

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH A. McNEAL and U.S. POSTAL SERVICE,
WAYNE POST OFFICE, Wayne, NJ

*Docket No. 02-2319; Submitted on the Record;
Issued February 27, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that she sustained a recurrence of disability from June 29, 2001 onward causally related to an accepted herniated L5-S1 disc.

The Office of Workers' Compensation Programs accepted that, on or before January 19, 1984, appellant, then a 32-year-old distribution clerk, sustained a herniated nucleus pulposus at L5-S1 and a lumbar strain, requiring laminectomy on December 16, 1986 to repair a large posterior herniation. Appellant missed work intermittently from January 1984 onward.¹ She received compensation benefits on the daily rolls from November 1986 to April 1987. Appellant resumed work for four hours per day on April 6, 1987 in a limited-duty or "rehab[ilitation]" position, with no lifting. She resumed full-time work on May 1, 1986, continuing in the light-duty clerical position.²

On June 1, 1999 appellant claimed a recurrence of disability commencing May 28, 1999 which she attributed to the accepted January 19, 1984 injury. In an accompanying note, she stated that she had been "okay for 13 years," with no treatment for her back since 1991, but had recently experienced "numbness in both feet -- numb spots and pins and needles in left leg -- lower back pain near tailbone." Appellant described "extreme" lumbar pain with paresthesias and anesthesia in both lower extremities, and permanent nerve damage due to postoperative degeneration and fusion of the lumbar discs. At the time of the alleged recurrence of disability,

¹ The record contains a March 20, 1989 decision finding an overpayment of compensation in the amount of \$329.26 as appellant was working four hours per day from May 1 to 9, 1987 but was paid wage-loss compensation for eight hours per day. This decision is not before the Board on the present appeal.

² In a May 22, 1990 letter, appellant requested that the Office reopen her claim "due to continued pain and discomfort in [her] left lumbar area [and] left leg." Appellant noted that she was working at the employing establishment "as a rehab." Appellant requested that the Office authorize a visit to her physician, Dr. Yaccarino, to determine whether she needed examination by Dr. John Flynn, who performed the lumbar laminectomy. The Office did not interpret appellant's letter as a claim for a recurrence of disability.

appellant was working in a modified “rehabilitation” position, performing sedentary, clerical work with no lifting over 25 pounds, no prolonged standing, and no twisting, bending or pushing. Appellant also requested that the Office authorize a change of physicians.³

Appellant submitted medical evidence in support of her claim.

In a September 2, 1999 report, Dr. Hervey S. Sicherman, an attending Board-certified orthopedic surgeon, provided a history of injury, treatment and the 1986 laminectomy. Dr. Sicherman related appellant’s account of a burning sensation in the left thigh radiating into the calf for approximately one year, aching and stiffness upon arising and at night, intermittent numbness of the right foot. On examination, Dr. Sicherman found limited forward flexion, a slightly positive straight leg raising test on the left. Dr. Sicherman obtained x-rays showing “diminished disc space at L4-5 and L5-S1 with some early sclerosis. Dr. Sicherman diagnosed “postlaminectomy/fusion syndrome w[ith] neuritis and sciatica. He opined that appellant’s symptoms were “permanent, she has some exacerbation of her symptoms as one would expect with time.” Dr. Sicherman prescribed anti-inflammatories to control the dysesthesias. He noted that there should “be no change in her status nor any change in job description.” In an accompanying form report, Dr. Sicherman checked a box “yes” indicating his support for causal relationship.

In a September 13, 1999 note, Dr. Sicherman stated that prescription anti-inflammatories were effective in reducing appellant’s symptoms.

In a September 18, 1999 letter, the Office advised appellant that her June 1, 1999 claim appeared to be a request for a change in physicians rather than a claim for a recurrence of disability. On that basis, the Office approved appellant’s request for a change of physicians from Dr. Flynn to Dr. Hervey Sicherman, and authorized appellant to consult Dr. Sicherman “to determine whether [her] current complaints [were] related to the accepted injury.” The Office did not further process appellant’s claim for a recurrence of disability.

In a December 7, 1999 report, Dr. Sicherman commented that appellant “asked about stopping work but [he thought appellant was] able to do the modified work she was given.” He recommended a pain management program.

A March 16, 2000 magnetic resonance imaging (MRI) scan showed “degenerative disc disease at the L3-4, L4-5 and L5-S1 levels. Postsurgical changes are noted at the L4-5 and L5-S1 levels without evidence of disc herniation.”

In a March 31, 2000 report, Dr. Sicherman stated that appellant had “postlaminectomy/fusion syndrome with neuritis and sciatica.” He found that the January 7,

³ In a July 8, 1999 letter, the Office acknowledged appellant’s claim for a recurrence of disability. The Office noted that as appellant was performing light duty at the time of the alleged recurrence of disability, she “must submit evidence which shows that [she could] not perform ... light or limited duty.... To establish your claim of recurrence, you must show ... a change in the nature and extent of [her] injury-related condition or ... a change in the nature and extent of the light-duty requirements.” Appellant was instructed to submit a report from her physician containing “a detailed description of medical findings before and after the date of recurrence,” and denoting any periods of total or partial disability. She was afforded 30 days in which to submit such evidence.

2000 MRI scan showed “degenerative changes as well as postoperative changes at L4-5 and L5-S1. No disc herniation is noted.” Dr. Sicherman opined that appellant would “most probably benefit from pain management care,” and referred her to Dr. Gamal Diab, a specialist in pain management.

In a November 9, 2000 note, Dr. Sicherman again requested that the Office authorize a pain management program for appellant with Dr. Diab.

In a June 11, 2001 report, Dr. Sicherman stated that “about a month ago [appellant] noted pain in the mid back when tried (sic) to lift or sitting in car.” On examination, he found “[t]enderness to palpation over the spinous process of D9 or D8,” pain on range of spinal motion, and a possible calcified disc at D8-9 by x-ray. Dr. Sicherman diagnosed “dorsal strain/sprain.”

On July 12, 2001 appellant claimed a recurrence of disability commencing June 29, 2001 which she attributed to sequelae of the accepted L5-S1 herniated disc. She noted that she had been approved for disability retirement through the Office of Personnel Management (OPM) effective June 30, 2001.⁴ Appellant noted that the Office had not approved her requests for a pain management program or physical therapy.

In an August 19, 2001 letter, the Office advised appellant of the type of medical evidence needed to establish her claim for a recurrence of disability. The Office noted that, as appellant was performing light duty at the time of the alleged recurrence of disability, she “must submit evidence which shows that [she could] not perform ... light or limited duty.... To establish your claim of recurrence, you must show ... a change in the nature and extent of [her] injury-related condition or ... a change in the nature and extent of the light-duty requirements.” Appellant was instructed to submit a report from her physician containing “a detailed description of medical findings before and after the date of recurrence,” and denoting any periods of total or partial disability. She was afforded 30 days in which to submit such evidence.

The record indicates that appellant did not submit additional evidence prior to the issuance of the December 1, 2001 decision.

By decision dated December 1, 2001, the Office denied appellant’s claim for a recurrence of disability on the grounds that appellant had not submitted sufficient medical evidence to establish the claimed recurrence of disability. The Office noted that appellant was advised by the August 19, 2001 letter of the type of medical and factual evidence required to establish her claim, but that she did not submit such evidence.

Appellant disagreed with this decision and in a December 7, 2001 letter requested reconsideration. She submitted additional evidence.⁵

In a March 14, 2001 report, Dr. John Vitolo, a Board-certified orthopedic surgeon, provided a history of injury and treatment, the 1986 laminectomy, and related appellant’s

⁴ Appellant’s application for disability retirement was approved by the OPM on June 12, 2001.

⁵ Appellant also submitted copies of reports previously of record or not pertaining to the period July 1999 and onward, and copies of correspondence with the Office.

symptoms of paresthesias and lancinating pain into the left lower extremity. On examination, Dr. Vitolo found limited forward flexion, no “obvious sensory abnormalities,” and negative straight leg raising tests bilaterally. He reviewed the March 16, 2000 MRI report, showing degenerative disc disease from L3 through S1 and “postsurgical changes noted at L4-5 and L5-S1.” Dr. Vitolo opined that appellant “had a continuous history of pain, difficulty with ambulation secondary to back surgery,” and that the anti-inflammatory treatment prescribed by Dr. Sicherman was not effective. He diagnosed “L4-5 discectomy with continuing lumbosacral radiculopathy,” noting that appellant’s condition was “permanent, with the highest probability that it will not improve.”

In a May 31, 2001 report, Dr. Pasquale Yaccarino, an attending Board-certified internist, who treated appellant since the early 1980s, noted appellant’s history of back pain beginning in the early 1980s, the December 1986 lumbar laminectomy, with “recurrent low back pain and sciatica” beginning in 1989 “involving the right lower extremity.” Dr. Yaccarino stated that, currently, appellant experienced “chronic, unremitting low back pain that radiates to both lower extremities with paresthesias and dysesthesias involving her right foot and her entire left leg to the ankle.” He noted that these symptoms interfered with stair climbing, prolonged standing and sitting. On examination, Dr. Yaccarino found bilaterally positive straight leg raising tests, and an inability to heel walk. He diagnosed “chronic low back pain with bilateral lumbar radiculitis,” and was “medically disabled to the point where she cannot perform her job duties.”

In a March 18, 2002 report, Dr. Dennis Shubert, an attending Board-certified orthopedic surgeon, provided a history of injury, surgery and other treatment, and related her complaints of severe, chronic lumbar pain with radiation into the lower extremities. Dr. Shubert reviewed the March 16, 2000 MRI report, noting that it “was obtained when she was having identical symptoms as presently,” and that there was degenerative disc disease from L3 through S1 without disc herniation. He noted that appellant was 5 feet 2 inches tall, weighed 194 pounds, and was under treatment for hypercholesterolemia and anxiety. On examination, Dr. Shubert found appellant able to heel and toe walk, bilaterally negative straight leg raising tests, good forward flexion of the lumbar spine, no loss of strength or muscle atrophy in the lower extremities, and no neurologic abnormalities. He diagnosed “degenerative disc disease causing chronic back pain.” Dr. Shubert opined that appellant was not a surgical candidate, and recommended an exercise regimen to address her deconditioning and weight-loss issues. Regarding work restrictions, he commented that appellant was “certainly free to do whatever she feels up to,” noting that “[f]urther specialty care does n[o]t appear warranted.”

By decision dated September 6, 2002, the Office denied modification on the grounds that the evidence appellant submitted was insufficient to warrant modification of the December 1, 2001 decision. The Office found that Dr. Yaccarino’s report was dated May 31, 2001, prior to the claimed recurrence of disability, and was therefore of limited relevance to her claim. However, the Office also found that Dr. Yaccarino provided insufficient rationale explaining how and why the accepted lumbar disc herniation would disable her for light-duty work on and after May 31, 2001. The Office further found that Dr. Shubert’s May 18, 2002 report did not find appellant disabled for work or “relate any of [appellant’s] current medical condition to her accepted ... injury.” The Office also found that Dr. Vitolo’s March 14, 2001 report was also insufficiently rationalized to establish a causal relationship between the accepted herniated lumbar disc and the claimed period of disability.

Appellant filed her appeal with the Board on September 19, 2002.

The Board finds that she has not established that she sustained a recurrence of disability from July 1999 onward due to an accepted L5-S1 herniated disc.

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. 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.⁶

Appellant does not allege and the record does not indicate that there was any change in the nature and extent of appellant's light-duty job requirements. Her claim is predicated on her belief that sequelae of the accepted L5-S1 herniated lumbar disc and December 1986 laminectomy totally disabled her for work on and after June 29, 2001. In support of her claim, appellant submitted several medical reports discussing her back condition.

The only report appellant submitted addressing her back condition on and after June 29, 2001 is the March 18, 2002 report of Dr. Dennis Shubert, an attending Board-certified orthopedic surgeon, who provided a history of injury and treatment, found no orthopedic or neurologic abnormality on examination, but noted that appellant was obese and deconditioned. Dr. Shubert diagnosed "degenerative disc disease causing chronic back pain." He stated that appellant was "certainly free to do whatever she feels," and did not provide specific work restrictions. Rather than restrict appellant's activities or find her disabled for work, Dr. Shubert recommended that appellant increase her physical activity to include an exercise regimen to address her deconditioning and weight-loss issues. As Dr. Shubert did not find appellant disabled for work on and after June 29, 2001, his opinion is contrary to appellant's assertion that she sustained a recurrence of disability on and after that date.

Appellant also submitted reports from three other physicians addressing her back condition during the period immediately prior to the alleged June 29, 2001 recurrence of disability.

Dr. Sicherman, an attending Board-certified orthopedic surgeon, submitted reports dated from September 2, 1999 to June 11, 2001. He diagnosed a "postlaminectomy/fusion syndrome w[ith] neuritis and sciatica," finding her condition permanent and stationary as of September 2, 1999. However, Dr. Sicherman did not opine that this syndrome disabled appellant for work. He stated explicitly that this diagnosed postlaminectomy syndrome should not cause a "change in her status nor any change in her job description." Dr. Sicherman reiterated his opinion that appellant was not disabled for work in a December 7, 1999 report, stating that appellant was "able to do the modified work she was given" although she desired to stop working. He recommended a pain management program, but did not find appellant disabled for

⁶ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Stuart K. Stanton*, 40 ECAB 864 (1989); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

work in any of his reports through July 12, 2001. As Dr. Sicherman did not find appellant disabled for work for any period, his opinion is contrary to appellant's assertion that she was disabled for work on and after June 29, 2001 due to sequelae of the accepted L5-S1 herniated disc.

Similarly, Dr. Vitolo, an attending Board-certified orthopedic surgeon, stated in a March 14, 2001 report that the December 1986 laminectomy needed to repair the accepted L5-S1 disc herniation caused postsurgical changes resulting in a permanent lumbosacral radiculopathy, with a "continuous history of pain" and "difficulty with ambulation." However, he did not find appellant disabled for work. Thus, Dr. Vitolo's opinion is contrary to appellant's assertion that she was totally disabled for work on and after June 29, 2001.

The only medical report of record finding appellant disabled for work during any period contemporaneous to June 29, 2001 is the May 31, 2001 report of Dr. Yaccarino, an attending Board-certified internist, who found appellant disabled for work for an indefinite period due to "chronic low back pain with bilateral lumbar radiculitis," with objectively positive straight leg raising tests bilaterally, and an inability to heel walk. Dr. Yaccarino stated that these symptoms interfered with prolonged sitting and standing, which were factors of appellant's light-duty position. However, he did not provide sufficient medical rationale explaining how and why these findings were related to the accepted injury. Dr. Yaccarino did not explain the medical mechanics as to how the accepted L5-S1 herniated disc, December 1986 laminectomy and their sequelae would cause the observed bilateral radiculitis. Without such rationale, his opinion is of diminished probative value and is insufficient to establish appellant's claim for recurrence of disability.⁷

Thus, appellant's own physicians do not support her claim for a recurrence of disability on and after June 29, 2001, as Drs. Shubert, Sicherman and Vitolo did not find appellant disabled for work, and Dr. Yaccarino did not submit sufficient rationale to support his finding of disability.

The Board notes that appellant submitted correspondence regarding her approval for OPM disability retirement benefits. However, this determination has no bearing on appellant's compensation claim. In determining whether an employee is disabled under the Federal Employees' Compensation Act, the findings of other administrative agencies, such as the Office of Personnel Management, are not determinative of disability under the Act. Under the Act, for a disability determination, appellant's injury must be shown to be causally related to an accepted injury or factors of his federal employment. Under the rules of the OPM, conditions which are not work related may be considered in rendering a disability determination. For this reason, the determinations of other administrative agencies or courts, while instructive, are not determinative with regard to disability under the Act.⁸

⁷ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

⁸ *See Daniel Deparini*, 44 ECAB 657 (1993).

Consequently, appellant has not established that she sustained a recurrence of disability beginning on June 29, 2001, as she submitted insufficient rationalized medical evidence to establish that she was disabled on and after that date due to the accepted L5-S1 disc herniation.

The decisions of the Office of Workers' Compensation Programs dated September 6, 2002 and December 1, 2001 are hereby affirmed.

Dated, Washington, DC
February 27, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member