U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERTA A. GIORDANO and U.S. POSTAL SERVICE,
NEW CANAAN POST OFFICE, New Canaan, CT

Docket No. 01-1450; Submitted on the Record;
Issued October 28, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained a recurrence of disability on and after June 12, 1995 due to sequelae of an accepted herniated L5-S1 lumbar disc, lumbar disc displacement and two L5-S1 laminectomies; (2) whether the Office of Workers' Compensation Programs properly determined that the position of modified general clerk reasonably represented appellant's wage-earning capacity as of June 12, 1995; and (3) whether the Office abused its discretion by denying appellant's December 28, 2000 request for a review of her case on the merits

The Office accepted that, on January 15, 1987, appellant, then a 31-year-old postal clerk, sustained a lumbar strain, an L5-S1 disc herniation requiring two surgical excisions and lumbar disc displacement, when she lifted a flat of mail. She stopped work on January 17, 1987. Appellant's case was placed on the daily rolls effective April 12, 1987.[1]

Appellant underwent a May 1987 L5-S1 microdiscectomy, performed by Dr. Michael H. Lavyne, a Board-certified neurosurgeon of professorial rank. In an October 23, 1987 report, he noted that the Office's delay in approving surgery until April 1987 resulted in the herniated L5-S1 disc rupturing prior to surgery, causing permanent nerve damage. Dr. Lavyne noted findings on examination of left lower extremity weakness, a nearly absent left ankle jerk reflex and opined that appellant had a "left S1 radiculopathy which is chronic and had shown no improvement to operative treatment. The postoperative scan shows no evidence of recurrent disc. She remains 100 percent disabled and unlikely to recover significantly at this point." Due to appellant's chronic S1 radiculopathy, she underwent a second L5-S1 discectomy with lysis of S1 nerve root adhesions on January 28, 1988, performed by Dr. Mark Camel, a Board-certified neurosurgeon.

[1] By decision dated August 3, 1987, the Office denied appellant's claim for homemaker services, as there was no provision under the Act for such services. This decision is not before the Board on the present appeal.

Appellant submitted reports dated from February 1987 through July 1995 from Dr. Harriet O. Kotsoris, an attending Board-certified neurologist, psychiatrist and internist. Following the January 27, 1988 laminectomy, in a January 11, 1990 report, Dr. Kotsoris found appellant totally disabled due to chronic S1 radiculopathy secondary to the accepted L5-S1 herniated disc, resulting in a permanent loss of strength and stamina in the left leg of 40 to 50 percent.[2] Dr. Kotsoris reiterated these findings in her reports through July 6, 1995, also observing a one-half inch atrophy of the left gastrocnemius, "giving way" in the left knee causing appellant to walk with a cane, an absent left ankle jerk reflex and possible arachnoiditis.

To determine if appellant was medically capable of performing light-duty work, the Office obtained a second opinion from Dr. Jeff Gross, a Board-certified neurologist, who submitted an October 11, 1994 report, finding tenderness of the lumbar paraspinal musculature, "slight atrophy of the left gastrocnemius muscle," subjective "sensory loss in the L5 and S1 distribution and a diminished left Achilles' reflex. He diagnosed chronic lumbar radiculopathy, residual left S1 radiculopathy, chronic pain syndrome and "significant residual disability" as a consequence of her herniated L5-S1 lumbar disc which is attributable" to the January 15, 1987 injury. However, Dr. Gross found appellant able to work four to six hours a day "if she were allowed to sit and stand as needed." In a January 20, 1995 work capacity evaluation, he permanently limited appellant to lifting no more than 5 pounds twice an hour, sitting for no more than 30 minutes a day and no reaching, bending or twisting.

In an April 12, 1995 work capacity evaluation, Dr. Kotsoris stated that appellant could not kneel or stand for more than 30 minutes, could not bend or twist and could not lift more than 10 pounds. He stated that appellant could work one hour a day within these restrictions.

On May 9, 1995 the employing establishment offered appellant a modified general clerk position, which it determined to be suitable work.[3] The position involved answering a telephone and performing clerical tasks for four hours a day, increasing to six hours a day after four weeks. Lifting was limited to five pounds intermittently for no more than two hours a day. The position required sitting for no more than 30 minutes at a time, change of position as needed, no reaching, twisting or bending. The Office advised appellant that, under section 8106(c) of the Federal Employees' Compensation Act, her wage-loss compensation would be terminated if she refused the offer without providing sufficient reason. The Office afforded appellant 30 days in which to either accept the offer or provide reasons for refusal.

In a May 22, 1995 report, Dr. Kotsoris stated that appellant could not perform the offered position as the duties would increase her "unrelenting radiculopathic pain" requiring daily narcotic medication.

Appellant resumed work for one hour on June 12, 1995, alleged an exacerbation of her condition, stopped work and did not return. Her case was replaced on the daily rolls for 20 hours

[2] July 26, 1988 electromyogram (EMG) studies objectively demonstrated left L5-S1 radiculopathy.

[3] Based on Dr. Gross' January 20, 1995 report, the Office referred appellant to vocational rehabilitation services on January 30, 1995. The light-duty position was developed in April 1995 in conjunction with Barbara Wolff, a certified vocational rehabilitation counselor.

a week effective July 22, 1995. In a June 29, 1995 report, Dr. Kotsoris found appellant totally disabled for work due to lumbar radiculopathy and sciatica into the left leg.

On August 10, 1995 appellant filed a claim for a recurrence of total disability commencing June 12, 1995. She asserted that her low back and left leg became extremely painful although she was able to change positions from sitting to standing at will.

By letter dated February 12, 1996, the Office advised appellant that there was a conflict of medical opinion in her case between Dr. Kotsoris and Dr. Gross. To resolve this conflict, the Office referred appellant, the medical record and statement of accepted facts to Dr. Edward Fredericks, a Board-certified neurologist.

In an April 15, 1996 report, Dr. Fredericks provided a history of injury and treatment, including the attempt to return to work on June 12, 1995. On examination he found atrophy of the left calf muscle with no loss of strength, an absent left ankle jerk reflex, with subjective findings of positive straight leg raising tests bilaterally, decreased pinprick and vibratory sensation in the left lower extremity and "giving way" when attempting to stand on her left toes. Dr. Fredericks noted that the absent H reflex on EMG, correlating with the absent left ankle reflex, was not indicative of a nerve injury as "[i]n general, it is felt the H reflex is of little value in evaluating an S-1 root lesion." He stated that appellant could perform the offered modified clerk position.

By decision dated April 25, 1996, the Office denied appellant's claim for a June 12, 1995 recurrence of disability, based on Dr. Fredericks' report as the weight of the medical evidence.[4]

By decision dated November 9, 1996, the Office found that the modified clerk position fairly and reasonably represented appellant's wage-earning capacity and calculated a 37 percent loss of wage-earning capacity.[5] By decision dated July 3, 1997 and finalized July 7, 1997, an Office hearing representative affirmed the April 25 and November 9, 1996 decisions.[6] The Office hearing representative found that Dr. Fredericks' April 15, 1996 report "clearly and compellingly establishe[d] that [appellant] was capable of performing" the offered light-duty position "on a four-hour-a-day basis, effective June 12, 1995 and continuing."

Appellant subsequently submitted five requests for reconsideration. In support of these requests, appellant submitted additional reports from Dr. Kotsoris dated from July 17, 1996 through August 2, 2000. She continued to find appellant totally disabled for work due to left-

[4] In a May 8, 1996 letter, the Office advised appellant that she had 30 days in which to accept the modified clerk position, which remained open or provide sufficient reasons for refusal. The Office also advised appellant of the Act's penalty for refusing an offer of suitable work without adequate justification. Appellant responded by May 26, 1996 letter that she was willing to attempt a return to work, but that she could not drive 45 minutes each way to the specified post office. She requested an assignment within her driving tolerance of 15 minutes. The record indicates that appellant was not offered a position closer to her home.

[5] The Office based this calculation on a 20-hour workweek, as appellant was already receiving wage-loss compensation for the remaining 20 hours a week.

[6] At the February 27, 1997 oral hearing, appellant reiterated that she was unable to work due to severe lumbar and left leg pain with instability.

sided lumbar radiculopathy. Dr. Kotsoris noted that appellant was unable to drive longer than 10 minutes without her left leg going numb, that prescription analgesics impaired her judgment, that "[d]uring the week, [appellant] barely does anything."

In a March 24, 1999 report, stated that, "[p]rior to June 1995, she had sensory loss in the left L-5 and S-1 dermatomes and diminished left ankle reflex. By September 1997, [appellant] suffered from a half-inch atrophy of the left calf, leg extension weakness on muscle testing, in addition to the previous … findings. I believe that" the "deterioration in her neurologic status, explain[s] her inability to return to work." In reports from October 25, 1999 through August 2, 2000, Dr. Kotsoris described a worsening of appellant's lumbar radiculopathy possibly due to the L5-S1 retrolisthesis and possible neurogenic bladder.

Appellant also submitted reports from Dr. Camel dated November 15, 1999, January 24 and February 25, 2000, finding a positive left straight leg raising test, antalgic gait, narrowing of the L5-S1 intervertebral disc and a minimal disc herniation at L4-5. Epidural steroid injections administered in January 2000 exacerbated appellant's symptoms. Dr. Camel stated that it was "unlikely that the small disc abnormality was causing her pain."[7]

Appellant also submitted reports from Dr. Paul J. Apostolides, an attending Board-certified neurosurgeon. In a March 13, 2000 report, he noted a history of injury and treatment and that appellant had "returned to fairly normal lifestyle until last July when she developed recurrent" L4-5 symptoms. On examination, Dr. Apostolides found no lumbosacral spasms or tenderness, no atrophy in the left lower extremity, an absent left ankle jerk and bilaterally positive straight leg raising tests. In an August 15, 2000 report, he also found diminished sensation "in the top of the left foot and a little in the anterior thigh. Dr. Apostolides noted that the March 4, 2000 lumbar magnetic resonance imaging (MRI) showed "mild central canal stenosis at L4-5, with "perineural enhancement at the L4-5 and L5-S1 levels," narrowing at L5-S1 and a "little central clumping of the roots at the L4-5 level," with no definitive evidence of arachnoiditis. He recommended an implanted dorsal spinal cord stimulator.

Appellant also submitted a May 3, 2000 report from Dr. Alain deLotbinieri, a Board-certified neurosurgeon, of professorial rank. He noted that, although Dr. Kotsoris "felt that the slight elevation of the CSF [cerebrospinal fluid] protein at 72 mg/dl might suggest the possibility of arachnoiditis … neither the MRI or CT scan gave findings consistent with that diagnosis." Dr. deLotbinieri noted that computerized axial tomography-myelography (CAT) and MRI scans showed "perineural fibrosis" at S1 on the left, with "minimal enhancement noted of the left L5 nerve root at the L4-5 intervertebral foramen." On examination Dr. deLotbinieri found restricted range of lumbar motion without spasm, bilaterally positive straight leg raising tests, "hypesthesia to pinprick and light touch involving both the medial and lateral aspects of the left foot, a

[7] Appellant also submitted test reports. March 19, 1998 EMG and nerve conduction velocity (NCV) studies showed "chronic left S1 reinervation without demonstrable acute denervation or other peripheral neuropathy." February 25, 1999 nerve conduction and EMG studies showed "H-reflexes were absent bilaterally without evidence of denervation in either leg. There is no longer evidence of radiculopathy as seen on the previous study of March 19, 1998." An April 13, 2000 lumbar myelogram and CT (computed tomography) scan showed "minimal degenerative retrolisthesis of L5 on S1 and mild disc bulging at L4-5," greater to the left. "The left L5 root sleeve does not opacity distally but there is no obvious compression.… [No] disc herniation, canal stenosis or apparent arachnoiditis."

depressed left ankle reflex and mild weakness of the left gastrocnemius-soleus muscle group" with atrophy of the left calf. Dr. deLotbinieri recommended a "trial of spinal cord stimulation." He noted that appellant's bladder urgency and frequency could not be positively "traced to the mild concentric stenosis noted at the L4-5 level."[8]

Appellant's requests for reconsideration were denied by merit decisions dated January 26, August 3, 1998, January 27, August 4, 1999 and August 23, 2000, each finding that Dr. Fredericks' report continued to represent the weight of the medical evidence.[9]

Appellant then submitted a sixth request for reconsideration, pertaining to the August 23, 2000 decision, on December 28, 2000. She submitted a December 4, 2000 thoracic MRI report, showing 3 "small hemangiomas" of no clinical significance, otherwise normal and a December 21, 2000 report from Dr. Kotsoris, stating that appellant's current "signs and symptoms remain[ed] a direct result of her work-related injury." She stated that she "still disagree[d] with Dr. Frederick's assessment."

By decision dated January 31, 2001, the Office denied reconsideration on the grounds that the evidence submitted in support of appellant's request was of a repetitious nature and, therefore, insufficient to warrant a merit review of the August 23, 2000 decision."

The Board finds that appellant has not established that she sustained a recurrence of disability commencing June 12, 1995, causally related to her accepted January 15, 1987 lumbar injuries.

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.[10]

In this case, the Office accepted that, on January 15, 1987, appellant sustained a herniated L5-S1 disc, lumbar strain and lumbar disc displacement. These injuries required lumbar laminectomies performed in May 1987 and on January 28, 1988. Appellant submitted numerous

[8] In a June 11, 2000 report, Dr. Barry Levine, an Office medical adviser, noted that the objective loss of sensation, weakness and decreased reflexes in the left lower extremity indicated that a trial of spinal cord stimulation would be beneficial. "This need is a direct result of the [Office's] accepted low back injury." On June 22, 2000 the Office approved the dorsal column stimulator as recommended by Dr. deLotbinieri and Dr. Apostolides.

[9] The record contains a February 8, 2000 preliminary determination of a $234.87 overpayment of compensation, due to an underdeduction of health insurance premiums from January 16 to February 27, 1999. Appellant was determined to be without fault. By decision dated April 5, 2000, the Office waived recovery of the $234.87 overpayment due to financial hardship, as her monthly expenses exceeded her monthly income by over $5,000.00. This decision is not before the Board on the present appeal.

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

reports from Dr. Kotsoris diagnosing chronic S1 radiculopathy with left leg weakness and an absent left ankle jerk and a chronic lumbar pain syndrome. In reports from February 1987 through May 22, 1995, she found appellant totally disabled for work due to chronic pain, which did not respond to medication or physical therapy.

The Office then obtained a second opinion from Dr. Gross. He opined in an October 11, 1994 report that appellant had "significant residual disability" from the L5-S1 rupture and two laminectomies, including chronic pain syndrome, chronic S1 radiculopathy and nerve damage resulting in slight left gastrocnemius atrophy and a diminished left Achilles' reflex. However, Dr. Gross found appellant able to work four to six hours a day restricted light duty if she could change positions as needed. He noted January 20, 1995 restrictions of lifting no more than 5 pounds, sitting limited to 30 minutes, no reaching, bending or twisting. In response, Dr. Kotsoris conceded in a March 24, 1995 report that appellant could work for one hour a day within these restrictions.

On June 12, 1995 appellant returned to work in a modified general clerk position allowing her to change positions as desired, with light, sedentary clerical duties. However, she stopped work after two hours and did not return. Appellant continued to submit reports from Dr. Kotsoris through August 2, 2000 asserting that she was totally disabled for all work due to chronic pain and the narcotic medication required to control it. On August 10, 1995 she claimed a recurrence of disability from June 12, 1995 onward.

To resolve a conflict between Dr. Kotsoris and Dr. Gross as to whether appellant was capable of performing the modified clerk position, the Office appointed Dr. Fredericks, a Board-certified neurosurgeon, as an impartial medical examiner. He submitted an April 15, 1995 report observing essentially the same findings made by Dr. Kotsoris and Dr. Gross. However, he explained that the absent H reflex on EMG studies, which Dr. Kotsoris relied on in diagnosing the severity of appellant's S1 radiculopathy, was not generally accepted as an indicator of the severity of S1 nerve root lesions. Dr. Fredericks opined that there were no reliable objective signs indicating that appellant could not perform the modified clerk position as of June 12, 1995 and onward. Based on this report, the Office denied appellant's claim for recurrence of disability and found that the modified clerk position properly represented her wage-earning capacity.

The Board finds that Dr. Fredericks' opinion is sufficient to represent the weight of the medical evidence. His report is based on a complete and accurate history and contains detailed medical rationale explaining why appellant's work-related condition was not totally disabling. Therefore, his opinion that appellant was able to perform the modified clerk position as of June 12, 1995 is of substantial probative value.

There are several difficulties with appellant's physicians' reports. First, these physicians found her disabled for work due to chronic lumbar pain and S1 radiculopathy. The Office does not deny this pain and thus authorized the dorsal spinal cord stimulator recommended by Drs. Apostolides, Camel and deLotbinieri, all Board-certified orthopedic surgeons. However, the Board has held that pain or a "chronic pain syndrome," uncorroborated by objective disability, is not a basis on which to pay compensation.[11] None of appellant's physicians

[11] *John L. Clark*, 32 ECAB 1618 (1981).

provided medical rationale explaining how and why objective findings attributable to the January 15, 1987 injury would render her disabled from performing the modified clerk position. Dr. Kotsoris found in a March 24, 1995 report, that appellant could not work because prolonged sitting or standing aggravated her pain. However, the modified clerk position allowed her to sit and stand at will, thus overcoming Dr. Kotsoris' objection. Yet, she opined in reports from May 22, 1995 onward that appellant was totally disabled for work, including the modified clerk job, due to chronic pain and the effects of narcotic medication.

The Board notes that there is indication of record that appellant was able to function more easily than Dr. Kotsoris suggests. In his March 13, 2000 report, Dr. Apostolides stated that appellant had "returned to fairly normal lifestyle" and did not require narcotic pain medication prior to an alleged July 1999 exacerbation. Although he did not provide work restrictions or detailed descriptions of appellant's daily tasks in his report, he does imply that appellant's condition had abated for some period prior to July 1999.

Dr. Kotsoris found appellant disabled in part due to arachnoiditis, which she first diagnosed in 1990. However, Dr. deLotbinieri explained in detail in his May 3, 2000 report, that the clinical findings on which Dr. Kotsoris relied were, in fact, not indicative of arachnoiditis and that CT and MRI scans did not show characteristic signs of arachnoiditis.

The Board finds that the deficiencies in Dr. Kotsoris' reports, as pointed out by her colleagues, diminish the probative value of her opinion regarding total disability.[12] The Office was thus, correct in appointing Dr. Fredericks as an impartial medical examiner to definitively decide this issue and in determining that his opinion should represent the weight of the medical evidence. Therefore, the Office properly found that, based on his opinion, appellant had not sustained a recurrence of disability from June 12, 1995 onward.

Regarding the second issue, the Board finds that the Office properly determined that the position of modified general clerk was representative of appellant's wage-earning capacity as of June 12, 1995.

Section 8115 of the Act[13] provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[14] In determining wage-earning capacity, the Office first makes a medical determination of disability and of specific work restrictions. A position is then either selected or obtained that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Then, application of the principles set forth in *Albert C. Shadrick*[15] to either the actual wages earned, or constructed earnings based on current labor statistics in that commuting area will result in the percentage of the employee's loss of wage-earning capacity.

[12] *Kenneth R. Love*, 50 ECAB 193 (1998).

[13] 5 U.S.C. §§ 8101-8193, 8115.

[14] *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[15] 5 ECAB 376 (1953).

In this case, by November 6, 1996 decision, the Office determined that appellant had a 37 percent loss of wage-earning capacity based on her actual earnings in the modified clerk position she started and stopped on June 12, 1995. Appellant does not contest the accuracy of the Office's calculations, but instead asserts that she was medically incapable of performing the modified clerk position, in effect alleging that she had a 100 percent loss of wage-earning capacity.

As set forth in regard to the first issue, appellant has not submitted sufficient medical evidence to establish that she could not perform the modified clerk position for four hours a day as of June 12, 1995. Thus, she has also not established that the Office erred in finding the position to be suitable work within her medical limitations. Therefore, appellant has not demonstrated that the position did not properly represent her wage-earning capacity as of June 12, 1995.

Regarding the third issue, the Board finds that the Office properly denied appellant's December 28, 2000 request for a merit review under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.[16]

Under section 8128(a) of the Act,[17] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[18] which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that the Office erred in applying or interpreting a point of law, advances a relevant legal argument not previously considered by the Office; or "[c]onstitutes relevant and pertinent new evidence not previously considered by the [Office]."[19] Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[20]

In support of her December 28, 2000 request for reconsideration of the August 23, 2000 merit decision, appellant submitted a December 21, 2000 report from Dr. Kotsoris and a December 4, 2000 MRI report. This report was nearly identical to her numerous reports previously of record, particularly those dated March 24, 1998 and April 20, 2000. Thus, it does not constitute new, relevant evidence. The MRI report did not contain any medical rationale addressing the critical issue of causal relationship and is thus not relevant to the claim. Also, neither appellant's December 28, 2000 letter or the two medical reports show that the Office erred in applying or interpreting the law or advance a new, relevant legal argument. Thus, the Office's December 28, 2000 decision was proper under the law and the facts of this case.

[16] *See* 20 C.F.R. §10.606(b)(2)(i-iii).

[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.606(b) (1999).

[19] 20 C.F.R. § 10.606(b).

[20] 20 C.F.R. § 10.608(b).

The decisions of the Office of Workers' Compensation Programs dated January 31, 2001 and August 23, 2000 are hereby affirmed.

Dated, Washington, DC
October 28, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member