

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHERINE TOMLIN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Lyon, NJ

*Docket No. 02-2263; Submitted on the Record;
Issued January 29, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether appellant has established that she sustained a recurrence of disability on May 11, 1999 causally related to her March 4, 1996 employment injury.

On March 5, 1996 appellant, then a 42-year-old food service worker, filed a claim alleging that she sustained an injury on March 4, 1996 in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for lumbosacral strain.

By decision dated September 9, 1997, the Office reduced appellant's compensation on the grounds that her actual earnings as a food service worker effective August 12, 1996 fairly and reasonably represented her wage-earning capacity.¹

On June 25, 1999 appellant filed a notice of recurrence of disability on March 15, 1999 due to her March 4, 1996 employment injury. By decision dated February 4, 2000, the Office denied appellant's claim on the grounds that the evidence did not establish either that she was disabled after March 15, 1999 or required surgery on May 11, 1999 due to her accepted employment injury.

On January 6, 2000 appellant filed a claim for a recurrence of disability beginning May 11, 1999. The employing establishment indicated that appellant worked light duty following her employment injury.

By decision dated August 2, 2000, the Office denied appellant's claim for a recurrence of disability beginning May 11, 1999 on the grounds that the evidence did not establish that it was causally related to her March 4, 1996 employment injury.

In a letter dated August 14, 2000, appellant, through her representative, requested a hearing regarding on the Office's August 2, 2000 decision. In a decision dated February 15, 2001, the Office denied the hearing request as untimely. Appellant's representative, by letter

¹ The employing establishment, in a letter dated September 5, 1997, noted that appellant had returned to full-time employment on August 12, 1996.

dated February 23, 2001, requested that the hearing be scheduled on the grounds that he had timely requested a hearing. A hearing was held on June 27, 2001. By decision dated September 20, 2001, the hearing representative affirmed the Office's August 2, 2000 decision after finding that appellant had not established that she sustained a recurrence of disability on May 11, 1999 causally related to her March 4, 1996 employment injury.²

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of disability on or after May 11, 1999 causally related to her accepted employment injury.

Where 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.³

In this case, appellant sustained lumbosacral strain as a result of a March 4, 1996 employment injury. She returned to full-time limited-duty work as a food service worker on August 12, 1996. At the hearing, appellant alleged that the employing establishment withdrew her light-duty assignment in March 1998. She, however, has not submitted any evidence in support of her claim that her light-duty assignment changed such that she could no longer perform her duties.

Appellant also has not submitted sufficient evidence to show that she was disabled from her light-duty position on or after May 11, 1999 due to her accepted employment injury. In a work restriction evaluation dated July 1, 1999, Dr. Richard Boiardo, a Board-certified orthopedic surgeon, found that appellant was disabled from employment.⁴ In an accompanying form report of the same date, Dr. Boiardo described the history of injury as occurring when appellant hurt her back on March 4, 1996 while carrying a food tray. He diagnosed lumbar radiculopathy and a herniated disc and checked "yes" that the condition was caused or aggravated by an employment activity. Dr. Boiardo noted that appellant "had a percutaneous discectomy on May 11, 1999" and was "unable to attend work until further notice." The record also contains an undated form report from Dr. Boiardo substantially similar to his July 1, 1999 report. These reports, however,

² The hearing representative did not explicitly address or set aside the February 15, 2001 Office decision denying appellant's request for a hearing as untimely.

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

⁴ By letter dated October 16, 1997, the Office requested that Dr. Boiardo submit a current medical report with objective findings supporting his September 5, 1997 request for surgical authorization. In a form report dated January 15, 1998, Dr. Boiardo diagnosed discogenic disease of the lumbar spine and found that appellant could work with restrictions. He did not provide objective findings or request surgical authorization. In a report dated April 8, 1998, Dr. Boiardo requested authorization for a repeat magnetic resonance imaging (MRI) study on appellant and noted that "a percutaneous disc excision may be considered after review of these results. This back injury is all related to the March 4, 1996 incident at work." The Office authorized the MRI scan, which was performed on June 5, 1998. The MRI scan revealed degenerative disease at L4-5 with a posterior tear of the annulus fibrosis and a small central herniation with mild central stenosis and diffuse degenerative disease at L5-S1. An MRI scan obtained on April 1, 1999 revealed similar findings.

are of little probative value as the Board has held that the checking of a box “yes” on a form report, without additional explanation or rationale, is not sufficient to establish causal relationship.⁵

Regarding appellant’s alleged recurrence of disability on March 15, 1999, the Office requested that an Office medical adviser review a statement of accepted facts and the medical evidence of record and discuss whether appellant’s claimed recurrence of disability and/or surgery on May 11, 1999 was causally related to her accepted employment injury. In a report dated February 2, 2000, an Office medical adviser opined that the medical evidence of record was insufficient to establish that appellant sustained a recurrence of disability beginning March 15, 1999 or the percantaneous discectomy was due to her accepted employment injury. He further opined that he would not have recommended surgery for appellant as her condition was chronic and discectomies usually were not successful in treating chronic conditions.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant’s claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.⁶ As appellant failed to submit a rationalized medical report supporting that her March 4, 1996 employment injury resulted in her inability to perform her employment on or after May 11, 1999, the Office properly denied her claim for compensation.

The decision of the Office of Workers’ Compensation Programs dated September 20, 2001 is affirmed.

Dated, Washington, DC
January 29, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

⁵ *Calvin E. King*, 51 ECAB 394 (2000).

⁶ *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).