

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BURDELL J. ROBINSON and U.S. POSTAL SERVICE,
STATISTICAL PROGRAMS OFFICE, New Orleans, LA

*Docket No. 01-1709; Submitted on the Record;
Issued May 14, 2002*

DECISION and ORDER

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

The issue is whether appellant has established that she was disabled for work on and after March 30, 1999 due to residuals of her accepted L4-5 and L5-S1 herniated discs.

The Office of Workers' Compensation Programs accepted that on June 20, 1994 appellant, then a 40-year-old data collection technician, sustained L4-5 and L5-S1 disc herniations while performing a "parcel heavy test" requiring repeated heavy lifting of mail parcels and sacks. The Office also accepted an April 5, 1995 left knee injury and aggravation of the accepted back injuries, sustained when appellant slipped and fell on a wet floor.

By decision dated February 29, 1996, the Office denied appellant's request for a microsurgical disc excision, as requested by Dr. Kenneth E. Vogel, an attending Board-certified neurosurgeon. The Office found that the weight of the medical evidence rested with Dr. John McLachlan, a Board-certified orthopedic surgeon and second opinion physician, who opined that the proposed surgery would not relieve appellant's symptoms.

Appellant disagreed with this decision and in a March 7, 1996 letter requested an oral hearing before a representative of the Office's Branch of Hearings and Review, later modified to a review of the written record.

By decision dated and finalized August 22, 1996, an Office hearing representative set aside the Office's February 29, 1996 decision and remanded the case to the Office for appointment of an impartial medical examiner to resolve a conflict of opinion between Drs. Vogel and McLachlan, to be followed by a *de novo* decision.

By letter dated November 7, 1996, the Office approved appellant's request for a microsurgical disc excision. On December 11, 1996 appellant underwent bilateral microsurgical laminectomy at L5-S1, with bilateral medial branch neurotomy at L4-5 and L5-S1.

Appellant returned to limited duty as a modified statistical clerk on May 24, 1997, with duties of computer keyboarding, driving a postal vehicle, photocopying and clerical work. The position required lifting up to 30 pounds for no more than 2 hours per day, no bending, twisting or stooping.

By letter decision dated July 1, 1997, the Office reduced appellant's compensation based on her wages as a limited-duty clerk. By decision dated July 28, 1997, the Office found that the limited-duty clerk position fairly and reasonably represented appellant's wage-earning capacity.

Appellant worked in the light-duty clerk position through March 30, 1999, when she stopped work due to increasing lumbar symptoms.¹ Appellant sought treatment from Dr. Wanda Tipton, an attending internist, who ordered an April 16, 1999 lumbar magnetic resonance imaging (MRI) scan, which showed "protrusion and extrusion of the L4-5 disc, extending more to the left," nerve root impingement at L5, "effacement of the neural foraminal fat" at L5-S1 impinging on the S1 nerve roots bilaterally, "Grade II degenerative signal alteration of the adjacent vertebral end plates at L5-S1," with minor osteophytes. Dr. Tipton then referred appellant back to Dr. Vogel.

In reports from May 4 to October 8, 1999, Dr. Vogel found appellant to be disabled for work through August 2000 due to the herniated lumbar discs with radiculopathy into the lower extremities and degenerative disc disease. He noted objective findings of "muscle spasm, scoliosis and a diminished right Achilles reflex," a recurrent disc herniation visible on MRI scan, "as well as disc narrowing consistent with symptomatic lumbar degenerative disc disease." Dr. Vogel recommended a posterior lumbar interbody cage fusion.

By decision dated October 12, 1999, the Office denied appellant's claim for a recurrence of disability for the period August 21 to September 24, 1999 on the grounds that she submitted insufficient medical evidence to establish a causal relationship between the accepted injuries and the claimed period of disability. Appellant disagreed with this decision and in an October 19, 1999 letter requested reconsideration and submitted additional medical evidence.

By decision dated November 2, 1999, the Office denied modification on the grounds of insufficient medical evidence. In a November 11, 1999 letter, appellant requested an oral hearing before a representative of the Office's Branch of Hearings and Review.

In a November 3, 1999 report, Dr. Walter R. Abbott, a Board-certified neurosurgeon and second opinion physician, indicated that appellant could work eight hours per day. Dr. Abbott noted restrictions of lifting 10 pounds or less, no more than 2 hours walking or standing, limited pushing and pulling, with 15-minute breaks 3 to 4 times per day.

In a January 24, 2000 form report, Dr. Vogel released appellant for a trial return to work, for four hours per day limited duty, beginning January 14, 2000. He noted permanent restrictions of lifting no more than 35 pounds, "no repeated bending, twisting or stooping." Dr. Vogel stated that appellant required a posterior lumbar interbody fusion.

¹ Appellant used sick leave, then requested compensation in August 1999.

By decision dated February 2, 2000 and finalized February 7, 2000, the Office set aside the November 2, 1999 decision, and remanded the case to the Office to obtain additional medical information from Dr. Vogel regarding appellant's condition on and after March 30, 1999, and the need for additional lumbar surgery.

By decision dated March 29, 2000, the Office denied appellant's request for a posterior lumbar interbody cage fusion on the grounds that Dr. Abbott opined that the procedure was not necessary or effective.

In March 9, 2000 letters, the Office requested that Drs. Vogel and Abbott provide additional information regarding whether appellant was able to perform her light-duty position on and after March 30, 1999. The Office enclosed a copy of the original job description of appellant's duties from May 1997 to March 1999.

In a March 13, 2000 report, Dr. Vogel noted objective findings of lumbar degenerative disc disease, bilateral rotator cuff bursitis and chronic cervical strain.

In a March 17, 2000 letter, Dr. Vogel stated that he would defer to a vocational specialist as to what type of work appellant could perform and that appellant still required the lumbar fusion.

In a March 29, 2000 report, Dr. Abbott stated that there was "no reason ... [appellant] could not continue performing her duties as described from March 19, 1999 to the present."

By decision dated April 19, 2000, the Office denied appellant's claim for total disability compensation beginning March 30, 1999, based on Dr. Abbott's opinion.

In April 21, 2000 letters, appellant requested an oral hearing regarding the March 29 and April 19, 2000 decisions, held September 26, 2000. At the hearing, she asserted that she reinjured her back at work in March 1999 after lifting trays of mail, sacks and parcels as part of a new test. The test newly required appellant to perform additional lifting and added the requirement of lifting trays of mail, which weighed more than 30 pounds. Appellant asserted that prescribed pain medication made her drowsy, lightheaded and unable to work, and that she desired the additional lumbar surgery in order to relieve her symptoms so she could stop taking the medication.

By decision dated and finalized April 19, 2001, an Office hearing representative affirmed the April 19, 2000 decision, finding that appellant submitted insufficient evidence to establish a work-related disability on or after March 30, 1999.

The Board finds that appellant has not established that she was disabled for work on or after March 30, 1999 due to residuals of her L4-5 and L5-S1 disc herniations.

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 of the light-duty job requirements.

Appellant alleged at the September 26, 2000 hearing that her job requirements were modified in March 1999 to include a new lifting test and that these new duties caused the claimed recurrence of disability. However, she did not submit sufficient factual evidence to substantiate a change in her job requirements in March 1999, the precise tasks involved in the new lifting test or that she was medically unable to perform those new duties.

Also, appellant did not submit sufficient medical evidence to substantiate worsening of her lumbar condition or that she was disabled for work beginning on March 30, 1999.

Following the alleged March 30, 1999 recurrence of disability, appellant first sought treatment from Dr. Tipton, an attending internist, who ordered an April 16, 1999 lumbar MRI scan showing L4-5 and L5-S1 disc herniations with nerve root impingement, but did not state that appellant was disabled for work or that there was a worsening of the accepted herniated lumbar discs.

In reports from May 4 to October 8, 1999, Dr. Vogel, an attending Board-certified neurosurgeon, found appellant disabled for work through August 2000, due to the herniated lumbar discs with radiculopathy, degenerative disc disease and the need for further surgery. However, he revised his opinion regarding the August 2000 return to work date, as he released appellant to return to limited-duty work 4 hours per day as of January 14, 2000, with permanent restrictions of lifting no more than 35 pounds, “no repeated bending, twisting or stooping.” In a March 17, 2000 letter, Dr. Vogel declined to specify what tasks appellant was able to perform. The Board finds that Dr. Vogel’s opinion is equivocal regarding the critical issues of disability and work capacity, and is therefore of diminished probative value.²

The Board finds that the weight of the medical evidence in this case rests with Dr. Abbott, a Board-certified neurosurgeon and second opinion physician. In a November 3, 1999 report, Dr. Abbott indicated that appellant could work eight hours per day with restrictions. In a March 29, 2000 report, he stated that there was “no reason ... [appellant] could not continue performing her duties as described from March 19, 1999 to the present.” Dr. Abbott’s opinion is clear, decisive and based on a statement of accepted facts and the complete medical record. It is therefore entitled to probative weight.³

Appellant has not established that she was disabled for work on and after March 30, 1999 due to accepted L4-5 and L5-S1 disc herniations, as she submitted insufficient evidence substantiating either a change in her accepted conditions or in her assigned light-duty position.

The decision of the Office of Workers’ Compensation Programs dated April 19, 2001 is hereby affirmed, as modified.

² *Bonnie Goodman*, 50 ECAB 139 (1998).

³ *Thomas A. Faber*, 50 ECAB 566 (1999).

Dated, Washington, DC
May 14, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member