U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGIE L. RUTLEDGE and U.S. POSTAL SERVICE,
POST OFFICE, Dayton, OH

Docket No. 03-802; Submitted on the Record;
Issued November 6, 2003

DECISION and ORDER

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

The issue is whether appellant had any disability for work or residuals requiring further medical treatment on or after February 15, 2000, causally related to her August 21, 1991 employment injury.

This is appellant's second appeal before the Board on this issue. By decision dated August 19, 2002, the Board affirmed a February 12, 2001 decision of the Office of Workers' Compensation Programs which affirmed the February 15, 2000 termination of appellant's compensation benefits and entitlement to medical treatment on the grounds that her work-related disability and injury-related residuals had resolved. The facts and circumstances of the case are set forth in the prior decision and are hereby incorporated by reference.[1]

By letter dated October 27, 2002, appellant, through her representative, requested reconsideration before the Office and submitted three medical reports from Dr. Susan Hubbell, a treating Board-certified physiatrist, dated March 1, 2000 and September 18 and November 4, 2002; a work restriction prescription slip dated February 14, 2000; and an October 4, 2002 employing establishment fitness-for-duty form.[2] Also submitted were an October 25, 2002 letter from the employing establishment seeking to obtain light-duty information; an incomplete request for a return to work assessment received November 8, 2002 by the employing establishment, a brochure from the Arthritis Foundation on fibromyalgia; and an August 23, 2002 decision from an arbitration panel between the employing establishment and the American Postal Workers' Union.

[1] Docket No. 01-1341 (issued August 19, 2002). The Office accepted that on August 21, 1991 appellant sustained a herniated cervical disc at C6-7, for which she underwent a posterior laminectomy on August 24, 1991 and an anterior discectomy on November 11, 1991.

[2] The fitness-for-duty form concluded "consider job as clerk at walk-up window, … cannot do previous job."

The February 14, 2000 prescription slip from Dr. Hubbell contained appellant's work activity restrictions which were; no use of arms above shoulder level, no lifting more than five pounds occasionally with the right arm, no repetitive continuous movements of the right arm, no lifting more than one pound with her left arm, use of her left hand at waist level only, must rotate work activity and tasks, no looking up or tilting her head back or to the side and limited neck flexion time to ten minutes.

In the March 1, 2000 report, Dr. Hubbell recounted appellant's history of injury and surgical interventions, diagnosed herniated cervical disc with recurrence requiring laminectomy and fusion, C7 radiculopathy, post-traumatic myofascial pain syndrome and chronic pain syndrome. She discussed the causation of appellant's nerve irritation and post-traumatic myofascial pain syndrome and opined that appellant could return to work but, in a very limited job with activity restrictions.

The August 23, 2002 award from the arbitration panel addressed appellant's removal from the employing establishment on April 29, 2000, and the surveillance of appellant performing activities that she supposedly was disabled from performing or was restricted from performing. These activities included lifting and carrying groceries, using both of her arms over her head without problems, opening and closing car trunks and doors, doing laundry, sitting for prolonged periods at sporting events and twisting and turning frequently to talk with people behind her, climbing stairs, driving cars and pushing shopping carts. The arbitration panel noted that appellant had failed four of six validity tests on her functional capacity evaluation, meaning that she gave a submaximal effort, and that she had dishonestly withheld her physician's statement approving offered limited duty. The panel found that appellant had wrongly rejected several suitable job offers and misled management about the offers being approved by her treating physician. Appellant's removal from the employing establishment was set aside based on a procedural error, but it was noted that her return was without back pay or benefits as she had misled medical professionals participating in the case.

In a September 18, 2002 report, Dr. Hubbell noted that appellant continued to experience neck and shoulder pain and noted that her back and foot were also hurting her. She reported appellant's measured range of cervical motion and grip strength and opined that there was "no significant change overall." Dr. Hubbell recommended that appellant continue current work restrictions.

The October 4, 2002 fitness-for-duty form, signed by a person with an illegible signature, noted a decreased range of neck motion in all directions with apparent pain but, without specific tenderness, decreased grip strength and reduced forearm abduction and flexion. The signatory recommended considering a job as a clerk at a walk-up window, proceeding with a pain management evaluation and performing a functional capacity evaluation. The information from the arthritis foundation regarding fibromyalgia was in the form of a pamphlet.

In the November 4, 2002 report, Dr. Hubbell noted that appellant continued to be off work due to the injuries that she sustained at work. She diagnosed a herniated cervical disc with radiculopathy and chronic pain and noted permanent work restrictions of no use of arms above shoulder level, no lifting more than five pounds occasionally with the right arm, no repetitive continuous movements of the right arm, no lifting more than one pound with her left arm, using

her left hand at waist level only, must rotate work activity and tasks, no looking up or tilting her head back or to the side and limited neck flexion time to ten minutes. Dr. Hubbell stated that appellant could return to work when a job within her restrictions was identified.

On January 23, 2003 the Office denied modification of its prior decisions.

The Board finds that appellant had no disability for work or injury residuals that required further medical treatment on or after February 15, 2000, causally related to her August 21, 1991 employment injury.

In the prior Board decision, the Board found that a conflict arose between appellant's treating physician, Dr. Hubbell and Dr. Rudolph A. Hoffman, a Board-certified orthopedic specialist, as to whether appellant remained disabled for work and injury-related residuals due to her accepted injury. Appellant was referred to Dr. Walter Hauser, a Board-certified orthopedic surgeon selected as the impartial medical specialist. Based on the report of Dr. Hauser, the Board affirmed the termination of appellant's compensation benefits. It is well established that after the termination of compensation benefits, clearly warranted on the basis of the evidence of record, the burden for reinstating compensation benefits shifts to appellant.[3]

The new medical reports submitted with appellant's request for reconsideration of her claim come from Dr. Hubbell, her attending physician who was on one side of the conflict that was resolved by Dr. Hauser, the impartial medical specialist, and are substantially similar in content to her earlier reports. The Board has explained that a substantially similar subsequent report submitted by an attending physician is insufficient to outweigh the report of the impartial medical specialist or to create a new conflict, as the attending physician's earlier reports had created the medical conflict which was referred to the impartial medical specialist to resolve.[4]

Dr. Hubbell's most recent reports are largely repetitive of her earlier reports except that they found that appellant was now able to perform some limited-duty work instead of being totally disabled. Her medical findings are insufficient to create a new conflict with the report of Dr. Hauser, the impartial medical examiner, who found appellant had recovered from her employment injuries. Dr. Hubbell's reports are insufficient to establish employment-related disability or residuals causally related to the accepted injury.

The February 14, 2000 prescription slip activity restrictions pertained to appellant's overall condition as a result of aging and degeneration and not to the accepted employment injury. It is, therefore, not probative of any continuing employment-related disability or the need for medical treatment.

The August 23, 2002 arbitration agreement merely reversed appellant's removal from the employing establishment on administrative grounds and does not pertain to her entitlement to benefits under the Federal Employees' Compensation Act. It is, therefore, not probative to the issue at hand. The Board has held that findings by other federal agencies or administrative

[3] *See Manuel Gill*, 52 ECAB 282 (2001); *George Servetas*, 43 ECAB 424 (1992).

[4] *Dorothy Sidwell*, 41 ECAB 857 (1990).

bodies are not dispositive with regard to questions arising under the Act.[5] Therefore, the arbitration award has no bearing of the issue of whether appellant has any continuing employment-related disability.

The fitness-for-duty form, which was illegibly signed, concluded that a position as a clerk at a walk-up window should be considered for appellant. It noted her condition and deficits but did not relate them to her accepted employment injury. This form indicated that appellant was capable of work as a clerk at a walk-up window it does not support continued disability. Moreover, it was illegibly signed and there is no proof that it was signed by a physician. Its probative value is greatly diminished.[6]

The article from the Arthritis Foundation also has no probative value, because excerpts from all publications, medical texts, newspaper clippings, circulars, brochures, patient hand-outs, instructional material, etc. are of no evidentiary value as they are of general application and are not determinative as to whether a specific condition is related to a particular employment factor.[7]

In this case the medical evidence submitted by appellant on reconsideration is not sufficient to overcome the weight of medical opinion given to the impartial medical specialist. Her contentions that her due process rights have been violated because she has not been provided with copies of all of the Postal Inspection Service surveillance videos documenting her lack of disability, are not relevant to the medical issue in this case.

[5] *See Shelby J. Rycroft*, 44 ECAB 795 (1993); *Richard L. Ballard*, 44 ECAB 146 (1992).

[6] *See, e.g., Sheila Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992).

[7] *See William C. Bush*, 40 ECAB 1064 (1989).

The decision of the Office of Workers' Compensation Programs dated January 23, 2003 is hereby affirmed.

Dated, Washington, DC
November 6, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member