U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN L. CROCKETT and U.S. POSTAL SERVICE,
POST OFFICE, Newark, NJ

Docket No. 03-952; Submitted on the Record;
Issued July 18, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of disability on and after January 26, 2001 causally related to her accepted employment injury.

On August 20, 1976 appellant, then a 27-year-old clerk, filed a traumatic injury claim stating that she injured her back on August 14, 1976 when she picked mail up from the top shelf of a cart. The Office of Workers' Compensation Programs accepted the claim for sprain of the dorso lumbarsacral area and paid appropriate medical and wage-loss compensation. The Office subsequently accepted that appellant sustained a number of recurrences.

On June 17, 1990 appellant filed a notice of occupational disease and claim for compensation alleging that, after she had worked on the flats during the morning of December 20, 1989, she experienced pain in her lower back which ran through her legs. She noted that this has happened before "about three or four times a month in the last two years." The record reflects that appellant's last day of work was December 22, 1989. The Office accepted, in a letter dated November 16, 1994, the condition of lumbosacral strain as arising from the December 20, 1989 incident. The Office subsequently expanded appellant's claim to include a herniated disc at L4-5. Appellant was paid compensation from December 26, 1989 until approximately November 2, 1999, when she was released to return to modified limited-duty work.

On March 16, 2000 appellant accepted a modified clerk position offered by the employing establishment which comported to the physical restrictions set by Dr. James M. Lee,

appellant's attending physician and a Board-certified orthopedic surgeon.[1] Appellant returned to work on May 20, 2000 and started her limited-duty assignment on or about May 23, 2000 for six hours per day. By decision dated July 10, 2000, the Office determined that the light-duty position fairly and reasonably represented appellant's wage-earning capacity. Appellant's compensation benefits were accordingly reduced.

On April 9, 2001 appellant filed a notice of recurrence of disability alleging that she experienced low back pain which radiated into her leg and buttocks beginning January 26, 2001. She attributed her pain to her employment injury of December 1989. Appellant stopped work on January 29, 2001. By letter dated May 30, 2001, the Office informed appellant of the type of evidence needed to support her recurrence of disability claim. In response, appellant submitted medical evidence.

By decision dated July 16, 2001, the Office denied appellant's recurrence of disability claim finding that the evidence of record failed to establish either a change in the nature or extent of her injury-related disability or the nature and extent of her light-duty position. By letter dated July 23, 2001, appellant's attorney requested an oral hearing and submitted additional medical evidence. After the hearing held on March 12, 2002, appellant submitted additional medical evidence.

By decision dated August 12, 2002, an Office hearing representative affirmed the July 16, 2001 decision of the Office, finding that appellant had failed to discharge her burden of proof to establish the claim. Appellant requested reconsideration on November 13, 2002 and submitted additional medical evidence. By decision dated December 2, 2002, the Office found that the evidence was insufficient to warrant modification of the prior decision.

The Board finds that the case is not in posture for decision.

Where 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. 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]

[1] The record reflects that appellant was assigned to manually distribute mail at a manual distribution case. The restrictions were comprised of working 6 hours per day, intermittent sitting 6 hours per day, reach/reach above the shoulders 6 hours per day, intermittent stand/walk/twist 4 hours per day; lift/push/pull up to 10 pounds 4 hours per day with no kneeling, climbing or operation of a motor vehicle. Appellant's limitations did not restrict her from placing mail in wall boxes and she walled mail on a daily basis. This was done for no more than approximately 1½ hours if she walled more than one distribution case. There was a ledge at the wall boxes, so appellant did not have to hold a tray while she placed mail in the wall boxes. Utility carts were available to use when walling mail. However, appellant did not choose to use a cart nor did she ever state she needed a cart.

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

In this case, the Office accepted the conditions of a lumbosacral strain and a herniated nucleus disc pulpous at L4-5 as a result of a December 20, 1989 employment injury. Appellant returned to a six-hour light-duty position as a modified clerk in May 2000.[3] At the March 12, 2002 hearing, appellant alleged that her job had changed as there were fewer people performing the required job duties; however, she did not submit any evidence in support of her claim that her light-duty assignment changed such that she could no longer perform her duties. Moreover, in a letter dated May 15, 2002, the employing establishment directly contradicted appellant's claims pertaining to her working conditions. The Board therefore finds that appellant has not established a change in her light-duty job.

Appellant also has not submitted sufficient evidence to show that she was disabled from her light-duty position on or after January 26, 2001 due to her accepted employment injury. In a February 2, 2001 report, Dr. Lee advised that appellant had worked six hours per day for the last five months with the diagnosis of chronic LS sprain with paravertebral myofasciitis discogenic disease at L5-S1. Examination findings revealed moderate to severe tenderness in the lower back with spasm at L4-5 and L5-S1. Straight leg raise was positive at 60 degrees right and left. Knee jerks were normal, but decreased ankle jerks bilaterally were exhibited. In view of appellant's significant spasm and pain in the lower back, Dr. Lee advised appellant to stop working.

In a May 29, 2001 report, Dr. Lee noted that the magnetic resonance imaging (MRI) scan of the lumbar spine dated April 11, 2001 revealed a mild central bulge of the annulus fibrosis at L4-5 and L5-S1, but no herniated nucleus pulposus or spinal stenosis. He stated that the result was unusual as appellant had progressive changes as demonstrated on past computerized tomography (CT) scan and a previous MRI scan. Dr. Lee stated that by appellant's chronic history of low back pain with paravertebral muscle spasm and clinical evidence of extensor hallucis longus (EHL)[4] weakness indicating L5 nerve root pathology, she had a chronic lumbosacral sprain with right paravertebral muscle spasm, clinical evidence and diagnostic studies of herniated disc on the right side at L4-5. He opined that appellant would not be able to return to work, as she would be unable to perform her duties. Dr. Lee noted that her condition was permanent, that surgery was not indicated and further treatment would only be palliative in nature. He opined that appellant was completely and totally disabled in regard to her job duties.

In an August 28, 2001 report, Dr. Lee acknowledged that, in spite of the disappearance of the disc bulge or disc herniation, appellant remained symptomatic and remained disabled. He noted that her prognosis was poor. Dr. Lee noted that appellant's limited-duty job was essentially sedentary and reiterated his opinion that appellant was unable to work at that time as she continued to be symptomatic with positive clinical findings. He concluded that she was permanently and totally disabled. In progress notes of September 18, 2001 and January 9, 2002 examinations, Dr. Lee advised that appellant's clinical condition had not changed significantly and continued to opine that she remained completely and totally disabled. In a May 24, 2002 report, Dr. Lee advised that, based on his clinical evaluation of May 10, 2001, it was his firm diagnosis that appellant had chronic lumbosacral sprain with paravertebral muscle spasm and

[3] It is not clear from the record whether appellant started her modified clerk position on May 20 or 21, 2000.

[4] EHL weakness is characterized by drooping of the big toe.

right sciatica with dessication of the disc at L4-5 and L5-S1 and nerve root encroachment of the neural foramen of the L5 nerve root, giving appellant partial paralysis in the right great toe. He noted that appellant's positive CT scan findings and advised that appellant would clinically periodically have recurrent symptomatology and she would not be able to return to any gainful employment. He advised that appellant was completely and totally disabled.

Proceedings under the Federal Employees' Compensation Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[5] In the instant case, Dr. Lee's reports are not sufficient to establish how appellant's condition changed or worsened for a finding that appellant was no longer able to perform her light-duty assignment. However, although Dr. Lee's reports generally support causal relationship to her accepted employment injuries and raise an inference of causal relationship between her January 26, 2001 allegedly disabling complaints and disability and her original occupational injuries.[6] The record reflects that Dr. Lee has treated appellant since at least 1991. The light-duty job appellant had worked since May 2000 was based on Dr. Lee's restrictions. Dr. Lee took her off work on February 2, 2001 and has consistently advised that she can not return to any work including sedentary employment. Additionally, there is no contradictory medical evidence in the record.

Therefore, the case will be remanded for further medical development including a referral of appellant, together with a statement of accepted facts, specific questions to be addressed and the relevant case record, to a Board-certified orthopedic surgeon, for a rationalized second medical opinion as to whether appellant sustained a change in the nature and extent of her injury-related conditions, and was, therefore, totally disabled for the period commencing January 26, 2001, causally related to her accepted occupationally-related back conditions.

[5] *William J. Cantrell*, 34 ECAB 1223 (1983).

[6] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

Consequently, the decisions of the Office of Workers' Compensation Programs dated December 2 and August 12, 2002 are hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, DC
July 18, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member