1991 and August 6 to 14, 1997.

[6] Appellant's husband described appellant's dealings with the Office during the previous 10 years.

Appellant submitted periodic reports from several physicians from June 1989 onward, attributing her ongoing lumbar "pain syndrome" to a variety of nonoccupational causes. In January 21, 1995 and September 4, 1996 reports, Dr. William N. Harsha, an attending Board-certified orthopedic surgeon, attributed appellant's muscular low back pain to sitting for prolonged periods at a computer, newly emergent sciatica and degenerative changes. In a September 28, 1995 repot, Dr. Harsha stated that he could not diagnose appellant's lumbar complaints as either discogenic or myofascial. He opined both that appellant's condition was due to "several on-the-job incidents" following the original June 27, 1989 injury and a "change in the structure of her back" caused by the 1989 injury. The Office did not accept sciatica, degenerative disc disease or a structural change in appellant's lumbar spine or paraspinal musculature. Also, Dr. Harsha stated that prolonged sitting at a computer, as well as other intervening incidents since June 27, 1989, caused appellant's complaints.

Appellant then sought treatment from Dr. Palmer, an attending Board-certified orthopedic surgeon, who submitted reports from March to December 1997, diagnosing chronic thoracic and lumbar pain and spasm, and recommending a physical conditioning program including walking on a treadmill. He discharged appellant from treatment as of December 31, 1997 as her symptoms should have resolved with conservative care, but remained persistent. Dr. Palmer examined appellant again on March 8, 1999, noting "[n]ew findings of sciatica" and chondromalacia of the left knee. He did not provide medical rationale in any of his reports explaining how and why the accepted June 27, 1989 lumbar strain would cause or contribute to appellant's lumbar condition as late as March 1997.

Due to the deficiencies in the medical evidence, the Office obtained a second opinion from Dr. Seradge, a Board-certified orthopedic surgeon. In an April 28, 1999 report, Dr. Seradge commented that a March 22, 1999 lumbar MRI scan was normal, and recommended a functional capacity evaluation, performed on June 8, 1999. This testing demonstrated a sedentary level of functioning, but also that appellant gave submaximal effort and the test results were therefore invalid. Dr. Seradge stated on July 26, 1999 that appellant showed no objective evidence of a lumbosacral strain. In a September 18, 2000 report, he found a negative physical examination, submaximal effort on strength testing and symptoms magnification. Dr. Seradge opined that appellant showed no signs of an active lumbosacral strain or that her condition had worsened. He found appellant able to resume her date-of-injury job as an air freight loader.

The Board finds that Dr. Seradge's reports, based on the complete medical record, a statement of accepted facts and an appropriate physical examination, as sufficient to represent the weight of the medical evidence. Dr. Seradge found no objective abnormalities on review of the medical record, including a "normal" March 22, 1999 lumbar MRI scan, x-rays obtained on April 28, 1999 and August 3, 2000, or on physical examination on September 18, 2000. He attributed appellant's symptoms and any apparent loss of function, to submaximal effort on testing and symptom magnification. Dr. Seradge therefore found appellant able to assume her date-of-injury position as an air freight loader, involving lifting up to 75 pounds. As he did not find or diagnose any lumbar abnormality, the issue of causal relationship to the June 27, 1989 lumbar strain is moot.

The Board notes that the reports of Drs. Harsha and Palmer are insufficient to create a conflict with Dr. Seradge's opinion, due to a lack of medical rationale attributing the diagnosed pain syndromes to the accepted June 27, 1989 lumbar strain.

The Board finds that appellant has not established that she sustained a recurrence of disability from April 22 to May 5, 1998.

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.[7]

As applied to this case, appellant would have to have submitted rationalized medical evidence demonstrating a worsening of the accepted lumbar strain from April 22 to May 5, 1998, or that her sedentary, secretarial duties had changed. However, her physicians, Drs. Harsha and Palmer, did not attribute appellant's condition during that period to the accepted June 27, 1989 lumbosacral strain. Thus, appellant cannot establish a recurrence of disability.

Regarding the third issue, the Board further finds that the Office did not abuse its discretion by denying appellant's request for a treadmill.

Section 8103(a) of the Federal Employees' Compensation Act,[8] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.

The Board has held that the Office has broad discretionary authority to approve appropriate medical treatment.[9] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[10] Abuse of discretion is not established by a showing merely that the evidence could be construed so as to produce a contrary factual conclusion.[11]

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[7] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Stuart K. Stanton*, 40 ECAB 864 (1989); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[8] 5 U.S.C. § 8103(a).

[9] *Billy Ware Forbes*, 45 ECAB 157 (1993).

[10] *Rosa Lee Jones*, 36 ECAB 679 (1985).

[11] *Manny Korn*, 1 ECAB 78 (1947).

The Board notes that on June 2, 1997, Dr. Palmer recommended a treadmill and walking program as part of an ongoing physical rehabilitation program for appellant's chronic lumbar pain. The Office accepted a recurrence of disability from August 6 to 14, 1997, approximately eight weeks after Dr. Palmer's recommendation. Approximately six months after Dr. Palmer's recommendation, appellant purchased a treadmill on November 12, 1997 and requested that the Office reimburse her for the $764.98 purchase price. However, appellant has not established that her lumbar condition at the time of Dr. Palmer's June 2, 1997 prescription or at the time she purchased the treadmill in November 1997, was related to the accepted June 1989 lumbosacral strain. Thus, the equipment would not likely cure or give relief to the accepted conditions. Therefore, the Office did not abuse its discretion in denying payment for the treadmill.

The decisions of the Office of Workers' Compensation Programs dated October 12 and June 15, 2000 are hereby affirmed.

Dated, Washington, DC
May 29, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member