United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
	)	**Docket No. 08-2185**
and	)	**Issued: April 10, 2009**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Saratoga, CA, Employer	)	

Appearances:
William H. Brawner, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 5, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs' dated January 24 and June 19, 2008 denying his claim for compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that he is entitled to compensation for total disability due to his accepted employment injury from November 29 through December 1, 2007.

Appellant's representative argues on appeal that the Office erred in finding that appellant was not entitled to compensation benefits because his wage loss was due to a reduction-in-force (RIF). He contends that appellant is entitled to lost wages due to the employing establishment's decision to withdraw suitable work by denying him a full 40-hour week. Appellant's representative also contends that the medical evidence establishes that appellant was totally disabled during the claimed period.

FACTUAL HISTORY

On June 20, 2006 appellant filed an occupational disease claim alleging that, he had developed a shoulder condition as a result of his federal employment duties, which included lifting and distributing heavy loads. His claim was accepted for a right shoulder strain. On November 20, 2006 appellant underwent approved arthroscopic surgery on his right shoulder, which involved subacromial decompression, distal clavical excision and superior labral repair.

On March 7, 2007 appellant accepted a position as a modified part-time flexible (PTF) clerk, which required him to perform the duties of a lobby director. The position description provided that, he would not be required to lift more than 2 pounds routinely or more than 10 pounds occasionally, reach with his right arm or work overtime. On January 11, 2005 appellant filed a claim for compensation for total disability for the period November 29 through December 1, 2007.

Appellant submitted a December 7, 2007 report from Dr. Julie E. Peltz, a treating physician, reflecting that she had examined appellant on November 30, 2007, who related appellant's reports that his work required him to do repetitive heavy lifting and reaching throughout his shift and that he had experienced a significant increase in right shoulder pain after he "cased several days in a row." He informed Dr. Peltz' that, he had worked only a half-day on November 28, 2007 and was "off" the following two days. Dr. Peltz provided the following objective findings: "Active ROM: abd I8O deg, flex I8O deg, ER 45 deg, IR T5 -- mild discomfort with all ROM. Strength 5/5 shoulder except for 4+/5 ER -- still improving over time. Very mildly positive impingement sign." Dr. Peltz diagnosed right shoulder strain and right trap strain, indicating that the date of injury was June 20, 2006. In a section entitled "Limitations," she stated that appellant was temporarily totally disabled from November 28 through December 1, 2007.

The record contains a time analysis sheet for the period June 28 through November 28, 2007. The Office's January 17, 2008 record of a telephone conversation reflects the employing establishment's representation that appellant was not sent home because of an inability to accommodate his restrictions. Rather, the employing establishment stated that all employees were sent home because no work was available.

In a decision dated January 24, 2008, the Office denied appellant's claim for compensation for the period November 29 through December 1, 2008, finding that the employing establishment did not have work available for part-time flexible employees during the period claimed and that the compensation period claimed was not related to appellant's accepted employment injury. On February 4, 2008 appellant, through his representative, requested an oral hearing.

In a January 18, 2008 report, Dr. Peltz diagnosed a partial rotator cuff tear, labral tear and rotator cuff impingement, indicating that appellant's condition was causally related to the accepted employment injury. She opined that appellant had a one percent permanent impairment of his right upper extremity.

In a January 24, 2008 letter from the employing establishment, Laura Garcia certified that all part-time flexible employees, including appellant were sent home early due to "no work available." She asserted that appellant was not sent home due to his accepted work-related injury. The record contains follow-up reports from Dr. Peltz dated January 25 and May 23, 2008, which reiterated previous diagnoses and a November 20, 2006 operative report.

In a letter dated March 26, 2008, appellant's representative modified his hearing request to a request for review of the written record. He contended that appellant was entitled to compensation for the period in question because the employing establishment had withdrawn light duty (under section 2-1500 of the Office procedure manual) by refusing to allow him to work 40 hours and that he received fewer hours that he would have, had he not been injured. The representative also contended that the Office used an incorrect pay rate when calculating his entitlement to previous compensation.

In a decision dated June 19, 2008, an Office hearing representative affirmed the Office's January 24, 2008 decision, denying appellant's compensation claim. The representative found that there was no evidence establishing that the employing establishment had withdrawn appellant's light-duty job. Rather, the evidence established that the work stoppage in this case was caused by a RIF, which included full-duty and light-duty employees. The representative further found that the medical evidence did not establish that appellant was disabled for the position had work been available.

LEGAL PRECEDENT

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence establishes that he can perform the limited-duty position, the employee has the burden of proof to establish a recurrence of total disability and that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature or extent of the injury-related condition or a change in nature and extent of the light-duty job requirements.[1]

The Office's definition of 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. The term also means the 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, except for when such withdrawal occurs for reasons of misconduct, nonperformance of the job duties or a RIF.[2] The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of the Federal Employees' Compensation Act.[3]

[1] *See John I. Echols*, 53 ECAB 481 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[2] *See* 20 C.F.R. § 10.5(x).

[3] *See John I. Echols, supra* note 1; *John W. Normand*, 39 ECAB 1378 (1988). Disability is defined to mean the incapacity because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total. *See* 20 C.F.R. § 10.5(f).

Under the Office's procedure manual, it is noted that a reemployed claimant may face removal from employment due to closure of an installation, cessation of special (pipeline) funding or termination of temporary employment or RIF. If it is not clear whether the claimant's situation involves a RIF or the withdrawal of light duty, the claims examiner should request the personnel document on which the removal was based. Such occurrences as a RIF are not considered recurrences of disability and further action may be warranted according to whether a formal loss of wage-earning capacity determination has been made.[4]

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim by the weight of the evidence.[5] For each period of disability claimed, the employee has the burden of establishing that he was disabled for work as a result of the accepted employment injury.[6] Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[7] To meet his burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.[8]

Under the Act, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[9] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[10] An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.[11] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.

The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.12 (July 1997).

[5] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

[6] *See Amelia S. Jefferson*, *supra* note 5; *see also David H. Goss*, 32 ECAB 24 (1980).

[7] *See Edward H. Horton*, 41 ECAB 301 (1989).

[8] *A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006).

[9] *S.M.*, 58 ECAB ___ (Docket No. 06-536, issued November 24, 2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

[10] *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

[11] *Merle J. Marceau*, 53 ECAB 197 (2001).

claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.[12]

ANALYSIS

The Office accepted appellant's claim for a right shoulder strain and subsequent arthroscopic surgery. Appellant received appropriate compensation benefits until March 7, 2007, when he accepted a position as a modified part-time flexible clerk under the work restrictions of Dr. Peltz. On January 11, 2008 he filed a claim for compensation for the period November 29 through December 1, 2007, contending that he was entitled to compensation for the period November 29 through December 1, 2007 due to the employing establishment's decision to withdraw his limited-duty work by denying him a full 40-hour week. Appellant also contended that the medical evidence established that he was totally disabled during the claimed period. The Board finds that appellant was not disabled during the claimed period and the Office properly denied his compensation claim.

The record reflects that appellant worked a half-day on November 28, 2007 and did not work at all from November 29 through December 1, 2007. He alleged that, he was sent home due to the employing establishment's inability to accommodate his restrictions and, therefore, he is entitled to compensation. However, appellant has not submitted any evidence to support his assertion that his position was withdrawn for the reasons claimed. On the other hand, Ms. Garcia of the employing establishment certified that all part-time flexible employees, including appellant were sent home early on the dates in question because no work was available. She specifically indicated that appellant was not sent home due to his accepted work-related injury. A claimant may be considered disabled 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 the job duties or a RIF.[13] The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is not disability within the meaning of the Act.[14] In this case, appellant's absence from work was due to the employing establishment's lack of available work for any and all part-time flexible employees, whether they were full duty

[12] *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[13] *See* 20 C.F.R. § 10.5(x).

[14] *See John I. Echols, supra* note 1; *John W. Normand, supra* note 3. Disability is defined to mean the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total. *See* 20 C.F.R. § 10.5(f).

or light duty, rather than to an inability to accommodate appellant's restrictions. The Board finds that the withdrawal of available work in this case was analogous to a RIF.[15] Therefore, the work stoppage imposed by the employing establishment did not constitute a recurrence of disability.[16]

Relevant medical evidence of record, consisting primarily of reports from Dr. Peltz, does not establish that appellant was totally disabled from November 29 through December 1, 2007 due to his accepted employment injury. Following a November 30, 2007 examination, Dr. Peltz stated that appellant's work required him to do repetitive heavy lifting and reaching throughout his shift. She indicated that appellant had experienced a significant increase in right shoulder pain after he "cased several days in a row." Range of motion testing produced mild discomfort with all range of motion. Shoulder strength was 5/5 (except for 4+/5 ER) and still improving over time. Appellant had a mildly positive impingement sign. Dr. Peltz diagnosed right shoulder strain and right "trap" strain, indicating that the date of injury was June 20, 2006. In a section entitled "Limitations," she stated that appellant was temporarily totally disabled from November 28 through December 1, 2007. On January 18, 2008 Dr. Peltz diagnosed a partial rotator cuff tear, labral tear and rotator cuff impingement and stated that appellant's condition was causally related to the accepted employment injury. Various follow-up reports reiterated previous diagnoses.

Dr. Peltz' reports do not contain a rationalized opinion explaining how the residuals or sequelae of appellant's employment injury prevented him from continuing in his employment on the dates in question. Her blanket statement that appellant was "TTD" from November 29 to December 1, 2007, does not constitute probative medical evidence. The Board has long held that medical conclusions, unsupported by rationale, are of little probative value.[17] Although Dr. Peltz provided examination findings, she did not explain how those findings resulted in appellant's disability. She noted that appellant had experienced an increase in pain following several days of casing. However, an increase in pain alone does not constitute objective evidence of disability.[18] Moreover, Dr. Peltz's opinion that appellant was totally disabled on November 29, 2007 was necessarily based on appellant's report, since her examination of appellant did not occur until the following day. She also failed to accurately describe appellant's job duties[19] or to explain why his current condition would prevent him from performing those duties. For all of these reasons,

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.12 (July 1997) ("A reemployed claimant may face removal from employment due to closure of an installation, cessation of special ('pipeline') funding or termination of temporary employment or reduction in force (RIF). (A true RIF affects full-duty and light-duty workers alike. If it is not clear whether the claimant's situation involves a RIF or the withdrawal of light duty, the CE should request the personnel document on which the removal was based). Such occurrences are not considered recurrences of disability (*see* FECA PM 2-1500.3b)…."

[16] *See supra* note 2.

[17] *Willa M. Frazier*, 55 ECAB 379 (2004).

[18] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7.a(1), (May 1997).

[19] The Board notes that appellant's position as a modified part-time flexible clerk required him to perform the clerical duties of a lobby director and restricted him from lifting more than 2 pounds routinely or more than 10 pounds occasionally, reach with his right arm or work overtime; whereas, Dr. Peltz stated that appellant's work required him to do repetitive heavy lifting and reaching throughout his shift.

Dr. Peltz' reports are of diminished probative value and are insufficient to establish appellant's claim.

In summary, appellant failed to submit rationalized medical opinion evidence, based on a complete factual and medical background, either establishing that he was totally disabled from November 29 through December 1, 2007 or supporting a causal relationship between his claimed disabling condition and the accepted injury.[20] The Board finds that the medical evidence of record is not sufficient to establish that appellant was disabled from November 29 through December 1, 2007. The Board also finds that appellant failed to establish that the employing establishment improperly withdrew his light-duty assignment. Therefore, the Office properly denied his compensation claim.[21]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish entitlement to compensation due to total disability for the period November 29 through December 1, 2007.

[20] *A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006). Dr. Peltz stated that appellant's work required him to do repetitive heavy lifting and reaching throughout his shift and that he had experienced a significant increase in right shoulder pain after he cased several days in a row. The Board notes that appellant's allegation may constitute a claim for a new traumatic injury, rather than a claim for a recurrence of disability. *See supra* note 2.

[21] The Board notes that the representative's contention that the Office used an incorrect pay rate when calculating his entitlement to previous compensation is not relevant to the issue in this case.

ORDER

IT IS HEREBY ORDERED THAT the June 19 and January 24, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 10, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board