United States Department of Labor
Employees' Compensation Appeals Board

P.A., Appellant	)	
and	)	**Docket No. 10-1225**
	)	**Issued: April 20, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Copiague, NY, Employer	)	

Appearances:
Paul Kalker, 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 March 30, 2010 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 11, 2010. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of total disability on or after June 13, 2009 causally related to her December 30, 2005 employment injury.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 4, 2006 appellant, then a 45-year-old part-time flexible clerk, filed a traumatic injury claim alleging that on December 30, 2005 she was hit in the head and knocked to the ground when a mail carrier pushed open the loading dock doors as she was unlocking them. The Office accepted the claim for a scalp abrasion and cervical subluxations. Appellant stopped work following the incident. She returned to work in a limited-duty capacity working full time, eight hours a day, on February 27, 2006. On December 31, 2008 appellant accepted a full-time modified position with restrictions which involved approximately three hours worth of sorting and lifting less than 10 pounds, three hours of standing with stool available and two hours of sitting.[2]

On July 7, 2009 appellant filed a claim for a recurrence of total disability beginning June 13, 2009 causally related to her December 30, 2005 employment injury. She stated that her head, neck and shoulder started to hurt when she was assigned to dispatch. Appellant also stated that her condition had worsened since her injury. The employing establishment indicated that her assigned duties were within her work restrictions. After the original injury, appellant was limited in her heavy lifting and loading and unloading of trucks. She stopped work on June 15, 2009. The employing establishment advised that it did not assign appellant any duties outside of her restrictions.

In support of her claim, appellant submitted an undated statement, December 1, 2009 and January 2, 2010 letters from her attorney and copies of physical therapy notes. She stated that she was unable to do heavy lifting and repetitive motions.

Appellant submitted reports from Dr. Obedian who advised that she was under his care for cervical radiculitis, degenerative disc disease and herniated nucleus pulpous. Dr. Obedian requested authorization for C4-6 anterior cervical discectomy and fusion.[3] In reports dated July 3 to December 7, 2009, he found that appellant was totally disabled. In an October 14, 2009 report, Dr. Obedian stated that she had been unable to work since June 13, 2009 and developed progressive numbness and weakness of the right upper extremity related to the cervical disc herniations.

Appellant submitted reports from Dr. Jasjit Singh, a Board-certified neurologist. In progress reports dated July 10 to December 2, 2009, Dr. Singh diagnosed headaches and cervical radiculitis.[4] In a September 17, 2009 duty status report, he diagnosed cervical radiculopathy as

[2] In a December 22, 2008 report, appellant's physician, Dr. Richard S. Obedian, a Board-certified orthopedic surgeon, advised that appellant could return to work on December 26, 2008 with restrictions on lifting more than 15 pounds.

[3] On August 17, 2009 an Office medical adviser agreed that appellant's December 30, 2005 work injury could produce a cervical radiculopathy and cervical disc herniations and the evidence of record supported surgery. On December 22, 2009 and February 23, 2010 the Office authorized surgery. This decision does not affect any claim for a period of disability that might be filed pursuant to the authorized surgery.

[4] On August 11, 2009 Dr. Singh referred appellant to physical therapy.

being due to the December 30, 2005 work injury. Dr. Singh also opined that appellant was totally disabled from working eight hours daily.

In a June 16, 2009 report, Dr. Paul A. Giambo, a chiropractor, advised that appellant had multiple herniated discs in her neck and spine as a result of the December 30, 2005 work injury. He stated that she could not do any lifting, pushing or pulling and that lifting would exacerbate her condition. In an October 5, 2009 report, Dr. Giambo diagnosed cervical radiculitis, rupture/herniation of cervical disc and cervical subluxation that were sustained at work on December 30, 2005. He indicated that a February 2, 2006 magnetic resonance imaging (MRI) scan revealed C2-3, C3-4 and C6-7 posterior disc herniations with ventral CSF impression and C2-3, C3-4 central canal stenosis with narrowing of the left foramina. Dr. Giambo opined that the herniated discs and canal stenosis resulted from the work injury. He noted that appellant had responded favorably to her treatment during the past three years. Due to an increased workload leading up to June 13, 2009, which included additional heavy lifting duties, appellant had an exacerbation of her condition which caused severe headaches, nausea and numbness in her left arm. Dr. Giambo stated that she had not been able to work since June 13, 2009 because of a recurrence of her work-related disability. Appellant could not lift or carry anything without increasing her neck pain. Dr. Giambo found that she was totally disabled from performing work duties that included bending, lifting and standing for long periods of time.

In a January 11, 2010 letter, the Office advised appellant that additional evidence was needed for her recurrence claim. Appellant was requested to submit evidence showing that she could not perform her limited-duty work at the time of the claimed recurrence. She was requested to provide a narrative medical report from a treating physician that provided findings before and after the date of recurrence, a firm medical diagnosis and a rationalized opinion explaining how her present condition was causally related to the December 30, 2005 work injury.

On January 11, 2010 the Office requested that Dr. P. Leo Varriale, a Board-certified orthopedic surgeon and a second opinion physician, provide an opinion as to whether appellant had residuals or disability due to the accepted scalp abrasion and cervical subluxation conditions. The questions provided to Dr. Varriale did not ask him to address the claimed recurrence or disability for work beginning June 13, 2009.

Appellant submitted letters from her attorney and a January 26, 2010 statement asserting that she experienced a change in the nature and extent of her injury-related condition without intervening cause on June 13, 2009. In progress reports dated January 14 and February 22, 2010, Dr. Obedian diagnosed displacement of cervical intervertebral disc, cervical degenerative disc disease and cervical radiculitis. He advised that appellant remained disabled.

In a February 1, 2010 report, Dr. Varriale reviewed the medical evidence of record, the statement of accepted facts and presented findings on examination. He noted that appellant had not worked since June 13, 2009. While appellant had objective findings of aggravation of degenerative disc disease related to the accepted work conditions, she was able to work no more than four hours on a part-time basis with restrictions of lifting no more than 20 pounds and only for one hour a day. Dr. Varriale advised that cervical fusion would be appropriate.

By decision dated March 11, 2010, the Office denied appellant's recurrence claim. It found that the medical evidence submitted was insufficient to establish that the claimed recurrence of disability of June 13, 2009 or her work stoppage on June 13, 2009 was related to the December 30, 2005 work injury.

LEGAL PRECEDENT

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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[5]

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 establishes that she can perform the limited-duty position, the employee has the burden of proof to establish a recurrence of total disability and that she 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 the nature and extent of the light-duty job requirements.[6] To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a rationalized medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[7]

ANALYSIS

The Board finds that the case is not in posture for decision as the Office did not properly adjudicate appellant's recurrence claim/disability for work as of June 13, 2009. The Office accepted that appellant sustained a scalp abrasion and cervical subluxations as a result of her December 30, 2005 work injury. The record reflects that she stopped work following the incident and returned to work in a full-time limited-duty capacity a short time later with restrictions. Appellant stopped work on June 13, 2009 and claimed a recurrence of disability. She noted that her head, neck and shoulder started to hurt when she was assigned to dispatch. Appellant also indicated that she was unable to do any heavy lifting and repetitive motions.

On January 11, 2010 the Office referred appellant for a second opinion examination by Dr. Varriale, who noted that she had not worked since June 13, 2009. Dr. Varriale opined that she had residuals of her accepted conditions and could only work four hours a day; however, the record does not establish that he was asked to address the issue of recurrence or her disability for

[5] *See* 20 C.F.R. § 10.5(x).

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

[7] *Maurissa Mack*, 50 ECAB 498 (1999).

work as of June 13, 2009. The questions presented to Dr. Varriale do not mention this aspect of the case.

It is well established that proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.[8] While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[9] It undertook development of the medical evidence by referring appellant to Dr. Varriale for a second opinion examination. The Office has an obligation to secure a report adequately addressing the relevant issue of whether she was disabled for work as of June 13, 2009.[10] The case will be remanded for appropriate development of the medical evidence and a *de novo* decision.

On appeal, counsel contends that the Office has ignored the symptoms and conditions which demonstrated a recurrence of disability. As noted the case is remanded for further development of the medical evidence. Counsel further contends that the Office has unjustifiably limited its characterization of the work-related condition. Appellant, however, bears the burden of establishing any nonaccepted conditions to the employment injury.[11] Moreover, as there is no final decision in this aspect of the claim, the Board does not have jurisdiction over this matter.[12]

CONCLUSION

The Board finds that this case is not in posture for decision as further development is required on the issue of whether appellant sustained a recurrence of total disability on or after June 13, 2009 causally related to her accepted December 30, 2005 employment injury.

[8] *Vanessa Young*, 55 ECAB 575 (2004).

[9] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard*, 53 ECAB 430 (2002); *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983).

[10] *See Peter C. Belkind*, 56 ECAB 580 (2005) (where the opinion of the Office's second opinion physician was unclear on whether the claimant had any permanent impairment due to his accepted employment injury, the Board found that the Office should secure a report adequately addressing the relevant issue). *See also Melvin James*, 55 ECAB 406 (2004).

[11] *See Alice J. Tysinger*, 51 ECAB 638 (2000).

[12] *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated March 11, 2010 is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: April 20, 2011
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