U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LIZABETH A. BROWN and U.S. POSTAL SERVICE,
POST OFFICE, Tiffin, OH

Docket No. 03-1389; Submitted on the Record;
Issued November 24, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability commencing August 22, 2002, causally related to her accepted January 5, 1998 employment injury.

On January 9, 1998 appellant, then a 40-year-old clerk, filed a traumatic injury claim alleging that on January 5, 1998 she sustained a low back strain in the performance of duty. She did not stop work with the exception of no pushing or pulling for three days. On February 13, 1998 the Office of Workers' Compensation Programs accepted appellant's claim for low back strain and aggravation of degenerative disc disease and spondylolisthesis with lumbar fusion in the course of her employment.[1] On May 26, 1998 appellant began performing limited duties and on June 12, 1998 she was further restricted to part-time limited-duty work.[2] On December 7, 1998 the Office authorized an anterior lumbar interbody fusion and appellant stopped working

[1] The record reveals that appellant also had a separate claim for stress and anxiety adjudicated by the Office under file No. 090421298.

[2] On June 23, 1998 appellant filed a notice of recurrence beginning February 10, 1998 and for changes in work status on May 12 and June 12, 1998. In an August 31, 1998 decision, the Office denied appellant's claim finding that the evidence failed to demonstrate a recurrence of disability. On November 23, 1998 the Office vacated the August 31, 1998 decision, finding an aggravation of preexisting nonwork-related degenerative disc disease and spondylolisthesis with surgical intervention and support for partial disability commencing June 12, 1998 and continuing. The record reflects that, thereafter, appellant made several claims for recurrence. By decision dated August 2, 1999, appellant's claim for recurrence beginning April 2, 1999 was disallowed. She also filed a claim for a schedule award; which was disallowed by decision dated July 2, 2002, as she had not reached maximum medical improvement.

completely until she returned to work for a four-hour workday on May 24, 1999, increasing to an eight-hour day on June 21, 1999 with restrictions of alternating: 1 hour of restricted duty 10 pounds, with 1 hour sedentary.[3] In an August 17, 1999 work capacity evaluation, Dr. Edmund P. Lawrence Jr., a Board-certified neurological surgeon, indicated that appellant needed a chair with a back support and should not be doing lengthy repetitious tasks. He indicated that appellant could do intermittent sitting for up to 10 hours, 4 hours of walking, 6 hours of intermittent standing, 10 hours of reaching, reaching above the shoulder, operating a motor vehicle and repetitive movements of wrists and no more than 2 hours of kneeling.

On August 28, 2002 appellant filed a notice of recurrence of disability claim alleging that she was experiencing severe back pain and pain and numbness in both legs.[4] She was off work from August 22 to 24, 2002 and continuing. On the claim form the employing establishment indicated that appellant stopped work on August 22, 2002 and was on annual leave from August 22 to 23, 2002.[5] In a letter dated September 6, 2002, the Office advised her of the additional factual and medical information needed to establish her claim. In a September 14, 2002 statement, appellant indicated that she was experiencing increased back pain, severe cramping and numbness in her right leg and that she believed the increased pain was due to the standing along with repeated lifting and bending she was required to do as a window clerk. She added that her restrictions were changed from a limitation of 50 pounds lifting and no limitation on standing to 30 pounds lifting and intermittent standing for 2 hours daily, which reduced the intensity of pain, but did not eliminate it. In response to whether she had any new injuries, appellant indicated that she had been hit in the face with a rototiller in April 2001 and in July 2001, her right leg cramped severely and gave out from under her, causing her to fall down the stairs. Both events occurred at home.

Appellant also submitted medical evidence including, treatment notes dating from July 5 to September 13, 2002, in which Dr. Michael Scherer, her treating osteopath, diagnosed chronic back pain and limited her to standing for 15 minutes an hour for a maximum of 2 hours a day. In an August 26, 2002 attending physician's report (CA-20), Dr. Scherer advised that appellant had a "recurrence of her original injury" and diagnosed chronic low back pain. He checked "yes" indicating that he believed the condition was employment related and advised that appellant was not able to return to work. In an August 30, 2002 treatment note, Dr. Scherer reported that appellant continued to have back and right leg pain. He completed a September 13, 2002 disability certificate, indicating that appellant was totally disabled for an indefinite period from August 16, 2002. Appellant provided a report from Dr. Scherer dated September 14, 2002, in which he indicated: "all positions that [appellant] could try needed to have restrictions placed on

[3] The modified position was comprised of casing mail, throwing P.O. Box mail, accountable cart, when needed and other duties within the physical restrictions. The job indicated alternating standing and casing duties with seated duties. The lifting requirement was limited to 10 to 15 pounds intermittently for 2 hours a day and no more than 4 hours of sitting, standing or walking.

[4] Appellant also filed a Form CA-7, commencing August 22, 2002. The record reflects that she filed several claims for compensation for wage loss for the periods August 22, 2002 to February 28, 2003.

[5] The employing establishment indicated that appellant usually worked for two hours as a window clerk on Saturdays, but that she always had a chair available to accommodate her restrictions.

them." In an October 1, 2002 report, Dr. Scherer indicated that appellant continued to experience back pain and noted that she had a small central disc herniation of the L5-S1 disc. He advised that she remain off work from August 22, 2002 until February 22, 2003.

A September 11, 2002 magnetic resonance imaging (MRI) scan showed a central bulge/small central herniation of the L5-S1 disc was essentially unchanged, since a February 2000 study with minimal impingement and postsurgical changes at L4-5 with no evidence of recurrent disc herniation or significant epidural fibrosis. A mild degree of central canal stenosis was present at the level of L3-4.

By decision dated October 18, 2002, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that she sustained a recurrence of disability beginning on August 22, 2002 and continuing which was causally related to the January 5, 1998 accepted employment injury.

On October 24, 2002 appellant requested reconsideration. She stated that her restrictions were increased by her physician on November 5, 2001 and acknowledged that the employing establishment was accommodating those restrictions, but that she was periodically asked to work outside of her restrictions and occasionally lifted trays of mail weighing more than 10 pounds, as the tubs were not marked with their weight.

Appellant also submitted an October 25, 2002 report, in which Dr. Scherer advised that she had been having increased pain in her back aggravated by prolonged standing at work. He reviewed his findings and treatment of appellant and noted that the MRI scan results demonstrating central bulging/small herniation of the L5-S1 disc essentially unchanged from previous MRI scans with a mild degree of central canal stenosis at L3-4, which was more prominent than before. Dr. Scherer advised appellant to remain off work until February 22, 2003, "due to all of the above circumstances." He explained that this would provide ample time to complete testing and to consult with other medical professionals regarding [appellant's] condition. Dr. Scherer added that, "if she continues to work at this time, even in a limited-duty capacity, she may incur permanent nerve damage from the constant pressure applied on the injury."

In addition, the Office received an x-ray report of the lumbar spine dated December 3, 2002, showing status post cage procedure at L4-5 with spondylolisthesis, which appeared unchanged since March 18, 1999 with no significant change regarding anterior slipping of vertebral bodies and generalized osteoporosis.

In a December 3, 2002 report, Dr. Lawrence, a Board-certified neurosurgeon noted appellant's complaints of pain and advised that further studies were needed.

In a September 13, 2002 treatment note, Dr. Scherer explained that appellant stopped working secondary to back pain which was worsening and due to an inability to perform her job secondary to this and due to the "apparent inability of the workplace to comply with work restrictions." In an October 22, 2002 note, he indicated that appellant was unable to perform her job and would remain off work. Dr. Scherer opined that she was unable to do so because of continued pain worsened by her work and concern for worsening nerve damage. In a

November 18, 2002 note, he indicated that he would keep appellant off work and in his December 12, 2002 treatment note, Dr. Scherer concluded that appellant's physical examination remained unchanged and, opined ''as previously reviewed, [appellant] is not disabled for all work, however, [she] has had problems with local [the employing establishment] complying with [her] restrictions, which have aggravated [her] back pain."

By decision dated January 23, 2003, the Office denied modification of the October 18, 2002 decision.

By letter dated February 25, 2003, the Office advised appellant that a Form CA-7 claim, submitted by her, was not compensable as her recurrence was denied on October 18, 2002 and affirmed on January 23, 2003.

By letter dated February 28, 2003, appellant, through her attorney, requested reconsideration. She provided statements from her coworkers regarding working outside her restrictions, they included: an email from Wonetta Miller dated February 23, 2003; a letter dated February 20, 2003 from Amy Frisch-Snyder; and a February 19, 2003 letter from Howard Pugh indicating that appellant worked over her limits in her position. She also included copies of her leave slips and a copy of the physical capacity evaluation report dated February 11, 2003 from a physical therapist. In a February 3, 2003 disability certificate, Dr. Scherer advised that appellant could not work from August 22, 2002 to May 5, 2003. In a March 7, 2003 report, he indicated that he had advised appellant that she could return to work in a sedentary capacity on February 11, 2003 in accordance with the results of a physical capacity evaluation of the same date.

By letter dated April 9, 2003, the employing establishment denied that appellant was required to work outside her limitations. William Geary, supervisor of customer services, indicated that, although appellant worked the window for three and a half hours on Saturdays, she was provided a high back stool that was purchased for her so that she could stay within her limitations. He explained that the stool was provided for appellant so that she could spread her time between standing and sitting in order to keep her under her two-hour standing restriction. Mr. Geary advised that appellant was told not to lift packages beyond her weight limit and that she was never alone at the window. Further, he questioned the validity of one of the statements provided by appellant wherein it was suggested that she worked the window for four hours as the window was only open from 9:00 a.m. to 12:30 p.m. In addition, Mr. Geary noted that another employee indicated that appellant spoke about doing other physical activities around her home that may have contributed to her condition. He indicated that he had been informed that appellant had used a rototiller and moved bales of hay at home. Mr. Geary concluded that appellant only stood at the window for two hours which was within her limitations and stated that she was never requested to lift beyond her limit.

By decision dated May 2, 2003, the Office denied modification of its prior decisions.

The Board finds that appellant has not established that she sustained a recurrence of disability beginning August 22, 2002 due to her January 5, 1998 employment injury.

When 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.[6]

In this case, the Office informed appellant of the type of evidence necessary to establish that either the requirements of her limited-duty job had changed or that her work-related condition had worsened, resulting in a recurrence of disability causally related to the accepted work injury.

Appellant, however, has not provided any medical reports, based on objective findings, which establish that there has been a change in the nature and extent of her condition such that she can no longer perform her light-duty job and also has provided insufficient evidence to establish that there has been a change in the nature and extent of her light-duty job requirements.

In support of her argument that there was a change in the nature and extent of her light-duty job requirements, appellant submitted statements from several coworkers. In a February 23, 2002 email, Ms. Miller indicated that she had noted that appellant would work the window on Saturdays, which was 3.75 hours. However, Ms. Miller did not discuss whether appellant was standing or sitting at the chair provided, nor did she provide specific details indicating that appellant was working outside her restrictions. In a February 20, 2003 letter, Ms. Frishh-Snyder indicated that she had worked with appellant, who sometime was scheduled for four hours at the window and there were times when she would stand for more than two hours. Ms. Snyder indicated that the job required that one carry heavy parcels and that lifting of heavy parcels was difficult to avoid as the employing establishment "expected you to do whatever is next." However, she gave no specifics regarding specific incidents or times and did not explain why appellant would not be utilizing the chair provided or why she failed to request assistance with respect to parcels. In a February 19, 2003 letter, Mr. Pugh stated that he had seen appellant work outside her restrictions and that he heard her tell her supervisor that it was difficult for her to pick packages up from the scale and that standing on her feet for more than two hours was outside her restrictions. However, Mr. Pugh did not provide specific examples of his observations.

The employing establishment responded to these allegations and explained that appellant was provided with a chair to alternate between sitting and standing so that she would not exceed her two-hour standing restriction and advised that the window was only open for three and a half hours. Mr. Geary denied that appellant was required to work outside her restrictions, denied that she was required to lift packages outside her restrictions and confirmed that appellant was never alone at the window. Appellant, therefore, failed to establish a change in the nature and extent of the light-duty requirements.

[6] *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

Similarly appellant failed to establish a change in the nature or extent of her employment-related back condition.

Regarding the medical documentation, appellant submitted a number of reports from Dr. Scherer dating from July 5, 2002 to March 7, 2003, in which he provided restrictions to appellant's physical activity, but did not discuss the cause of her condition. On an Office form report dated August 26, 2002, Dr. Scherer checked "yes" in response to whether appellant's condition was caused or aggravated by an employment activity and advised that appellant could not return to work. The Board has long held that merely checking a box "yes" is insufficient without further explanation or rationale, to establish causal relationship.[7] Dr. Scherer, however, provided no further explanation. His August 26, 2002 report, therefore, is insufficient to establish that appellant sustained a recurrence of disability. In his October 25, 2002 report, Dr. Scherer noted appellant's complaints of pain due to prolonged standing at work and discussed the MRI scan findings of a small herniation and explained that her condition was "due to all of the above circumstances." He concluded that, even with limited-duty work, she could incur permanent nerve damage. Fear of future injury is not a compensable factor of employment.[8] Furthermore, the Office has not accepted that the disc herniation is employment related. The Board finds that, as Dr. Scherer did not provide a sufficient explanation to show that appellant sustained a recurrence of total disability after returning to light duty, such that she could not continue to perform her light-duty position, his opinion is insufficient to meet appellant's burden.[9]

Appellant also submitted diagnostic reports that merely stated findings on examination and provided no opinion regarding the cause of her condition.

As appellant has not submitted competent medical evidence showing that she was disabled beginning August 22, 2002, due to her accepted employment injury, she has not met her burden of proof.[10]

[7] *Barbara J. Williams*, 40 ECAB 649 (1989).

[8] *Calvin E. King*, 51 ECAB 394 (2000).

[9] *See Richard E. Konnen*, *supra* note 6.

[10] Following the issuance of the Office's May 2, 2003 decision, appellant submitted additional evidence. However, the Board may not consider this evidence as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. *See* 20 C.F.R. § 501.2(c).

The decisions of the Office of Workers' Compensation Programs dated May 2 and January 23, 2003 and October 18, 2002 are hereby affirmed.

Dated, Washington, DC
November 24, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member