U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MADELINE M. FAIELLA and U.S. POSTAL SERVICE,
POST OFFICE, Staten Island, NY

Docket No. 98-1110; Submitted on the Record;
Issued February 3, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant established that she sustained a recurrence of disability on or after March 20, 1996 causally related to her accepted work injury.

On January 23, 1995 appellant, then a 52-year-old mailhandler, injured her back in the performance of duty. At the time, appellant was working in a limited-duty assignment due to restrictions imposed by a nonwork-related condition. On September 20, 1995 the Office of Workers' Compensation Programs accepted the claim for a lumbosacral sprain. Appellant received continuation of pay from January 23 to February 17, 1995 and was returned to light duty. She worked light duty until September 24, 1995 when she filed for a recurrence of disability. The Office accepted the claim for recurrence of disability on November 2, 1995. Appellant received wage-loss compensation from September 24 until November 30, 1995, when she was again approved for light duty.

Appellant was under the care of Dr. Stanley Soren, a Board-certified orthopedic surgeon, for treatment of her low back pain. In a report dated April 18, 1995, Dr. Soren related that appellant bent over at work on January 9, 1995 and felt back pain, then on January 23, 1995 while pushing an empty skid, she again felt low back pain with numbness in the right leg. He reported that x-rays of the thoracic spine and right hip showed evidence of osteoporosis, Paget's disease and degenerative disc disease. Dr. Soren's initial impression was listed as lumbosacral sprain with herniated lumbar disc with right-sided exogenous obesity and hypothyroidism, for which he prescribed local heat, physical therapy, a corset, a cane and weight loss. He approved appellant for limited duty effective February 16, 1995 but opined that she should continue with physical therapy. Dr. Soren attributed appellant's back condition to both work incidents on January 9 and January 23, 1995.

In an attending physician's report dated November 16, 1995, Dr. Soren diagnosed that appellant suffered from lumbosacral sprain with "HNP [herniated nucleus pulposus] and right radiculopathy" related to her January 23, 1995 work injury. He approved appellant for a return

to part-time light duty on November 20, 1995. Dr. Soren later approved appellant for full-time light duty effective December 1, 1995.

On March 22, 1996 the employing establishment offered appellant a limited-duty assignment as a modified mailhandler. The duties were listed as follows: "Sedentary duties with no lifting or bending, pulling or pushing. Sorting letters, hand-stamping, labeling. Can be further modified by treating physician." Appellant signed the form indicating her acceptance of the position.

On March 25, 1996 appellant filed a claim alleging a recurrence of disability beginning March 20, 1996. She has not returned to work since March 20, 1996.

In an attending physician's report (Form CA-20) dated March 29, 1996, Dr. Leonard A. Langman, a Board-certified neurologist, advised that he first treated appellant on March 22, 1996 for lumbar radiculopathy related to a back injury on January 23, 1995 when appellant pushed an empty skid at work. He stated that appellant was totally disabled. Dr. Langman also signed the job offer form indicating that appellant could not perform the duties of a modified mailhandler.

By letter dated May 6, 1996, the Office requested that appellant submit additional information and medical evidence in support of her claim.

Appellant responded to an Office questionnaire, stating that on March 19, 1996 at 10:00 p.m. she was getting ready to go to work when she got "severe pains in her lower back and dead weight numbness in her left leg." She further stated that she contacted Dr. Soren who told her to come in for an examination on March 21, 1996. She indicated that she then called the employing establishment to inform her supervisor that she was going to be out sick with severe lower back pain.

In a May 20, 1996 report, Dr. Langman noted that appellant had fallen down stairs and injured her back 10 years ago. He also noted that most recently, appellant related that she injured her back at work on January 23, 1995 while pushing a skid. Dr. Langman reported physical findings including a spasm in the lumbar spine, decreased range of motion, along with weakness of dorsiflexion in the great toe on the right side. He diagnosed lumbar radiculopathy at L4-5 "directly related to injuries sustained while working on January 23, 1995." Dr. Langman concluded that appellant was totally disabled and requested a magnetic resonance imaging scan.

In a May 26, 1996 report, Dr. Soren stated, "[appellant] was most recently seen in the office on March 21, 1996 at which time it was felt that from the [o]rthopedic standpoint, no further treatment was warranted and she should go under the care of a [n]eurosurgeon."[1]

In an attending physician's report dated May 31, 1996, Dr. Langman noted appellant's history of injury and diagnosed lumbar radiculopathy. He check marked the box on the CA-20 form indicating that appellant's condition was caused or aggravated by an employment activity. He further noted that appellant was disabled from work for an undetermined period.

[1] In a report dated March 21, 1996, Dr. Soren noted only that appellant could return to work on April 1, 1996.

By letter dated June 14, 1996, the Office referred appellant to Dr. Daniel Feuer, a Board-certified neurologist, for a second opinion evaluation. In a June 25, 1996 report, Dr. Feuer noted appellant's history of multiple work-related back injuries and her complaints of back pain with right leg numbness. He reported that electrodiagnostic studies of the lower extremities dated October 9, 1995 were normal. He indicated that there were no neurological findings to support appellant's subjective complaints and opined that appellant had reached maximum medical improvement. According to Dr. Feuer, appellant was capable of resuming full active employment. He concluded that appellant's lumbosacral strain related to the January 23, 1995 work injury had completely resolved.

On June 21, 1996 the employing establishment reissued the job offer. Although appellant signed the job offer form, indicating that she accepted the position, Dr. Langman signed the job offer form, reporting that she was unable to perform the duties associated with the position.

The Office issued a notice of proposed termination of compensation on July 29, 1996. In a memorandum attached to the notice dated July 18, 1996, the Office credited Dr. Feuer's opinion over Dr. Langman's as to whether appellant had continuing disability or residuals related to her work injury.

In a decision dated September 3, 1996, the Office denied appellant's claim for compensation on the grounds that the evidence of record was insufficient to establish that her claimed recurrence of disability on or after March 20, 1996 was causally related to the January 23, 1995 work injury or that claimant had any continuing disability causally related to the January 23, 1995 work injury.

On August 25, 1997 appellant, by counsel, filed a request for reconsideration.

In support of her reconsideration request, appellant submitted new medical evidence including a report from Dr. Langman dated July 7, 1997. He reported that an electromyogram/nerve ? velocity (EMG/NEV) study performed on March 22, 1995 revealed lumbar radiculopathy at L4-5. Dr. Langman opined that appellant's recurrence of disability on March 20, 1996 was causally related to the work injury of January 23, 1995. He concluded that appellant could "no longer perform the duties she was performing when she stopped work because to continue in such a capacity could result in cord impingement and potential paraplegia."

Appellant also submitted reports from Dr. Soren dated February 3 and August 15, 1997. Dr. Soren reported that he treated appellant from January 23, 1995 when she injured her back at work while pushing an empty skid. He noted that appellant had injured her back some 10 years ago when she fell down some stairs. Dr. Soren indicated that appellant had preexisting degenerative disc disease and osteoporosis. Dr. Soren diagnosed a lumbosacral strain with a herniated disc and right-sided radiculopathy which he attributed to appellant's work injury. He also suggested that appellant's back condition was complicated by obesity. Dr. Soren indicated that he treated appellant on a monthly basis for continuing back complaints, during which time he prescribed physical therapy, a corset, cane and a transcutaneous electrical nerve stimulator unit. He stated that he last treated appellant on March 21, 1996 for back pain at which time he felt there was no longer anything he could do for her from an orthopedic standpoint. Dr. Soren

related that he approved appellant for a return to work on April 1, 1996 in a light-duty position with restrictions and also recommended that appellant see a neurosurgeon for her continued care. He indicated that appellant was partially disabled due to a combination of factors including the January 23, 1995 work injury, obesity and a preexisting degenerative back condition.

In a decision dated February 6, 1998, the Office denied modification following a merit review.

The Board finds that the case is not in posture for a decision on the issue of whether appellant sustained a recurrence of disability.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[2] This burden includes the necessity of furnishing medical evidence from a 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.[3] An award of compensation may not be made on the basis of surmise, conjecture, or speculation or on appellant's unsupported belief of causal relation.[4]

When an employee, who is disabled form the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative evidence a recurrence of total disability and 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.[5]

In the instant case, there is a conflict in the medical evidence between the Office referral physician, Dr. Feuer and appellant's treating physician, Dr. Langman. According to Dr. Feuer, appellant's disability related to the accepted work injury was fully resolved by June 25, 1996, the date of his examination. He approved appellant for a return to full-time regular duty. Dr. Langman, on the other hand, reported that an EMG/NEV study performed on March 22, 1996 showed lumbar radiculopathy at L4-5. He has noted physical findings such as muscle spasm, decreased range of motion of the lumbar spine and weakness in the dorsiflexion of the great toe on appellant's right side which supports appellant's contention that she sustained a recurrence of disability on March 20, 1996. Dr. Langman has also specifically stated on

[2] *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

[3] *See Nicolea Bruso*, 33 ECAB 1138 (1982).

[4] *Ausberto Guzman*, 25 ECAB 362 (1974).

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

numerous CA-5 and CA-20 forms that appellant is disabled from work due to her work injury and is unable to return to the modified clerk position offered by the employing establishment.

Contrary to the Office's determination, Dr. Feuer's opinion is not entitled to greater probative weight than Dr. Langman's opinion on the issue of recurrence of disability since Dr. Feuer's report does not address whether appellant had any disability between March 20, 1996 and the date of his examination on June 25, 1996. Dr. Feuer's report only suggests that appellant had no residuals of her work injury as of June 25, 1996.

Section 8123(a) of the Federal Employees' Compensation Act provides that, "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." This case must be remanded for the Office to obtain an impartial medical evaluation relevant to whether appellant sustained a recurrence of disability on or after March 20, 1996. Thereafter, the Office must issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated February 6, 1998 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
February 3, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member