U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE M. SULLIVAN and U.S. POSTAL SERVICE,
POST OFFICE, White River Junction, VT

Docket No. 99-1795; Submitted on the Record;
Issued May 2, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has met his burden of proof in establishing that he had a recurrence of disability due to an accepted employment-related condition.

On July 11, 1994 appellant, then a 34-year-old letter carrier, was lifting sacks of mail while unloading a trailer when he felt sharp pain in his lower back.[1] The Office of Workers' Compensation Programs accepted appellant's claim for a lower back strain. Appellant received continuation of pay for the period July 11 through August 29, 1994. The Office began payment of temporary total disability compensation effective September 3, 1994. The Office subsequently authorized buy back of leave for the period August 30 to September 2, 1994. Appellant returned to work on October 3, 1994.

On November 2, 1994 appellant twisted his back at work and developed back pain with numbness extending down the sciatic distribution of the left leg. He worked intermittently thereafter. The Office accepted appellant's claim for a back spasm. Appellant stopped working on March 6, 1995. The Office began payment of temporary total disability compensation effective March 18, 1995.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. David H. Gundy, a Board-certified orthopedic surgeon, for an examination and opinion on appellant's ability to work. In a November 6, 1995 report, Dr. Gundy indicated that appellant had limitation of motion in the back with increased pain in his back and left leg. He found no deficit in the sensory examination of the legs and no clear-cut motor loss in the motor examination of the legs. Dr. Gundy noted appellant had a negative sacroiliac distraction test but did have a mildly positive sacroiliac compression test. He related that a March 27, 1995 magnetic resonance imaging (MRI) test showed a small central herniated disc at L5-S1, which did not appear to be effacing either nerve root. Dr. Gundy diagnosed degenerative lumbar disc

[1] Appellant had sustained herniated L5-S1 disc in 1985 while working for another employer.

disease with left-sided radiculopathy, possibly associated with left sacroiliac dysfunction. He commented that the examination showed some consistent findings, which tended to support a diagnosis of a left-sided radiculopathy. Dr. Gundy concluded that appellant exhibited objectively verifiable residuals of the traumatic back strain injuries he sustained. He stated that appellant was not capable of performing his original duties as a mailhandler. Dr. Gundy indicated appellant had minimal, if any, work capacity. In an accompanying work evaluation restriction form, he stated that appellant should limit sitting, standing, bending, twisting, lifting and walking. Dr. Gundy indicated that appellant should not do any continuous sitting or standing for more than 20 minutes and no walking for more than 15 minutes. He noted appellant was required to use a cane while walking. Dr. Gundy stated appellant could do no bending or twisting and no lifting over 5 to 10 pounds. He noted that appellant had to be free to move and change positions as needed. Dr. Gundy stated that all the restrictions were due to appellant's employment injuries.

In a March 4, 1996 letter, the employing establishment offered appellant a sedentary position involving sedentary work at a desk, arranging paperwork, stuffing envelopes and answering the telephone. Appellant rejected the job offer, submitting reports from his treating physician, Dr. Thomas B. Parrott, a Board-certified family practitioner, who stated that appellant could not return to even limited duty at work. In a March 27, 1996 letter, the Office informed appellant that it found the position suitable for him. It indicated that it found the medical evidence he had submitted to be of diminished probative value. It stated that the weight of the medical evidence, the report of Dr. Gundy, showed he could perform the duties of the offered position. The Office gave appellant 30 days to accept the position or offer his explanation for refusing the position. The Office stated that a final decision would be made at that time.

In an April 9, 1996 report, Dr. Parrott stated that appellant had suffered from the effects of two employment-related back injuries, which exacerbated an underlying degenerative intervertebral disc problem. He indicated that an MRI scan demonstrated the presence of protruding intervertebral discs at L4-5 and L5-S1, which were most likely pressing on the nerve roots. Dr. Parrott stated that since appellant had undergone back surgery previously, he was not a candidate for further surgery. He commented that there was no successful treatment available to bring appellant back to the point where he could perform even a limited-duty position. Dr. Parrott related that appellant was in mild to moderate pain for most of a 24-hour period. He concurred with Dr. Gundy's assessment that appellant had minimal, if any, work capacity. Dr. Parrott stated since it had been over 12 months since the most recent exacerbation of appellant's back injury and appellant had demonstrated an inability to become comfortable with extensive periods of rest at home, it was unlikely that he would ever return to active employment at the employing establishment. He commented that this would preclude even a limited-duty position. Dr. Pattott noted that appellant's inability to sit was based on his discomfort in his back after only a minute of sitting.

In a May 9, 1996 report, Dr. Rex G. Carr, a Board-certified physiatrist, stated that he did not find evidence of a radiculopathy that would lead to surgery. He noted that it was possible that appellant had a component of L5 radiculopathy based on pain extending into the big toes but he pointed out that the hamstring reflex was active. Dr. Carr indicated that appellant had extensive muscle spasm and tenderness. He concluded that a large amount of appellant's pain

was due to myofascial pain from the employment injuries. Dr. Carr noted appellant had a preexisting panic and anxiety disorder that arose approximately in 1990. He stated that appellant should not attempt any type of work activity, sedentary, modified, light duty or otherwise. Dr. Carr indicated that any type of activity would worsen appellant's clinical condition and eliminate any possibility of physical rehabilitation.

Appellant returned to work on June 4, 1996 for four hours but stopped again on June 10, 1996 upon instructions to the employing establishment from the Office. The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Robert Arbuckle, a Board-certified orthopedic surgeon, to resolve a conflict in the medical evidence between Drs. Carr and Gundy. In an August 12, 1996 report, Dr. Arbuckle indicated that appellant had marked stiffness in his back with limited motion. He noted appellant had a positive straight leg-raising test at 45 degrees on the left. Dr. Arbuckle found no atrophy of the left leg. He indicated that x-rays showed appellant had narrowing at the L5-S1 level due to his prior surgery with some scarring. Dr. Arbuckle reported that appellant had a small central disc herniation at L4-5 that was not significant. He remarked that appellant could sit for 10 to 15 minutes and stand for 10 to 15 minutes. Dr. Arbuckle stated that if appellant could tolerate working four hours a day at a sedentary position, sitting for a little while, standing for a little while, he would be better than if he stayed at home. He declined to give a diagnosis, stating that no one really knew what the diagnosis was and that there was no way to find out. Dr. Arbuckle commented that appellant did not have a surgical disc problem or mechanical instability. He indicated that he could not make a decision on whether Drs. Gundy's or Carr's report should be followed. Dr. Arbuckle recommended that Dr. Carr, who was following appellant, should make the determination of whether appellant should work. He commented that he believed it would be better if appellant tried to tolerate the four-hour situation created for him but indicated that he thought it was more important to follow Dr. Carr's treatment plan.

In a March 17, 1997 letter, the employing establishment offered appellant a limited-duty position as a mailhandler for four hours a day, in which he would sit at a desk, arranging files in alphabetical and numerical order, stuffing envelopes for mailings and answering the telephone. The employing establishment indicated that the medical restrictions would be no continuous sitting or standing for more than 20 minutes, no walking for more than 15 minutes, no bending or twisting, no lifting over 5 to 10 pounds and freedom to move and change positions as necessary.

In a March 26, 1997 letter, the Office informed appellant that it found the job offered by the employing establishment to be suitable. The Office indicated that upon acceptance of the job appellant would be paid compensation based on the pay of the position and the pay of his former position on the date of injury. The Office warned appellant that failure to accept the position without reasonable cause would lead to termination of compensation. The Office gave appellant 30 days to accept the position or provide an explanation for his reasons for refusing it.

In an April 21, 1997 response, appellant declined the offered position. He submitted an April 17, 1997 report from Dr. Carr who stated that he had reviewed the job offer and concluded that placing appellant in the position would worsen his clinical condition and interfere with his treatment and rehabilitation for work. He noted that he had advised appellant that at current stage of the rehabilitation program, appellant was not suitable for any gainful employment.

In a June 4, 1997 letter, the Office informed appellant that his reasons for refusing the position were not acceptable. The Office noted that Dr. Carr had not provided objective findings nor explained why working four hours a day would be counterproductive to appellant. It further commented that he had not explained why appellant's accepted condition of strain would persist beyond an expected recovery date and had not addressed appellant's underlying degenerative joint disease, which was not an accepted condition. The Office warned appellant that if he did not accept the position and he did not justify his refusal to accept the position, his compensation would be terminated.

Appellant, in a June 13, 1997 note, accepted the offered position and returned to work, four hours a day on June 16, 1997. The Office began payment of compensation for the hours appellant did not work. The Office subsequently determined that appellant had a 50 percent loss of wage-earning capacity based on his actual earnings.

In a February 18, 1998 report, Dr. Carr stated that appellant was losing time from work due to increased back pain. He repeated his comments that it was dangerous for appellant to work and that his work would worsen his clinical condition. Dr. Carr noted that appellant had not been given a suitable chair with appropriate lumbar support. He also stated that appellant had not been able to take his one hour rests, three times a day, as prescribed. Dr. Carr indicated that appellant's work was interfering with his ability to rest. He, therefore, recommended that appellant be allowed to rest in a recumbent position with heat for one hour for each hour that he worked. Dr. Carr related his recommendation to appellant's back spasms.

On March 27, 1997 the employing establishment informed appellant that it could not accommodate the restrictions proposed by Dr. Carr in his February 18, 1998 report. He, therefore, instructed appellant not to return to work. Appellant filed claims for continuing compensation, 40 hours a week, beginning March 30, 1998.

The Office referred appellant to Dr. Arbuckle for his opinion on appellant's work restrictions. In a May 14, 1998 report, he stated that appellant still suffered from a chronic low back condition. Dr. Arbuckle commented that if appellant was able to tolerate the light-duty position from June 1997 until April 1998, he should still be able to tolerate it. He indicated that appellant's back condition had been aggravated by his previous injuries at the employing establishment. Dr. Arbuckle expressed doubt that appellant would ever return to full-time employment but recommended that he continue on a part-time basis. He noted Dr. Carr's request that appellant rest one hour for every hour of work and commented that the request was inappropriate. Dr. Arbuckle stated that the important aspect was to allow appellant to change positions on a fairly frequent basis.

In a June 24, 1998 decision, the Office rejected appellant's claim for recurrence of disability effective March 27, 1998 on the grounds that the medical evidence of record failed to establish that the claimed recurrence was casually related to the employment injuries.

In a July 16, 1998 letter, appellant, through his attorney, requested a hearing before an Office hearing representative. He returned to work on September 9, 1998. In a December 9, 1998 letter, appellant indicated that the employing establishment had withdrawn his limited-duty assignment effective December 3, 1998. He stated that he was ready, willing and able to return

to the limited-duty assignment. At the February 16, 1999 hearing, appellant's attorney argued that appellant was entitled to compensation because the employing establishment had refused to allow him to work after March 27, 1998.

In an April 8, 1999 decision, the Office hearing representative found that the medical evidence established that appellant was capable of performing the light-duty position he held on March 27, 1998. The hearing representative indicated that there was no rationalized medical explanation describing how and why appellant's condition worsened in such a way that he was unable to perform the duties of the position. She found that the employing establishment was in error in advising appellant not to report to work effective March 27, 1998. The hearing representative concluded, however, that the employing establishment's erroneous action did not obligate the Office to pay temporary total disability compensation nor did it remove appellant's obligation to establish a material change in his condition or a material change in the nature and extent of his light-duty position. She, therefore, affirmed the Office's June 24, 1997 decision.

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

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he 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 he 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.[2]

Appellant returned to a light-duty part-time position on June 16, 1997 based on Dr. Arbuckle's report. He commented that appellant should attempt to perform a light-duty position, four hours a day. The employing establishment offered appellant a position that was within the work restrictions set forth by Dr. Arbuckle. Appellant continued to work at the position until the employing establishment instructed him not to report to work because it could not accommodate the work restrictions set forth in Dr. Carr's February 18, 1998 report. Dr. Carr stated that appellant had increased back pain, which he attributed to appellant's return to work in June 1997. He proposed that appellant be allowed to rest for one hour for each hour that he worked. Dr. Carr noted that appellant was having increased muscle spasms in his back, which was related to increased pain in appellant's back. He commented that if appellant's spasm increased then his medical condition would worsen. Dr. Carr's report, therefore, showed that appellant had great difficulty in performing the offered position and could only perform it with the accommodations that Dr. Carr recommended. The employing establishment decided that it could not accommodate appellant under the restrictions set by Dr. Carr and, therefore, had him stop work. Dr. Carr's report conflicted with Dr. Arbuckle's conclusion that appellant could perform the offered position without difficulty. The case must, therefore, be remanded for further development.

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

On remand, the Office should refer appellant, together with a statement of accepted facts and the case record, to an appropriate impartial medical specialist for an examination. The specialist should be requested to give a diagnosis of appellant's condition and should discuss whether appellant's condition is causally related to his employment injuries or to his return to work. The specialist should also describe appellant's work restrictions and give his opinion on whether appellant could perform the duties of the light-duty part-time mailhandler position offered by the employing establishment. After further development as it may find necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs, dated April 8, 1999, is hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC
May 2, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member