United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 06-1101**
	)	**Issued: January 4, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Rochester, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 11, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated November 28, 2005, finding that she had not established recurrences of disability and a March 1, 2006 nonmerit decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained recurrences of total disability on May 12, August 4 and 13, 2005; and (2) whether the Office properly declined to reopen appellant's claim for merit review on March 1, 2006 in accordance with 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. By decision dated March 15, 2005,[1] the Board noted that appellant, a mail handler, sustained employment-related neck and trapezius strains due to an April 26, 1989 employment injury. She returned to light-duty work.[2] Appellant sustained several recurrences of disability accepted by the Office. She alleged that she sustained a recurrence of total disability on September 9, 2003 and again on February 10, 2004. The Office denied these claims by decisions dated January 7, April 14 and 27, 2004. The Board affirmed these decisions. Appellant requested reconsideration before the Office on May 7, 2004 and submitted additional medical evidence in addition to a statement regarding a change in her light-duty job requirements. The Office denied this request by decision dated May 28, 2004. On appeal, the Board found that the evidence included a May 6, 2004 report from Dr. Robert J. Brandon, a Board-certified family practitioner. This evidence was sufficient to require the Office to reopen appellant's claim for further consideration of the merits. The facts and the circumstances of the case, as set out in the Board's prior decision, are adopted herein by reference.

In a July 18, 2005 decision, the Office reviewed appellant's case on the merits and denied modification, finding that Dr. Brandon's report did not provide sufficient medical reasoning to establish appellant's claim. Appellant again requested reconsideration on August 15, 2005 and the Office declined to reopen her claim for consideration of the merits on August 25, 2005. By decision dated October 25, 2005, the Office reopened appellant's claims on its own motion and vacated the July 18 and August 25, 2005 decisions. The Office found that Dr. Brandon's August 22, 2005 report was sufficient to establish that appellant was totally disabled from September 9, 2003 to February 26, 2004.

Appellant filed an additional claim for recurrence of disability alleging that she was totally disabled beginning on May 12, 2005 due to decreased range of motion in her neck and dizziness. She filed a second claim for recurrence of disability on August 5, 2005 alleging that on August 4, 2005 she experienced strain and muscle spasms due to her accepted employment injuries. On August 22, 2005 appellant filed a claim for recurrence alleging that on August 13, 2005 she became totally disabled as her condition worsened due to pain, strain and spasms.

Dr. Brandon's August 22, 2005 report noted that appellant was only capable of performing light-duty work and stated that appellant's medical conditions were worsened by repetitive use of the upper extremities and back. He noted that appellant reported a change in her job from light duty to more continuous repetitive motions requiring increased use of the arms, hands and shoulders. Dr. Brandon stated that appellant's increased use of her upper extremities resulted in stiffness and pain in the neck and shoulders aggravating her C4-5 disc disease, fibromyalgia and carpal tunnel syndrome. He noted that he had not treated appellant since August 2004.

[1] Docket No. 04-1653 (issued March 15, 2005).

[2] Appellant's accepted her most recent light-duty position on May 3, 2004. This position changed only her scheduled days off work.

Dr. Vincent F. Reale, a Board-certified surgeon, completed a report on August 24, 2005 and stated that he was treating appellant for bilateral thumb tendinitis and arthritis. He stated that appellant had not worked since August 14, 2005.

By letter dated October 26, 2005, the Office requested additional factual and medical evidence in support of appellant's claims for recurrence of total disability beginning May 12, 2005. The Office allowed 30 days for a response.

By decision dated November 28, 2005, the Office denied appellant's claim for recurrence of total disability on May 12, August 4 and 13, 2005. The Office noted that appellant had not responded to the request for additional supporting evidence. The Office concluded that there was no evidence to show that the recurrences were connected to her accepted employment injuries.

Appellant requested reconsideration of the November 28, 2005 decision on December 14, 2005 and noted that she sought treatment from a chiropractor. She also referenced Dr. Brandon's August 22, 2005 report. In a report dated December 15, 2005, Dr. Louis S. Catapano, a chiropractor, stated that he began treating appellant on August 13, 2005. He diagnosed C4-5 disc syndrome and opined that appellant was totally disabled due to this condition.

Appellant submitted a report dated February 15, 2006 from Dr. William S. Beckett, a physician Board-certified in physical medicine and rehabilitation, who noted that he had not examined appellant and that an associate, Dr. Linda Karbonit, a physician Board-certified physical medicine and rehabilitation, had examined appellant on February 25, 2005. Dr. Beckett could not determine whether appellant's conditions were work related. He stated that appellant's chiropractor, Dr. Catapano, found that she was totally disabled for work beginning in August 2005 and appellant had not returned.

By decision dated March 1, 2006, the Office declined to reopen appellant's claim for consideration of the merits. The Office found that appellant had not submitted relevant new evidence which required review of the merits of her claim.[3]

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability is defined as the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical

[3] Following the Office's March 1, 2006 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

requirement of such an assignment are altered so that they exceed his or her established physical limitations.[4]

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-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 she cannot perform such limited-duty work. 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 limited-duty job requirements.[5] A claimant's burden of proof 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 condition is causally related to the employment injury and supports that conclusion with medical rationale. Where no such rationale is present, the medical evidence is of diminished probative value.[6]

ANALYSIS -- ISSUE 1

As appellant has returned to light-duty work following the accepted recurrences of disability, she must establish either a change in the nature and extent of her injury-related condition or a change in her light-duty job requirements. In completing her claim forms for the recurrences on and after May 12, 2005, appellant has not alleged a change in her light-duty job requirements. Instead she asserted on her claim forms that her condition had worsened.

In order to establish a change in the nature and extent of her injury-related condition appellant must submit rationalized medical opinion evidence.[7] The report from Dr. Brandon, a Board-certified family practitioner, dated August 22, 2005, is not sufficient to meet appellant's burden of proof in establishing a recurrence of disability on or after May 12, 2005. Dr. Brandon noted that he had not treated appellant since August 2004. His report is apparently based on examinations which predated her alleged recurrence of total disability. Dr. Brandon's reports do not establish that appellant had disability due to her accepted employment-related conditions for periods after which he examined and treated appellant. Any opinion that Dr. Brandon rendered in his August 22, 2005 report is speculative and not based on a complete factual and medical background. Therefore this report is not sufficient to meet appellant's burden of proof.

The report of Dr. Reale, a Board-certified surgeon, dated August 24, 2005, does not address appellant's accepted employment-related conditions as he diagnosed bilateral thumb tendinitis and arthritis. These conditions have not been accepted by the Office in this claim and this report cannot establish a causal relationship between appellant's accepted employment-related injury and her current periods of disability.

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[4] 20 C.F.R. § 10.5(x).

[5] *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[6] *Mary A. Ceglia*, 55 ECAB 626, 629 (2004).

[7] *Id.*

Appellant did not submit any medical evidence based on a contemporaneous examination establishing that she was totally disabled due to a change in the nature and extent of her accepted employment-related conditions. Due to this deficiency, she failed to meet her burden of proof and the Office properly denied her claim on November 28, 2005.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[8] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[9] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[10]

ANALYSIS -- ISSUE 2

On December 14, 2005 appellant requested reconsideration of the Office's November 28, 2005 decision denying her claim due to the lack of medical evidence establishing a change in the nature and extent of the injury-related condition rendering her totally disabled. She submitted a report dated December 15, 2005 from Dr. Catapano, a chiropractor. Section 8101(2) of the Act provides that the term "'physician' … includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[11] Dr. Catapano diagnosed C4-5 disc syndrome. He did not diagnose a subluxation of the spine. As Dr. Catapano is not a physician for the purposes of the Act, his report does not constitute medical evidence. As this report is not medical evidence it is not relevant to the issue for which appellant's claim was denied and is insufficient to require the Office to reopen her claim for consideration of the merits.

Appellant also submitted a report from Dr. Beckett, a physician Board-certified in physical medicine and rehabilitation, dated February 15, 2006. Dr. Beckett stated that he did not examine appellant. He did not offer his opinion regarding whether appellant was disabled, nor whether her condition was work related. Dr. Beckett recommended that she seek treatment from another physician. This report is not relevant to appellant's claim as the physician did not address any of the issues for which the Office denied her claim, such as the extent of her disability or the causal relationship between her employment and her current disability. As appellant failed to submit relevant new evidence in support of her request for reconsideration, the Office properly declined to reopen her claim for consideration of the merits.

[8] 5 U.S.C. §§ 8101-8193, § 8128(a).

[9] 20 C.F.R. § 10.606(b)(2).

[10] 20 C.F.R. § 10.608(b).

[11] 5 U.S.C. § 8101(2).

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing a change in the nature and extent of her injury-related condition rendering her totally disabled on or after May 12, 2005. The Board further finds that appellant failed to support her request for reconsideration with relevant and pertinent new evidence and that the Office therefore properly declined to reopen her claim for consideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2006 and November 28, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 4, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board