U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAVONNE EVANS and DEPARTMENT OF COMMERCE, PATENT & TRADEMARK OFFICE, Arlington, VA

Docket No. 03-1571; Submitted on the Record;
Issued March 2, 2004

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether appellant is entitled to wage-loss compensation for total disability during the period October 5, 2001 through May 11, 2002 due to her October 4, 2001 employment injury.

On October 4, 2001 appellant, then a 41-year-old administrative assistant, filed a traumatic injury claim alleging on that date she hurt her back and shoulder area while pushing and pulling a cart loaded with "MPE" manuals. She stated that she was also picking up and carrying the manuals. Appellant's claim was accompanied by an accident report regarding the October 4, 2001 incident and instructions for completing the accident report.

Appellant submitted an October 5, 2001 authorization for examination and/or treatment report (Form CA-16) of Dr. Talaat F. Maximous, an orthopedic surgeon and her treating physician. Dr. Maximous provided a history that appellant experienced upper and lower back pain that went down her legs. He diagnosed dorsal lumbar strain and indicated that appellant's condition was caused by the employment activity by placing a checkmark in the box marked "yes." He indicated that appellant was totally disabled for the period October 5 through 26, 2001.

By letter dated November 19, 2001, the Office of Workers' Compensation Programs accepted appellant's claim for lumbar strain.

Appellant filed several claims for wage-loss compensation (Form CA-7), covering the period October 5, 2001 through May 11, 2002 and numerous medical reports and disability certificates from Dr. Hampton J. Jackson, a Board-certified orthopedic surgeon and her treating physician, regarding her total disability. He diagnosed cervical disc syndrome and lumbar disc syndrome that were caused by appellant's October 4, 2001 employment injury. Dr. Jackson opined that appellant was totally disabled on intermittent dates during the claimed period of disability.

By decision dated May 29, 2002, the Office found the evidence of record insufficient to establish that appellant was totally disabled for work during the period October 5, 2001 through May 11, 2002 due to her October 4, 2001 employment injury. In a June 12, 2002 letter, appellant requested a review of the written record by an Office hearing representative.

The Office received additional medical reports and disability certificates from Dr. Jackson reiterating that appellant had cervical disc syndrome and lumbar disc syndrome causally related to her October 4, 2001 employment injury. He indicated that appellant was totally disabled on particular dates during the period in question. The Office also received treatment notes from appellant's physical therapists who found that she was unable to work.

In a February 24, 2003 decision, the hearing representative affirmed the Office's May 29, 2002 decision.[1]

The Board finds that appellant has failed to establish that she is entitled to wage-loss compensation for total disability during the period October 5, 2001 through May 11, 2002 due to her October 4, 2001 employment injury.

As used in the Federal Employees' Compensation Act,[2] the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[3] Disability is thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[4] An employee who has a physical impairment causally related to her federal employment, but who nonetheless has the capacity to earn the wages she was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.[5] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

The Office accepted that appellant sustained a lumbar strain on October 4, 2001. Although the Office accepted that appellant sustained an employment injury, she still has the burden of establishing that her accepted condition resulted in disability for work for the specific

[1] On appeal appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f).

[4] *See Fred Foster*, 1 ECAB 21 at 24-25 (1947) (finding that the Act provides for the payment of compensation in disability cases upon the basis of the impairment in the employee's capacity to earn wages and not upon physical impairment as such).

[5] *See Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

claimed period.[6] To meet this burden appellant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor(s). The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[7]

Dr. Maximous' October 5, 2001 Form CA-16 report indicated that appellant's dorsal lumbar strain was caused by her employment activity by placing a checkmark in the box marked "yes." The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's disability was related to the history is of diminished probative value and without any explanation or rationale for the conclusion reached such report is insufficient to establish causal relationship.[8] Dr. Maximous did not explain how or why appellant's claimed disability was caused by her employment activity, and thus his report is insufficient to establish appellant's burden.

The medical reports and disability certificates of Dr. Jackson, appellant's treating physician, indicated that appellant had cervical and lumbar disc syndromes that were caused by her October 4, 2001 employment injury and that she was totally disabled on intermittent dates during the period in question are insufficient to establish appellant's burden. The Office has not accepted appellant's claim for cervical or lumbar disc syndrome. Rather, the Office accepted her claim for lumbar strain. The reports of Dr. Jackson did not address appellant's disability in terms of the accepted condition and are therefore of diminished probative value.

The treatment notes of appellant's physical therapists who found that she was totally disabled are of no probative value inasmuch as a physical therapist is not considered to be a "physician" under the Act and, therefore, is not competent to give a medical opinion.[9]

Because appellant has not provided a rationalized medical opinion supporting her disability for work during the period in question, the Office properly denied appellant's claim for wage-loss compensation.

[6] *See Dorothy J. Bell*, 47 ECAB 624 (1996).

[7] *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

[8] *Lucrecia M. Nielson*, 42 ECAB 583, 594 (1991).

[9] 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

The February 24, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 2, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member