

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. GULLETTE and U.S. POSTAL SERVICE,
PROCESSING & DISTRIBUTION CENTER, Oakland, CA

*Docket No. 03-871; Submitted on the Record;
Issued July 28, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established entitlement to compensation for intermittent periods claimed from February 9, 1999 to October 31, 2001.

On July 14, 2000 appellant, then a 49-year-old distribution clerk, filed a claim for an occupational disease for bilateral hand pain that she attributed to repetitive motion in processing mail. The employing establishment indicated that appellant had not stopped work but that she was reassigned to repairing damaged mail at her own pace.

In a report dated August 29, 2000, appellant's attending physician, Dr. Kenneth R. Harley, who is Board-certified in emergency medicine, diagnosed bilateral thumb carpometacarpal (CMC) joint degenerative joint disease, explained how the repetitive motion of appellant's work activities caused this condition and described the treatment provided to appellant, which consisted of medications, heat/ice, rest, wrist braces, cortisone injections and referrals to an orthopedist and hand specialist for further evaluation and treatment. Dr. Harley indicated that the effect of treatment was "periods of intermittent pain relief followed by more intensified pain" and that "periods off work result in lessening of pain with increased range of motion."

By letter dated October 20, 2000, the Office of Workers' Compensation Programs advised appellant that it had accepted that she sustained bilateral thumb strains and degenerative joint disease of the thumbs in the performance of duty.

On December 17, 2000 appellant filed a claim for compensation for intermittent days missed from work from July 21, 1999 to December 15, 2000. Appellant submitted a list of the number of hours she worked, used leave and was in a leave-without-pay status for each two-week pay period from the one beginning July 17, 1999 to the one ending November 3, 2000.

By letter dated January 16, 2001, the Office advised the employing establishment that it needed a day-to-day breakdown of the days appellant was requesting compensation. A copy of

this letter was sent to appellant. By another letter dated January 16, 2001, the Office advised appellant that the medical evidence established disability for July 13 and 14 and November 21 to 24, 2000, but that additional medical evidence supporting disability and identifying the specific dates claimed was needed to support disability for the other days listed on her claim form.

Appellant submitted a document from Dr. Harley dated January 26, 2001 titled "Verification of Periods of Total Disability," which listed individual dates and periods of up to three weeks between February 9, 1999 and January 26, 2001. Above this listing, the form stated: "This patient was absent from work due to the injury-related disability shown above during the specific periods indicated herein as per medical advice." She also submitted a series of office notes from Dr. Harley regarding visits from November 22, 2000 to September 8, 2002 and two reports from Dr. Kendrick E. Lee, a Board-certified orthopedic surgeon. In a June 5, 2001 report, Dr. Lee diagnosed "Left worse than right thumb CMC osteoarthritis, work aggravated," and stated that splint, medication, modified duty and multiple steroid injections had failed to provide lasting relief. He stated that surgery would result in some improvement but not complete relief and that "Absent surgery, she would be expected to have her current symptoms indefinitely." In a January 22, 2002 report, Dr. Lee rated the permanent impairment of appellant's hands.

By letter dated October 15, 2002, the Office advised appellant that the medical evidence did not demonstrate disability for work for the periods claimed and that Dr. Harley's reports were insufficient because they did not provide objective findings to support disability for specific dates and because the dates on his "[v]erification of [p]eriods of [t]otal [d]isability" did not correspond with the dates or hours she was absent from work. The Office again advised appellant that it needed a day-to-day list of the dates, for which she wished to receive compensation for leave without pay and that it could not process her request to buy back leave because the employing establishment had not agreed to the leave buy back.

On November 11, 2002 appellant filed a claim for compensation for intermittent periods from February 9, 1999 to October 31, 2001, accompanied by a list of the hours of leave without pay or paid leave used each day, for which she was claiming compensation and the reason for the absence, which was either "physician recommendation" or a medical appointment or treatment.

Appellant submitted another "[v]erification of [p]eriods of [t]otal [d]isability" from Dr. Harley, which was dated November 6, 2002, covering the period from February 9, 1999 to October 31, 2001 and listing individual dates, periods of two days to four weeks and one period of almost three months. In an October 21, 2002 report, Dr. Harley stated that appellant had reached maximum medical improvement, listed duties she performed at work and stated, "As the patient's hand injury progressed these activities became painful and the pain was exacerbated by especially holding, grasping and lifting, which included separating the mail at her own pace." After describing his treatment to attempt to alleviate appellant's pain, Dr. Harley stated:

"Sometimes there was increased pain and swelling in her hands after use of the braces with thumb spica; increased pain and swelling in her hands after cortisone injections; medication side effects including drowsiness and dizziness: (See reports from Dr. Lee dated June 5, 2001 and January 22, 2002); increased pain

with climate changes -- cold and dampness; increased pain with age and everyday use of hands.

“As per my previous submission of certification for periods of disability noted, the patient was off work on certain partial days due to medical appointments with me and other physicians previously mentioned. For the remaining intermittent periods of total disability they were physician recommended due to the information described in the previous paragraph. It was felt that the patient might benefit from temporary periods of pain relief.”

In a report dated November 20, 2002, Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion evaluation, diagnosed “Bilateral thumb osteoarthritis affecting the [CMC] joints bilaterally with complaints of pain but no neurologic or mechanical deficit.” Dr. Sherman stated: “The osteoarthritis involving the bases of both thumbs is nonindustrial in nature but is aggravated temporarily by her work activity, which requires grasping. The osteoarthritic condition of both thumbs would be as it is today even absent her work activity for the post office.” Dr. Sherman also stated that the period of aggravation would be no longer than two days after she discontinued repetitive heavy grasping, that the osteoarthritic condition of her thumbs could be expected to slowly progress “even absent her work activity for the post office,” that her bilateral thumb condition would prevent her from doing any repetitive heavy grasping and that “Her subjective complaints regarding her thumbs [are] reasonable given her thumb arthritic condition.”

By letter dated November 25, 2002, the Office advised appellant that the medical evidence did not demonstrate total disability for work for the periods claimed, because “Dr. Harley provided no objective findings, other than swelling, to support the worsening of your condition or explain why you were unable to continue working your light[-]duty job” and because Dr. Harley’s reports “frequently retroactively found you to be disabled for the days prior to his examination of you, based on your reports of increased pain. Retroactive declarations of disability are insufficient to establish disability, especially when the contemporaneous reports do not provide objective findings.”

In a letter dated December 1, 2002, appellant stated: “As I am unaware of when I will become ill, I cannot make medical appointments in advance to cover the absence from the first day. Additionally, in many instances the [physician] does not have any appointments available until a certain date or may not be on the schedule until a day or so later.” Appellant submitted a December 9, 2002 report from Dr. Harley, stating that her condition had worsened since a July 25, 2000 offer of limited duty by the employing establishment, that his list of appellant’s job duties in his October 21, 2002 report was intended to show “that the work involves grasping and pinching use of the thumbs, which only aggravate the accepted condition, which has worsened as per orthopedic examinations and testing herein indicated,” and that in his “last report information was deleted that the patient also suffers from cramping and visible spasming of both hands for, which I prescribed potassium and, for which she was treated in emergency at San Leandro Hospital.”

By decision dated January 22, 2003, the Office found that appellant was entitled to compensation for August 29, November 21, 22, 24 and 30 and December 12 and 15, 2000;

January 26, March 9, April 27, May 1, June 4 and 11, July 16, 17 and 30, August 20 and September 12 to 14, 2001. The decision states: "These dates are exclusive of dates, on which you were not seen by a [physician,] or which you were retroactively found to be disabled." The Office's denied appellant's claim for compensation for the other dates claimed, finding:

"Although Dr. Harley attempts to provide objective findings that support your diagnosis, he does not explain how your condition made you unable to work on the specific dates you took off from work. How your condition permits you to work on some days, but not other days, is not explained by objective findings. Rather, your subjective complaints of pain appear to determine the days on which you work. This Office cannot compensate you due to pain when there are no objective findings to support that your condition on the days you can work is any different from the days you cannot work.

"In your statement dated December 1, 2002, you said that your [physician] was forced to retroactively declare you to be disabled because you were unable to get medical appointments from the first date you were absent from work. Your difficulty in scheduling appointments does not permit this Office to pay for disability prior to the date you were seen by a [physician], because temporary total disability is a medical determination which can only be established by a [physician]. Disability, cannot be established retroactively based on a patient's subjective reports of pain. You should be able to receive emergency treatment on days when your condition becomes so acute and disabling that it prevents you from working."

* * *

"You will receive no compensation for dates claimed prior to July 21, 1999, the date of injury, as claimed on your [Form] CA-2. Although it is conceivable that you might have received medical treatment and have been disabled due to your thumb condition prior to your filing a claim, no contemporaneous medical reports were submitted discussing disability due to a thumb condition prior to your date of injury. The earliest medical report this Office has received stating that you were disabled due to your thumb condition is dated August 29, 2000."

By letter dated January 28, 2003, the Office advised appellant that she was entitled to buy back 50 hours of leave she used, from November 24, 2000 to July 30, 2001, for the days approved by the Office's January 22, 2003 decision.

On March 3, 2003 the Office issued appellant a schedule award for a five percent permanent impairment of the right arm and a seven percent permanent impairment of the left arm. This award was paid from January 22 to October 11, 2002.

The Board finds that appellant is entitled to compensation on additional days, on which she underwent medical treatment or examination.

An injured employee is entitled to compensation for time missed from work to undergo medical examination, treatment and testing for an employment-related condition.¹ The case record establishes that appellant underwent examination, treatment or testing on two days, for which compensation was claimed but not paid by the Office: March 19, 1999 (x-rays of the thumbs), and March 2, 2001 (steroid injection). Although the record also reflects medical examinations on March 21 and September 17, 2001, these are not dates for which appellant claimed compensation.

With regard to payment of compensation for disability, appellant, for each period of disability claimed, has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of her employment-related condition.² Whether a particular injury or condition causes an employee to be disabled for work and the duration of that disability are medical issues, which must be proved by a preponderance of the reliable, probative and substantial medical evidence.³

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.⁴ The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁵

In the present case, the Office accepted that appellant sustained bilateral thumb strains and degenerative joint disease of the thumbs in the performance of duty. In an August 29, 2000 report, appellant's attending physician, Dr. Harley, stated that treatment resulted in "periods of pain relief followed by more intensified pain." In an October 21, 2002 report, Dr. Harley described appellant's work activities and stated that these activities, even separating mail at her own pace, exacerbated her pain. Dr. Harley also stated that appellant sometimes had increased pain and swelling after treatment, with climate changes, with age and with everyday use.

While there must be a proven basis for the pain, pain due to an employment-related condition can be the basis for payment of compensation under the Federal Employees' Compensation Act.⁶ In the present case, there is a proven basis for appellant's pain, namely the

¹ *Dorothy J. Bell*, 47 ECAB 624 (1996); *Vincent E. Washington*, 40 ECAB 1242 (1989); Federal (FECA) Procedure Manual, Part 5 -- Benefit Payments, *Principles of Bill Adjudication*, Chapter 5.204.12b (January 1996) provides: "If a claimant has returned to work following an accepted injury or the onset of an occupational disease and must leave work and lose pay or use leave to undergo treatment, examination or testing, compensation should be paid for wage loss under 5 U.S.C. § 8105 while undergoing the medical services and for a reasonable time spent traveling to and from the location where services were rendered."

² *David H. Goss*, 32 ECAB 24 (1980).

³ *Edward H. Horton*, 41 ECAB 301 (1989).

⁴ *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

⁵ *John L. Clark*, 32 ECAB 1618 (1981).

⁶ *Barry C. Peterson*, 52 ECAB 120 (2000).

degenerative joint disease of the thumbs accepted by the Office as related to her employment. The Office's referral physician, Dr. Sherman, concluded that appellant's subjective complaints regarding her thumbs were reasonable given the arthritic condition of her thumbs.

Appellant's attending physician, Dr. Harley, attributed appellant's disability to her increased pain with activity or treatment and to her need for temporary relief of pain by not working. In this situation, appellant's burden of proving she was disabled on particular dates can be met by less than definitive medical evidence, which may not include a requirement of an examination on each day of claimed disability. However, the Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the particular period of disability, for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁷

While Dr. Harley's documents titled "[v]erification of [p]eriods of [t]otal [d]isability" list particular dates for which compensation was claimed and indicate appellant was "absent from work due to the injury-related disability" on these dates, these documents do not provide a basis for a finding of disability. They indicate appellant was absent "per medical advice," but do not indicate what that advice was or when it was given. The mere listing of dates that appellant claimed to be disabled, with a note from a physician that appellant was disabled on those dates, is not sufficient to warrant payment of compensation.

In his October 21, 2002 report, Dr. Harley indicated that the listed periods of disability were "physician recommended" due to increased pain after use of thumb spica or cortisone injections, medication side effects and with climate changes, age and everyday use. Dr. Harley, however, did not address which of these reasons applied to which dates.

Dr. Harley did list specific periods in some of his treatment notes. His March 9, 2001 note stated that appellant was off work from March 2 to 9, 2001 but did not state that appellant was disabled during that period. His March 21, 2001 note stated that appellant was off work on March 19, 2001 "due to worsening pain in her thumbs." His April 27, 2001 report stated that appellant complained of more difficulty with her hands and thumbs and that she was off work on April 23, 2001. His June 11, 2001 note stated that appellant had "been having more trouble and has been off work" for June 4 to 11 2001. Any support for disability from June 4 to 11, 2001 afforded by this note is contradicted by the fact that Dr. Lee examined her on June 4, 2001 and did not indicate, in his extensive narrative report, that appellant was disabled. In his July 16, 2001 note, Dr. Harley indicated that appellant was off work from July 12 to 17, 2001 and had "missed some work" because of "more difficulty with her hands." Dr. Harley's September 12, 2001 note indicated that appellant was "having increasing difficulty with her hands from her work," and that she was off work from September 10 to 14, 2001.⁸ All of these reports indicated that appellant could return to her modified work the next workday after Dr. Harley saw her and none of them provide an explanation why the doctor believed appellant was disabled for the period immediately before she was seen. These reports are not sufficient to meet appellant's burden of proving that she was disabled for the dates claimed.

⁷ *Fereidoon Kharabi*, 52 ECAB ____ (Docket No. 00-273, issued March 7, 2001).

⁸ The Office paid compensation for September 12 to 14, 2001, but not for September 10 or 11, 2001.

The January 22, 2003 decision of the Office of Workers' Compensation Programs is modified to reflect entitlement to compensation for the additional dates of March 19, 1999 and March 2, 2001 and affirmed as modified.

Dated, Washington, DC
July 28, 2003

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member