United States Department of Labor
Employees' Compensation Appeals Board

P.F., Appellant	)	
and	)	**Docket No. 09-731**
	)	**Issued: October 1, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Lake Elsinore, CA, Employer	)	

Appearances:
John G. Ferrell, for the appellant
No appearance, for the Director

Oral Argument July 8, 2009

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 22, 2009 appellant, through her representative, filed a timely appeal from the December 26, 2008 merit decision of the Office of Workers' Compensation Programs, which denied her claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant is entitled to wage-loss compensation from July 17 to September 1, 2006.

FACTUAL HISTORY

This case was previously before the Board.[1] In an August 12, 2008 decision, the Board reviewed the history related to occupational disease claims filed by appellant on March 25 and

[1] Docket No. 08-590 (issued August 12, 2008).

December 2, 2004. On July 1, 2004 the Office accepted that appellant sustained sprains of both wrists and rotator cuffs and a cervical strain. On February 9, 2005 it accepted lumbar sprain/strain, displacement of a lumbar disc without myelopathy and thoracic and lumbar disc degeneration.[2] Appellant claimed total disability from July 17 to September 1, 2006 due to her 2004 injury and contended that the Office should accept that she sustained cervical spondylosis or stenosis, carpal tunnel syndrome and other degenerative conditions affecting her spine. The Office denied her claim for wage loss and found that her other claimed conditions were not due to her federal employment. The Board reviewed the medical evidence of record and remanded the case for further development, finding that the Office had only considered whether appellant's disability was due to the March 25, 2004 claim without consideration of the conditions accepted under her December 2, 2004 claim. The Office was directed to clarify the conditions it had accepted as causally related to appellant's federal employment and to amend the statement of accepted facts to include a description of the physical demands of appellant's letter carrier position. Thereafter, the Office was directed to further development the medical evidence and issue an appropriate decision on appellant's entitlement to compensation for the period claimed. The facts of the case, as set forth in the Board's prior decision, are incorporated by reference. Those facts relevant to the present appeal are as noted.

The record reflects that, after the March 2004 claim, appellant accepted a limited-duty job offer on April 4, 2004. She continued at limited duty following the filing of her December 2004 claim. On May 24, 2005 Dr. Rodney D. Henderson, an attending Board-certified orthopedic surgeon, requested authorization for a surgical repair of a ruptured musculotendinous cuff and arthroscopic decompression of the subacromial space with partial acromioplasty.[3] On June 1, 2005 the Office denied authorization for arthroscopic repair of appellant's right shoulder tendon. Appellant saw Dr. Henderson on June 2, 2005. She advised that her back and neck and shoulder pain was currently much worse. Dr. Henderson diagnosed nerve impingement syndrome, carpal tunnel syndrome and anxiety and took appellant off work. On July 7, 2005 he reviewed her limited-duty job description from April 2004 and advised that she was totally disabled. The Office paid compensation for temporary total disability from June 3 through July 10, 2005.

The Office determined that on July 8, 2005 Dr. Henderson had released appellant to return to work with restrictions. The employer prepared a July 11, 2005 offer of limited duty based on those restrictions. However, on July 12, 2005, appellant first notified the Office that she had not seen Dr. Henderson; but a nurse, and it was the nurse who filled out the work capacity evaluation releasing her to duty as of July 8, 2005. She subsequently submitted a sworn declaration from Dr. Henderson, dated January 15, 2007. Dr. Henderson stated that the signature appearing on the work restriction form was not his nor had he returned appellant back to work on July 8, 2008. The contemporaneous evidence establishes that he continued appellant on total disability.

[2] The files related to the two claims (File Nos. xxxxxx703 and xxxxxx698) were consolidated by the Office in March 2006.

[3] A May 26, 2004 magnetic resonance imaging scan showed a highly focal distal supraspinatus tear with subacromial/subdeltoid bursal effusion.

Appellant stopped treatment with Dr. Henderson and on July 12, 2005 requested a change of physicians. On July 14, 2005 she was seen by Dr. Victor V. Nguyen, an internist, who also kept her off work. She received a series of epidural steroid injections at C7-T1 and electric stimulation therapy.

On March 22, 2006 the Office authorized a change of physicians. On April 24, 2006 Dr. Ghassan S. Tooma, an orthopedic surgeon, examined appellant and noted impingement and supraspinatus signs at the right shoulder. He diagnosed right shoulder impingement with supraspinatus tendinopathy and supraspinatus tear; bilateral carpal tunnel syndrome; and C3-7 discogenic disease and spondylosis with varying degrees of central and neural foraminal stenosis. Dr. Tooma recommended right shoulder surgery for impingement syndrome and rotator cuff tear involving the supraspinatus tendon. He advised that appellant would benefit from a subsequent right carpal tunnel release and potentially a left carpal tunnel release. Dr. Tooma addressed her disability status, as follows:

> "In my opinion she may resume her previous line of work with modifications of no lifting over five pounds. No repetitive activities or forceful activities with both hands are recommended. I recommend no data entry or writing activities since she is unable to handle more than two to three minutes of those activities without exacerbating her symptoms. I also recommend limited neck rotation. If these modifications are not available by her employer, then temporary total disability will be needed."

On June 5, 2006 appellant was seen for her right shoulder, bilateral carpal tunnel syndrome and cervical discogenic disease. She reported complaint of shoulder pain. Dr. Tooma found a positive impingement sign at the right shoulder and positive Tinel's and Phalen's tests at both wrists. He reiterated the prior disability status.

On July 17, 2006 Dr. Tooma noted that appellant had not been working. Appellant reported significant pain in her cervical spine radiating to the base of her skull in the occipital region and both sides of her neck. She noted pain in her right shoulder radiating to her neck. Dr. Tooma again found a positive impingement sign at the right shoulder, as well as pain with neck rotation. He placed her on temporary total disability, stating: "since with the condition she is in, it is unlikely that she is able to perform duties even with modifications." Dr. Tooma requested authorization for right shoulder surgery and prescribed medication. He subsequently extended appellant's total disability status on August 28, 2006. Dr. Tooma recommended evaluation of the cervical spine by a neurosurgeon or orthopedic spine specialist. As noted, appellant claimed compensation for total disability from July 17 to September 1, 2006.

Dr. Joseph Pierce Conaty, a Board-certified orthopedic surgeon and Office referral physician, characterized appellant's ongoing problems as age-related problems referable to degenerative changes in the cervical spine and the rotator cuff tear on the right. He did not find that she had residuals of her March 25, 2004 employment injury. As noted, the Board found that Dr. Conaty's opinion was deficient based on the statement of accepted facts prepared for his review and the failure to incorporate conditions accepted under the December 2004 claim.

The Office prepared an amended statement of accepted facts noting that it had accepted bilateral shoulder sprain, bilateral wrist sprain, neck sprain; lumbar sprain, displacement of lumbar intervertebral disc without myelopathy, thoracic/lumbar intervertebral disc, bilateral rotator cuff strain, bilateral wrist strain, cervical strain, bilateral carpal tunnel syndrome; and bilateral shoulder impingement, cervical radiculopathy, bilateral medial epicondylitis, right knee sprain/strain, lumbar strain, thoracic strain/sprain, medial epicondylitis and displacement of cervical intervertebral disc without myelopathy.[4] The Office noted that appellant was disabled from June 3 to July 10, 2005 as a result of work-related conditions but had been released back to work on modified duty on July 8, 2005.

The Office referred appellant, together with the medical record and the amended statement of accepted facts, to Dr. Philip Z. Wirganowicz, a Board-certified orthopedic surgeon, for a second opinion on whether she was disabled for work from July 17 to September 1, 2006 as a result of an injury-related medical condition.

On December 9, 2008 Dr. Wirganowicz noted appellant's chief complaints and reviewed the history of her present illness. She underwent a right rotator cuff repair in 2007, which improved motion but did not eliminate pain in that area.[5] Dr. Wirganowicz described findings on examination and reviewed the diagnostic studies. He diagnosed cervical radiculopathy, bilateral shoulder impingement with right shoulder rotator cuff tear, status post surgery, bilateral medial and lateral epicondylitis, lumbar degenerative disc disease and bilateral hand and wrist pain.

Dr. Wirganowicz reported that the diagnosed upper extremity conditions appeared to be directly related to appellant's work duties as a mail carrier. The cervical spine degenerative changes appeared work related by direct cause; the lumbar changes, however, did not appear work related. Dr. Wirganowicz noted that no nonindustrial or preexisting disability was present. He stated: "The period of total disability for this claimant due to the work-related conditions would be for duration of approximately two months from the time of injury." From his review of the medical records, it did not appear that appellant's condition had substantially worsened such that she had been unable to perform normal work activities between "June [sic] 17" and September 1, 2006. He completed a work capacity evaluation indicating appellant was capable of returning to her usual job. Dr. Wirganowicz also indicated that she was capable of working eight hours a day with restrictions. He then restricted appellant to working six hours a day and handling 25 pounds.

In a decision dated December 26, 2008, the Office denied wage loss from July 17 to September 1, 2006, finding that the medical evidence did not establish that appellant was disabled for that period. It noted Dr. Henderson's release of appellant on July 8, 2005 to return to work with restrictions and the employer's July 11, 2005 limited-duty job offer based on those restrictions. The weight of the medical evidence rested with Dr. Wirganowicz.

[4] Contrary to appellant's contention on appeal, the statement of accepted facts reflects that the Office accepted more than just strains and sprains.

[5] Evidence of the reported surgery, including the operative report and any authorization from the Office, does not appear in appellant's case file.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[6] "Disability" means 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.[7]

A claimant seeking benefits under the Act has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[8] including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.[9]

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[10] After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[11] Having accepted a claim and initiated payments, the Office may not terminate compensation without a positive demonstration by the weight of evidence that entitlement to benefits has ceased.[12] The inadequacy or absence of a report in support of continuing benefits is not sufficient to support termination and benefits should not be suspended for that reason.[13]

ANALYSIS

The Office's December 26, 2008 decision denied wage-loss compensation from July 17 to September 1, 2006. Generally, when an employee claims compensation under the Act, she has the burden of proof to establish her entitlement to the benefits claimed. The Board notes, however, that the factual circumstances of this case are not typical and have a bearing on the burden of proof in this claim.

Prior to the claim for disability from July 17 to September 1, 2006, appellant underwent examination on June 2, 2005 by Dr. Henderson, a treating orthopedic surgeon. Appellant had accepted an offer of limited duty following her March 25, 2004 injury claim and worked within

---

[6] 5 U.S.C. § 8102(a).

[7] 20 C.F.R. § 10.5(f).

[8] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[9] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[10] *Harold S. McGough*, 36 ECAB 332 (1984).

[11] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.3 (July 1993).

[13] *Id*. at Chapter 2.812.8(c)(1) (June 2003).

prescribed limitations after her December 2, 2004 injury claim. However, on June 2, 2005, Dr. Henderson found that she was totally disabled due to her back, neck and shoulder conditions. On July 7, 2005 Dr. Henderson reviewed her limited-duty job description and again advised that she was temporarily totally disabled based on her work restrictions. The record reveals that the Office accepted the physician's opinion and paid compensation for temporary total disability commencing June 3, 2005.

Five weeks later, the Office received a work capacity evaluation dated July 8, 2005 purportedly from Dr. Henderson indicating that appellant could once again return to work with medical limitations. The Office relied on this medical release in its statement of accepted facts and in its December 26, 2008 final decision. However, this is error. Appellant submitted the January 15, 2007 declaration of Dr. Henderson, who stated that he did not sign the July 8, 2005 medical release or return her back to work on July 8, 2005. The previous day, in a July 7, 2005 narrative report, he had reviewed the limited-duty job description and found that she remained totally disabled for work.

The Office stopped paying compensation for wage loss effective July 11, 2005 in reliance on the July 8, 2005 release. The employer made a July 11, 2005 job offer based on this document and the Office determined that appellant had the capacity to earn the wages she was receiving at the time of injury. This was error, as the evidence from the physician notes that he did not complete the release form returning appellant to work. Therefore, the Office had an obligation to continue appellant's wage-loss benefits until the evidence established that her disability had ceased or was no longer related to her federal employment. As she had already established her entitlement to compensation for wage loss, the burden belonged to the Office to modify or terminate benefits. The Office did not meet that burden. The Board finds that appellant remained entitled to compensation for total disability as of July 11, 2005.

The Board notes that the medical evidence following July 11, 2005 generally supported appellant's temporary total disability. Dr. Nguyen, an internist, saw her on July 14, 2005 and kept her off work. No physician returned her to work until April 24, 2006, when Dr. Tooma, her orthopedic surgeon, reported that she could resume her previous line of work within certain modifications. What is not clear from the record is whether limited duty within those restrictions was available to appellant. The Board finds that further development of the evidence is warranted. The case will be returned to the Office to develop whether limited duty within the April 24, 2006 modifications was available at that time.

Dr. Tooma's July 17, 2006 report indicated some worsening of appellant's condition. Appellant's pain had become quite severe, requiring an increase in pain medication from a nonsteroidal anti-inflammatory to a narcotic opioid. Dr. Tooma concluded that it was unlikely that she could return to work, even with modifications. This evidence tends to support temporary total disability after July 17, 2006. Dr. Conaty, an orthopedic surgeon and Office referral physician, reported that appellant was suffering not from the residuals of her accepted injuries but simply from the ongoing process of aging. In the prior decision, the Board addressed the deficiencies in his opinion. Dr. Wirganowicz, an orthopedic surgeon and Office referral physician, reported that disability due to the accepted work-related conditions ceased approximately two months from the time of injury. He did not say which injury and he offered no explanation as his responses to the questions posed by the Office were brief, mostly one or

two sentences. Dr. Wirganowicz's December 9, 2008 report lacks sound medical rationale for his stated conclusions. Medical conclusions unsupported by rationale are of diminished probative value.[14] Moreover, Dr. Wirganowicz based his opinion on an incorrect statement of accepted facts: that appellant had been released to modified duty on July 8, 2005.

The Board will set aside the Office's December 28, 2006 decision and remand the case for further development in conformance with this decision. The Office should reinstate compensation for wage loss beginning July 11, 2005 and determine the period of total disability or whether limited duty consistent with the April 24, 2006 modifications was available to appellant. After such further development of the medical evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to compensation.

CONCLUSION

The Board finds that appellant is entitled to compensation for wage loss commencing July 11, 2005. The Board further finds that the case is not in posture for decision as to the full period of disability as further development of the evidence is warranted.

[14] *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

ORDER

IT IS HEREBY ORDERED THAT the December 26, 2008 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for payment of compensation for wage loss and further action consistent with this decision.

Issued: October 1, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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