

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBRA M. MILLER and U.S. POSTAL SERVICE,
POST OFFICE, Carthage, N.Y.

*Docket No. 96-1555; Submitted on the Record;
Issued June 24, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issue is whether appellant has established that she sustained a recurrence of disability, causally related to her October 22, 1994 accepted employment-related lumbosacral sprain.

On October 25, 1994 appellant, then a 32-year-old postal worker, filed a claim for traumatic injury noting alleging that on October 22, 1994, she picked up a tray of flats from the floor and when she went to put them down again she experienced a sharp pain in her lower back, through her right hip and down into her right leg.

In support of her claim, appellant submitted a medical report dated October 26, 1994 from her treating physician, Dr. George Mina, a Board-certified orthopedic surgeon, who stated that appellant reported having back pain on and off in the past, and that he had previously seen her on September 14, 1994. He reported that his examination revealed no muscle spasms, but range of motion was moderately restricted and straight leg raising was slightly painful on the right at 80 degrees. He added that previous x-rays of the lumbar spine revealed mild narrowing and spurring at the L2 and L3 level and that computerized tomography indicated mild bulging at the L3, L4, and L5 levels, but no disc degeneration or spinal canal stenosis. Dr. Mina diagnosed low back strain and concluded that appellant had a "mild temporary disability, slightly aggravated by the injury she had at work" and should be able to return to work within four to seven days.

On March 8, 1995, the Office of Workers' Compensation Programs accepted that appellant sustained an employment-related lumbosacral sprain. Appellant returned to light duty on October 29, 1994.

On February 22, 1995, appellant stopped work and filed a claim for recurrence of disability related to her October 22, 1994 accepted employment-related injury. In response to the Office's request for additional information, appellant stated that following her return to work

on October 29, 1994, she was still experiencing pain which began to increase over time. Appellant stated that her treating physician, Dr. Ronald G. Donelson, a Board-certified orthopedic surgeon, attempted to control her pain through additional physical restrictions and physical therapy, but on February 22, 1995 Dr. Donelson removed appellant from work to attempt more complete pain management.

In his narrative treatment note dated February 22, 1995, Dr. Donelson stated that appellant was still struggling with her pain, and that it was clear that her workday was a routine aggravation. He added that she was “too vulnerable to be able to withstand the stresses at work and still be able to make progress.” He concluded that he had decided to remove her from her job and work on her pain free strategies and exercises, after which she would be evaluated for possible return to work. Under Dr. Donelson’s supervision, appellant returned to restricted duty on March 29, 1995.

On June 10, 1995 appellant filed a second claim for a recurrence of disability.

In support of her recurrence claim, appellant submitted a June 7, 1995 treatment note from Dr. Donelson in which he noted that appellant reported that she “was just not making it and slipping further behind in terms of her ability to control her symptoms at work.” The physician concluded that he had taken appellant off work until further notice and that he would reevaluate her in three to four weeks after continued physical therapy.

In a treatment note dated July 6, 1995, Dr. Donelson noted that appellant had been off work for three to four weeks but had very little improvement in her pain. He added that his attempt to increase her activities in an effort to return her to work resulted in an aggravation of her symptoms. He concluded that appellant remained totally disabled. In a letter of the same date summarizing his treatment of appellant, Dr. Donelson stated in pertinent part that “it would appear that her current condition and disability is work related and that I am not aware of any pre-existing significant problems with her back.”

In a decision dated September 18, 1995, the Office denied appellant’s June 7, 1995 recurrence claim finding that the evidence of record failed to establish either a change in the nature and extent of her light duty job requirements or a worsening of her condition.

By letter dated November 21, 1995, appellant requested reconsideration of the prior decision and in support she submitted additional medical records from Dr. Donelson and the results of a static testing session on the Medx Lumbar Extension machine.

In a report dated August 3, 1995, Dr. Donelson stated, in pertinent part:

“She remains [out of work] and totally disabled in my opinion due to an exacerbation of the same problem she had pre-existing. It is my opinion that this is discogenic as best I can tell. It is clear in the scientific literature that painful discs do occur without herniations on MRIs. This must be discographically proven but my current suspicion is based upon the mechanical behavior of her pain historically and on her response to end-range clinical testing repetitively.

“This, in my opinion is clearly related to her work-related injury of October 22, 1994 because there has been no cessation nor change in pattern of her symptoms since that time.

“She has now been totally disabled in my opinion since we took her back [out of work] in early June 1995”.

Appellant underwent additional static testing on the Medx Lumbar extension machine on September 11, 1995. The tester administrator explained that an “ideal” subject would have a flexed/extended strength ratio of 1.40:1, representing that the patient is 1.40 times stronger at the flexed position than at the extended position. The test administrator reported that appellant’s ration was 2.25:1

Appellant was also given dynamic exercise on the Medx machine on two occasions. On September 15, 1995, a weight of 50 pounds was placed on the weight stack and moved throughout the full range of motion for a total of seventeen repetitions. Appellant was able to maintain full load for a total of 125 seconds. This test was repeated on September 18, 1995, at which time appellant was able to maintain full load for a total of 123 seconds.

In a report dated September 27, 1995, Dr. Donelson related appellant’s treatment and progress, and noted that following each Medx session appellant’s pain was intensified and peripheralized down her right leg, and that it took approximately 24 hours each time to slowly get the pain out of her leg using mechanical self treatment strategies. He discussed appellant’s treatment options and stated:

“It is my very strong opinion that she remains totally disabled and that this is work related to the injury of October 22, 1994 and that any symptoms are all related even though there has been variation in the intensity of the symptoms and she has been able to return to work for periods of time. It is the consistency of her pattern of symptoms and the response mechanically to spinal load testing that is the basis for my opinion.”

In a comprehensive report dated October 10, 1995, Dr. Donelson discussed appellant’s treatment and progress since she was first seen by him on December 1, 1994. He noted that when appellant was first seen she was still working on a limited basis. Dr. Donelson stated that initially appellant made progress through physical therapy but “her ability to centralize and abolish the pain however became progressively more difficult for her and it was apparent that the mechanical stresses to her lumbar spine at work were significantly aggravating her problem manifested by pain peripheralizing back into her legs routinely through her work day. She was most reluctant to come out of work but she finally became convinced by our February 22, 1995 appointment that her activities at work were making her worse and the successful mechanical interventions that we had identified were becoming less effective at centralizing and abolishing her pain.” Dr. Donelson explained that appellant pushed to return to work, which she did on March 29, 1995 and that she seemed to manage with the very tight physical restrictions placed upon her. He stated that “[b]y June, however, her pain, despite these restrictions, was becoming progressively worse and her ability to centralize and abolish her pain with extension and laterally

directed exercises was diminishing,” and she was taken off work again on June 7, 1995. He further stated:

“Her treatment has been to train her to move and function without losing her lordosis but even this now is not successful at keeping her pain quieted. She is unable to function in any employment situation due to the increased back and leg symptoms that come on if she is not frequently performing prone lumbar extension exercises or standing back bends. She had been having considerable difficulty keeping her pain under control even when she is free at home to select her positions, exercises, and activities as dictated by her lumbar lesion. Her pain becomes quite intense and peripheralized into her legs if she violates these mechanical treatment strategies.

“The consistent reproducibility of these symptoms with loss of lumbar lordosis coupled with the diminishing capacity to centralize and abolish her pain with extension are very objective findings in her physical examination that implicate the presence of disc pathology. She had a CAT scan in August of 1994 which showed a mild bulging of the L3/4 and L4/5 discs and some small marginal osteophytes as well. While the bulging is not of any clear diagnostic consequence, certainly osteophytes in someone of her relatively young age is indicative of substantial disc degeneration and consistent with the clinical diagnosis”.

Dr. Donelson further explained the mechanics of appellant’s condition, stating:

“It has been clear over and over again in these past 8 months that any attempt to increase her activities greatly aggravates her pain to the point that she must seek medication and bed rest to recover. This type of set back happens very promptly as a result of any time spent with her lumbar spine in flexion which would displace nuclear contents posteriorly into the painful fissures in her annulus which create the back pain and refer it into her legs.”

Dr. Donelson concluded:

“...[I]t is my opinion that this patient suffers from an internal lumbar disc disruption creating her persistent disabling condition. I believe it is causally related to those work-circumstances which initiated her pain in October 1994. I believe this will be a permanent disability to some degree although I believe it is too early to determine whether this will be permanently total. Certainly, if she reconsiders the alternative of MR/discography/surgery, we may identify an evasive procedure that could be helpful in her recovery. Otherwise, I believe she may well have reached her maximal medical improvement. I should further add that I have observed and documented no indicators of behavioral or psychogenic pain.”

By decision dated March 4, 1996, the Office denied modification of the prior decision finding that the medical evidence did not provide a reasoned opinion as to how the condition found on examination is causally related to the October 22, 1994 employment injury.

On April 15, 1996 the Office issued a second decision on reconsideration, noting that the original September 18, 1995 merit decision failed to properly provide a recommendation to disallow appellant's February 22, 1995 claim for recurrence and that the March 4, 1996 decision on reconsideration did not correct this oversight. In the April 15, 1996 decision, the Office incorporated by reference the prior decisions, and specifically denied appellant's February 22, 1995 claim for recurrence for disability on the grounds that evidence submitted was insufficient to demonstrate that the claimed recurrence of disability was caused, precipitated, accelerated or aggravated by the original employment related injury.

The Board finds that this case is not in posture for decision, and must be remanded for further development.

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 job requirements.¹

The record shows that there was no change in appellant's light-duty job requirements. However, the medical evidence suggests that there was a change in appellant's injury-related condition. Appellant submitted multiple reports from Dr. Donelson in which he documented the course of appellant's condition beginning with her October 22, 1994 employment injury, unequivocally stated that her condition is causally related to her October 22, 1994 employment injury, and explained how her condition became "progressively worse" and her ability to centralize and abolish her pain with extension and laterally directed exercises "diminished." These reports suggest that there was a change in appellant's injury-related condition such that she could no longer meet the physical requirements of her light duty position. While these reports are insufficient to establish appellant's burden of proof, they are sufficient to require further development of the case record by the Office.² Additionally, the Board notes that in this

¹ *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

² *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978). In order to determine whether appellant's employment injury temporarily or permanently aggravated her underlying condition, and the extent and degree of any disability which may have resulted from such aggravation, a rationalized medical opinion must include a discussion of: the nature of the underlying condition, its natural or traditional course; how the underlying condition may have been affected by appellant's employment injury as determined by medical records; whether such affects, if any, caused material changes in the underlying condition; or, if no material changes occurred, would the symptoms or changes indicative of a temporary aggravation subside or resolve immediately upon appellant's recovery from surgery and, if not, at what point would such symptoms or changes be expected to resolve; and whether any aggravation of appellant's underlying condition caused her disability prior to, or subsequent to appellant's surgery and convalescence.

case the record contains no medical opinion contrary to appellant's claim and further notes that the Office did not seek advice from an Office medical adviser or refer the case to an Office referral physician for a second opinion.

Therefore, upon remand the Office should refer appellant, together with a statement of accepted facts, questions to be answered and the complete case record, to an appropriate medical specialist for further evaluation. After such further development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

Consequently, the decisions of the Office of Workers' Compensation Programs dated April 15 and March 4, 1996, and September 18, 1995 are hereby set aside and the case is remanded for further development in accordance with this decision.

Dated, Washington, D.C.
June 24, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member