U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VALERIE SEMLOW and U.S. POSTAL SERVICE,
RINCON STATION, Tucson, AZ

Docket No. 00-1928; Submitted on the Record;
Issued November 9, 2001

DECISION and ORDER

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

The issue is whether appellant has met her burden of proof to establish that she sustained a recurrence of disability on or after November 12, 1997, causally related to her accepted January 21, 1997 employment injury

On February 6, 1997 appellant, then a 38-year-old rural mail carrier, filed a claim alleging that on January 21, 1997 she injured her right shoulder while casing a heavy volume of mail in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for a right shoulder strain on July 15, 1997. In accordance with the recommendations of her treating physician, Dr. Laurance Silverman, a Board-certified physiatrist, appellant worked full-time light duty from February 5 through June 19, 1997 and then stopped work from June 20 through July 14, 1997. Appellant returned to light duty, four hours a day, from July 17 through August 30, 1997 and then stopped work again from August 31 through November 9, 1997.

On October 14, 1997 appellant underwent a functional capacity evaluation, during which it was determined that appellant had the ability to perform all of the physical requirements of a rural carrier position, with the exception of lifting. Her job was noted to require lifting 0 to 20 pounds continuously for 1 to 3 hours and 20 to 40 pounds intermittently for 1 to 2 hours, while appellant was capable of lifting only 5 to 10 pounds continuously and 10 to 30 pounds occasionally.

On October 20, 1997 appellant underwent a second opinion examination by a panel of physicians, including Dr. Bruce D. Bingham, a Board-certified orthopedic surgeon, Dr. Richard M. Petronella, a physiatrist and Dr. Raymond J. Schumacher, a Board-certified internist specializing in occupational medicine. In a joint report, the physicians diagnosed right shoulder strain, resolved and noted that appellant had additional right upper extremity symptoms of uncertain cause, but had not fulfilled the additional clinical criteria for fibromyalgia syndrome. The report concluded that appellant could return to her preinjury occupation without limitations or restrictions.

In a report dated November 5, 1997, Dr. Silverman, appellant's treating physician, agreed that appellant had reached maximum medical improvement and could return to work November 10, 1997, without restrictions or limitations. The physician qualified his work-release order, however, by recommending that appellant return to work four hours a day for the first week and then work eight hours a day thereafter. Dr. Silverman explained that this gradual return to work was due to appellant's deconditioned status and not due to any residuals of her January 27, 1997 injury.

On November 10, 1997 appellant returned to work part-time work, as scheduled, but actually worked at least five hours that day. Appellant then worked four hours on November 11, 1997 and eight hours on November 12, 1997. On November 12, 1997 appellant filed a claim alleging that she sustained a recurrence of disability and had to stop work. In a report dated January 27, 1998, submitted in response to an Office request for additional information regarding appellant's work status, Dr. Silverman stated that on physical examination appellant exhibited bilateral trigger points, spasm of the superior mid-trapezius adjacent to scapular border, lumbosacral and sacroiliac pain on palpation and mobilization, moderate spasm of the lumbosacral paravertebrals, greater trochanteric pain on deep palpation bilaterally and paresthesias of the right hand. He diagnosed myofascial pain syndrome and indicated that fibromyalgia should be considered. Dr. Silverman concluded that based on his clinical evaluation and on a review of the reports of several other physicians appellant had recently seen,[1] appellant was unable to perform the activities of her job description and Dr. Silverman was reversing his prior opinion that appellant could work four hours a day, followed by progression to full duty.

On April 14, 1998 the employing establishment offered appellant a light-duty job, four hours a day. In a report dated April 15, 1998, Dr. Silverman approved the position on a four-hour per day basis and appellant accepted the light-duty job. Appellant returned to work on April 18, 1998, but only worked two hours before stopping work entirely. In a report dated April 20, 1998, he noted that appellant's attempt to return to work had failed due to intolerable pain after two hours and stated that appellant's work duties should be further revised to a more sedentary, less repetitive position, or she should be declared disabled with respect to her regular work duties. Appellant did not return to work.

After a period of medical and factual development, by decision dated February 16, 2000, the Office denied appellant's November 12, 1997 claim for a recurrence of disability.

The Board finds that the case is not in posture for decision with respect to whether appellant sustained a recurrence of disability on or after November 12, 1997. 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 requirements.[2] Furthermore, appellant has the burden of establishing by the weight of

[1] Dr. Silverman reviewed the reports of Drs. Worden, Gossler and Walter, discussed below.

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

the substantial, reliable and probative evidence, a causal relationship between his recurrence of disability and his accepted employment injury.[3] 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 employment factors and supports that conclusion with sound medical reasoning.[4]

Appellant has submitted medical evidence in an attempt to establish that was disabled for work after November 12, 1997 due to a worsening of her injury-related condition. In addition to the above-mentioned reports from Dr. Silverman, her primary treating physician, appellant submitted reports from several specialists she consulted. In a report dated December 9, 1997, Dr. Katherine A. Worden, an osteopath, reviewed appellant's history of injury and treatment and noted her findings on physical examination, including major muscle spasm and trigger points in the trapezius and many other muscle groups and numerous postural abnormalities. Dr. Worden diagnosed: (1) somatic dysfunction-cervical, thoracic, rib, lumbar, pelvis, sacrum, upper and lower extremities and abdominal/visceral areas, secondary to cervical/thoracic/rib sprain; (2) thoracic outlet syndrome, right, apparently without demonstrable dysfunction on electromyogram yet; (3) myofascial pain syndrome, secondary to above; and (4) muscle tension cephalgia with some involvement of the trigeminal nerve ganglion on the right with autonomic nervous system dysfunction, with imbalance in favor of sympathetic overdrive.

The record also contains a December 11, 1997 report from Dr. Kenneth B. Gossler, a Board-certified anesthesiologist specializing in pain management. Dr. Gossler reviewed appellant's history of injury and treatment and noted that physical examination revealed trigger points at the right pectoralis fascia insertion upon the humerous, right paraspinous muscle spasm, some vague trigger points throughout the right trapezius, quadratus lumborum trigger point and greater occipital nerve trigger point. He diagnosed myofascial pain syndrome and noted that while appellant did not meet the true diagnostic criteria for fibromyalgia, she was heading in that, direction. Dr. Gossler recommended a multidisciplinary treatment approach, including physical therapy, antidepressants and the judicious use of injection therapy.

In a report dated December 18, 1997, Dr. Debra A. Walter, a Board-certified physiatrist, reviewed appellant's history of injury and treatment and noted that on examination appellant's range of motion was largely normal, with no joint swelling, inflammation or deformity, but that appellant exhibited mild tenderness in symmetrical spots and some increased tenderness in the posterior shoulder girdle, subscap and right pectoralis. Dr. Walter diagnosed appellant's condition as a somewhat diffuse pain syndrome, which was now mainly in the right hemi-body, but certainly started with what sounded like a myofascial pain problem in the right shoulder girdle. She stated that she felt appellant's problem should be approached as a fibromyalgia problem in nonspecific terms, but with an awareness of the possibility of other underlying diagnoses. Dr. Walter concluded that appellant's work aggravated her symptoms, particular with heavy repetitive use of the right arm and that overall a less demanding, less repetitive job would be more appropriate for appellant.

[3] *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

[4] *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

In reports dated January 22 and February 12, 1998, Dr. J. Steven Strong, a Board-certified internist, reviewed appellant's medical and factual history, as well as the results of his physical examination and diagnosed myofascial pain syndrome involving the right shoulder and scapular muscle distribution of the right upper back. He also noted symptoms of torchanteric and gluteal muscle soreness, but noted that appellant did not have a sufficient number of trigger pints to be classified as true fibromyalgia. Dr. Strong recommended a course of treatment and indicated that he felt appellant had a good prognosis, but that her work description may have to be altered away from a position requiring repetitive motion with her right arm, as this may be a problem in initiating appellant's initial symptoms and may be aggravating in the future.

In periodic reports dated June 22, July 1 and December 4, 1998 and February 15, April 13 and June 8, 1999, Dr. Silverman explained that he now believed appellant suffered from fibromyalgia, myofascial pain syndrome and reported on appellant's progress and treatment. Dr. Silverman indicated that appellant continued to see Dr. Worden for treatment of her condition.

In a report dated July 3, 1998, Dr. Worden updated appellant's condition and progress, listing her diagnosis as somatic dysfunction: head, cervical, thoracic, rib, lumbar, pelvis, sacrum, upper and lower extremities secondary to cervical, thoracic, rib, lumbosacral and bilateral shoulder sprains, right greater than left, all with a secondary myofascial pain syndrome secondary to occupational overuse syndrome of the right shoulder and arm. Dr. Worden stated that appellant's job duties which included mail sorting and repetitive motion, could not be tolerated by appellant for even as little as two hours and that it was unlikely that appellant would be able to return to her current job position, as it exists.

The record also contains a report from Dr. John C. Medlen, a Board-certified orthopedic surgeon, to whom appellant was referred by the Office, together with a statement of accepted facts, a list of questions to be answered and copies of the relevant medical evidence of record.[5] In his report dated June 30, 1998, Dr. Medlen reviewed appellant's employment and medical history and listed his findings on physical examination. Dr. Medlen diagnosed myofascial pain syndrome or fibromyalgia, in addition to mild rotator cuff impingement syndrome. He further stated that appellant's "symptoms are causally related to her industrial injury," and added that no further active care was indicated, as her condition should resolve over time with home stretching and strengthening exercises, relaxation techniques, avoidance of repetitive heavy use of the upper extremity and perhaps occasional trigger point injections. Dr. Medlen further stated: "If her job is such that it requires repetitive heavy use of the upper extremities, consideration should be given to some sort of light sedentary duties or else limited vocational rehabilitation during the healing phase which may be extended. I do, however, feel that with time her symptoms should resolve and she should be able to continue to function quite well in the future without any significant permanent impairment."

[5] The Office originally sent appellant to Dr. Medlen for an independent medical examination to resolve a conflict in medical opinion between Drs. Silverman, Bingham, Petronella and Schumacher. However, as Drs. Bingham, Petronella and Schumacher examined appellant before she sustained her November 12, 1997 recurrence of disability, their opinions could not create a conflict with Dr. Silverman on the issue of recurrence. Therefore, Dr. Medlen cannot be considered an impartial medical specialist.

By letters dated September 17, 1998 and March 22, 1999, the Office sought clarification from Dr. Medlen as to whether the physician had the opportunity to review the statement of accepted facts or the list of questions posed by the Office. The Office additionally asked him to clarify whether appellant was capable of performing the duties of a rural carrier, on either a part-time or full-time basis.

When Dr. Medlen did not respond to the Office's requests for additional information, the Office referred appellant, together with a revised statement of accepted facts, copies of the medical record and a list of questions to be answered, to Dr. John A. Maltry, for further evaluation.[6]

In a report dated August 12, 1999, Dr. Maltry, a Board-certified orthopedic surgeon, reviewed appellant's history of injury and medical treatment and listed his findings on physical examination and stated, in pertinent part:

> "I suspect that [appellant] should carry a diagnosis of fibromyalgia, especially involving this right upper extremity. I certainly do not feel that she can work in any type of productive manner as a letter carrier, nor do I feel that any repetitive right upper extremity work greater than 1 to 2 lbs. will be tolerated. She could work a sedentary job perhaps half time involving desk level work only. According to [appellant], she had no preexisting disability prior to this injury. Certainly this condition should be connected to her work injury owing to the fact that she was a working-able employee until this point and has had these increasing complaints which are well documented since their onset back in February of 1997."

By letter dated August 30, 1999, the Office asked Dr. Maltry to provide specific answers to the questions initially posed by the Office. In his response dated September 13, 1999, Dr. Maltry stated that he felt he had answered the Office's questions in his initial report. Dr. Maltry reiterated his diagnosis of fibromyalgia and stated:

> "Injury to related factors are impossible for me to determine as a referee physician owing to the fact that I was not there and we are now very removed from her injury. However, according to her history all of the pain is related to the initiated injury back in January of 1997."

The Board notes that, while record contains numerous medical opinions, there is almost no medical evidence in the record which addresses the critical issue in this case, which is whether appellant sustained a recurrence of disability on or after November 12, 1997, due to a change in the nature of her injury-related condition or an a change in her light-duty job requirements, such that she could no longer perform her light-duty job four hours a day. Only Dr. Silverman, in his January 27, 1998 report, attempts to address this issue, stating that, based

[6] The Board notes that the June 7, 1999 statement of accepted facts sent to Dr. Maltry does not accurately reflect appellant's history, as it states that she worked four hours a day from July 17, 1997 to April 18, 1998. In fact, appellant stopped work from August 31 to November 9, 1997, returned to work on November 10, 1997 and stopped work again November 12, 1997. Appellant remained off work until April 18, 1998, when she worked two hours and stopped work completely.

on the evaluations by Drs. Gossler, Walter and Worden, as well as his own clinical evaluation, that appellant now suffered from myofascial pain syndrome and possibly fibromyalgia and was not capable of performing her light-duty job, four hours a day. Dr. Silverman's report is insufficient to establish that appellant sustained a recurrence of disability, as alleged, however, in that he did not clearly explain the causal relationship, if any, between appellant's January 21, 1997 accepted shoulder strain and her diagnosed myofascial pain syndrome or fibromyalgia. However, the Board notes that there is no contradictory medical evidence of record. Each of the remaining treating physicians of record, as well as Office referral physicians Drs. Medlen and Maltry, discussed only appellant's condition at the time of their respective examinations and did not address whether appellant sustained a recurrence of disability on or after November 12, 1997, due to a worsening of her accepted condition or to a change in her employment duties, such that she could no longer perform her light-duty job, four hours a day. As Dr. Silverman's reports, taken as a whole, raise an inference of causal relation between appellant's accepted employment injury and her recurrence of disability on or after November 12, 1997 and as there is no contradictory evidence of record, they are sufficient to require the Office to undertake further development of appellant's claim.[7]

On remand the Office should refer appellant, an accurate statement of accepted facts, a list of specific questions and the medical evidence of record to an appropriate Board-certified specialist for a well-rationalized report to determine if there is a causal relationship between appellant's accepted employment injuries and her diagnosed conditions, such that she was disabled for work for periods on or after November 12, 1997.

The February 16, 2000 decision of the Office of Workers' Compensation Programs is hereby and set aside and remanded for further development consistent with this opinion.

Dated, Washington, DC
November 9, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

[7] *John J. Carlone*, 41 ECAB 354, 358-60 (1989).