U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELENE NAKIS and U.S. POSTAL SERVICE,
TRANSPORTATION MANAGEMENT OFFICE, New York, NY

Docket No. 99-686; Submitted on the Record;
Issued March 15, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant is not entitled to compensation from October 25 to December 22, 1997; and (2) whether appellant sustained a recurrence of disability beginning January 12, 1998 causally related to her June 30, 1980 employment injury.

The Office accepted that appellant sustained a low back sprain and recurrent low back syndrome on June 30, 1980, after she bent over to fix a floor protector. Appellant received compensation for intermittent temporary disability from then until she stopped work on January 12, 1984, after which she began receiving compensation for temporary total disability.

On October 28, 1996 the Office issued a notice of proposed termination of compensation on the basis that appellant no longer had disability causally related to her June 30, 1980 employment injury. By letter dated November 4, 1996, however, the Office notified appellant that, since the physician who examined her was not the physician to whom the Office referred her to, to resolve a conflict of medical opinion, the examining physician's report could not represent the weight of the medical evidence. On February 28, 1997 the Office referred appellant, the case record and a statement of accepted facts to Dr. Raymond Koval, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion on the issue of whether appellant continued to be disabled due to residuals of her June 30, 1980 employment injury. The statement of accepted facts listed "physical restrictions of the modified position" as no bending, no lifting more than 10 pounds, no pushing or pulling more than 20 pounds and sitting and standing at the employee's comfort.

In a report dated April 8, 1997, Dr. Koval stated that appellant had limited spinal motion in all directions, no muscle spasm, no motor or sensory disturbances of the lower extremities, no atrophy and no weakness on muscle testing. Dr. Koval concluded:

> "Based on the history, physical examination and review of records, I feel that the June 30, 1980 injury was a lumbosacral strain, aggravated by her preexisting back condition, namely the laminectomy and disc problems she had. Other than the limitation of back motion and tenderness she has, there are really no objective findings. I certainly feel that she could return to work in the modified position that is described in the medical records."

Dr. Koval set forth work tolerance limitations indicating appellant could work eight hours and could lift no more than 10 pounds intermittently.

On September 25, 1997 the employing establishment offered appellant a position as a modified network-planning specialist, with physical restrictions of lifting no more than 10 pounds intermittently and limited kneeling, standing, bending, twisting and reaching. On October 8, 1997 appellant accepted this position, with the understanding that her medical needs would be discussed and accommodated.

By letter dated October 27, 1997, the employing establishment notified appellant that, as a result of her acceptance of its rehabilitative job assignment, she had been scheduled for a one-day orientation class on October 31, 1997. A form accompanying this notice stated that the effective date of appellant's appointment was October 25, 1997. Appellant attended the orientation class on October 31, 1997.

On November 4, 1997 appellant filed a claim for a recurrence of disability on October 24, 1997 due to her June 30, 1980 employment injury and stopped work on November 1, 1997. Appellant stated that on October 24, 1997 she was in her bedroom, lost her balance and fell, injuring her left hand and thumb. Appellant submitted a report dated October 29, 1997 from an attending physician, Dr. Apostolos Tambakis, stating that she had sprained her left thumb and could not work for six weeks.

Appellant returned to work in the modified planning position on December 22, 1997 but stopped work on January 12, 1998 and filed a claim for a recurrence of disability. Appellant stated that she had been in constant pain since her return to work on December 22, 1997.

In letters dated January 31, 1998, appellant contended that she fell on October 24, 1997 because her right leg gave way, that her pain worsened daily after her return to work on December 22, 1997 and that on January 7, 1998 she went to Dr. Tambakis, who advised her not to work more than six hours per day. Appellant submitted an October 27, 1997 note from Dr. Tambakis that stated: "About a week ago, she was trying to put her pants on and she lost her balance because her leg gave away and she fell and also injured her left thumb, which is swollen, painful and has some loss of motion on the … joints." In a report dated January 7, 1998, Dr. Tambakis stated that appellant had "painful muscle spasm in the back" and was unable to work more than six hours per day.

By decision dated March 6, 1998, the Office found that appellant had not established that she sustained recurrences of disability on October 25 or December 22, 1997. Appellant requested a hearing, which was held before an Office hearing representative on September 2, 1998.

By decision dated November 12, 1998, the Office hearing representative found that "the medical evidence does not give sufficient explanation as to whether or how the fall [on October 24, 1997] was related to the original work injury." The hearing representative also found that the opinion of appellant's physician was not sufficient to outweigh the opinion of Dr. Koval, the impartial medical specialist, that appellant was able to work eight hours per day.

The Board finds that the Office properly determined that appellant is not entitled to compensation from October 25 to December 22, 1997.

In *Terry R. Hedman*, the Board held that when an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or she cannot perform such light duty.[1]

In this case, the employing establishment did offer appellant a suitable limited-duty position on September 25, 1997. This position was approved by Dr. Koval, the impartial medical specialist who resolved a conflict of medical opinion and whose opinion is entitled to special weight.[2] Appellant accepted this position on October 8, 1997, but did not return to work until December 22, 1997. The reason appellant did not return was not her employment-related condition, but rather an injury to her thumb that she sustained at home on October 24, 1997.

Appellant contends that this was a consequential injury related to her employment-related condition, but the medical evidence does not establish causal relation. Dr. Tambakis stated in an October 27, 1997 report that appellant lost her balance because her leg gave way and fell, injuring her thumb. This report is not sufficient to establish that appellant fell because of an employment-related condition. Her thumb injury, therefore, constitutes an independent, intervening injury that is responsible for her inability to perform the limited-duty job she accepted on October 8, 1997.[3] The Office is not obligated to pay compensation in this situation.

The Board further finds that appellant has not established that she sustained a recurrence of disability on January 12, 1998.

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[1] *Terry R. Hedman*, 38 ECAB 222 (1986).

[2] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight. *James P. Roberts*, 31 ECAB 1010 (1980).

[3] *See Charlet Garrett Smith*, 47 ECAB 562 (1996) for a discussion of consequential injuries and independent, intervening injuries.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a 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 to 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.[4]

Appellant has not alleged a change in her light-duty requirements after her return to light duty as a network-planning specialist on December 22, 1997 and she has not shown a change in the nature and extent of her injury-related condition. The impartial medical specialist, Dr. Koval, stated in an April 8, 1997 report that appellant could perform light duty for eight hours per day. An employing establishment physician stated on December 23, 1997 that appellant was fit for the limited-duty, full-time position offered by the employing establishment.

In a report dated December 19, 1997, Dr. Tambakis indicated appellant could work eight hours per day and appellant did so from December 22, 1997 until January 11, 1998. In a report dated January 7, 1998, Dr. Tambakis stated that appellant had "painful muscle spasm in the back" and was unable to work more than six hours per day. However, the only physical finding that he reported was "painful muscle spasm in the back," which does not represent a change in appellant's condition because Dr. Tambakis reported such spasms in clinical notes dated December 19, November 17 and October 27, 1997.

Another of appellant's attending physicians, Dr. David Eisenberg, stated in a January 20, 1998 report that appellant was unable to work more than six hours a day. He offered no explanation for this conclusion except that appellant complained of an exacerbation of pain with working eight hours per day. This essentially amounted to a repetition of appellant's complaint that it hurt too much to work eight hours per day, which in and of itself is not a basis for payment of compensation.[5] Therefore, this report is insufficient to show any change in appellant's back condition after January 12, 1998.

[4] *Terry R. Hedman*, 38 ECAB 222 (1986).

[5] *See John L. Clark*, 32 ECAB 1618 (1981).

The decision of the Office of Workers' Compensation Programs dated November 12, 1998 is hereby affirmed.

Dated, Washington, DC
March 15, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member