

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BARBARA J. REINERT and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Topeka, KS

*Docket No. 01-1251; Submitted on the Record;  
Issued October 9, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,  
MICHAEL E. GROOM

The issue is whether appellant established that she sustained a recurrence of disability for intermittent periods between January 24 to June 9, 1997 and October 29, 1997 to April 30, 1998 causally related to her September 10, 1994 employment injuries.

The Board has duly reviewed the case record in the present appeal and finds that this case is not in posture for decision.

On September 12, 1994 appellant, then a 51-year-old medical technologist, filed a claim for traumatic injury, Form CA-1, alleging that on September 10, 1994 she sustained multiple injuries when a 408-pound body fell on her while she was assisting in transferring it from the morgue. The Office of Workers' Compensation Programs accepted appellant's claim for herniated nucleus pulposus at C6-7 with anterior cervical discectomy C6-7 with disc removal on June 14, 1995 and herniated nucleus pulposus with L4-5 hemilaminectomy and foraminotomy on August 30, 1995.

On October 2, 1995 appellant was released to light-duty work in the laboratory, three days a week for two weeks and then full time. On December 10, 1995 she was reassigned to the chemistry department to further accommodate her condition. On January 28, 1997 appellant's treating physician, Dr. Raymond D. Magee, a Board-certified family practitioner, restricted appellant to four hours work per day due to her complaints of increasing back pain and indicated that this work restriction was to be long term. On February 10, 1997 she was transferred to the hematology department in order to accommodate her changing physical restrictions, but on February 18, 1997 she was taken off work completely by Dr. Magee due to chronic back pain. On March 7, 1997 appellant was released to light-duty work, eight hours a day, three days a week and on March 21, 1997, she was released to light work four hours a day, five days a week. However, she did not return to work with the employing establishment,<sup>1</sup> but did work for 11.5

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<sup>1</sup> Appellant never returned to the employing establishment and was removed from the employing establishment's rolls effective November 25, 1997.

hours at a private hospital on April 7, 1997. On April 12, 1997 at the request of Dr. Sharon McKinney, appellant's treating osteopath and Board-certified physiatrist, appellant was granted leave until June 30, 1997.

On June 10, 1997 appellant was examined by Dr. Richard E. Whitehead, a Board-certified orthopedic surgeon and Office second opinion physician. In his report, Dr. Whitehead reviewed the medical evidence of record as well as the results of a June 5, 1997 lumbar magnetic resonance imaging (MRI) scan. He noted that appellant had several positive Waddell's signs indicating symptom magnification and overreaction, stating:

"There is evidence that [appellant] work[-]related low back injury is still active. The objective findings are those of the MRI [scan] at this time showing a herniated intervertebral disc at L4-5 on the right. This may well be an instance where disc material regenerated following the previous operative treatment of removing herniated disc material. Objective findings are very difficult to point to as far as physical examination because of [appellant's] inability to cooperate with muscle testing because of the sensory examination not proving to be physiologic and because of straight leg raising varying greatly from the lying to the sitting position. However, the MRI [scan] is very definite and very clear."

With respect to appellant's accepted cervical condition, Dr. Whitehead stated that by physical examination, there was no objective evidence of continuing aggravation, but that appellant needed an MRI scan or computer tomography (CT) in order to make any firm conclusions regarding her cervical condition. On an accompanying work-capacity evaluation form, Dr. Whitehead stated that, from his objective physical findings, he thought appellant would be able to work in a sedentary job for four hours a day, with restrictions on standing, pushing, pulling, reaching and bending.

On October 28, 1997 appellant went back to work as an on-call medical technologist with Providence Medford Medical Center, a private hospital for which she had worked in the past. She worked approximately 80 hours per pay period through December 20, 1997, but then began to taper off, working between 22 and 65 hours a pay period, until she stopped work altogether on February 28, 1998.<sup>2</sup>

On January 28, 1998 appellant underwent a repeat lumbar MRI scan which confirmed the presence of a "recurrent disc prolapse" at L4-5. In a report dated February 24, 1998, Dr. Antonio D. Zelaya recommended that appellant undergo repeat surgery for her recurrent L4-5 herniated disc. On April 21, 1998 an Office medical adviser approved the surgery and on May 1, 1998, appellant underwent an L4-5 laminectomy and foraminotomy with removal of the L4-5 disc.

In a decision dated March 29, 2000, the Office denied appellant's recurrence claim for the period January 24, 1997 through April 30, 1998. Following an oral hearing, held at appellant's request, in a decision dated December 8, 2000, an Office hearing representative

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<sup>2</sup> Appellant performed on-call work for Providence for nine consecutive pay periods, working 71.5, 82, 80, 80.5, 65, 22, 65, 37.5 and 29.5 hours respectively.

affirmed the Office's decision with respect to the periods January 24 to June 9, 1997 and October 29, 1997 through April 30, 1998. The Office hearing representative found, however, that, based on the opinion of the Office second opinion physician, Dr. Whitehead, appellant was entitled to four hours of compensation per day from June 10, 1997, the date of his opinion, until October 28, 1997 when she returned to work full time at Providence Medford Medical Center.

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.<sup>3</sup> This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>4</sup> Causal relationship is a medical issue<sup>5</sup> and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence, which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>6</sup>

In the present case, appellant does not allege a specific change in the nature and extent of the light-duty job requirements. The record shows that, in an attempt to accommodate her restrictions, appellant performed several different light-duty jobs for both the employing establishment and private hospitals between her return to work on January 24, 1997 and stopping work on February 28, 1998. Therefore, the record does not establish that the claimed recurrent intermittent periods of total and partial disability were caused by a change in the nature or extent of the light-duty job requirements.

The evidence relevant to the issue of whether appellant suffered a worsening of her accepted injury-related conditions such that she could no longer perform her light-duty work between January 24 to June 9, 1997 and October 29, 1997 to February 28, 1998 consists of treatment notes and work release slips from her primary treating physicians, Dr. McKinney and Dr. Magee, in which the physicians document appellant's increasing complaints of pain and attempt to adjust her work restrictions accordingly. In addition, the record contains numerous

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<sup>3</sup> *Fallon Bush*, 48 ECAB 594 (1997); *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>4</sup> *Frances B. Evans*, 32 ECAB 60 (1980).

<sup>5</sup> *Mary J. Briggs*, 37 ECAB 578 (1986).

<sup>6</sup> *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

other medical reports from physicians whom appellant consulted regarding her pain complaints, including Drs. James E. Dunn, Douglas B. Kirkpatrick, Antonio D. Zelaya, Jennie Jet, Jeremy Goodwin and David B. Hagie, which do not address appellant's ability to work during the relevant period.

The record also contains a June 10, 1997 report by Dr. Whitehead, a Board-certified orthopedic surgeon who performed a second opinion examination at the request of the Office. Dr. Whitehead specifically found that appellant's employment-related back injury was still active, noting that an MRI scan performed at his request on June 5, 1997 revealed that appellant's employment-related herniated L4-5 disc, which had been ostensibly removed on August 30, 1995, had regenerated and was again herniated. Dr. Whitehead concluded that due to this employment-related back condition, appellant could perform only sedentary work, four hours a day. The Office accepted, based on Dr. Whitehead's report, that appellant was entitled to four hours of compensation for disability commencing June 10 through October 28, 1997 when she returned to work. The Board notes that Dr. Whitehead did not address, and the Office did not ask, when appellant's partial disability began or when he expected it to end. While appellant did return to full-time work on October 28, 1997 the record reflects she worked full time for a short while before reducing her hours and again stopping completely on February 28, 1998. In addition, appellant underwent surgery to repair her recurrent L4-5 herniated disc on May 1, 1998.

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature, nor is the Office a disinterested arbiter. While a claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>7</sup>

The medical reports of Dr. McKinney and Magee recommended that appellant reduce her hours or stop work between January 24 to June 9, 1997 and October 29, 1997 to April 30, 1998. The Board finds that Dr. McKinney's and Dr. Magee's medical reports, taken together with Dr. Whitehead's second opinion and the June 5, 1997 MRI scan evidence of a recurrent herniated L4-5 disc, raise an inference of causal relationship between appellant's periods of disability and her accepted employment injuries and are sufficient to require further development of the case record by the Office.<sup>8</sup> Additionally, the Board notes that the record contains no medical opinion contrary to appellant's claim.

On remand, the Office should further develop the medical evidence by referring appellant and a complete statement of accepted facts to an appropriate Board-certified specialist for a rationalized medical opinion on the periods she was disabled and whether appellant's current medical condition is causally related, either directly or by way of aggravation, acceleration or precipitation, to her 1994 accepted back and neck conditions.

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<sup>7</sup> *William J. Cantrell*, 34 ECAB 1223 (1983).

<sup>8</sup> *See John J. Carlone*, 41 ECAB 354 (1989).

The decision of the Office of Workers' Compensation Programs dated December 8, 2000 is affirmed, in part, to compensation paid for the period June 10 to October 27, 1997 and set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC  
October 9, 2002

Michael J. Walsh  
Chairman

Alec J. Koromilas  
Member

Michael E. Groom  
Alternate Member