



treating physician (who is not an orthopedist) submitted the following note:

[Petitioner] suffered a very severe back fracture from a fall from a scaffolding and was fortunate not to have been rendered paralyzed. I saw her recently; and she still has a fair amount of fatigue and pain which has prevented her from returning to any meaningful task, particularly sitting, standing, or any manual type of work. I suspect this will persist for the better part of a year, but I cannot in all fairness say that she is going to be totally disabled for a period of 12 months or longer. Since it has been 6 months from her injury, I anticipate that progressive healing should occur. I would more likely want to rely on an orthopedic consult than on my opinion alone.

I would be more than willing to testify at a hearing, if this is required. [Petitioner] has been a patient of mine for 20 years and has always exhibited a willingness to be physically active and hold down more than one job. So I feel that her current situation certainly is not one of malingering and in deed she still has pain and discomfort.

A hearing in this matter was held on July 11, 1989, at which time the petitioner's treating physician did indeed testify in the petitioner's behalf. He reiterated his opinion that the petitioner's back problems precluded her from a full time job that involved sitting or standing. He admitted, however, that he was not an orthopedic specialist, and he recommended that the petitioner be evaluated by a back clinic. The department agreed that this be done on a consultative basis. Unfortunately, it was several months before the petitioner could get an appointment.

The orthopedic examination finally took place in January, 1990, yielding the following report:

Upon your request, I saw [petitioner] today. She

has had a back injury on 10/26/88. She fell off a scaffolding approximately 7 1/2 feet above the ground. She landed directly on her back, did not hit her head and there was no loss of consciousness.

She did have immediate, severe, low back pain. She was taken to the Medical Center Hospital of VT, and was found to have a burst fracture of L1, with a 30 degree traumatic kyphosis. She has no neurological deficit, including no bladder nor bowel problems.

She was initially treated on the rotokinetic bed, and was eventually given a TSLO brace. She was discharged on 11/4/88.

She was followed up in the Orthopaedic Clinic by Dr. Grobler, who ordered interval x-rays, and as time went on, there were no further changes, and the local kyphosis ended up to be 18 degrees, and remained stable between 4/89 and 7/89 follow-up dates.

No repeat CAT scan was done. The original one showed a 25% to 30% canal compromise at the level of the burst fracture. It was felt that she had a stable configuration.

[Petitioner] wore her TSLO brace for approximately four months continuously, but after that, was weaned off over the next two months. During that period of time, she went to physical therapy in Middlebury, VT, where she received three times/week treatment for three months duration. She was given modalities, as well as an exercise program, and on the days that she did not go to physical therapy, she would do the exercises at home.

[Petitioner] felt that although the exercises did not make her pain worse, they did not decrease the pain either. She also felt that it did not make any difference in her functional limitations.

She was referred to Vocational Rehabilitation on 01/89; met with a counselor, and was told a few weeks later that she was not eligible at that time (I am not clear why that happened).

In the meantime, she has been receiving welfare, although she was employed at the time of her accident and it happened at work, there was no Workman's Compensation involved.

Since her injury and inactivity, she has gained 45 pounds. This is very distressing to her. She has cut down on her food intake, but that has not made any

difference. In the summer, she was swimming in an outdoor pool, and that was the most comfortable form of exercise, but had to give up on that when the temperatures dropped. There is no inside pool available to her, and even if there were, she would not be able to afford it.

The pain is pretty constant at the site of the burst fracture, and radiates to both buttocks and thighs, but never below that. She has no numbness nor paraesthesias. She tolerates sitting up straight, standing and walking for one hour each. The pain does not wake her up at night.

PAIN MEDICATIONS:

1) Advil II, TID, when she has a very bad day, and during the week, will take six doses.

PAST MEDICAL HISTORY:

- 1) Thyroidectomy, 1970 (no substitute medications).
- 2) Tonsillectomy.
- 3) Appendectomy.

She is on Premarin, low dose, because of hot flashes, and has not had her period for several years.

PHYSICAL EXAMINATION: [Petitioner] is a 48-year-old woman, looking her stated age. She shows no apparent discomfort. She is overweight. She ambulates without a limp, and can hop on either leg independently.

Range of motion is:

- 1) Forward Flexion 90 degrees.
- 2) Extension 30 degrees.
- 3) Lateral bending 30 degrees, right.
- 4) Lateral bending 30 degrees, left.
- 5) Rotation 40 degrees, left.
- 6) Rotation 30 degrees, right (slightly limited).

Straight leg raising is negative. Reflexes are equal and present. Muscle strength is within normal limits. Sensation is intact. She has point tenderness over T12 and L1.

ASSESSMENT: [Petitioner] is now fifteen months post injury. She has a well-documented, L1 burst fracture, with no neurological impairments; minimally limited range of motion in her lumbosacral spine.

She is deconditioned, overweight and continues to have back/leg discomfort, aggravated by sitting,

standing, walking, carrying, lifting, bending, etc.  
(See Functional Capacity Form).

I feel that this lady is a very good candidate for a program in a health club, to increase her strength and endurance. She is motivated to get back into some form of work that she used to do prior to her injury.

This lady has been in construction for the last six to eight years, and has been in outdoor painting. She has been on assembly lines in Simmonds Precision - in other words, is a lady of many trades.

Unfortunately, at this point, the heavy labor is out of the question, and she should be looking at a more sedentary type of work. She is very interested in working at a travel agency, and this may not be an impossible wish. She has a high school diploma, and went one year into further education.

I have asked her to reapply for vocational rehabilitation, and I will call the counselor on Monday, to find out why she was not accepted as a client - most likely, it was because it was too early - only three months following the injury, and still wearing a TSLO brace.

I did not take new x-rays, as in July it looked as though the situation was stable, and there is no change in symptoms.

Based on the above report and on the other medical evidence it is concluded that as of July, 1989, the petitioner had regained the residual functional capacity for, at best, a part-time sedentary job that would accommodate her need to frequently change positions and to take frequent breaks from work. Unfortunately, it does not appear that the petitioner has advanced much beyond that status since that time. The hearing officer was struck by the strong testimonials from the petitioner's doctors regarding her motivation to return to work. It is clear she is not malingering.

Obviously, the above limitations have precluded the

petitioner from returning to her past work. Moreover, it is found that the petitioner's impairments render fewer jobs available to her than to a similarly educated and work-experienced 50-year-old individual who is capable of performing a full range of sedentary work (see infra).

ORDER

The department's decision is reversed.

REASONS

Medicaid Manual Section M211.2 defines disability as follows:

Disability is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, or combination of impairments, which can be expected to result in death or has lasted or can be expected to last for a continuous period of not fewer than twelve (12) months. To meet this definition, the applicant must have a severe impairment, which makes him/her unable to do his/her previous work or any other substantial gainful activity which exists in the national economy. To determine whether the client is able to do any other work, the client's residual functional capacity, age, education, and work experience is considered.

When an individual establishes that she can no longer return to her past work, the burden of proof shifts to the department to establish that alternative jobs exist that the individual, considering her age, education, and work experience, can perform. Normally, the department can meet this burden of proof through the "grid" regulations when those rules dictate a finding of "not disabled". 20 C.F.R.

§ 416.966 and 416.969. In cases such as this, however, when the grid rules do not specifically apply--in this case,

it is because the petitioner's residual functional capacity is for less than a full range of sedentary work--the grid still can be used for "guidance", or as a "framework", in determining the numbers of jobs available to an individual who "closely approximates" the factors of a particular grid rule. 20 C.F.R. § 404, Subpart P, Appendix II, Sections 200.00(d) and (e).

Rules 201.12 and 201.14 of the grid provide that a 50-year-old individual who has the same education and work experience as the petitioner, and who is limited to performing a full range of "sedentary" work (as defined by 20 C.F.R. § 416.967(a)) must be considered disabled. As found above, the petitioner's residual functional capacity is for substantially less than the full range of full-time sedentary work. It is concluded that even though she is two or three years younger than her hypothetical "grid-disabled" counterpart, the greater severity of her impairments more than offsets her age in terms of the numbers of jobs that are available to her in comparison to her counterpart. Thus, since there are fewer jobs available to the petitioner than there are for a similarly trained and educated 50-year-old person, and since the grid dictates a finding of disabled for that 50-year-old person, it must be concluded that the petitioner is also disabled.

Although it is hoped and expected that the petitioner will follow through on vocational rehabilitation, it must be concluded that since her accident she has met the definition

of disability (supra). Therefore, the department's decision is reversed.

# # #