U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CINDY L. DUESLER and U.S. POSTAL SERVICE,
POST OFFICE, Albany, NY

Docket No. 03-950; Submitted on the Record;
Issued January 8, 2004

DECISION and ORDER

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

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability beginning May 7, 2001, due to her September 5, 1995 employment injury.

On September 5, 1995 appellant, then a 34-year-old letter carrier, injured her back while pulling and lifting mail trays out from under parcel packages. The Office of Workers' Compensation Programs accepted that appellant sustained a lumbar sprain and paid appropriate compensation. Appellant stopped work on September 5, 1995 and returned to modified duty on October 4, 1995, for four hours a day. On January 6, 1996 she began working six hours per day. The Office subsequently accepted that appellant sustained recurrences of disability commencing April 25 and August 11, 1997. She returned to a limited-duty position on October 2, 1997 for two hours a day. Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians.[1] On April 30, 1999 appellant accepted a limited-duty position three hours per day, effective May 1, 1999.

On October 27, 2000 the employing establishment offered appellant a limited-duty position for four hours a day. Thereafter, she received wage-loss compensation for four hours per day and continued in this position until April 18, 2001, when the employing establishment offered appellant a limited-duty position for four hours per day from 3:00 to 7:00 p.m. The duties included clerical work, clearing carriers, locking gates where vehicles were parked, answering telephones, downloading scanners and spreaders and pitching mail. The position was subject to the following restrictions: limited sitting, walking, reaching, twisting; operating a motor vehicle for one hour per day; limited pushing, pulling and lifting up to one-half hour per day up to fifteen pounds; limited squatting, kneeling, climbing and reaching above the shoulder

[1] On March 2, 1998 the Office issued a loss of wage-earning capacity determination noting that appellant had been reemployed as a city carrier effective October 2, 1997, which fairly and reasonably represented her wage-earning capacity.

to one-half hour per day; limited standing up to two hours per day; and limited repetitive movements of wrists and elbows of one hour per day. Appellant accepted the position on April 18, 2001, indicating that she accepted the job under protest.

On June 8, 2001 appellant filed a Form CA-2a, notice of recurrence of disability. Appellant indicated a recurrence of disability commencing on May 7, 2001, when she experienced back pain while bending over to put on her sneakers. She stopped work on May 7, 2001. She returned to work on September 10, 2001.

In support of her recurrence claim, appellant submitted a report from Dr. David F. Pearce, an orthopedic surgeon, dated May 10, 2001. Dr. Pearce advised that appellant experienced a flare-up of acute low back pain with radiation into her legs. Dr. Pearce noted limitation of motion upon physical examination in the back and took appellant off of work until May 24, 2001. The physician's note of May 24, 2001 advised that she was improving but had continued limitation of motion and could return to work four hours per day on May 29, 2001. Dr. Pearce indicated that appellant should work morning hours because her pain worsened as the day progressed. On June 1, 2001 Dr. Pearce advised that appellant was unable to work late in the day as she experienced increased stress and pain, which caused an exacerbation of acute low back pain. The physician noted that appellant had less chance of flare-ups when working in the morning because her back was rested.

In a letter dated July 5, 2001, the Office advised appellant to provide additional evidence in support of her recurrence of disability claim.

Appellant submitted a July 19, 2001 report from Dr. Pearce, who advised that it was necessary for her to work morning hours because she needed a complete night of bed rest before starting work to prevent recurrences of acute back pain. On July 25, 2001 he noted that "up until about" May 10, 2001 while at work, appellant had increased low back pain with radiation to both legs. The physician indicated that appellant had been off work and had returned to work four hours per day on May 29, 2001 with restrictions on bending, stooping and heavy lifting. Dr. Pearce further advised that appellant had a permanent partial disability since 1995 and had been totally disabled May 10 to 29, 2001. He again recommended that appellant work in the morning.

In a decision dated August 23, 2001, the Office denied appellant's claim for recurrence of disability on the grounds that she did not submit sufficient medical evidence to establish that her disability commencing on or about May 7, 2001, was causally related to the accepted employment injury sustained September 5, 1995.

In a letter dated September 17, 2001, appellant requested an oral hearing before an Office hearing representative. The hearing was held on November 18, 2002. Appellant submitted an August 29, 2001 report from Dr. Pearce, who noted appellant's preference to work in the morning because she required pain medication in the afternoon, which she could not use while working. On May 6, 2002 Dr. Pearce advised that appellant sustained a recurrence of low back pain on May 7, 2001 while preparing for work and was treated in his office on May 10, 2001. The physician noted that physical examination revealed marked limitation of motion of the back and positive straight leg raises. Dr. Pearce advised that the recurrence on May 7, 2001 was due

to the injury of September 5, 1995 and indicated that appellant was totally disabled from May 7 to 29, 2001. Also submitted was an August 6, 2002 report from Dr. Gregory Shankman, an orthopedic surgeon, dated, who saw appellant in consultation, diagnosed a herniated disc at L4-5 and L5-S1 and recommended conservative treatment.

In a decision dated January 14, 2003, the hearing representative affirmed the August 23, 2001 decision of the Office.

The Board finds that the case is 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 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 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.[2]

Appellant has submitted reports from Dr. Pearce, which noted positive physical findings and who found that she was totally disabled for work commencing May 7, 2001. Dr. Pearce noted that on May 7, 2001 appellant experienced a recurrence of low back pain while preparing for work. He examined her in his office on May 10, 2001 and found a marked limitation of range of motion and positive straight leg raises. He found that she was totally disabled from May 7 to 29, 2001. The physician advised that the recurrence on May 7, 2001 was due to the injury of September 5, 1995 and that appellant was totally disabled from May 7 to 29, 2001. This report is supportive of appellant's recurrence claim.

Proceedings under the Federal Employees' Compensation Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[3] This holds true in recurrence claims as well as in initial traumatic and occupational claims. In the instant case, although the reports of Dr. Pearce contain rationale insufficient to discharge appellant's burden of proof total disability on May 7, 2001 causally related to her September 5, 1995 injury, they constitute substantial evidence in support of appellant's claim and raise a unrefuted inference of causal relationship sufficient to require further development of the case record by the Office.[4] There is no probative opposing medical evidence in the record for this period.

---

[2] *Terry R. Hedman*, 38 ECAB 222 (1986); *Roberta L. Kaaumoana*, 54 ECAB ___ (Docket No. 02-891, issued October 9, 2002); *Jackie D. West*, 54 ECAB ___ (Docket No. 02-1299, issued October 21, 2002); *Joseph D. Duncan*, 54 ECAB ___ (Docket No. 02-1115, issued March 4, 2003).

[3] *William J. Cantrell*, 34 ECAB 1223 (1983).

[4] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978); *see also Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987) (if medical evidence establishes that residuals of an employment-related impairment are such that they prevent an employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity).

On remand, the Office should develop the medical evidence as appropriate to obtain a rationalized opinion regarding whether appellant sustained a recurrence of disability on or about May 7, 2001 causally related to the September 5, 1995 injury and, if so, the period of disability. Following such further development of the case record as it deems necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated January 14, 2003 is set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
January 8, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member