

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY DAWSON, widower of MARY DAWSON and U.S. POSTAL
SERVICE, MAIN POST OFFICE, Cincinnati, OH

*Docket No. 99-2204; Submitted on the Record;
Issued October 12, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the employee's recurrence of disability commencing October 17, 1993 was causally related to her accepted conditions of aggravation of spinal stenosis and lumbar spondylosis or to other employment-related conditions; and (2) whether the refusal of the Office of Workers' Compensation Programs in its June 1, 1999 decision to reopen appellant's case on the merits of his claim constitutes an abuse of discretion.

The case has been on appeal twice previously.¹ In a May 1, 1996 decision, the Board noted that the employee had filed a claim for lower back pain and a bulging disc which she related to continuous bending, heavy lifting and pushing at work. Dr. Russell P. Clarke, a Board-certified orthopedic surgeon, diagnosed spondylosis and spinal stenosis of the lumbar spine which he concluded were not caused by the factors of the employee's employment. Dr. Clarke concluded that the employee's employment had caused a permanent aggravation of her underlying conditions. The Office accepted the employee's claim for aggravation of L4-5 stenosis and spondylosis and began payment of temporary total disability compensation. The employing establishment offered the employee a position as a manual distribution clerk which was approved by Dr. Clarke. The employee accepted the position and returned to work on October 16, 1993. She stopped working after one shift and filed a claim for recurrence of disability. Dr. Clarke concluded that the employee could not perform the duties of the offered position and added that she had a possible herniated disc. The Board set aside the Office's denial of the employee's claim and remanded the case for a determination of whether the residuals of the employee's employment-related condition prevented her from performing the duties of the offered manual distribution clerk position; whether a new and distinct condition was the cause of her chronic pain complaints which prevented her from performing the offered

¹ Docket No. 97-501 (issued November 2, 1998); Docket No. 94-1726 (issued May 1, 1996). The history of the case is contained in the prior decision and is incorporated by reference.

position; and whether she had sustained a herniated disc which compromised her spinal canal at the time of her employment injury.

In a November 2, 1998 decision, the Board noted that the employee had died of stomach cancer on December 11, 1995. The Board further noted that the employee had returned to part-time work on March 1, 1995, stopped after one day, and then returned to work, four hours a day, from April 8 through August 4, 1995. The Office denied appellant's claim for any unpaid compensation due to the employee on the basis of the report of Dr. Norman Pollack, a Board-certified orthopedic surgeon, who stated that the employee's condition did not preclude her from performing the part-time duties of a distribution clerk that had been modified to ease her symptoms. Dr. Pollack also stated that he was not aware of a distinct diagnosis of a herniated disc nor was there any medical indication in the records of a distinct diagnosis of a herniated disc. The Board found that Dr. Pollack's report was not supported by any rationale and therefore was insufficient to resolve the issues set forth in the Board's first decision. The Board therefore remanded the case so that the Office could request rationale from Dr. Pollack in support of his conclusions that the employee could have performed the duties of the offered position and did not have a herniated disc causally related to her employment.

On remand, the Office requested clarification from Dr. Pollack. In a December 30, 1998 report, Dr. Pollack stated:

"The first question relates to rationale in determining why [the employee] was judged able to perform her light-duty position. This woman had a diagnosis of spinal stenosis due to thickening or hypertrophy of the ligamentum flavum when she underwent an MRI [magnetic resonance imaging] study on April 27, 1993. There was no repeat MRI study ordered by the treating orthopedist, Dr. Clarke. No EMG [electromyogram] was ordered as well. There were no neurological findings on any of the medical examinations. [Appellant] was returned to [a] light-duty work position and her duties were specifically within the confines of Dr. Clarke's recommended restrictions, which is the primary basis for my opinion that she was able to perform those job activities.

"The second question is in regard to the diagnosis of herniated disc in relation to her employment. I will again state that there is no where in these medical records a distinct diagnosis of herniated disc. There is a suggestion of the 'possibility of' in the MRI report; however, the working diagnosis of Dr. Clarke was that of spinal stenosis and he specifically indicated that this condition was not directly caused by her employment but was 'aggravated.' In other words, certain activities increased her symptoms and her work restrictions were basically for the purpose of removing the conditions or activities that would aggravate her condition. Again, there is no indication of a herniated disc being a specific diagnosis in any of these medical records."

In a March 29, 1999 decision, the Office denied the employee's claim for recurrence of disability on the grounds that the medical evidence of record failed to establish that she was totally disabled beginning October 17, 1993 as a result of residuals from her accepted 1991 employment-related injury.

In an undated letter received by the Office on May 24, 1999, appellant requested reconsideration. He submitted in support of his request a May 4, 1999 report from Dr. Clarke stating that the April 27, 1993 MRI scan showed a left-sided herniated disc. Appellant noted that the employee's spinal stenosis steadily became worse. He pointed out that there was a change in the employee's neurologic condition in that she had a diminished left ankle reflex as he reported on May 20, 1994. Appellant stated that a person with primarily spinal stenosis may have back pain, leg pain or both but neurologic examinations and EMG studies would commonly be normal. He commented that there was no reason to suspect that a major change occurred between the April 27, 1993 MRI scan and some months later. Appellant indicated that, on the other hand, a person with spinal stenosis may have difficulty with prolonged standing or sitting, could have single or double leg symptoms and might or might not have a great deal of back pain. He concluded that the employee had spinal stenosis at L4-5 that predated her work aggravation of October 17, 1993. Appellant stated that the employee also had a bulging disc at the same level with a small, left-sided herniation. He commented that her symptoms were making work quite difficult and reached such a level in October 1993 that she was unable to continue with even light duty.

In a June 1, 1999 decision, the Office denied appellant's request for reconsideration on the grounds that the medical evidence submitted was irrelevant and immaterial and therefore insufficient to warrant review of the prior decision.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

Dr. Pollack stated that the employee was able to perform the duties of the position offered to her which was within the restrictions recommended by Dr. Clarke. However, in a May 20, 1994 report, Dr. Clarke stated that the employee had managed to return to work on October 16, 1993 but, after one night of work, had terrific pain in the left buttocks and down the left leg. He indicated that her examination remained unremarkable except for sciatic notch tenderness but she continued to have pain in the left leg and low back regions. Dr. Clarke reported that the employee was unable to do any work with her arms outstretched because of the stress in her low back. He added that the employee remained unable to do any lifting or stooping. Dr. Clarke concluded the employee was totally disabled from returning to the type of work at the employing establishment because the work seemed to cause a significant aggravation of her symptoms. He indicated that although the employee's work did not produce the spinal stenosis, working full time or part time in her previous job caused a large degree of symptoms. Dr. Clarke stated that the employee's spinal stenosis had been aggravated by a 1991 injury and was further aggravated by her attempt to return to work on October 16, 1993. He therefore concluded that the employee was unable to perform the duties of the offered position while Dr. Pollack stated that she was able to do so. Dr. Pollack also stated that there was no direct indication that the employee had a herniated disc. However, in a January 25, 1994 report, Dr. Clarke stated that the MRI scan showed a herniated disc at L4-5. Drs. Pollack and Clarke therefore have different interpretations of the MRI scan in question. Since Drs. Pollack and Clarke have different opinions on whether the employee could have performed the duties of the offered position after October 17, 1993 and whether she had a herniated L4-5 disc, the case must be referred to an appropriate impartial medical specialist.

On remand, the Office should refer the case record, with a statement of accepted facts, to an appropriate impartial medical specialist for his review. The specialist should give his opinion on whether the employee had a herniated lumbar disc and, if so, give his opinion to a reasonable degree of medical certainty on whether such a herniated disc was causally related to the factors of her employment. He should also give his rationalized opinion on whether the employee could have performed the duties of the offered position after October 17, 1993, either full time or part time. If the specialist should find that the employee was unable to perform these duties, he should indicate whether such inability was due to her underlying spinal stenosis or was due to an employment-related permanent aggravation of such a condition. After further development as it may find necessary, the Office should issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated June 1 and March 29, 1999 are hereby set aside and the case remanded for further action as set forth in this decision.²

Dated, Washington, DC
October 12, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

² In view of the Board's disposition of the merits of the claim, the second issue is rendered moot.