United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 06-987**
	)	**Issued: March 19, 2007**
U.S. POSTAL SERVICE, POST OFFICE, North Topeka, KS, Employer	)	

Appearances:
Bruce Alan Brumley, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 29, 2006 appellant filed a timely appeal of August 18 and December 28, 2005 decisions of the Office of Workers' Compensation Programs which denied her claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 the Board has jurisdiction to review the merits of this claim.

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability on June 22, 2004 causally related to his August 1, 2001 employment injury.

FACTUAL HISTORY

On August 1, 2001 appellant, then a 54-year-old letter carrier, filed a traumatic injury claim for injuries to his head and neck and dizziness following a motor vehicle accident in which he was "rear-ended" by another vehicle while driving his postal vehicle. On August 21, 2001 the Office accepted appellant's claim for cervical strain. The Office later accepted shoulder strain

neck strain and a temporary aggravation of degenerative disc disease at L4-5. Appellant returned to full-duty work the day after the accident.

Appellant received treatment from Dr. Michael J. Schmidt, a Board-certified surgeon. In a report dated July 31, 2002, Dr. Schmidt opined that appellant's significant low back pain stemmed from severe spinal stenosis at the L4-5 level and was most likely aggravated at work. On August 20, 2002 he noted that appellant suffered from severe spinal stenosis at the L4-5 level, which was a chronic condition that had lasted many years. It was most likely that the automobile accident of August 1, 2001 caused a significant lumbar flexion injury that aggravated his condition by causing increased bulging of the disc and increased instability at this level of the spine. Appellant stopped work on August 28, 2002 and on September 13, 2002 underwent right shoulder arthroscopy and arthroscopic acromioplasty by Dr. Schmidt. He returned to work with restrictions on September 20, 2002.

On March 21, 2003 appellant saw Dr. Glenn M. Amundson, a Board-certified orthopedic surgeon, for a second opinion. In a report dated April 6, 2003, Dr. Amundson noted that appellant remained on light-duty restrictions. Appellant continued to receive treatment by Dr. Amundson. In a duty status report completed on February 18, 2004, Dr. Amundson stated that appellant could lift up to 70 pounds for two hours a day. Appellant was further restricted from sitting or driving a vehicle more than six hours per day, twisting restricted to four hours a day, standing walking, bending, stooping, pushing or pulling more than two hours a day and kneeling one hour a day. He was prohibited from reaching above his shoulder. On April 16, 2004 Dr. Amundson indicated that appellant had limitations of sitting, bending and stooping for six to eight hours a day with no twisting, repetitive movements of the wrist and elbow were limited to six hours, pushing, pulling and lifting up to 70 pounds were limited to three hours and appellant was to have frequent breaks.

On April 24, 2004 the employing establishment made an offer of a modified assignment (limited duty) as a city letter carrier. The employing establishment indicated that appellant would case mail below shoulder height for two hours, deliver mail for four hours and deliver express mail for two hours. The offer was made in accordance with the restrictions as set forth in the duty status report of February 18, 2004. By letter dated May 11, 2004, the Office informed appellant that the offered position was found to be within his work restrictions and advised appellant to accept the offer and that failure to report to work will result in the denial of further compensation for wage loss. On May 17, 2004 the employing establishment modified the job offer in accordance with the restrictions set forth in the duty status report dated April 16, 2004. Appellant accepted the modified job offer.

In a duty status report completed on June 18, 2004, Dr. Schmidt indicated that appellant was limited to lifting 70 pounds. He further restricted appellant from twisting or driving a vehicle at work. In a note on the form, the employing establishment indicated that appellant completed the supervisor's section of the form and that this form was not the same form given to appellant. On June 22, 2004 appellant took eight hours leave. On June 23, 2004 he began to work two to three hours a day and take four to five hours a day leave without pay, for which he filed claims for compensation. Appellant contended that there was no work available for the remaining hours of the day. The employing establishment controverted his claims. On July 6, 2004 the employing establishment noted that appellant was offered a limited-duty job on

May 17, 2004 which was based on the duty restrictions set on April 16, 2004 by Dr. Amundson. Appellant accepted this offer on May 17, 2004 but was refusing suitable work.

Appellant filed a claim requesting compensation beginning June 22, 2004 contending that he could not perform the duties of the job offer and the employing establishment had no work available for him.

On July 28, 2004 Dr. Amundson completed a duty status report indicating that appellant had not reached maximum medical improvement. He stated that appellant could not twist, could sit for six hours and stand for one-half hour and should avoid reaching above his shoulder. Dr. Amundson limited appellant to operating a motor vehicle for "one-half [sic] per episode."

In a decision dated August 20, 2004, the Office found that appellant failed to establish a recurrence of total disability beginning June 22, 2004 causally related to the work injury of August 1, 2001.

On September 2, 2004 appellant requested a hearing and submitted additional evidence.

In an August 8, 2004 report, Dr. Amundson opined that appellant did not have a cervical neck strain, but had conditions that included a herniated disc and spondylosis with radiculopathy. He also noted significant aggravation and manifestations of spinal stenosis due to injury of the L4-5 disc, instead of a right shoulder strain, an aggravation and flare up of right acromioclavicular arthritis that has resulted in acromioplasty. Dr. Amundson noted that this had significantly affected his ability to work since the date of the injury. He noted that appellant has attempted to work and that conditions that require prolonged sitting, repetitive bending or twisting maneuvers would be expected to exacerbate appellant's condition. Dr. Amundson listed final diagnoses as acromioclavicular joint arthritis status post acromioclavicular arthroplasty, cervical C6-7 herniated disc, C5-6 spondylosis with radiculopathy, degenerative disc disease and neck pain and lumbar degenerative disc disease with clinical syndrome of spinal stenosis, central and lateral recess L4-5, and lateral recess L5-S1 with disc injury, T10-11.

In a September 24, 2004 report, Dr. Edward J. Prostic, a Board-certified surgeon, stated:

> "On or about August 1, 2001, [appellant] sustained injuries to his cervical spine and right shoulder in a motor vehicle accident during the course of his employment. He subsequently reported difficulties with his low back. [Appellant] has had good response to surgery to his right shoulder. He has minimal radicular symptoms to the right upper extremity. Until such time as [appellant's] radiculopathy to the arm increases and is refractory to epidural steroid injections, cervical spine surgery is not indicated. He has MRI [magnetic resonance imaging] [scan] findings of lumbar spinal stenosis predominantly at L4-5. At some point he will have sufficient radicular symptoms to the lower extremity, again unrelieved by epidural steroid injections, for which decompressive surgery will be appropriate. It is recommended that the patient return to duties with restrictions as follows: occasional lifting up to 40 pounds and frequent to 15 pounds (in the optimum position for his low back and not

above shoulder level); avoid frequent bending or twisting at the waist, avoid significant vibrations and be allowed to change position as needed for comfort."

In a report dated October 1, 2004, Dr. Prostic stated that it was probable that appellant's motor vehicle accident caused or contributed to his cervical spine problems. He completed a work capacity evaluation limiting appellant to twisting, bending or stooping for two hours a day, and pushing, pulling or lifting 40 pounds two hours a day. In response to a query from the Office, on October 29, 2004, Dr. Prostic stated that appellant's low back symptoms were not reported until February 2002, he could not prove they were caused by the motor vehicle accident or whether appellant's difficulties have returned to baseline.

In a statement dated February 23, 2003, the employing establishment contended that appellant chose to go home and refused to work.

A hearing was held on April 20, 2005. Appellant testified that on May 17, 2004 he was offered a position in which he would case mail for two hours a day and deliver mail for six hours a day. He stated that he tried delivering mail but could not tolerate it due to numbness in his right leg and arm and severe low back pain. Appellant noted that he could stop driving and stand, but noted that he had a time frame to deliver mail and would not be fast enough if he took frequent breaks. The employing establishment submitted a response to the hearing on May 23, 2005. It was noted that appellant's vehicle was a right hand drive vehicle with an automatic transmission and equipped with a driver's seat that could swivel 90 degrees to the left and right (for a total of 180 degrees). The employing establishment argued that it had accommodated appellant's medical restrictions but that he refused to do the work and went home.

Appellant was seen by Dr. Theodore L. Sandow, Jr., a Board-certified orthopedic surgeon. In a report dated April 26, 2005, Dr. Sandow diagnosed right shoulder impingement syndrome, status postoperative right acromioplasty, musculigamentous strain, lumbar spine with intermittent radiculopathy, central and forminal spinal stenosis, L4-5 and L5-S1, herniation C6-7, and degenerative joint and disc disease, cervical spine. He opined that the occupational injury of August 1, 2001 was a cause or substantial contributing factor to cause the right shoulder, neck and low back injuries. Dr. Sandow noted that appellant had preexisting degenerative joint and disc disease in the cervical spine and preexisting central and forminal stenosis in the lumbar spine and that these conditions were aggravated by the occupational injury. He noted that appellant had not reached maximum medical improvement. Dr. Sandow indicated that appellant should avoid repetitive bending, stooping and twisting and should be limited to no lifting over 50 pounds on an occasional basis and 70 pounds on a rare basis. He opined that appellant should not sit or drive a vehicle for more than 30 minutes at a time and should be allowed to change positions as necessary. Dr. Sandow concluded that appellant was unable to meet the requirements of a mail carrier.

On June 7, 2005 appellant's union steward stated that appellant's job required twisting, and could not be performed without twisting. He overheard appellant ask his supervisor several times for work after the two hours casing was finished and was told that there was not any work available.

On June 20, 2005 appellant stated that he was currently working the only job that the employing establishment offered him, which allowed only two hours of work a day. He stated that the employing establishment had other light-duty work but they would not offer it to him.

On July 19, 2005 appellant's manager reiterated that appellant was taught how to perform his job delivering mail without twisting. He contended that the employing establishment provided appellant work within his restrictions for eight hours a day, but appellant only worked two hours a day. Appellant's modified job did not require him to do any repetitive bending, stooping or twisting. He indicated that appellant rarely had to lift a 70-pound package but, if he did, the employing establishment could easily accommodate him by providing assistance. Appellant's manager further noted that all restrictions set by Dr. Sandow are accommodated in appellant's current job.

By decision dated August 18, 2005, the Office affirmed the June 22, 2004 decision denying a recurrence of disability on June 22, 2004.

On November 9, 2005 appellant filed a request for reconsideration. He submitted another affidavit, dated October 18, 2005, from appellant's union steward. Appellant stated that the swivel chair used by appellant in his job was not a special chair but the same chair used by other drivers and therefore was not an accommodation. He contended that it would be impossible to do the job without twisting and bending. Appellant contended that, even with the swivel seat, he could not avoid twisting and bending his back.

Appellant also submitted two reports by Dr. Sandow. On August 31, 2005 Dr. Sandow stated that he reviewed the hearing transcript and that appellant's injuries to his right shoulder, neck and low back areas were "completely, totally and permanently aggravated by the August 1, 2001 injury." He further stated:

> "On May 17, 2004 [appellant] had been offered a job at the employing establishment doing the same job category that he was in when he was injured on August 1, 2001. He attempted to perform this job of truck delivery on a full-time basis, however, he was unable to accomplish this and was only able to work two hours because of the recurrence of his low back symptoms. This recurrence of [appellant's] low back symptoms on May 17, 2004 was a permanent injury resulting in significant alteration of his work capacity as outlined by his treating surgeon. This reoccurrence (sic) is a continuance of symptoms of his August 1, 2001 injury. It is my medical opinion that these symptoms represent a recurrence of the original injury's symptoms.
>
> "Presently, [appellant] has disabling symptoms in both the cervical and lumbar spine and will undoubtedly require surgical management in both areas. He will be unable to ever return to gainful employment as a mail carrier as his permanent

physical injuries will prevent him from meeting the requirements and job description of a mail carrier."

In a note dated October 26, 2005, Dr. Sandow stated that he reviewed the affidavits of appellant and the union steward and it was his opinion that appellant was unable to perform the job described. He concluded that the job description would not meet appellant's restrictions.

In a decision dated December 28, 2005, the Office denied modification of the August 18, 2005 decision.

LEGAL PRECEDENT

A recurrence of disability means an 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.[1] This term also means an inability to work 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 (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his established physical limitations.[2]

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position, or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements.[3]

The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[4]

ANALYSIS

In the instant case, appellant contends that he sustained a recurrence of total disability on June 22, 2004 causally related to the accepted injury of August 1, 2001. His claim for an injury on August 1, 2001 was accepted for cervical strain, shoulder strain, neck strain and temporary aggravation of degenerative disc disease L4-5. Appellant initially worked full time until

[1] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[2] *Id.*

[3] *Barry C. Peterson*, 52 ECAB 120, 125 (2000).

[4] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

September 13, 2002 when he underwent right shoulder surgery. He returned to work on September 21, 2002 as limited duty. Commencing on or about June 22, 2004, appellant began working approximately two hours a day casing mail and filed claims for disability, alleging that there was no work at the employing establishment within his restrictions. The Office contended that appellant was offered employment within his restrictions but that appellant refused to work the full day, leaving after casing mail was done.

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability. The employing establishment made its job offer within the restrictions of Dr. Amundson's February 18, 2004 report. Dr. Amundson stated that appellant could lift up to 70 pounds for two hours a day, was restricted from driving a vehicle more than six hours a day, and was restricted to twisting four hours a day. In an April 16, 2004 report, he indicated that appellant could not perform any twisting. Accordingly, the employing establishment modified appellant's job offer further to accommodate the twisting restrictions. Specifically, the employing establishment noted that it showed appellant how to perform his job without twisting. It also provided a swivel seat in his vehicle that turned 180 degrees in order that appellant did not need to twist his back if he followed the proper procedures. While appellant and the union steward contend that the job could not be performed without twisting, the record indicates that adequate accommodation and training was provided. Appellant acknowledged that he only tried delivering mail for two hours. Although appellant indicated that he aggravated his back when he tried to deliver mail, there is no indication that he sought treatment of the alleged recurrence on June 22, 2004.

In a duty status report dated June 18, 2004, Dr. Schmidt indicated that appellant was prohibited from twisting or driving a vehicle at work. There is no indication that Dr. Schmidt examined appellant when he wrote these restrictions. Furthermore, there is no explanation as to why appellant was prohibited from driving a vehicle. On July 28, 2004 Dr. Amundson limited appellant to operating a motor vehicle one-half per episode. It is unclear what Dr. Amundson meant. Although the column heading is "number of hours [a]ble to [w]ork," in the block immediately preceding this, Dr. Amundson indicated that appellant could bend or stoop for one-half day. Accordingly, it is unclear whether Dr. Amundson was prohibiting appellant from driving more than one-half a day or one-half an hour. He did note that a frequent change in positions is required and appellant stated that he could get out of the car and stand, if needed. In an August 8, 2004 report, Dr. Amundson indicated that appellant told him that he attempted to work and that his job, which required prolonged sitting, repetitive bending and twisting, would be expected to aggravate his back condition. Appellant did not establish as factual the nature of the bending and twisting performed as in excess of his restrictions. An opinion may not be based on surmise or speculation.[5] Dr. Prostic indicated that appellant could twist two hours a day, which was more than the position required. At no time did he indicate that appellant sustained a recurrence on or about June 22, 2004. After reviewing affidavits of record and the hearing transcript, Dr. Sandow did not believe that appellant would be able to return to work as a mail carrier. However, in reaching his conclusion, Dr. Sandow relied on appellant's statement that he needed to excessively twist his back during his employment, which has not been established as factually accurate. In his August 31, 2005 report, Dr. Sardow stated that appellant's latest

[5] *See Dennis M. Mascarenas*, 49 ECAB 215 (1997).

symptoms recurred on May 17, 2004. However, it appears that Dr. Sardow is basing his conclusion solely on appellant's statements. Dr. Sardow first saw appellant on August 26, 2005, approximately 10 months after the alleged recurrence. As noted there is no medical report of record contemporaneous to the injury addressing the recurrence.

Accordingly, appellant has not met his burden of proof to establish a recurrence of total disability beginning June 22, 2004 causally related to his accepted August 1, 2001 injury.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of total disability on June 22, 2004 causally related to his August 1, 2001 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 28 and August 18, 2005 are affirmed.

Issued: March 19, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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