

**United States Department of Labor
Employees' Compensation Appeals Board**

HARVINDER BIRDI, Appellant)	
)	
and)	Docket No. 04-1874
)	Issued: December 10, 2004
U.S. POSTAL SERVICE, BULK MAIL)	
CENTER, Richmond, CA, Employer)	
)	

Appearances:
Harvinder Birdi, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 19, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated July 6, 2004 finding that she had not established that she was totally disabled from May 19 through June 7, 2004 due to her accepted employment injuries. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she was totally disabled from May 19 through June 7, 2004 due to her accepted employment injuries.

FACTUAL HISTORY

On January 9, 2004 appellant, then a 40-year-old mail handler, filed a traumatic injury claim alleging that she sustained a broken leg in the performance of duty on January 5, 2004. The Office accepted her claim for open wound right ankle and right displaced medial malleolus

fracture. Appellant received continuation of pay and the Office authorized compensation benefits.

Appellant's attending physician, Dr. Aurelia Gincauskas, a Board-certified family practitioner, completed a note on April 30, 2004 and indicated that appellant could return to work 4 hours a day in a desk job only with walking and standing limited to no more than 15 minutes at a time.

The Office referred appellant for second opinion evaluations on April 15, 2004. In a report dated May 6, 2004, Dr. John Chu, a Board-certified orthopedic surgeon and Office referral physician, found that appellant could return to work eight hours a day with restrictions on standing, walking, lifting and kneeling.

Dr. Robert Hepps, a Board-certified psychiatrist and Office referral physician, completed a report on May 10, 2004 and diagnosed post-traumatic stress disorder caused by appellant's employment injury. He stated that appellant was precluded from working around machinery due to her diagnosed condition.

On May 14, 2004 Dr. Gincauskas again opined that appellant could return to work four hours a day with restrictions on standing, walking, bending, squatting, kneeling and climbing. She indicated that appellant should not lift over 25 pounds. Dr. Gincauskas completed a separate report on May 14, 2004 and stated that appellant could return to work on May 19, 2004 for 4 hours a day, standing and walking for 15 minutes each, no bending or squatting. She indicated that appellant could kneel and climb occasionally and lift up to 25 pounds occasionally. Dr. Gincauskas completed a third report on May 14, 2004 noting appellant's history of injury and findings on examination. She stated that appellant could begin work on May 10, 2004 with occasional lifting up to 25 pounds, occasional kneeling and climbing and no bending or squatting. Dr. Gincauskas stated that appellant should not stand or walk more than 15 minutes at a time and should perform a desk job. She noted that appellant had developed post-traumatic stress disorder and complaints of right knee pain.

Appellant accepted a light-duty position at the employing establishment on May 18, 2004 which required answering telephones, taking messages, making copies and sorting and filing. Appellant returned to work in this position on June 7, 2004.

In a note dated May 18, 2004, Dr. Julie Nefkens, a Board-certified internist, diagnosed right knee strain and stated that appellant should be "off work." Appellant completed a claim for compensation on May 18, 2004 and requested wage-loss compensation from May 18, 2004 through June 7, 2004. In a letter dated May 27, 2004, the Office informed appellant that the medical evidence did not support her total disability for this period and allowed her 30 days to submit additional evidence.

In a report dated May 21, 2004, Dr. Nefkens stated that appellant reported right knee pain. She stated, "Patient feels she cannot return to work modified tomorrow because of right knee pain, ongoing right ankle PTX [physical therapy] and poor sleep."

On June 2, 2004 Dr. Gincauskas listed appellant's symptoms of right knee medial pain since the January 5, 2004 employment injury. She requested diagnostic studies due to clicking, locking and the sensation that the knee was giving out. Dr. Gincauskas diagnosed right knee strain.

In a letter dated June 3, 2004, the Office requested additional medical explanation from Dr. Gincauskas who submitted a report dated June 11, 2004 and noted that appellant was unable to proceed with modified work on May 19, 2004 due to her increased right knee pain. Dr. Gincauskas released appellant to return to light duty on June 7, 2004 when she examined her. She diagnosed right medial meniscal tear.

On June 16, 2004 the Office accepted the additional conditions of right knee strain, right ankle fracture and post-traumatic stress, partially resolved.

By decision dated June 29, 2004, the Office denied appellant's claim for total disability from May 19 through June 7, 2004 finding the medical evidence did not establish that she was totally disabled for this period.¹

LEGAL PRECEDENT

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that she cannot perform such light-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.²

ANALYSIS

Appellant's attending physician, Dr. Gincauskas, a Board-certified family practitioner, and the Office referral physicians, Dr. Chu, a Board-certified orthopedic surgeon, and Dr. Hepps, a Board-certified psychiatrist, found that appellant was capable of performing light duty with restrictions. Appellant accepted a light-duty position offered by the employing establishment on May 18, 2004 which was within her restrictions and reported to work on June 7, 2004. However, appellant has alleged that she was totally disabled from performing the duties of this position from May 19 to June 7, 2004 due to her accepted right knee condition. In support of her claim, appellant submitted a report dated May 21, 2004 from Dr. Nefkens, a Board-certified internist, who stated that appellant reported right knee pain. She stated, "Patient feels she cannot return to work modified tomorrow because of right knee pain, ongoing right ankle PTX and poor sleep."

¹ Following the Office's June 29, 2004 decision, appellant submitted additional new evidence. As the Office did not review this evidence in reaching a final decision, the Board may not consider this evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

² *Joseph D. Duncan*, 54 ECAB ____ (Docket No. 02-1115, issued March 4, 2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

Dr. Nefkens did not opine that appellant was incapable of working, but instead merely noted that appellant stated that she did not feel capable of working. The Board has long held that whether a particular injury causes an employee disability for employment is a medical question that must be resolved by competent medical evidence.³ In this situation, Dr. Nefkens did not offer a medical opinion that appellant could not return to work. Instead she merely repeated appellant's assessment of her condition and deferred her return to work until Dr. Gincauskas could perform an examination. Due to the lack of medical reasoning, this report is not sufficient to establish that appellant was totally disabled for the period in question.

Dr. Gincauskas submitted a report dated June 11, 2004 and noted that appellant was unable to proceed with modified work on May 19, 2004 due to her increased right knee pain in accordance with Dr. Nefkens. Dr. Gincauskas released appellant to return to light duty on June 7, 2004 when she examined her. Dr. Gincauskas did not offer an independent opinion that appellant was totally disabled on May 19, 2004. She merely noted that Dr. Nefkens had prevented appellant from returning to work until Dr. Gincauskas could examine her. Dr. Gincauskas did not provide any findings supporting appellant's total disability from May 19 to June 7, 2004 the date she examined her and released her to return to light duty, this report is not sufficient to meet appellant's burden of proof and she has not established her claim for total disability for the period in question.

CONCLUSION

The Board finds that there is no medical opinion evidence establishing that appellant was totally disabled from May 19 through June 7, 2004. As the medical evidence does not establish that appellant was totally disabled, she is not entitled to compensation for total disability during that period.

³ *Danald E. Ewals*, 51 ECAB 428, 434 (2000).

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member