

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA DeVITO and U.S. POSTAL SERVICE,
POST OFFICE, Red Bank, NJ

*Docket No. 03-260; Submitted on the Record;
Issued March 21, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant's back condition is causally related to her employment as a letter carrier.

On November 30, 2000 appellant, then a 38-year-old letter carrier, filed an occupational disease claim alleging that she suffered from degenerative disc disease as a result of her federal employment. She noted that her job was very physical and that over the prior years she experienced pain and was becoming slower at her job. In support of her claim, appellant submitted an attending physician's report (Form CA-20) dated April 5, 2000 from Dr. Arthur H. Phair, her treating Board-certified orthopedic surgeon, who indicated that appellant had lumbar degenerative disc disease at L4-5. He noted that appellant's history of back pain related to a work-related injury dating back to 1998. Dr. Phair checked a box indicating that he believed that this condition was caused or aggravated by her employment. He noted that light-duty restrictions were already in place and that he would refer appellant for a provocative discogram study of the lumbar spine and that based on the results of the study, she might be offered a lumbar fusion at L4-5. The employing establishment indicated on the form that appellant had not returned to work since March 22, 2000.

By letter dated June 8, 2001, the Office of Workers' Compensation Programs requested further information. In response, appellant submitted a letter, dated July 5, 2001, in which she described her job duties and indicated how her injury affected her life.

By decision dated August 17, 2001, the Office denied appellant's claim finding that she had not established that her back condition was caused by factors of her employment.

On September 10, 2001 appellant requested an oral hearing and submitted progress notes by Dr. Marshall Allegra, a Board-certified orthopedic surgeon, dated from March 9, 1993 through February 26, 1998. Dr. Allegra first noted back pain on February 13, 1995. He indicated that appellant, a letter carrier, was lifting a tub of mail on January 27, 1995 when she experienced a sharp lower back pain. His impression was a lumbosacral sprain with spasm and

sciatica and he gave her an injection of Marcaine, Xylocaine and Celestone, which he stated helped. On February 5, 1998 Dr. Allegra noted that appellant had recurrent lower back pain that radiated to her left foot with intermittent numbness of the left foot. He noted that she had a prior injury to her back three years ago. Dr. Allegra also treated her for back pain on February 26 and March 12, 1998.

A magnetic resonance imaging (MRI) scan was done on appellant on April 13, 1995 and was interpreted by Dr. Zelig R. Weinstein, a neuroradiologist, as showing early changes of disc desiccation at the L4-5 level, no obvious disc herniations and no evidence of lumbar spinal stenosis. A February 16, 1998 MRI scan of her lumbar spine was interpreted by Dr. Myron Levitt, a Board-certified radiologist, as mild L4-5 level disc bulge, with no spinal stenosis seen at any level.

At the hearing held on June 18, 2002, appellant testified that she has worked for the employing establishment since May 1986 and described her job duties. She noted that she first hurt her back on January 27, 1995, when she lifted a tub of mail and could not move. She was out of work for about six weeks for this incident and then returned to work. Appellant noted that in October 1999 she sneezed and her back went out again. She filed a compensation claim which was accepted for an aggravation of a low back condition and she returned to light work. She noted that after October 1999 she was in constant pain and that on March 24, 2000, pursuant to Dr. Phair's instructions, she stopped working.

At the hearing, appellant submitted an October 10, 2001 report by Dr. Phair, who stated:

“In summary then, [appellant] has chronic, recurrent and severe low back pain due to a long-standing degenerative disc disease at the L4-5 level. A review of [appellant's] history reveals that there was a clear causal relationship between her present and ongoing symptoms and the injury of her back that occurred on January 27, 1995 while at work in the [employing establishment]. To my knowledge and according to [her], there was no preexisting lumbar disc disease or history of back pain that could provide any other reasonable explanation for the onset of her pain and that with reasonable medical certainty I can state that there is a direct causal relationship between her January 27, 1995 injury and her present disabilities and clinical problem.”

On June 12, 2002 Dr. Phair issued a supplemental report, wherein he stated:

“I felt clearly with a reasonable degree of medical probability, that [appellant's] degenerative disc problem dates back to a work[-]related injury that occurred on January 27, 1995. It is my belief that at that time [appellant] suffered an injury to her L4-5 disc and that she continued to be symptomatic over the course of the years due to this injury. [Appellant] continued to be symptomatic due to her disc problem, in spite of work restrictions that were put in place by me, in spite of therapeutic measures such as medications and epidural steroid injections and in spite of accommodations that were made on the part of [the employing establishment].

“She had a provocative discogram performed at the lumbar spine that clearly implicates that the L4-5 disc that was noted in her 1995 MRI scan was the principal source of her discomfort. It has become obvious to me from repeated interviews and clinical examinations over the course of time that [appellant’s] condition was symptomatically aggravated by her ongoing efforts to remain employed in the [employing establishment]. It was upon my recommendation that she seek different employment that was unavailable through the postal service.

“I would like to state as emphatically as I can that I believe that her current symptoms and inability to work are causally and directly related to her 1995 injury to the L4-5 disc. I feel that the only therapeutic option that makes sense for this individual is to allow her to undergo a lumbar fusion in an attempt to alleviate her discomfort.”

By decision dated August 5, 2002, the hearing representative affirmed the Office’s August 17, 2001 decision.

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

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;¹ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;² and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.³ The medical opinion must be one of reasonable medical certainty⁴ 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.⁵

However, it is well established that proceedings under the Federal Employees’ Compensation Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility for the development of the evidence.⁶ The Office has an obligation to see that justice is done.⁷

¹ See *Ronald K. White*, 37 ECAB 176, 178 (1985).

² See *Walter D. Morehead*, 31 ECAB 188, 194 (1979).

³ *Solomon Polen*, 51 ECAB 341 (2000).

⁴ See *Morris Scanlon*, 11 ECAB 384-85 (1960).

⁵ See *William E. Enright*, 31 ECAB 426, 430 (1980).

⁶ *Mark A. Cacchione*, 46 ECAB 148, 152 (1994).

⁷ *John J. Carlone*, 41 ECAB 354, 360 (1989).

In the instant case, Dr. Phair, in the April 5, 2000 attending physician's form report, checked a box indicating that appellant's lumbar degenerative disc disease at L4-5 was work related, but failed to provide an explanation, although he was asked to do so. Merely checking the "yes" box is insufficient to establish that appellant's disabling condition is work related.⁸ In his narrative reports, Dr. Phair stated with a reasonable degree of medical probability that there was a direct causal relationship between appellant's January 27, 1995 work injury and her current back condition. He stated that appellant originally sustained an injury to the L4-5 disc and she continued to be symptomatic over the years, despite work restrictions imposed. Dr. Phair stated that, based on his clinical examinations over the years, appellant's back condition was being aggravated by her ongoing employment. He recommended treatment by spinal fusion. The Board finds that the reports of Dr. Phair establish a *prima facie* claim that appellant's employment has aggravated her back condition.

Accordingly, the Office should prepare a statement of accepted facts and refer appellant, along with the statement of accepted facts and medical records, to an appropriate specialist for a rationalized medical opinion on whether appellant's degenerative disc disease is causally related to the factors of her federal employment. After such further development as it may deem necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated August 5, 2002 is hereby set aside and this case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
March 21, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁸ See *Debra S. King*, 44 ECAB 203, 210 (1992).