United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 10-832**
	)	**Issued: December 23, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 3, 2010 appellant timely appealed the December 30, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[1]

ISSUE

The issue is whether appellant sustained a recurrence of disability beginning April 8, 2009 causally related to her June 4, 2004 employment injury

FACTUAL HISTORY

Appellant, a 40-year-old mail processing and distribution clerk, has an accepted claim for right lateral epicondylitis, which arose on or about June 4, 2004. She returned to work in October 2004 and subsequently accepted a position as an automated mark-up clerk. Appellant

[1] The record on appeal includes evidence received after the Office issued its December 30, 2009 merit decision. The Board cannot consider evidence for the first time on appeal. 20 C.F.R. § 501.2 (c)(1) (2009).

sustained another injury to her right upper extremity on or about May 24, 2005, which the Office accepted for aggravation of right lateral epicondylitis. The June 4, 2004 and May 24, 2005 right upper extremity injuries were combined under claim number xxxxxx187. In addition to receiving wage-loss compensation, appellant received two schedule awards totaling eight percent impairment of the right arm.

On April 8, 2009 appellant stopped work due to pain and inflammation in her right arm. Prior to her work stoppage she worked as a limited-duty clerk. According to an August 14, 2008 limited-duty job offer, appellant's modified clerk duties included both window and distribution work. The window duties were four to eight hours a shift and the distribution work was two to four hours. Appellant was required to stand one to three hours and sit three to four hours. She had a 10-pound weight restriction with respect to lifting, carrying, pushing and pulling and a corresponding one- to two-hour time limitation. Appellant was also limited to one to two hours walking. The job restrictions were based on August 2008 limitations recommended by Dr. Jason V. Sustersic, a family practitioner.[2] Appellant accepted that position on August 18, 2008.

On March 24, 2009 Dr. Sustersic submitted a one-paragraph letter which stated:

> [Appellant] is currently under my care for right lateral epicondylitis. This injury affects her ability to perform her job requirements on an intermittent basis. [Appellant's] duties as a window clerk are more severely affected due to the fine manipulation of the digits of the hand. The type of movements used as window clerk require[s] sole use of the forearm muscles without the aid of any other parts of her upper extremities. This causes much more strain on the tendons of the elbow than [appellant's] duties as distribution clerk. The duties of distribution clerk allow the shoulder and upper arm movement to aid the forearm muscles. This causes much less stress on the tendons of the elbow. For this reason, [appellant] will require more frequent breaks and consecutive days off as a window clerk. She will also experience more restrictions in terms of her duties as window clerk.

On April 6, 2009 the employing establishment offered appellant a limited-duty assignment that included one hour of window duties per eight-hour shift. Appellant's distribution duties remained at two to four hours and she was assigned one hour working the "P.M. Accountable Cage." The physical requirements of the job were consistent with her August 14, 2008 limited-duty assignment. Appellant rejected the April 6, 2009 offer noting that it was against her work restrictions.

According to the employing establishment, appellant stated she had a problem with the window duties. In an April 6, 2009 letter to April G. Williams, health and resource management specialist, appellant stated that, while one hour of window service did not seem like a huge task to handle, she was very leery of this particular function due to the lack of support for her right arm and fingers. She expressed concern about a possible flare up of her right arm condition and she wanted to avoid severely aggravating her arm. After appellant declined the April 6, 2009

[2] Dr. Sustersic imposed the same restrictions from September 23, 2008 to March 23, 2009.

limited-duty job offer, the employing establishment sent her home. She filed a claim for wage-loss compensation beginning April 8, 2009.

In an April 20, 2009 statement, appellant noted that she previously had difficulty performing her window service duties. She claimed to have obtained new medical restrictions in December 2008 that precluded fine manipulation duties such as window service. The employing establishment relieved her of her window service duties beginning December 31, 2008.[3] Appellant stated that, because she was precluded from performing fine manipulation, the April 6, 2009 limited-duty job offer was beyond her physical limitations and therefore she declined the offer.

On April 29, 2009 the employing establishment offered appellant another limited-duty job, that included an additional hour of mark-up duty. This latest offer still included one hour of window service. Appellant accepted the April 29, 2009 limited-duty job offer and returned to work May 4, 2009.

On May 12, 2009 the Office received a copy of an April 8, 2009 duty status report (Form CA-17) from Dr. Sustersic, who changed the previous 10-pound lifting/carrying restriction to 5 pounds. The form did not include any information with respect to fine manipulation.[4] In a May 13, 2009 report, Dr. Sustersic reiterated his March 24, 2009 report. He also noted that appellant had a seven to eight percent impairment of the right upper extremity based on recent examination findings.[5]

In a July 10, 2009 decision, the Office denied appellant's claim for a recurrence of disability beginning April 8, 2009.

Appellant timely requested an oral hearing, which was held on October 13, 2009.

Dr. Sustersic provided another CA-17 form dated September 2, 2009 and a report dated September 8, 2009. He limited appellant to one hour sitting, two hours walking, one hour kneeling, one hour bending/stooping, one hour twisting and one hour reaching above shoulder. Dr. Sustersic also imposed a one-hour, 5-pound lifting/carrying limitation and a one-hour, 10-pound pushing/pulling limitation. There was also a checkmark in box k, "Fine Manipulation," but he did not identify any specific time limitation. After describing the differing affects of the window clerk and distribution clerk duties, Dr. Sustersic clued as follows: "For this reason, [appellant] is not to work as window clerk at any time. Her progress has been affected by the duties of window clerk."

[3] Appellant submitted an April 20, 2009 notarized statement indicating that she had not performed window service and/or fine manipulation duties since December 30, 2008. The statement also included signatures from four coworkers attesting to its accuracy.

[4] In earlier CA-17 forms dating back to August 12, 2008, Dr. Sustersic placed a checkmark in box k, "Fine Manipulation (includes keyboarding)," indicating that appellant was capable of performing such duties on an "Intermittent" basis. However, the duties of the position (manual distribution clerk/sales associate), as identified by the employing establishment, did not involve fine manipulation.

[5] As previously noted, appellant had already received schedule awards totaling eight percent impairment of the right upper extremity.

By decision dated December 30, 2009, an Office hearings representative affirmed the July 10, 2009 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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to 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 her established physical limitations.[7] Moreover, when the claimed recurrence of disability follows a return to light-duty work, the employee may satisfy her burden of proof by showing a change in the nature and extent of the injury-related condition such that she was no longer able to perform the light-duty assignment.[8]

Where an employee claims a recurrence of disability due to an accepted employment-related injury, she has the burden of establishing that the recurrence of disability is causally related to the original injury.[9] This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury.[10] The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[11]

ANALYSIS

At the October 13, 2009 hearing before the Branch of Hearings and Review, appellant's counsel argued that his client was seeking three days' wage-loss compensation from April 8 to 10, 2009. He contended that the employing establishment effectively withdrew her previous limited-duty assignment and offered a new position on April 6, 2009 that exceeded her established physical limitations. Counsel cited Dr. Sustersic's March 24, 2009 report as support for her concern about performing window service duties.

The August 14, 2008 limited-duty clerk position appellant previously accepted included four to eight hours of window duties. The assignment was patterned after Dr. Sustersic's

[6] 20 C.F.R. § 10.5(x).

[7] *Id.*

[8] *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

[9] 20 C.F.R. § 10.104(b); *Carmen Gould*, 50 ECAB 504 (1999); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[10] *See Helen K. Holt, supra* note *id.*

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

August 2008 limitations, which at the time did not specifically preclude either window duties or fine manipulation. Dr. Sustersic imposed the same restrictions from September 23, 2008 through March 23, 2009.

Appellant claimed that she stopped performing window service duties in December 2008 based on new restrictions from her physician precluding fine manipulation. The employing establishment reportedly did not require her to perform window service duties after December 31, 2008. Apart from appellant's April 20, 2009 notarized statement, there is nothing of record documenting any change in the August 14, 2008 limited-duty assignment prior to the employing establishment's April 6, 2009 job offer. Even if the employing establishment relieved her of window service duties as she claimed, the record does not support her contention that she received new medical restrictions in December 2008 precluding fine manipulation, such as window service. The medical evidence contradicts appellant's claim. The CA-17 form Dr. Sustersic submitted on December 23, 2008 did not preclude fine manipulation and was entirely consistent with the restrictions he previously recommended in August and September 2008. Those same restrictions remained in effect through March 23, 2009. To the extent that appellant did not perform window service duties after December 31, 2008, the medical evidence of record does not indicate she was unable to do so.

Appellant rejected the April 6, 2009 job offer, contending that it was against her restrictions. She noted concern about her ability to perform window service duties. Although it appears that the April 6, 2009 limited-duty job offer may have been in response to Dr. Sustersic's March 24, 2009 letter; his report did not specifically preclude window service duties or fine manipulation. Dr. Sustersic noted that the window clerk duties caused more strain on the tendons of the elbow than appellant's duties as distribution clerk. He did not preclude all window service duties; rather, noted that she would require more frequent breaks and consecutive days off as a window clerk. Dr. Sustersic also indicated that appellant would experience more restrictions in terms of her duties as window clerk. However, he did not address what those restrictions were. The CA-17 form Dr. Sustersic prepared on March 23, 2009 did not preclude fine manipulation and was consistent with the restrictions that had been in place since August 2008. On April 8, 2009 he changed the previous 10-pound lifting/carrying restriction to 5 pounds, but he did not provide an explanation for the change. Also, the April 8, 2009 CA-17 form did not include any information with respect to fine manipulation.

On September 2, 2009 Dr. Sustersic imposed more severe restrictions that included a one-hour, 5-pound lifting/carrying limitation and a one-hour, 10-pound pushing/pulling limitation. He also limited appellant to one hour sitting, two hours walking, one hour kneeling, one hour bending/stooping, one hour twisting and one hour reaching above shoulder. Dr. Sustersic noted a checkmark in box k, "Fine Manipulation," but did not identify anytime limitation. In a September 8, 2009 report, he reiterated his March 24, 2009 remarks about elbow tendon strain associated with appellant's window clerk duties as compared to her distribution clerk duties. Dr. Sustersic advised that appellant was "*not* to work as window clerk at any time." He also stated that her "progress [had] been affected by the duties of window clerk."

Dr. Sustersic's most recent opinion regarding appellant's work restrictions was provided without benefit of any explanation for the additional limitation. The brief forms did not provide any contemporaneous examination findings or objective studies. Dr. Sustersic provided no

discussion for the restrictions listed in the September 2, 2009 CA-17 form. The September 8, 2009 report, while unequivocal in stating that appellant was precluded from performing window clerk duties, nonetheless lacked explanation from the attending physician for these changes. Dr. Sustersic essentially provided the same discussion in both the March 24 and September 8, 2009 reports but provided differing conclusions and without offering any explanation for the subsequent change. He did not address the issue of appellant's capacity for work as April 8, 2009.

The Board finds that appellant has not established a recurrence of disability beginning April 8, 2009. Appellant did not argue, nor does the evidence establish a change in the nature and extent of her employment-related condition. She stopped work on April 8, 2009 because she was unwilling to perform window service duties up to one hour per shift. Appellant claimed that these duties exceeded her established physical limitations and would likely aggravate her right upper extremity condition. The medical evidence does not support her contention that she was physically unable to perform window clerk duties on or after April 8, 2009. The previous limited-duty assignment, which appellant accepted on August 18, 2008, included four to eight hours of window service. The medical evidence of record did not establish that she was physically incapable of performing any and all window service duties. The April 6, 2009 limited-duty job offer, which included one hour of window service, did not constitute an alteration of appellant's previous light-duty assignment such that it was no longer consistent with her established physical limitations. Notwithstanding appellant's stated reservations about possibly aggravating her right elbow condition by performing window service, appellant ultimately accepted a similar assignment on April 29, 2009. The evidence does not establish a recurrence of disability as of April 8, 2009 and therefore the Office properly denied her claim.

CONCLUSION

Appellant has not established that she sustained a recurrence of disability on April 8, 2009, causally related to her June 4, 2004 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 23, 2010
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