U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN E. ODELL and U.S. POSTAL SERVICE,
KANSAS CITY BULK MAIL CENTER, Kansas City, KS

Docket No. 02-1455; Submitted on the Record;
Issued April 3, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained a recurrence of disability for the period March 15, 1995 to January 20, 2000, causally related to her May 16, 1989 employment injury.

On May 16, 1989 appellant, then a 33-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that she injured her lower back while bending down to pick up a tray of mail. The Office of Workers' Compensation Programs accepted the claim for a low back strain and later expanded its acceptance to include a laminectomy L4-5. The Office paid for appellant's surgeries on October 24, 1989 and April 5, 1991. Appellant accepted the employing establishment's offer of a modified job on June 8, 1990. The Office placed appellant on the periodic rolls for temporary total disability effective June 30, 1991. Appellant returned to part-time work on July 8, 1991.

By letter dated February 4, 1994, the Office referred appellant, along with medical records and a list of questions to Dr. Robert Rondinelli, Associate Professor and Chairman, Department of Rehabilitation Medicine at the University of Kansas, for examination and treatment for residuals of her accepted May 16, 1989 employment injury.

In his reports dated February 22 and April 18, 1994, Dr. Rondinelli opined that appellant was capable of working a full eight hours a day provided she had opportunities for stretch breaks at regular intervals and she avoid above the shoulder level activity.

By letter dated August 2, 1994, the employing establishment offered appellant the position of letter carrier (limited duty) which it noted was within the restrictions defined by Dr. Rondinelli. In a report dated July 26, 1994, Dr. Rondinelli reviewed and approved the proposed job offer. Appellant accepted the job offer and started her limited-duty position effective September 24, 1994. In accepting the job offer, appellant noted that she did so under duress as she could not work the hours the job required and feared aggravating and making her condition worse if she worked eight hours per day.

By letter dated August 24, 1994, Dr. V. Carlos Palmeri, appellant's attending physician, disagreed with extending appellant's work hours from six to eight hours per day. Dr. Palmeri opined that appellant was only capable of performing four hours of work per day because any more hours would put appellant "at risk of aggravating her back and leg pain. Even a four-hour day is exhausting for her."

The record indicates that appellant stopped work on March 16, 1995. The record further reflects that between August 20, 1994, when she accepted the position and March 16, 1995, when she stopped all work, appellant worked an average of four hours a day, not the eight hours delineated in the job offer. There is no indication in the record that appellant was paid compensation by the Office for any time lost.

By decision dated August 24, 1995, the Office issued a retroactive determination that appellant had no loss of wage-earning capacity based upon her job as a limited-duty letter carrier. The Office stated that appellant abandoned her suitable employment on March 16, 1995. In determining that appellant had no loss of wage-earning capacity, the Office noted that the current salary for her date-of-injury position was $656.58 per week and her weekly salary in the position of letter carrier was $656.58. The Office thus determined that appellant had no loss of wage-earning capacity.

In a narrative report dated May 3, 1993, Dr. Palmeri diagnosed radicular leg pain, extreme stress and depression and noted that, on March 20, 1995, appellant had been advised by the Employee Assistance Program (EAP) to obtain a leave of absence in order to get control of her pain. Dr. Palmeri stated that he concurred with this recommendation as it had become increasingly difficult for appellant to deal with her pain on the job. In an attending physician's supplemental report (Form CA-20) dated May 4, 1995, Dr. Palmeri diagnosed chronic low back pain, sciatica, stress and depression and opined that appellant was totally disabled due to this condition.

In a note dated September 25, 1995, Dr. Palmeri noted that appellant attempted to work four hours per day which caused her "a marked increase in pain, frustration and depression." Dr. Palmeri noted that appellant continued to have L4-5 radicular pain and opined that appellant was totally disabled for any type of employment.

By letter dated September 22, 1995, appellant requested a hearing before an Office hearing representative.

In a letter dated February 16, 1996, appellant, through her counsel, disagreed with the August 24, 1995 decision. Appellant argued that she accepted the position under duress, that Dr. Palmeri stated that appellant attempted to perform the position offered and that she finally quit on March 16, 1995 upon the advice of EAP. Appellant argued that she never abandoned suitable employment and that she remained totally disabled.

In a February 28, 1996 report, Dr. Gael E. Frank, a Board-certified orthopedic surgeon, based upon a history of the employment injury and a physical examination, opined that appellant had reached maximum medical improvement and she was totally disabled to work. He opined that appellant has fallen once this year and that she "might still 'suffer injury or harm if she is not

restricted or accommodated." Dr. Frank concluded that appellant was unable to return to work for the employing establishment.

A hearing was held on May 8, 1996 at which appellant was represented by counsel. Appellant also asserted that she had developed a psychological condition, namely depression, as a consequence of her accepted employment injuries and associated constant pain.

By decision dated July 19, 1996 and finalized July 22, 1996, the hearing representative affirmed the Office's August 24, 1995 decision that appellant had no loss of wage-earning capacity.

Appellant appealed to the Board and in a decision issued April 6, 1999,[1] the Board reviewed the Office's July 19, 1996 decision and found that as the Office failed to issue a loss of wage-earning capacity after appellant returned to limited duty effective September 24, 1994, the Office should have considered appellant's March 16, 1995 claim as one for a recurrence of disability and follow the standard enunciated by the Board in *Terry R. Hedman*.[2] The Board set aside the Office's July 19, 1996 decision and instructed the Office to develop the claim as a request for a recurrence of disability as set forth in the Federal (FECA) Procedure Manual and consistent with Board precedent, followed by a *de novo* decision on whether appellant has established that she sustained a recurrence of disability causally related to her accepted May 16, 1989 employment injury. The complete facts of this case are set forth in the Board's April 6, 1999 decision and are herein incorporated by reference.

On remand, in a decision dated July 20, 1999, the Office denied appellant's claim for a recurrence of disability beginning March 16, 1995, on the grounds that the medical evidence of record was insufficient to establish either a change in the nature of appellant's light-duty job, or a worsening of her condition as of that date, such that she could no longer perform her light-duty position.

On January 21, 2000 appellant underwent surgical partial hemilaminectomy and medial facetectomy and foraminotomy at L4-5 with removal of a large extruded disc fragment.

Following an oral hearing, held at appellant's request, in a decision dated December 28, 2000, an Office hearing representative set aside the Office's prior decision on the grounds that further medical development was needed both with respect to appellant's physical condition and her ability to work, and with respect to whether her accepted physical conditions had caused her to develop a consequential psychiatric condition.

On remand, by letter dated October 9, 2001, the Office requested that appellant submit all prior psychiatric therapy notes since 1995 together with a list of all prescribed medication since that time. The Office explained to appellant that it was necessary that the Office receive this information before it could refer her to a specialist for a psychiatric examination. The Office

[1] Docket No. 97-420 (issued April 6, 1999).

[2] 38 ECAB 222 (1986).

informed appellant that failure to respond to the Office's request could result in the denial of her claim for depression.

By letter dated October 17, 2001, the Office referred appellant, together with a statement of accepted facts, a list of questions to be answered and the relevant medical evidence of record, to Dr. Don B.W. Miskew, a Board-certified orthopedic surgeon, for an orthopedic evaluation as to whether appellant sustained an employment-related recurrence of disability, on or after March 16, 1995, such that she could not perform her light-duty job eight hours a day.

In a report dated December 5, 2001, Dr. Miskew provided findings on examination and reviewed the medical records, relating that appellant had had significant lumbar disc problems at the L4-5 level and has had three operative interventions which have failed to improve her symptomatology. He also noted that she had fairly significant depression from her medical history. Dr. Miskew stated that he believed appellant's condition was causally related to her accepted work injury and that her additional surgery on January 21, 2000 was also medically warranted and causally related to her original accepted condition. Dr. Miskew concluded that appellant was "essentially unemployable due to her chronic subjective complaints of back and leg pain and her chronic depression." With respect to whether appellant had suffered a recurrence of total disability on March 16, 1995, Dr. Miskew stated that he "reviewed the job that this lady was offered and worked at for a period of time. I do not have enough material to make any decision that her condition worsened and that she was not able to continue working at this level."

In a letter decision dated February 1, 2002, the Office accepted that appellant's January 21, 2000 disc surgery was necessitated by a progression of and, therefore, was causally related to appellant's originally accepted back conditions.

In a separate decision dated February 1, 2002, the Office denied appellant's claim for a consequential psychiatric condition, noting that appellant's failure to respond to its October 9, 2001 request for additional information had hindered the Office's efforts to refer appellant for a second opinion evaluation.[3]

With respect to appellant's orthopedic conditions, the Office determined that Dr. Miskew's opinion required clarification and asked the physician to identify the additional information he would need to offer an opinion as to whether appellant suffered a material worsening of her work-related condition such that she could no longer work effective March 16, 1995.

In a response dated February 28, 2002, Dr. Miskew clarified his earlier comments, stating that the material he was provided did not contain any documentation medically of a worsening of appellant's condition from January 1994 until March 1995, and that the sort of additional information he required would be an attending physician's examination documenting a worsening of appellant's condition.

[3] Appellant, who is represented by counsel, has not appealed this decision to the Board.

By decision dated March 12, 2002, the Office denied appellant's claim for a recurrence of disability for the period March 16, 1995 to January 20, 2000.

The Board finds that appellant failed to establish a recurrence of total disability beginning March 16, 1995 causally related to her accepted May 16, 1989 employment injury.

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 job requirements.[4] 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.[5] Causal relationship is a medical issue[6] 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.[7]

In this case, appellant has shown no change in the nature and extent of her injury-related condition or of the limited-duty job requirements. The record shows that appellant returned to limited-duty work at the employing establishment on September 24, 1994. The record does not establish that the claimed recurrence of total disability was caused by a change in the nature or extent of her limited-duty job requirements and further does not contain sufficient medical evidence establishing that the accepted conditions have materially changed or worsened since her return to work. While appellant's treating physicians repeatedly stated that appellant is totally disabled from all work, none of the physicians of record explained why appellant was physically unable to perform her light-duty job. Dr. Palmeri stated in his report dated May 3, 1995 only that he concurred with EAP counselor's recommendation that appellant stop work in an attempt to gain control of her pain. In a follow-up report dated September 25, 1995, while Dr. Palmeri stated that, following her return to work, appellant had suffered a marked increase in pain, frustration and depression, and was totally disabled, he did not opine that appellant's underlying accepted conditions had worsened, such that she could no longer perform her light duties. Similarly, while Dr. Donald McIntosh and Dr. Frank stated in their reports dated January 8 and

[4] *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, *supra* note 2.

[5] *Frances B. Evans*, 32 ECAB 60 (1980).

[6] *Mary J. Briggs*, 37 ECAB 578 (1986).

[7] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

February 28, 1996 that appellant was totally disabled for all work, neither physician explained how appellant's physical condition had worsened, such that she could no longer perform her light-duty job. As this claim has not been accepted for an emotional condition and as the opinions of appellant's treating physicians are based primarily on appellant's subjective complaints of pain and offer no rationalized medical opinion, supported by objective findings, explaining how appellant's accepted conditions had worsened such that she could no longer perform her limited-duty work, these reports lack the necessary probative value to establish appellant's claim. Therefore, the Board finds that the weight of the medical evidence rests with Dr. Miskew's well-rationalized second opinion report, in which he noted that there was no medical documentation in the record to establish that appellant's accepted conditions worsened to the point where she was no longer able to work, beginning March 16, 1995.

By letter dated May 11, 1999, the Office advised appellant of the type of medical evidence necessary to establish her claim. As appellant has failed to submit rationalized medical evidence establishing that she sustained a recurrence of disability causally related to her accepted employment injury, she has not met her burden of proof.[8]

The March 12, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[8] *Charles P. Mulholland, Jr.*, 48 ECAB 604 (1997) (the test of "disability" under the Federal Employees' Compensation Act is whether an employment-related impairment prevents the employee from engaging in the kind of work he or she was doing when injured); *Debra A. Kirk-Littleton*, 41 ECAB 703, 706 (1990) (whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence); (in assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality); *Anna C. Leanza*, 48 ECAB 115, 124 (1996) (the factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion).