

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MADELINE M. FAIELLA and U.S. POSTAL SERVICE,
POST OFFICE, Staten Island, NY

*Docket No. 01-2152; Submitted on the Record;
Issued May 9, 2002*

DECISION and ORDER

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

The issue is whether appellant established that she sustained a recurrence of disability on or after March 20, 1996 causally related to her accepted work injury.

On January 23, 1995 appellant, then a 52-year-old mailhandler, injured her back in the performance of duty. At the time, she was working in a limited-duty assignment due to restrictions imposed by a nonwork-related condition. On September 20, 1995 the Office of Workers' Compensation Programs accepted the claim for a lumbosacral sprain. Appellant received continuation of pay from January 23 to February 17, 1995 and was returned to light duty. She worked light duty until September 24, 1995 when she filed for a recurrence of disability. The Office accepted the claim for recurrence of disability on November 2, 1995. Appellant received wage-loss compensation from September 24 until November 30, 1995, when she was again approved for light duty.

Appellant was under the care of Dr. Stanley Soren, a Board-certified orthopedic surgeon, for treatment of her low back pain. In a report dated April 18, 1995, he related that appellant bent over at work on January 9, 1995 and felt back pain, then on January 23, 1995 while pushing an empty skid, she again felt low back pain with numbness in the right leg. Dr. Soren reported that x-rays of the thoracic spine and right hip showed evidence of osteoporosis, Paget's disease, and degenerative disc disease. His initial impression was listed as lumbosacral sprain with herniated lumbar disc with right-sided exogenous obesity and hypothyroidism, for which he prescribed local heat, physical therapy, a corset, a cane and weight loss. Dr. Soren approved appellant for limited duty effective February 16, 1995 but opined that she should continue with physical therapy. He attributed appellant's back condition to both work incidents on January 9 and 23, 1995.

In an attending physician's report dated November 16, 1995, Dr. Soren diagnosed that appellant suffered from lumbosacral sprain with "HNP [herniated nucleus pulposus] and right radiculopathy" related to her January 23, 1995 work injury. He approved appellant for a return

to part-time light duty on November 20, 1995. Appellant was later approved by Dr. Soren for full-time light duty effective December 1, 1995.

On March 22, 1996 the employing establishment offered appellant a limited-duty assignment as a modified mailhandler. The duties were listed as follows: “[s]edentary duties with no lifting or bending, pulling or pushing. Sorting letters, hand-stamping, labeling. Can be further modified by treating physician.” Appellant signed the form indicating her acceptance of the position.

On March 25, 1996 appellant filed a claim alleging a recurrence of disability beginning March 20, 1996. She has not returned to work since March 20, 1996.

In an attending physicians’ report (Form CA-20) dated March 29, 1996, Dr. Leonard A. Langman, a Board-certified neurologist, advised that he first treated appellant on March 22, 1996 for lumbar radiculopathy related to a back injury on January 23, 1995 when appellant pushed an empty skid at work. He stated that appellant was totally disabled. Dr. Langman also signed the job offer form indicating that appellant could not perform the duties of a modified mailhandler.

By letter dated May 6, 1996, the Office requested that appellant submit additional information and medical evidence in support of her claim.

Appellant responded to an Office questionnaire, stating that on March 19, 1996 at 10:00 p.m. she was getting ready to go to work when she got “severe pains in her lower back and dead weight numbness in her left leg.” She further stated that she contacted Dr. Soren who told her to come in for an examination on March 21, 1996. Appellant indicated that she then called the employing establishment to inform her supervisor that she was going to be out sick with severe lower back pain.

In a May 20, 1996 report, Dr. Langman noted that appellant had fallen down stairs and injured her back 10 years ago. He also noted that most recently, appellant related that she injured her back at work on January 23, 1995 while pushing a skid. Dr. Langman reported physical findings including a spasm in the lumbar spine, decreased range of motion, along with weakness of dorsiflexion in the great toe on the right side. He diagnosed lumbar radiculopathy at L4-5 “directly related to injuries sustained while working on January 23, 1995.” Dr. Langman concluded that appellant was totally disabled and requested a magnetic resonance imaging scan.

In a May 26, 1996 report, Dr. Soren stated “[appellant] was most recently seen in the office on March 21, 1996 at which time it was felt that from the [o]rthopedic standpoint, no further treatment was warranted and she should go under the care of a [n]eurosurgeon.”¹

In an attending physician’s report dated May 31, 1996, Dr. Langman noted appellant’s history of injury and diagnosed lumbar radiculopathy. He check-marked the box on the CA-20 form indicating that appellant’s condition was caused or aggravated by an employment activity. He further noted that appellant was disabled from work for an undetermined period.

¹ In a report dated March 21, 1996, Dr. Soren noted only that appellant could return to work on April 1, 1996.

By letter dated June 14, 1996, the Office referred appellant to Dr. Daniel Feuer, a Board-certified neurologist, for a second opinion evaluation. In a June 25, 1996 report, Dr. Feuer noted appellant's history of multiple work-related back injuries and her complaints of back pain with right leg numbness. He reported that electrodiagnostic studies of the lower extremities dated October 9, 1995 were normal. Dr. Feuer indicated that there were no neurological findings to support appellant's subjective complaints and opined that appellant had reached maximum medical improvement. According to him, appellant was capable of resuming full active employment. Dr. Feuer concluded that appellant's lumbosacral strain related to the January 23, 1995 work injury had completely resolved.

On June 21, 1996 the employing establishment reissued the job offer. Although appellant signed the job offer form, indicating that she accepted the position, Dr. Langman signed the job offer form, reporting that she was unable to perform the duties associated with the position.

The Office issued a notice of proposed termination of compensation on July 29, 1996. In a memorandum attached to the notice dated July 18, 1996, the Office credited Dr. Feuer's opinion over Dr. Langman's as to whether appellant had continuing disability or residuals related to her work injury.

In a decision dated September 3, 1996, the Office denied appellant's claim for compensation on the grounds that the evidence of record was insufficient to establish that her claimed recurrence of disability on or after March 20, 1996 was causally related to the January 23, 1995 work injury or that claimant had any continuing disability causally related to the January 23, 1995 work injury.

On August 25, 1997 appellant, by counsel, filed a request for reconsideration.

In support of her reconsideration request, appellant submitted new medical evidence including a report from Dr. Langman dated a July 7, 1997. Dr. Langman reported that an EMG/NEV study performed on March 22, 1995 revealed lumbar radiculopathy at L4-5. He opined that appellant's recurrence of disability on March 20, 1996 was causally related to the work injury of January 23, 1995. Dr. Langman concluded that appellant could "no longer perform the duties she was performing when she stopped work because to continue in such a capacity could result in cord impingement and potential paraplegia."

Appellant also submitted reports from Dr. Soren dated February 3 and August 15, 1997. Dr. Soren reported that he treated appellant from January 23, 1995 when she injured her back at work while pushing an empty skid. He noted that appellant had injured her back some 10 years ago when she fell down some stairs. Dr. Soren indicated that appellant had preexisting degenerative disc disease and osteoporosis. He diagnosed a lumbosacral strain with a herniated disc and right-sided radiculopathy which he attributed to appellant's work injury. Dr. Soren also suggested that appellant's back condition was complicated by obesity. He indicated that he treated appellant on a monthly basis for continuing back complaints, during which time he prescribed physical therapy, a corset, cane and a transcutaneous electrical nerve stimulator unit. Dr. Soren stated that he last treated appellant on March 21, 1996 for back pain at which time he felt there was no longer anything he could do for her from an orthopedic standpoint. He related that he approved appellant for a return to work on April 1, 1996 in a light-duty position with

restrictions and also recommended that appellant see a neurosurgeon for her continued care. Dr. Soren indicated that appellant was partially disabled due to a combination of factors including the January 23, 1995 work injury, obesity and a preexisting degenerative back condition.

In a decision dated February 6, 1998, the Office denied modification following a merit review.

Appellant subsequently filed an appeal with the Board and by decision dated February 3, 2000 the case was vacated and remanded for further consideration.² The Board specifically found that a conflict existed in the medical record between Drs. Feurer and Langman as to whether or not appellant sustained a recurrence of disability causally related to her January 23, 1995 work injury. The Board directed the Office to obtain an evaluation opinion by an impartial medical specialist to resolve the conflict.

On remand the Office referred appellant along with a statement of accepted facts and a copy of the medical record to Dr. C.M. Sharma, a Board-certified physician of psychiatry and neurology, for an examination scheduled for May 11, 2000.

In a report dated May 11, 2000, Dr. Sharma discussed appellant's work and medical histories. He noted appellant's symptoms, complaints and reported physical finding. The diagnosis was listed as moderate weakness of both legs due to polyneuropathy and scoliosis of the spine. Dr. Sharma indicated that there was a moderate partial degree of neurological disability. He stated, "[o]n examination, there are neurological problems involving both legs with weakness in both legs. These problems are related to a metabolic polyneuropathy. In my opinion, [appellant] has a moderate partial degree of neurological disability. In my opinion, she is able to continue working on a light[-]duty level of capability. [Appellant] will require ongoing medical and neurological care for management of these problems."

On June 16, 2000 the Office requested that Dr. Sharma clarify whether or not appellant sustained a recurrence of disability on or after March 20, 1996.

In a letter dated June 30, 2000, Dr. Sharma stated:

"This is an addendum to my report of [appellant] dated May 11, 2000. Based on my examination and the available information, I found no total disability only a moderate partial degree of neurological disability. According to the information [appellant] returned to light[-]duty work. Her problems are related to a metabolic polyneuropathy."

In a decision dated July 7, 2000, the Office denied appellant's claim on the grounds that the opinion of the impartial medical specialist established that appellant did not sustain a recurrence of disability causally related to her accepted work injury of January 23, 1995.

² *Madeline M. Faiella*, Docket No. 98-1110 (February 3, 2000).

On March 30, 2001 appellant by counsel filed a 26-page request for reconsideration with attached exhibits A, B and C.

Most of the evidence submitted by appellant on reconsideration was duplicative of evidence already of record, except for a March 2, 2001 report by Dr. Langman who noted physical findings with respect to an examination of appellant of March 1, 2001. Dr. Langman reviewed the letter of Dr. Sharma dated June 30, 2000 and stated that Dr. Sharma's findings were false and unsupported by appellant's medical history. He opined that appellant had no metabolic problems and was not diabetic as confirmed by her family physician. Dr. Langman concluded that appellant sustained a recurrence of disability and was unable to work due to the April 21, 1999 employment injury.

In a June 22, 2001 decision, the Office denied modification of its prior decision.

The Board finds that the case is not in posture for a decision since the opinion of the impartial medical specialist was not responsive to the issue presented to him which was whether or not appellant sustained a recurrence of disability.

Although the Office complied with the Board's directive to obtain an impartial medical report, Dr. Sharma's opinion has no probative value in determining whether or not appellant sustained a recurrence of disability on or after March 20, 1996 causally related to her work injury. Dr. Sharma notes that appellant was not disabled at the time of his examination, but that was May 11, 2000. He does not address whether appellant had any disability between March 20, 1996 and May 11, 2000. Attempts by the Office to obtain clarification of this issue have also failed to produce a response from the physician.

Where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical opinion evidence and the opinion requires further clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for purpose of correcting the defect in the original report. However, when the impartial specialist's statement of clarification or elaboration is not forthcoming or if the physician is not able to clarify or elaborate on the original report, or if the specialist's supplemental report is speculative or lacks rationale, the Office must refer the claimant to another impartial medical specialist to resolve the issue in question.³

Due to the limitations of Dr. Sharma's report and clarification, the Board finds that his opinion is not sufficient to resolve the conflict in the medical record. As the conflict in the medical record has not been resolved, the case must be remanded for referral of appellant to another impartial medical specialist to resolve the conflict in the medical record as to whether appellant sustained a recurrence of disability.

³ *Harry T. Mosier*, 49 ECAB 688 (1988); *Terrance R. Stath*, 45 ECAB 412 (1994).

The decision of the Office of Workers' Compensation Programs dated June 22, 2001 is hereby set aside and the case is remanded for further development consistent with this decision of the Board.

Dated, Washington, DC
May 9, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member