

**United States Department of Labor
Employees' Compensation Appeals Board**

CINDY L. MOSS, Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Arlington, MA, Employer)

**Docket No. 04-1386
Issued: December 13, 2004**

Appearances:

*William E. Shanahan, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On May 3, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's merit decision dated March 22, 2004 finding that the Office met its burden of proof to terminate appellant's compensation benefits effective December 1, 2002 by decision dated December 4, 2002 on the grounds that she had no continuing employment-related disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective December 1, 2002; and (2) whether appellant has met her burden of proof in establishing any continuing employment-related disability on or after December 1, 2002.

FACTUAL HISTORY

Appellant filed her first claim for a back injury arising in the performance of duty on October 26, 1990. The Office denied this claim on April 8, 1991. She underwent a bilateral partial laminectomy of L4 and L5 on October 31, 1991. On June 25, 1993 the Office accepted that appellant sustained a lumbar strain on June 24, 1992 while working as a letter carrier. Appellant established that she sustained a second employment injury on August 4, 1994 and the Office accepted her claim for low back strain with sciatica. She slipped on ice on March 2, 1995 and the Office accepted a back contusion and lumbar strain on March 31, 1995. Appellant alleged a recurrence of disability on March 29, 1995, she underwent surgery on May 22, 1995 for excision of a recurrent herniated disc at L4-5 and the Office accepted her claim for herniated disc and surgery on June 7, 1995. Appellant underwent a decompression of the S1 left nerve root with neuroplasty on January 22, 1998. On May 4, 1998 appellant underwent an epiduroscopic lysis of adhesions and neuroplasty injection. She returned to work on May 5, 1998 working light duty two hours a day as a modified carrier technician. Appellant gradually increased her light-duty work and on August 21, 1998 she began working eight hours a day in the light-duty position. The employing establishment provided appellant with a modified letter carrier position on September 12, 1998 entailing casing mail for three to four hours, delivering mail up to three hours and administrative duties for one to two hours a day. She accepted this position on September 15, 1998. On November 13, 1998 appellant's physician, Robert J. Kaplan, a Board-certified obstetrician and gynecologist, noted that appellant's work requirements included set up as well as 6 hours of carrying mail up to 45 pounds. Appellant underwent a second epiduroscopic lysis of adhesions and neuroplasty injection on January 14, 1999. Dr. Julien Vaisman, a Board-certified anesthesiologist, recommended an in-office route from January 20 to February 1, 1999. On February 3, 1999 he released her to full employment in one week. In a letter dated February 22, 1999, the Office denied authorization of compensation from January 14 through February 4, 1999.¹

On May 24, 1999 appellant, then a 35-year-old city carrier, filed a traumatic injury claim alleging that on that date she slipped on a banana peel in the performance of duty injuring her back.² The Office entered appellant on the periodic rolls on July 26, 1999 and on December 29, 1999 the Office accepted low back strain due to this employment injury.

Appellant underwent a magnetic resonance imaging (MRI) scan on June 4, 1999 which suggested a recurrent disc herniation bilaterally at L4-5. Appellant also had an area of enhancement at L1-2. Dr. Vaisman diagnosed recurrent S1 left radiculopathy, new right L5 radicular symptomatology on August 18, 1999. On September 14, 1999 he found that the MRI scan provided evidence of fibrous tissues exiting nerve root L5-S1 on the left side. The Office medical adviser reviewed this report on October 22, 1999 and concluded that any fibrous adhesions would not be secondary to the work-related injury which occurred on May 24, 1999.

¹ The Office found that appellant had returned to full-time light duty prior to May 24, 1999.

² Appellant provided two different dates of injury, May 14 and 24, 1999. She ultimately established that the injury in question occurred on May 24, 1999.

On January 5, 2000 appellant telephoned the Office regarding a tumor at L5-S1 which required surgery. On January 17, 2000 Dr. Francis X. Rockett, a Board-certified neurosurgeon, performed excision of neoplasm intraspinal, intradural and intramedullary.³ In a note dated January 31, 2000 Dr. Rockett stated that appellant's left leg symptoms had improved, but that she continued to experience right leg pain.

In a report dated March 10, 2000, Dr. Rockett informed appellant that there were no signs of recurrent tumors or herniated discs. He stated that appellant's current condition was a continuation of her former problems of nerve root involvement and not related to her tumor. Dr. Rockett diagnosed clinical depression. Appellant underwent a second MRI scan on March 30, 2000 which demonstrated postoperative changes at L1-2 and L2-3 with granulation tissue. The MRI scan also demonstrated postoperative changes at L4-5 on the left side and severe degeneration of the L4-5 intervertebral disc with narrowing of the disc space. Appellant's MRI scan results included facet joint arthritis at L2-3, L3-4 and L4-5.

Dr. Joseph F. Audette, a physician Board-certified in physical medicine and rehabilitation, completed a form report on May 5, 2000 diagnosing lumbar radiculopathy and sacroiliac joint dysfunction. He indicated that appellant's previous employment injuries were not implicated as she was working full duty prior to her injury. Dr. Audette stated that appellant's current condition was aggravated by her employment as she experienced a twisting fall. He found that she was totally disabled.

The Office referred appellant for a second opinion evaluation with Dr. Joel Saperstein, a Board-certified orthopedic surgeon, on May 30, 2000. In a report dated June 20, 2000, Dr. Saperstein listed appellant's employment injuries and performed a physical examination and diagnosed chronic back pain, chronic low back strain with chronic pain syndrome and traumatic arthritis of the lumbar spine. He provided a secondary diagnosis of chronic depression and stated that this condition appeared to be related to her physical conditions. Dr. Saperstein stated that the primary inciting cause of appellant's disability was her May 1999 employment injury superimposed upon a preexisting condition of impending traumatic arthritis related to her 1991 alleged employment injury. He found that she was totally disabled.

Dr. Kaplan completed a form report on July 28, 2000 and diagnosed lumbar radiculopathy with sacroiliac joint dysfunction. He found that appellant was totally disabled. Dr. Audette continued to opine that appellant was totally disabled in form reports through February 1, 2001.

Dr. Vaisman completed a report on May 15, 2001 and noted that appellant's condition was deteriorating. He stated that appellant had difficult sitting and driving, that she was totally disabled and that she had difficulty doing household chores. He further stated, "She has difficulty playing sports such as volleyball and softball. She can walk barely up to one block." He diagnosed chronic lumbar radiculopathy status post lumbar laminectomy and recommended caudal epidurolysis of adhesion. The Office medical adviser approved this procedure on May 30, 2001 and on June 15, 2001 the Office authorized surgery. Dr. Vaisman performed a epidural lysis of adhesion with lumbar epidurogram on July 9, 2001. He reported on July 27,

³ The Office did not accept that this condition or the related surgery were due to appellant's employment.

2001 that appellant continued to experience symptoms of back pain with radiation down the left leg. Dr. Vaisman stated, "She continues to be fairly active, biking and hiking as much as she can." He diagnosed lumbar radiculopathy. Dr. Heechin Chae, a physician specializing in physical medicine and rehabilitation, completed a report on September 21, 2001 and stated that appellant's pain was interfering with walking and other physical activities. He diagnosed lumbar radiculopathy.

An MRI scan dated January 14, 2002 found no significant change from appellant's March 3, 2000 study.

Dr. David C. Karli, a physician Board-certified in physical medicine and rehabilitation, completed a form report on February 29, 2002 diagnosing postlaminectomy syndrome after multiple surgeries and chronic radiculopathy. He found that appellant was totally disabled.

The Office referred appellant for a second opinion evaluation on June 28, 2002. In a report dated July 29, 2002, Dr. Donald Pettit, a Board-certified orthopedic surgeon, reviewed appellant's medical history and history of injury and performed a physical examination finding good lumbosacral mechanics with no muscle spasm, no motor loss in the lower extremities and no muscle atrophy. He diagnosed degenerative disc disease in the lumbar spine. Dr. Pettit stated, "Objectively she has recovered from the only diagnosis that is tenable as a result of the banana peel episode, which is a lumbosacral strain. She has fully recovered from that event and is back to preinjury status, which would allow her to be fully functional as a postal employee." He diagnosed degenerative disc disease and stated that he would limit the amount of weight that appellant could lift to 25 pounds.

The Office proposed to terminate appellant's compensation for wage loss by letter dated October 29, 2002. By decision dated December 4, 2002, the Office terminated appellant's wage-loss compensation effective December 1, 2002.

Appellant submitted a note dated January 10, 2003 from Dr. Alec Meleger, a physician, diagnosing progressive left gluteal sacral pains unresponsive to conservative measures. He did not provide a history of injury nor an opinion regarding appellant's ability to work.

Appellant, through her attorney, requested an oral hearing on March 31, 2003. The Branch of Hearings and Review initially denied appellant's request for an oral hearing on April 22, 2003. Appellant requested that the Branch of Hearings and Review reconsider this decision on May 13, 2003. Appellant testified at the oral hearing on December 17, 2003.

On August 13, 2003 Dr. William O'Callahan, a physician Board-certified in emergency medicine, noted appellant's complaints of increasing pain in the lower back with radiation down both legs and diagnosed acute exacerbation of chronic low back pain secondary to lumbar disc disease.

Appellant submitted an MRI scan dated August 21, 2003 which demonstrated degeneration of the L4-5 intervertebral disc with no encroachment on the exiting nerve roots.

Dr. Rockett completed a note on October 14, 2003 diagnosing chronic pain syndrome, failed back syndrome and surgeries on the L4-5 and L5-S1 discs.

In a report dated December 27, 2003, Dr. Rockett reviewed his treatment of appellant and noted that repeated MRI scans demonstrated scarring along the nerve roots as a result of her surgeries. He diagnosed chronic pain syndrome in addition to and because of the arachnoiditis or scarring. Dr. Rockett stated, “[I]t is my impression that [appellant] is disabled from her regular job as a letter carrier because of the continuing pain that she is experiencing and the aggravation of pain that occurs with activities such as twisting, bending, lifting, walking and prolonged sitting.” He opined that appellant sustained a nerve root injury as a result of her May 1999 employment injury. Dr. Rockett stated, “It is my impression that [appellant] is suffering from back pain and radicular leg pain secondary to ruptured discs, recurrent ruptured discs and repetitive back strain, repetitive nerve injuries due to adhesions around the nerve roots as well as arachnoiditis and facet joint arthritis.”

Dr. Rockett submitted a note dated January 5, 2004 which mentioned additional symptoms.

By decision dated March 22, 2004, the Office hearing representative affirmed the Office’s December 4, 2002 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.⁵

The Board has held that 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 to show that she cannot perform such light-duty work. 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 However, before the burden of proof shifts to a claimant under the foregoing principle, the evidence of record must establish that light duty consistent with the claimant’s medical restrictions was in fact made available to the claimant.⁷

ANALYSIS -- ISSUE 1

Appellant sustained work-related injuries in 1993, 1994 and 1995. She returned to full-time light-duty work in 1998. Appellant filed a claim for an injury in May 1999 which the

⁴ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

⁵ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁶ *Joseph D. Duncan*, 54 ECAB ____ (Docket No. 02-1115, issued March 4, 2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁷ *Louise R. Silva*, 41 ECAB 176, 184 (1989).

Office accepted for lumbar strain. On July 29, 2002 Dr. Pettit, a second opinion physician and a Board-certified orthopedic surgeon, stated that appellant had recovered from the banana peel injury on May 25, 1999 which resulted in a lumbosacral strain. He found that appellant was back to her “preinjury status” and that she could be fully functional as a postal employee. By decision dated December 4, 2002, the Office found that appellant was no longer disabled for work due to her May 1999 injury and terminated her compensation benefits on those grounds.

Although Dr. Pettit found that appellant had recovered from her May 25, 1999 employment injury of lumbar strain and returned to her preinjury status, he did not opine that appellant had no continuing disability due to her previous employment injuries which begin in 1993. In the context of Dr. Pettit’s report, it is clear that he found that she was recovered from the 1999 lumbar strain and had returned to her status immediately prior to this injury. Dr. Pettit did not attempt to address any current conditions resulting from appellant’s previously accepted injuries and any disability from these conditions.⁸ His report is not sufficient to establish that appellant had no disability due to her employment. Instead, Dr. Pettit merely opined that appellant had returned to her pre-May 25, 1999 condition. However, before May 25, 1999, appellant was working full time in a light-duty position. The Board has held that the fact that an employee returns to work or the medical evidence establishes that the employee may return to work with limitations on her regular activities is not a sufficient basis for finding that the employee’s disability has ceased.⁹ The Office must establish, by the weight of the medical evidence, that either appellant’s employment-related disability ceased or that light duty consistent with appellant’s physical limitations was made available to her and that she refused the light-duty work.

The medical evidence, as represented by Dr. Pettit’s report, does not establish that appellant’s entire employment-related disability had ceased. Furthermore, there is no evidence of record establishing that light duty consistent with appellant’s physical limitations was made available to appellant at the time the Office terminated her compensation benefits. The Office, therefore, failed to discharge its burden of proof to terminate appellant’s compensation benefits effective December 1, 2002.¹⁰

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant’s compensation benefits effective December 1, 2002 as the medical evidence does not establish that appellant’s employment-related disability ceased nor that light duty was made available to appellant at the time of the Office’s December 4, 2002 decision.

⁸ Although Dr. Pettit diagnosed degenerative disc disease in the lumbar spine and found that appellant was partially disabled due to this condition, he did not offer an opinion as to whether this diagnosis was related to any of her previously accepted employment injuries. Such an opinion would be necessary to establish that appellant had fully recovered from all employment injuries as appellant’s physician, Dr. Rockett, opined that her MRI scans demonstrated postoperative scarring and degeneration.

⁹ *Id.* at 185.

¹⁰ Due to the disposition of this issue, it is not necessary for the Board to address whether appellant has met her burden of proof in establishing any continuing disability on or after December 1, 2002.

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 13, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member