U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALDINE PORTER and DEPARTMENT OF THE NAVY, NAVAL HOSPITAL, Camp LeJeune, NC

Docket No. 98-1333; Oral Argument Held October 12, 2000; Issued December 1, 2000

Appearances: *Ronald Roussel*, for appellant; *Catherine P. Carter, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB

The issue is whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on December 5, 1997.

Appellant, a linen control worker, filed a claim on September 6, 1995 alleging that she injured her back, ribs and shoulder in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for fractures of the ribs and thoracic spine and contusion of the chest wall on November 9, 1995. Appellant returned to light-duty work on January 3, 1996. By decision dated May 21, 1996, the Office determined that appellant's light-duty work represented her wage-earning capacity.

On June 19, 1997 appellant filed a claim for compensation requesting wage-loss compensation from April 7 to June 2, 1997. By decision dated August 6, 1997, the Office denied appellant's claim for compensation from April 7 to June 2, 1997. On December 8, 1997 appellant filed a claim for compensation beginning December 5, 1997. Appellant continued to file claims for compensation. By decision dated February 20, 1998, the Office denied appellant's claim for recurrence of total disability beginning December 5, 1997.[1]

The Board finds that appellant has failed to meet her burden of proof in establishing a recurrence of disability on or after December 5, 1997.

[1] Following the Office's February 20, 1998 decision, appellant submitted additional new evidence to the Office. As the Office did not review the evidence in reaching its final decision, the Board may not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

On appeal, appellant alleged that she was not allowed to select her treating physician due to interference by the employing establishment. Appellant initially sought treatment with Dr. Charles T. Nance, Jr., a Board-certified orthopedic surgeon. On January 16, 1996 appellant requested a change of physicians to Dr. Wayne B. Venters, also a Board-certified orthopedic surgeon. On January 24, 1996 the Office noted that Dr. Venters was not accepting new patients. In a letter dated January 26, 1996, appellant requested that Dr. John Langley, a Board-certified surgeon, become her treating physician.

In a report dated March 12, 1996, Dr. Langley found that appellant was capable of performing light duty. Appellant requested a change of physicians to Dr. Venters or Dr. Ray B. Armistead, a Board-certified orthopedic surgeon, on March 26, 1997. Appellant informed the Office on May 2, 1997 that Dr. Langley was semi-retired. By letter dated June 2, 1997, the Office authorized treatment with Dr. Venters.

In a report dated June 11, 1997, Dr. Langley noted that appellant was unhappy with his treatment and demanded a referral. He added that she could perform light work and referred her to Dr. Ellis F. Muther, a Board-certified neurologist, who submitted reports on July 7 and August 25, 1997 noting that appellant could work.

By letter dated October 10, 1997, appellant stated, "I would like to know if Dr. Muther will be my doctor now because he does have an office in Jacksonville…." On October 23, 1997 the Office stated that Dr. Muther would become appellant's physician of record. On October 30, 1997 appellant again requested that Dr. Venters become her treating physician alleging that she had not received the Office's June 2, 1997 approval letter. By letter dated November 5, 1997, the Office denied authorization to change treating physicians. The Board notes that the Office has not issued a final decision on this issue with the appropriate appeal rights. Therefore, this issue is currently not before the Board.[2]

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the requirements of 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 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 requirements.[3]

Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability commencing December 5, 1997 and her September 6, 1995 employment injury.[4] 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

[2] 20 C.F.R. § 501.2(c).

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

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

causally related to employment factors and supports that conclusion with sound medical reasoning.[5]

In support of her claim for a recurrence of total disability, appellant has failed to submit any rationalized medical opinion evidence establishing that she was totally disabled on or after December 5, 1997 due to her accepted employment-related injuries. Dr. Muther continued to support appellant's partial disability for work and in a November 17, 1997 report reduced her lifting limits to nine pounds. He stated that appellant's "log" indicated that she had exceeded her weight restrictions and that he was decreasing her limit due to "continued complaints, possible exposure to weight tasks exceeding the limitations and her extremely short stature…." Dr. Muther indicates that appellant can continue to work with restrictions and does not attribute the increased weight restriction to a change in the nature and extent of her injury-related condition or to a clear change in the nature and extent of her light-duty job requirements. Therefore, this report is not sufficient to establish that appellant was totally disabled due to her employment injury.

In a report dated December 5, 1997, Dr. Muther stated that appellant claimed that working at a desk job and filing increased her pain to unbearable levels. He released her from work until her disability claim was approved. This report does not provide a medical opinion that appellant was totally disabled due to her accepted employment injury. Dr. Muther merely restates appellant's complaints of pain and offers no opinion on any change in the nature and extent of her work-related condition.

As appellant has failed to submit the necessary medical opinion evidence establishing that she was totally disabled due to her accepted employment injuries, she has failed to establish a recurrence of disability on or after December 5, 1997 due to her September 6, 1995 employment injury.

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

The February 20, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 1, 2000

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member