U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THERESA A. SPELLMAN and U.S. POSTAL SERVICE,
POST OFFICE, South Suburban, IL

Docket No. 01-1216; Submitted on the Record;
Issued September 16, 2002

DECISION and ORDER

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

The issue is whether appellant met her burden of proof to establish that she sustained recurrences of disability on April 12 and July 10, 1999 due to her January 17, 1987 and September 6, 1990 employment injuries.

On January 17, 1987 appellant, then a 42-year-old carrier, filed a claim alleging that she injured her lower back when loading a mailbag onto her mail truck. The Office of Workers' Compensation Programs accepted that appellant sustained a lumbar strain, lumbar radiculopathy, herniated disc at L4-5 and authorized a lumbar laminectomy on March 1, 1990. Appellant stopped work on January 20, 1987 and returned to a limited-duty position and worked intermittently until her injury on September 6, 1990.[1] She was released to limited duty, four to six hours a day in 1993.

Appellant submitted various records from Dr. William B. Fischer, a Board-certified orthopedist, dated January 4 to 31, 1990; and Dr. Francisco A. Gutierrez, a Board-certified neurologist, dated March 1, 1990 to May 9, 1991. Dr. Fischer's reports of January 4 to 31, 1990 noted appellant was being treated for an exacerbation of her lumbar condition. He recommended she discontinue work at this time. Dr. Gutierrez's operative report dated March 1, 1990 indicated that he performed a lumbar laminectomy at L4-5 and removal of a herniated lumbar disc and osteophyte bilaterally. He diagnosed appellant with herniated disc at L4-5 associated with osteophytes on the right side. Dr.Gutierrez's note of May 9, 1991 indicated that appellant continued to work four to six hour a day with minimal complaints about her back. He noted an essentially normal physical examination except for tenderness along the lumbar back. Dr. Gutierrez recommended appellant work four to six hours a day and avoids driving long distances.

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[1] The record reflects that appellant filed a claim for an injury sustained on September 6, 1990. The Office accepted the claim for a lumbar strain. Thereafter the files were combined.

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians and also to impartial medical examiners.[2]

Appellant submitted several CA-8, continuing compensation on account of disability forms for intermittent periods in 1996 and in 1997. Appellant also submitted a medical report from Dr. Gutierrez dated December 23, 1996. His report of December 23, 1996 noted that appellant could return to light duty, working no more than four hours a day.

By letter dated December 21, 1996 the employing establishment offered appellant a limited-duty position as a clerk which complied with the medical restrictions set forth by her treating physician. She returned to work on limited duty, four hours a day.

Appellant submitted a January 6, 1997 report from Dr. Gutierrez noting the results of the January 2, 1997 magnetic resonance imaging (MRI) scan of the lumbar spine. He noted that the MRI revealed a right paramedian osteophyte/herniated disc at C6-7 and a narrowing of the right intervertebral neuroforamen at C6-7. Dr. Gutierrez indicated his neurological examination was normal. He recommended appellant return to work four hours a day.

In a decision dated April 21, 1997, the Office denied appellant's claim for compensation after November 22, 1996 on the grounds that the evidence failed to establish that she had any disability causally related to her accepted work-related injury.

In a letter dated May 11, 1997, appellant requested an oral hearing before an Office hearing representative. She submitted a report from Dr. Gutierrez dated May 5, 1997 and a report from Dr. George S. Miz, a Board-certified orthopedist, dated May 15, 1997. Both doctors agreed that appellant could continue to work four hours a day with limitations on lifting, bending, squatting and reaching above her shoulders.

In a decision dated January 7, 1998 the hearing representative reversed the decision of the Office dated April 21, 1997 on the grounds that the evidence established that appellant was entitled to wage-loss compensation for disability retroactive to November 23, 1996.

Appellant submitted several CA-8, continuing compensation on account of disability forms for intermittent periods in January to March 1998.

Thereafter, appellant submitted a report from Dr. Gutierrez dated April 27, 1998. He indicated that appellant's neurological examination was entirely normal. Dr. Gutierrez noted that he did not have a medical reason to keep appellant on part-time work and advised her to return to work on a full-time basis. He noted appellant stated that she would look for a physician who would give her total disability. Dr. Gutierrez indicated that from a neurological standpoint he could not see any reason to limit appellant to part-time work.

In a letter dated June 8, 1998, the Office declined appellant's request for a switch in physicians. The Office noted that authorization for a change in physician cannot be given in

[2] This included referring appellant to a second opinion referral physician in 1995 and an impartial specialist in 1995.

order for an employee to seek or obtain disability payments after being released back to full-time employment by a treating physician. The Office further indicated that it would seek clarification from Dr. Gutierrez regarding appellant's ability to work as a full-time carrier.

Appellant submitted a report from Dr. Giri Gireesan, a Board-certified orthopedist, dated June 11, 1998 and previous impartial medical examiner in this case. He indicated that appellant presented with severe pain in the lumbar spine. Dr. Gireesan diagnosed appellant with lumbar scoliosis as revealed by an MRI with a collapsed disc space at L4-5. He recommended appellant return to work for four hours a day, with restrictions on lifting, bending, twisting and driving.

In a letter dated July 27, 1998, Dr. Gutierrez indicated that appellant could return to work on a full-time basis, based on an eight-hour day with the same modified position as was offered to her on June 11, 1997.

On August 5, 1998 the Office offered appellant a position as a modified carrier in express mail services, full time, eight hours a day. This position was in compliance with the medical restrictions set forth by Dr. Gutierrez.

Appellant rejected the position, indicating that the offer was based on unacceptable medical information. She submitted a report from Dr. Richard T. Beaty, an osteopath dated August 18, 1998. Dr. Beaty provided a history of appellant's treatment and work injury. He diagnosed her as status-post lumbar laminectomy and cervical disc condition. Dr. Beaty recommended a functional capacity evaluation to determine her level of work capacity. He recommended appellant return to work four hours a day with a lifting restriction of 10 pounds.

On August 19, 1998 the Office referred appellant for a second opinion to Dr. Michael D. Kornblatt, a Board-certified orthopedist. The Office provided him with appellant's medical records, a statement of accepted facts as well as a detailed description of her employment duties.

On September 21, 1998 Dr. Gutierrez signed the job offer of August 22, 1998, full time, eight hours a day indicating that the position complied with her medical restrictions.

In a medical report dated September 24, 1998, Dr. Kornblatt indicated that he reviewed the medical records provided to him and performed a physical examination of appellant. He diagnosed appellant with cervical and lumbar degenerative disease, chronic mechanical low back pain with chronic pain dysfunction. Dr. Kornblatt noted appellant's symptoms were consistent with chronic mechanical low back pain. He recommended a permanent restriction of light-duty work, with a lifting restriction of 10 pounds. He further noted that appellant should continue working four hours a day but should be able to increase her hours to eight hours a day within six months. In a supplemental report dated October 26, 1998, Dr. Kornblatt indicated that as of October 1998 appellant could work five hours a day to be increased one hour per ensuing month to the point where she is working eight hours a day.

By letter dated December 4, 1998, the employing establishment offered appellant a limited-duty position as a modified carrier which complied with the medical restrictions set forth by Dr. Kornblatt. The employing establishment indicated that appellant would work a graduated schedule of five hours a day from December 5, 1998 to February 5, 1999; six hours a day from

February 6, 1999 to April 2, 1999; seven hours a day from April 3, 1999 to June 4, 1999; and eight hours a day from June 5, 1999 indefinitely.

In a letter dated December 15, 1998, the Office indicated that it reviewed the position offered appellant on December 4, 1998 and found it suitable. The Office provided appellant 30 days within which to accept the job offer or provide an explanation for refusing such job.

Appellant submitted several CA-8, continuing compensation on account of disability forms for intermittent periods in October 1998 to February 1999.

By letter dated January 11, 1999, the employing establishment offered appellant a limited-duty position as a modified carrier, which complied with the medical restrictions set forth by Dr. Kornblatt. The employing establishment indicated that appellant would work a graduated schedule of five hours a day from January 11 to March 12, 1999; six hours a day from March 13 to May 8, 1999; seven hours a day from May 9 to July, 10, 1999; and eight hours a day from July 11, 1999 indefinitely.

Appellant accepted the job offer of January 11, 1999 indicating that she was under financial, physical and emotional duress. She noted that in this position she spent the majority of her time at the nixie table and three to four hours a day looking for other work. Appellant indicated that she has not been asked to do any work outside her physical restrictions.

In a letter dated February 17, 1999, the Office notified appellant that her request for four hours of compensation for January 23, 1999 would be denied if she did not submit medical documentation supporting disability for this day.

Appellant submitted a report from Dr. Gutierrez dated March 1, 1999 noting appellant presented with radiating pain in her cervical area. He noted that appellant was working five hours a day on light duty. Dr. Gutierrez indicated that his neurological examination revealed no abnormalities.

Appellant submitted several CA-8, continuing compensation on account of disability forms for intermittent periods from January 30 to February 12, 1999.

In a letter dated March 25, 1999, the Office notified appellant that her most recent request for compensation would be denied if she did not submit medical documentation supporting disability for this period.

Appellant submitted several CA-8, continuing compensation on account of disability forms for intermittent periods from March 13 to April 9, 1999.

In a letter dated June 14, 1999, the Office notified appellant that her most recent request for compensation would be denied if she did not submit medical documentation supporting disability for this period.

Appellant submitted several CA-8, continuing compensation on account of disability forms for intermittent periods from April 10 to July 23, 1999.

In a letter dated August 16, 1999, the Office notified appellant that her most recent request for compensation would be denied if she did not submit medical documentation supporting disability for this period.

In a letter dated October 12, 1999, the Office scheduled appellant for a fitness-for-duty examination. On October 18, 1999 she underwent an examination, which revealed that on April 1, 1999 appellant experienced blurring of vision, mental disorientation and numbness on the right side of her face. She was diagnosed with a history of chronic neck and low back pain. It was noted that appellant's work restrictions would be strictly followed.

Appellant submitted several CA-8, continuing compensation on account of disability forms for intermittent periods in February 13 to 26, 1999. She submitted an MRI of the brain dated April 23, 1999; an angiogram dated June 7, 1999; and an MRI of the cervical spine dated October 7, 1999. The MRI of the brain dated April 23, 1999 was normal. The angiogram dated June 7, 1999 revealed a normal carotid bifurcation and a questionable plaque in the internal carotid artery. The MRI of the cervical spine dated October 7, 1999 revealed changes of spondylosis; some central and left lateral bulging of the disc at C4-5; and narrowing of the spinal canal at the C6-7 level.

Appellant submitted several CA-8, continuing compensation on account of disability forms for intermittent periods from July 24 to October 1, 1999.

In a prearbitration settlement agreement dated October 19, 1999, the employing establishment indicated that appellant was issued a notice of removal dated May 3, 1999 as a result of being absent without official leave since April 5, 1999. The employing establishment noted that as a result of the settlement agreement appellant was to return to work on October 23, 1999 to continue the rehabilitation job offer assignment accepted by her. When her absence began on April 5, 1999 appellant was working a rehabilitation job offer at a point in the graduated schedule of six hours a day; five weeks were remaining at six hours a day before appellant was to progress to seven hours a day. The employing establishment indicated that she would remain at six hours a day until November 27, 1999 at which time she would begin to work seven hours a day. Under the agreement appellant was permitted to use her accumulated sick leave for the time period of April 4 to August 28, 1999; and would be compensated for four hours a day from October 2 through October 19, 1999.

In a letter dated November 2, 1999, the Office notified appellant that her most recent request for compensation would be denied if she did not submit medical documentation supporting disability for this period.

Appellant submitted several CA-8, continuing compensation on account of disability forms for intermittent periods in October 2 to October 29, 1999.

In a decision dated November 22, 1999, the Office denied appellant's claim for total disability for the time period of April 10 to July 10, 1999 and from July 10, 1999 forward on the grounds that the evidence of file failed to establish disability for work due to the accepted work-related injuries of January 17, 1987 and September 6, 1989.

Appellant submitted several CA-8, continuing compensation on account of disability forms for intermittent periods October 30 to December 3, 1999.

In a letter dated December 6, 1999, appellant requested a hearing before an Office hearing representative. The hearing was held on May 16, 2000. Appellant testified that when she accepted the limited-duty position in January 1999 she had to commute 50 minutes to work. She noted that she did not have two consecutive days off which she found exhausting. Appellant noted that the employing establishment did not ask her to do any work outside her physical restrictions. She submitted various medical records.

By decision dated July 24, 2000, the hearing representative affirmed the decision of the Office dated November 22, 1999.

By letter dated October 12, 2000, appellant through her attorney requested reconsideration of the Office decision of July 24, 2000. She submitted voluminous medical records most of, which were duplicates of, records in the file in addition to Office decisions and grievance documents. The new medical records included x-ray's of the lumbar spine dated 1995 and 1997; an MRI dated 1998; a report from Dr. Michael H. Haak, a Board-certified orthopedist, dated May 21, 1997; and a report from Dr. Miz dated September 14, 2000. The x-ray of the lumbar spine from September 7, 1995 revealed scoliosis of the lumbar spine; with degenerative spur formation at L3-S1 with considerable narrowing of the L5-S1 disc space. The x-ray of the spine from March 13, 1997 revealed a complete loss of the normal lordotic curve and a rotary scoliosis with narrowing of the disc space at L4-5 and L5-S1. The MRI of the lumbar spine from June 25, 1998 revealed multilevel degenerative disc disease and spondylosis; with several areas of central and foraminal narrowing. The report from Dr. Haak dated May 21, 1997 revealed a history of appellant's work-related injury. He diagnosed appellant with cervical degenerative disc disease; episodic radiculopathy; lumbar degenerative disc disease; and residual sciatica. Dr. Haak noted appellant could return to work four hours a day. The report from Dr. Miz dated September 14, 2000 noted that appellant attempted to return to work on a graduated schedule but was unsuccessful due to the severely increasing mechanical low back pain. He noted a normal physical examination. Dr. Haak reviewed the results of the MRI from June 1998 which revealed severe disc degeneration at L2-3, L3-4, L4-5 and L5-S1, however, noted that there was no evidence of recurrent disc herniation or significant spinal stenosis. Dr. Miz indicated that based on this he would concur that a 4-hour workday with lifting restrictions of 10 to 15 pounds, with no repetitive bending or stooping would be appropriate.

By decision dated January 10, 2001, the Office affirmed the decision of the hearing representative dated July 24, 2000.

The Board finds that the evidence fails to establish that appellant sustained a recurrence of disability for the time period of April 10 to July 10, 1999 and from July 10, 1999 forward due to the accepted work-related injuries of January 17, 1987 and September 6, 1990.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she 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 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 requirements.[3]

Appellant has not submitted sufficient evidence to support a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements. In August 1998, the Office referred appellant for a second opinion to Dr. Kornblatt. In his reports dated September 24 and October 26, 1998, Dr. Kornblatt diagnosed appellant with cervical and lumbar degenerative disease, chronic mechanical low back pain with chronic pain dysfunction. He noted appellant's symptoms were consistent with chronic mechanical low back pain. Dr. Kornblatt recommended a permanent restriction of light-duty work, with a lifting restriction of 10 pounds. He further noted appellant should continue working four hours a day but should be able to increase her hours to eight hours a day within six months. He indicated that as of October 1998 appellant could work five hours a day to be increased one hour per ensuing month to the point where she is working eight hours a day. This schedule was consistent with the January 11, 1999 limited-duty position offered appellant which required her to work a graduated schedule of five hours a day from January 11 to March 12, 1999; six hours a day from March 13 to May 8, 1999; seven hours a day from May 9 to July, 10, 1999; and eight hours a day from July 11, 1999 indefinitely.

Appellant submitted numerous medical records from her treatment physician, particularly reports from Dr. Haak dated May 21, 1997; Dr. Gutierrez dated March 1, 1999; and Dr. Miz dated September 14, 2000. The report from Dr. Haak dated May 21, 1997 is of no value in establishing the claimed recurrence of disability beginning April 1999 since it predates the time of the claimed recurrent condition. Dr. Gutierrez's report of March 1, 1999 noted that appellant's complaints of radiating pain in her cervical area. He noted that appellant was working five hours per day on light duty. Dr. Gutierrez indicated that his neurological examination revealed no abnormalities. However, none of his reports, most contemporaneous with the recurrences of injury noted a specific date of a recurrence of disability nor did they note a particular change in the nature of appellant's physical condition, arising from the employment injury, which prevented her from performing her light-duty position. Therefore, this does not establish a change in the nature and extent of appellant's injury.[4]

The report from Dr. Miz dated September 14, 2000 noted a normal physical examination and indicated that there was no evidence of recurrent disc herniation or significant spinal stenosis on the MRI. He indicated that based on this, he would concur that a 4-hour workday with lifting restrictions of 10 to 15 pounds, with no repetitive bending or stooping would be appropriate. Dr. Miz noted that appellant attempted to return to work on a graduated schedule but was unsuccessful due to the severely increasing mechanical low back pain. However, these notes are vague regarding the time of the onset of the claimed recurrence of disability and are unrationalized regarding how the 1987 and 1990 employment injuries would have caused a

[3] *Terry R. Hedman*, 38 ECAB 222 (1986).

[4] The Board has consistently held that contemporaneous evidence is entitled to greater probative value than later evidence; *see Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

particular period of disability beginning in April 1999.[5] Dr. Miz neither addresses whether appellant was totally disabled due to her work injury on or after April 1999 nor did he offer any reasoned support for causal relationship of the claimed condition or disability to the accepted work-related injuries of 1987 and 1990. The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.[6] Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[7]

Other records submitted by appellant including a 1999 angiogram and MRI of the brain neither address the time of the onset of the claimed recurrence of disability nor do they provide a rationalized opinion regarding how the 1987 and 1990 employment injuries would have caused a particular period of disability beginning in April 1999.

The Board finds that, under the circumstances of this case, the opinion of Dr. Kornblatt is sufficiently well rationalized and based upon a proper factual background such that it is the weight of the evidence and established that there was no change in the nature and extent of her injury-related condition and that appellant could perform the light-duty position offered to her. The Board further notes that appellant's arguments regarding not being afforded due process for her claim and the Office not following procedures for the preparation of the statement of accepted facts or the issuance of decisions, without merit. The record substantiates that the Office properly prepared and submitted to the second opinion physician, Dr. Kornblatt a statement of accepted facts for his review prior to issuance of his report. Additionally, the record reflects that appellant was provided with due process regarding her claim and given numerous opportunities to provide supportive medical evidence to support her alleged recurrences of injury and failed to do so.

Appellant has not met her burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty requirements which would prohibit her from performing the light-duty position she assumed after she returned to work.

[5] *See Theron J. Barham,* 34 ECAB 1070 (1983) (where the Board found that a vague and unrationalized medical opinion on causal relationship had little probative value).

[6] *Id.*

[7] *Lucrecia M. Nielson,* 41 ECAB 583, 594 (1991).

The decisions of the Office of Workers' Compensation Programs dated January 10, 2001 and July 24, 2000 are hereby affirmed.

Dated, Washington, DC
September 16, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member