

fell on a postal patron's porch steps. Appellant listed the nature of her injury as severe pain in her neck, shoulders, lower back, hand and wrist. Appellant stopped work on February 7, 2003 and was seen on that day at a hospital emergency room, where Dr. M.L. McNeill, a specialist in emergency medicine, diagnosed a myofascial strain of the neck and back and indicated that appellant was totally disabled from February 7 to 10, 2003, when she could resume light work. Dr. Frederick S. Falchook, a Board-certified radiologist, reported that February 8, 2003 x-rays showed no fracture or malalignment of the cervical, thoracic or lumbar spine. On February 10, 2003 appellant was seen by Dr. Eduardo M. Cossio, a specialist in emergency medicine, who indicated she could return to work on February 14, 2003.

On February 10, 2003 the employing establishment mailed appellant a February 4, 2003 notice of removal, effective March 21, 2003, for submitting a falsified physician's statement in support of her request for sick leave on January 22, 2003.

In a February 25, 2003 note, Dr. Man Mohan Gupta, a Board-certified internist and rheumatologist, indicated appellant was under care for chronic back and neck pain, and that she could not work until she was seen in one week. In a March 6, 2003 report, Dr. Clarence H. Fossier, a Board-certified orthopedic surgeon, described appellant's February 7, 2003 injury and her complaints of low back pain with radiation down the right leg and neck pain with numbness in both hands. Dr. Fossier stated that there was obviously a significant degree of symptom magnification, that he told appellant the quicker he could get her back to regular work the better she would be, that he gave her the benefit of the doubt and sent her to physical therapy for an exercise program but did not want them using modalities, and that his "feelings are that she has nothing of any significance. The range of motion and the straight leg raising that she exhibits today on a voluntary basis are really incompatible with getting out of bed, getting dressed and coming to this office." In a March 6, 2003 note, Dr. Fossier indicated appellant could return to light work on March 23, 2003, and in a March 20, 2003 report on an Office form the doctor diagnosed back pain and listed the date she could return to light work as March 24, 2003.

By decision dated March 31, 2003, the Office found that the medical evidence did not establish that the claimed condition resulted from the accepted event, noting that the medical reports contained no diagnosis and no medical rationale.

Appellant requested reconsideration, and submitted additional medical evidence. In a March 20, 2003 report Dr. Fossier stated that appellant felt physical therapy was helping but she still had some complaints of right leg and arm pain. Dr. Fossier stated that appellant should continue her medications and physical therapy, and that she could return to light duty on Monday. In an April 18, 2003 report, Dr. Gupta noted that appellant had been complaining of chronic neck and low back pain since a May 1993 accident, and was doing reasonably well until a February 7, 2003 fall on her buttocks and hips, after which she noticed increasing pain in her neck and lower extremities. Examination revealed normal cervical spine motion with mild paranchal tenderness, minimal tenderness in the presacral area, normal gait, 5/5 muscle power, and a grossly intact neurological examination. Dr. Gupta concluded that appellant had chronic neck and low back pain with x-ray evidence of multilevel degenerative spondylosis, that she lacked features of lumbar or cervical radiculopathy, that she had evidence of mild myofascial pain syndrome, and that she should continue her medications and use stretching and abdominal muscle strengthening exercises.

In a May 31, 2003 report, Dr. Rita Daniel, a chiropractor, noted that she first saw appellant on May 17, 2003 with complaints of neck pain and stiffness, chronic headaches, burning sensation and muscle spasm in the bilateral shoulder areas, numbness of the right hand and low back pain. Dr. Daniel indicated that she reviewed x-rays on May 17, 2003, and performed manipulations of the cervical, dorsal and sacral areas. In this report and in reports dated July 19 and August 9, 2003, Dr. Daniel described appellant's complaints and the treatment rendered on 10 visits, the last of which was August 9, 2003, at which time appellant was released to return on an as-needed basis.

By decision dated January 30, 2004, the Office denied modification of the March 31, 2003 decision, finding that the newly submitted medical evidence did not contain any medical reasoning.

By letter dated February 6, 2004, appellant requested reconsideration, and submitted an October 18, 2003 report from Dr. Daniel stating that upon her initial examination of x-rays for injuries sustained on February 7, 2003 a "diagnosis of subluxation of the spinal column was given in order to treat injuries sustained in the fall." Dr. Daniel noted that appellant was released to full duty on August 9, 2003.

On May 7, 2004 the Office notified appellant that it had accepted her claim for cervical strain and lumbar strain, and that she could file a claim for any time lost from work. By decision dated May 7, 2004, the Office found that the evidence did not establish that she sustained a subluxation of the spine due to the February 7, 2003 employment injury.

On May 10, 2004 appellant filed an Office Form CA-7 claiming compensation from March 22 to August 9, 2003. She submitted a notification of personnel action showing she was removed effective April 16, 2003 for submitting a falsified physician's statement. Her last day in a pay status was March 21, 2003. By letter dated May 19, 2004, the Office advised appellant that it needed medical evidence supporting disability for work for the period claimed.

By decision dated July 6, 2004, the Office denied appellant's claim for compensation for the period March 22 to August 9, 2003 on the basis that there was no medical rationale to support that she was totally disabled during this period.

By letter dated July 12, 2004, appellant requested reconsideration, contending that the medical evidence of record was sufficient to meet her burden of proof, and that the Office had not considered that she was already on a permanent rehabilitation assignment at the time of her February 7, 2003 employment injury. By decision dated August 26, 2004, the Office found that appellant's request for reconsideration was insufficient to warrant merit review of its prior decisions.

LEGAL PRECEDENT -- ISSUE 1

A person who claims benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim including the fact that an injury

¹ 5 U.S.C. §§ 8101-8193.

occurred in the performance of duty as alleged and that disability for employment was sustained as a result thereof.² Every injury does not necessarily cause disability for employment.³ As used in the Act the term “disability” means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-related impairment prevents the employee from engaging in the kind of work he was doing when he was injured.⁴ Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he or she is disabled for work as a result of an employment injury or condition. This burden includes the necessity of submitting medical opinion evidence, based on a proper factual and medical background, establishing such disability and its relationship to employment.⁵

ANALYSIS -- ISSUE 1

On May 7, 2004 the Office accepted that appellant’s February 7, 2003 employment injury resulted in a cervical strain and a lumbar strain, and advised her to file a claim for any period of disability. Appellant filed a claim for compensation for the period from March 22, 2003, the day after her employment was terminated for cause, to August 9, 2003, the date Dr. Daniel, her chiropractor, released her for full duty.

The Board finds that appellant has not presented sufficient medical evidence establishing that she was totally disabled from March 22 to August 9, 2003. Dr. Daniel first examined appellant on May 17, 2003 and submitted several reports describing her complaints and treatment from that date to August 9, 2003, but none of these reports stated that appellant was totally disabled at any time. Appellant submitted an April 18, 2003 report from Dr. Gupta, but this report also did not state that appellant was totally disabled. Dr. Fossier’s reports indicated appellant could return to light duty on March 24, 2003, and lend no support to her claim for disability, especially since appellant was performing limited duty at the time of her February 7, 2003 employment injury. The burden of proof is on appellant, and she has not submitted medical evidence sufficient to meet this burden.⁶

CONCLUSION -- ISSUE 1

Appellant has not met her burden of proof to establish that she was disabled from March 22 to August 9, 2003 due to her accepted employment injury.

² *Nathaniel Miller*, 37 ECAB 712 (1986).

³ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

⁴ *Frazier V. Nichol*, 37 ECAB 528 (1980).

⁵ *David H. Goss*, 32 ECAB 24 (1980).

⁶ There is no indication that appellant received continuation of pay immediately prior to March 22, 2003. The burden of proof did not shift to the Office to justify termination of her compensation. *See Thelma R. Webb*, 32 ECAB 1471 (1981) (where the Office acknowledged that, once it has accepted a claim and continuation of pay has been paid, it has the burden of justifying the denial of such benefits).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

ANALYSIS -- ISSUE 2

Appellant’s July 12, 2004 request for reconsideration was not accompanied by any new evidence. Instead, appellant contended that the medical evidence of record was sufficient to meet her burden of proof, and that the Office had not considered that she was already in a rehabilitation position at the time of her February 7, 2003 employment injury. These arguments do not show that the Office erroneously applied or interpreted a specific point of law, nor do they advance a relevant legal argument not previously considered by the Office. Appellant’s interpretation of the medical evidence cannot substitute for the required medical opinion establishing that she was totally disabled during the period claimed. That she was already performing limited duty at the time of her February 7, 2003 employment injury is not relevant to the determinative question of whether the medical evidence is sufficient to show that she was totally disabled for work during the period claimed.

CONCLUSION -- ISSUE 2

The Office properly refused to reopen appellant’s case for further review of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 26 and July 6, 2004 are affirmed.

Issued: February 11, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member