

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA FARMER and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

*Docket No. 03-184; Submitted on the Record;
Issued March 14, 2003*

DECISION and ORDER

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

The issue is whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on or after June 2, 1996 as alleged.

This case has previously been before the Board on appeal. In its November 6, 2000 decision,¹ the Board noted that appellant alleged that her light-duty requirements had changed resulting in pain, discomfort and swelling in her left shoulder. The Board found that there was a conflict of medical opinion evidence between appellant's attending physician, Dr. Richard Memoli, an orthopedic surgeon, and the Office of Workers' Compensation Programs second opinion physician, Dr. Martin Manin, a Board-certified orthopedic surgeon, regarding whether appellant was totally disabled on or after June 2, 1996 due to a change in the nature and extent of her injury-related condition. The Board remanded the case for an impartial medical examination to resolve the existing conflict of medical opinion evidence. The facts and the circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Following the Board's decision, the Office referred appellant, a statement of accepted facts and a list of specific questions for an impartial medical examination with Dr. Benjamin A. Nachamie, a Board-certified orthopedic surgeon. By decision dated May 4, 2001, the Office determined that Dr. Nachamie's report established that appellant was not totally disabled on or after June 2, 1996 due to her employment injuries and denied her claim for recurrence of disability.

Appellant, through her representative, requested reconsideration on April 30, 2001. By decision dated July 22, 2002, the Office denied modification of its May 4, 2001 decision.²

¹ Docket No. 98-1716 (issued November 6, 2000).

² Following the Office's July 22, 2002 decision, appellant submitted additional new evidence before the Office. As the Office did not review this evidence in reaching a final decision, the Board will not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

The Board finds that this case not in posture for a decision.

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 establish 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

In the prior appeal, appellant alleged that her light-duty job requirements changed resulting in additional pain and swelling in her left shoulder. Appellant did not establish this claim by submitting any substantiating evidence. In the current case, appellant has not submitted additional factual evidence establishing that she experienced a change in the nature and extent of her light-duty job requirements. Therefore she has not established this aspect of her claim.

On remand from the Board, the Office referred appellant to Dr. Nachamie, a Board-certified orthopedic surgeon, to resolve the existing conflict of medical opinion evidence regarding the issue of whether appellant had experienced a change in the nature and extent of her injury-related left shoulder condition such that she was totally disabled for work on or after June 2, 1996. In his March 10, 2001 report, Dr. Nachamie noted appellant's history of injury and medical treatment. He performed a physical examination finding that appellant demonstrated limited rotation of her neck to the left with pain as well as painful right and left head tilt to 15 degrees. Dr. Nachamie stated that appellant's left shoulder had well-healed arthroscopic portals with a positive impingement test and trembles in her left hand. He found that appellant's left shoulder abducts to 100 degrees, and that forward flexion was 80 degrees. Dr. Nachamie diagnosed status post injury to the left shoulder and post arthroscopy. He stated that appellant did not require further treatment and that appellant could currently work 8 hours a day with no pushing, pulling or lifting over 10 pounds. This report does not address the central issue of whether appellant sustained a change in the nature and extent of her injury-related condition on or after June 2, 1996, and is insufficient to resolve the existing conflict of medical opinion evidence.

In a letter dated March 20, 2001, the Office requested a supplemental report from Dr. Nachamie addressing whether appellant's total disability beginning June 2, 1996 was due to her accepted October 4, 1987 left shoulder injury. In a report dated April 2, 2001, Dr. Nachamie diagnosed shoulder cuff disorder and shoulder impingement left side. He stated, "It is my opinion that her disability is solely due to the accident at work on October 4, 1987 and subsequent surgery. In my opinion the intervening automobile accidents of December 12, 1990 and February 10, 1994 had no significant effect on her disability." Dr. Nachamie further stated, "It is my opinion that [appellant] was capable of working eight hours a day with limitations on lifting and pushing."

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving

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

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁴ The Board finds that Dr. Nachamie's reports are not sufficiently well rationalized to be accorded special weight. He merely stated that appellant was capable of working eight hours day without specifying any time period. Dr. Nachamie did not address appellant's work duties at the time of the alleged recurrence of total disability and did not explain his reasons for determining that appellant could have worked eight hours a day rather than the four recommended by appellant's physician. He did not specifically address appellant's condition and work restrictions at the time of her alleged recurrence of disability, the disputed issue in the case. For these reasons, there remains an unresolved conflict of medical opinion evidence in this case, requiring an additional impartial medical opinion.

On remand the Office should compose a statement of accepted facts including the requirements of appellant's limited-duty position at the time of her alleged recurrence of disability and refer appellant, the statement of accepted facts and a list of specific questions, including whether appellant's alleged total disability on or after June 2, 1996 was due to a change in the nature and extent of her accepted left shoulder condition, such that she has sustained a recurrence of total disability on that date, to an appropriate Board-certified specialist to resolve the existing conflict of medical opinion evidence. After this and such other development as the Office deems necessary, the Office shall issue an appropriate decision.

The July 22, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded for further development consistent with this opinion of the Board.

Dated, Washington, DC
March 14, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).