

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of JOANN R. HOLBOURN and U.S. POSTAL SERVICE,  
POST OFFICE, Tampa, Fla.

*Docket No. 96-2175; Submitted on the Record;  
Issued September 16, 1998*

---

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability during or after May 1993 causally related to her June 7, 1990 employment injury.

In this case, the Office of Workers' Compensation Programs accepted that appellant sustained a low back strain and herniated L4-5 disc with foot drop as a result of a tripping incident during the performance of her duties on June 7, 1990. Appellant received continuation of pay for 45 days following the injury. Beginning August 7, 1990, she received compensation for total disability. Appellant was placed on the periodic roll in October 1990 at the temporary total rate. In addition, she was paid a schedule award for 20 percent permanent impairment of the left leg.

Following her injury, appellant returned to work in a modified position as a PTF Carrier in December 1992 with no loss in pay. The Office advised appellant by letter dated November 19, 1993 that the job she was working in fairly and reasonably represented her earning capacity. Appellant was further advised that, since she had suffered no loss of pay, she was not entitled to any compensation. On March 6, 1993 appellant was made a full-time regular carrier.

On November 23, 1993 appellant filed a claim for recurrence of total disability due to her employment-related condition. Appellant contended that the claimed recurrence of disability began on May 6, 1993. Appellant stated that she believed that this is a recurrence because the pain and foot drop did not go away and got increasingly worse. On the reverse side of the form, the employing establishment indicated that appellant stopped work July 8, 1993 and had been placed on limited duty since June 1990.

By decision dated April 20, 1994, the Office denied appellant's claim for a recurrence of total disability on the grounds that the medical evidence of record failed to demonstrate a material worsening of the condition that would prevent her from working the modified position

as a PTF Carrier, the position she was rated in at the time she stopped work. Moreover, the Office found that the medical evidence of record did not show evidence of disabling objective findings of the accepted condition and the record was devoid of medical evidence to substantiate appellant's claimed condition of recurrence or support of total disability due to the original injury.

By decision dated December 12, 1994, an Office hearing representative affirmed the Office's decision. The hearing representative noted that it was the employee's burden to furnish evidence to establish a recurrence of disability. The burden was noted to include the need of medical evidence establishing a change in the nature of the injury-related condition. Dr. McCarthy, a Board-certified orthopedic surgeon and appellant's attending surgeon, noted in an October 5, 1993 report that the recent episodes had not resulted in additional disability. The hearing representative noted that the medical evidence submitted provided no indication of medically certified disability for work much less a material worsening of the job-related condition.

By decision dated March 2, 1995, the Office denied modification of the April 20, 1994 decision on the basis that the additional evidence submitted did not establish that appellant suffered a recurrence of job-related disability from May to July 1993.

By letter dated February 25, 1996, appellant again requested reconsideration. She noted that the memorandum incorporated in the March 2, 1995 denial of modification erroneously referred to hospitalization in March 1993 instead of May 1993. She noted that she was hospitalized as a result of her compensable injury and that the Office had paid the bills associated with the hospitalization. Appellant further disputed a statement in the memorandum referring to her claim of recurrence; the memorandum stated that disability did not begin on May 6, 1993, but began on July 13, 1993. To support her allegation that her recurrence began in May 1993, appellant submitted hospital records to indicate that she was hospitalized for her back condition on May 13 until May 15, 1993, when she checked herself out. Appellant further indicated that the Office paid bills associated with the hospitalization.

Along with her request for reconsideration, appellant submitted medical evidence which she believed supported her recurrence claim.

Appellant submitted medical records dated February 21, and March 11, 1993 which concern her back condition and complaints. A physical therapy note of October 29, 1993 noted that appellant complained of increased pain in her low back and gluts for the past 4 months.

Appellant submitted a May 13, 1993 hospital record which refers to post-laminectomy syndrome and the "recurrence of ruptures" at possibly two levels.

Appellant submitted a July 13, 1993 emergency room report which notes appellant's subjective complaint's at work. Appellant was diagnosed as having an acute LS sprain with right lumbar radiculopathy.

Appellant submitted an August 19, 1993 Work or Disability Certificate from Dr. Mark B. Lonstein, a Board-certified orthopedic surgeon, which certified that appellant was unfit to return

to work for an unknown period of time. In his August 19, 1993 narrative report, Dr. Lonstein noted appellant's medical history, reviewed an MRI from January 1993, and examined appellant. Dr. Lonstein diagnosed post-lumbar laminectomy syndrome with arachnoiditis. He recommended that appellant continue with conservative treatments and opined that at least part of appellant's symptoms were coming from the arachnoiditis that has developed postoperatively.

An October 24, 1994 MRI report indicated disc bulging, scar tissue and stenosis.

Appellant also submitted an emergency room report dated November 22, 1993 which diagnosed appellant as having acute lumbosacral radiculopathy and identified a "recurrent low back injury."

Appellant resubmitted a February 10, 1995 medical report from Dr. McCarthy. Dr. McCarthy notes that appellant had been followed in his office since 1990, at which time she had an on-the-job injury. Dr. McCarthy stated that appellant has continued to be treated for recurrent right sciatica, which at the present time, is of moderately severe degree. He noted that appellant has had multiple MRI's, CT scans, and myelograms and that the most recent MRI in October 1994 showed basically scar tissue from previous surgery with no evidence of significant correctable obstructive pathology. Dr. McCarthy diagnosed post-laminectomy syndrome with arachnoiditis. He further noted that appellant continued to suffer from a permanent left foot drop and a permanent bladder injury. He opined that appellant's present medical condition is caused by and aggravated by employment factors. Dr. McCarthy opined that this aggravation appears to be permanent. He further opined that appellant was partially disabled and not able to return to her regular job.

In a decision dated April 2, 1996, the Office stated that it reviewed appellant's claim on the merits but that the evidence submitted was not sufficient to require modification of its April 20, 1994 decision. The Office initially stated that from the medical evidence submitted at the time of the recurrence, it was not evident that appellant lost time from work in May 1993, as claimed, so appellant's recurrence claim was considered from July 1993, the date she stopped work. As review of the record established that appellant used sick and annual leave in May 1993 and returned to her limited-duty position before stopping work in July 1993, the Office expanded the issue under reconsideration to cover whether appellant suffered a recurrence of her job-related disability in May 1993 or in July 1993. The Office found that the evidence submitted did not establish a recurrence of disability in either May or July 1993.

The Board only has jurisdiction over the April 2, 1996 decision, which denied appellant's request for modification of the decision dated April 20, 1994 after a merit review was performed of the case. Because more than one year has elapsed between the issuance of the Office's previous decisions dated March 2, 1995, December 12 and April 20, 1994 and July 2, 1996, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the earlier decisions.<sup>1</sup>

---

<sup>1</sup> See 20 C.F.R. §§ 501.2(c), 501.3(d).

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained a recurrence of disability during or after May 1993 causally related to her June 7, 1990 employment injury.

When an employee, who is disabled from a 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 job requirements.<sup>2</sup> This burden further includes the necessity of furnishing medical evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>3</sup> Where no such rationale is present, medical evidence is of diminished probative value.<sup>4</sup> The Board has also held that the fact that a condition worsens to cause total disability, without establishment of causal relationship, is not sufficient to establish entitlement to total disability benefits. The burden of proof can be met, however, if the employee demonstrates a change in the injury-related condition, which is now totally disabling, and that the decompensation of the condition was a natural consequence arising from the accepted employment injury.<sup>5</sup> As is noted by Professor Larson in his treatise: “[O]nce the work-connected character of any injury has been established, the subsequent progression of the condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.”<sup>6</sup>

In the present case, appellant was working part time in a modified letter carrier job. She alleges that her disability worsened to the extent that she ceased work in early July 1993 and has been disabled since that time. There is no medical evidence of record, however, which provides the necessary causal relationship to establish that appellant’s disability on or after May 1993 was causally related to the accepted injury.

Although appellant submitted a hospital record to indicate that she was hospitalized in May 1993 and indicated that the Office may have paid bills associated with the hospitalization, such payment of bills does not establish entitlement to compensation. As noted above, entitlement to compensation is based on medical evidence. In the situation of recurrent disability, such evidence must establish a material worsening of a job-related condition. The hospital records merely indicate appellant’s increased subjective complaints.

---

<sup>2</sup> *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>3</sup> *Jerry A. Miller*, 46 ECAB 243 (1994); *Ezra D. Long*, 46 ECAB 791 (1995); *Ronald M. Cokes*, 46 ECAB 967 (1995).

<sup>4</sup> *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

<sup>5</sup> *Dana Bruce*, 44 ECAB 132 (1992).

<sup>6</sup> Larson, *The Law of Workmen’s Compensation* § 13.00 (March 1990).

The medical records dated February 21 and March 11, 1993 concern her condition and complaints prior to the date on which she stopped work and claimed recurrent disability and have no value in establishing that a material change occurred on or about May 6, 1993, as claimed, or on July 13, 1993, the date appellant stopped work. Moreover, the physical therapy note of October 29, 1993 merely indicates that appellant had increased subjective complaints for the past four months.

Although the May 13, 1993 hospital records indicate hospitalization as an acute post-laminectomy situation, they fail to establish a material worsening of a job-related condition was found or that appellant was totally disabled from her limited-duty position at the time she left the hospital. Moreover, the report provided an assessment of “post-laminectomy syndrome - possibly of recurrent disc material at one, perhaps two levels.” Such opinion is a speculation of the diagnosis and does not establish the diagnosis since the physician indicates it as a possibility rather than as a fact. An award of compensation may not be based on surmise, conjecture or speculation.<sup>7</sup>

Although the July 13, 1993 emergency room report diagnosed acute LS sprain with right lumbar radiculopathy, the report merely identifies subjective complaints without noting any objective findings. Moreover, the report does not indicate medically certified disability at the time of release from emergency care.

Although Dr. Longstein found appellant to be unfit to return to work, in his August 19, 1993 medical report, Dr. Lonstein failed to provide any medical opinion based on objective findings to establish a material worsening of appellant’s back condition in either May or July 1993.

The October 24, 1993 MRI report, although it indicated disc bulging, scar tissue and stenosis, gives no indication that such changes were present or represented material changes that manifested in May or July 1993.

Although the November 22, 1993 emergency room report identified a “recurrent low back injury,” there is no medical opinion attributing the diagnosis of acute lumbosacral radiculopathy to the accepted work injury. Furthermore, an emergency room report generated in November 1993 would not establish a recurrence of disability in either May or July 1993.

Lastly, as previously noted, Dr. McCarthy’s February 10, 1995 report was resubmitted. As his report was considered and reviewed at the time of previous decisions, this report is not considered new evidence.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant’s claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.<sup>8</sup> Appellant failed to submit rationalized medical evidence

---

<sup>7</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>8</sup> *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

establishing that her claimed recurrence of disability was causally related to the accepted employment injury in 1990, and therefore, the Office properly denied her claim for compensation.

The April 2, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
September 16, 1998

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member