United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 06-276**
	)	**Issued: September 20, 2006**
U.S. POSTAL SERVICE, PROCESSING & DELIVERY CENTER, Southeastern, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 16, 2005 appellant filed an appeal from a July 20, 2005 decision of the Office of Workers' Compensation Programs, which denied that she sustained a recurrence of disability beginning November 19, 2002. 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's absence from November 19, 2002 to March 7, 2003 was caused by a recurrence of disability causally related to her employment injury. On appeal, appellant contends that, at the very minimum, a conflict in medical evidence had been created between her physician Dr. Bruce J. Menkowitz and Dr. Robert F. Draper, Jr., an Office referral physician, both of whom are Board-certified in orthopedic surgery.

FACTUAL HISTORY

This case has previously been before the Board. In an October 23, 2002 decision, the Board reversed Office decisions dated July 9, 2001 and March 26, 2002 that terminated

appellant's compensation benefits. The Board found that a conflict existed between appellant's treating physicians and Dr. Steven J. Valentino, a Board-certified osteopath specializing in orthopedic surgery, who served as a second opinion examiner.[1] The law and the facts of the previous Board decision and order are incorporated herein by reference.[2]

Subsequent to the Board's October 23, 2002 decision, on November 23, 2002 appellant filed a Form CA-2a claim, alleging that she sustained a recurrence of disability on November 19, 2002 when she had to stop work due to pain. Her supervisor indicated that appellant was working in the nixie area where she could sit or stand with a five-pound weight restriction and no pushing, pulling or lifting. In an attached statement, appellant acknowledged that she was allowed to stand or sit but stated that she stopped work due to chronic pain and submitted an attending physician's report dated November 26, 2002 in which Dr. Menkowitz advised that she could not work due to increased pain.

By letter dated December 6, 2002, the Office informed appellant of the type evidence needed to develop the claim and on December 6, 2002 referred her to Dr. Norman Stempler, a Board-certified osteopath specializing in orthopedic surgery, who was to serve as an impartial examiner regarding the termination dated July 9, 2001 and as a second opinion examiner regarding whether she sustained a recurrence of disability on November 19, 2002. In a January 3, 2003 report, Dr. Menkowitz advised that appellant could not work due to severe low back pain. By report dated January 7, 2003, Dr. Stempler noted the history of injury, appellant's complaints and his review of the medical record. He opined that, at the time of his examination, the symptoms of the September 9, 2000 strain had long resolved and appellant's present condition was due to degenerative changes and moderate obesity.

In a decision dated February 27, 2003, the Office expanded appellant's accepted conditions to include aggravation of degenerative disc disease and denied that she sustained a recurrence of disability on November 19, 2002. Appellant, through counsel, requested a hearing that was held on October 21, 2003. She testified regarding her modified job duties, noting that she worked both in nixie mail and at a color coding position, stating that pain, especially in her right leg, got so bad that she had to stop work. Appellant had returned to duty in the nixie area on March 7, 2003. She submitted an electromyography (EMG) report dated December 4, 2002 that was suggestive but not diagnostic of S1 radiculopathy.[3] In a duty status report dated July 15, 2003, Dr. Menkowitz advised that appellant could work eight hours a day with restrictions to her physical activity and in an October 2, 2003 report, advised that she continued to suffer residuals

[1] Docket No. 02-1676.

[2] The Office accepted that on September 9, 2000 appellant sustained an employment-related lumbosacral sprain and sciatica. Appellant had claimed total disability for the period July 5 to 9, 2001 and for intermittent periods thereafter. She has an additional claim, accepted for bilateral carpal tunnel syndrome, adjudicated by the Office under file number 030256746. The instant claim is adjudicated under file number 030254300.

[3] Appellant also submitted a report dated September 26, 2002 in which Dr. Nicholas Diamond rated her upper and lower extremities for schedule award purposes. On November 1, 2003 she filed a schedule award claim. The record before the Board does not contain a final decision this claim. The record also contains a magnetic resonance imaging (MRI) scan study dated August 4, 2001 that demonstrated a minimal disc bulge at L5-S1 with no herniation of significant stenosis. Dr. Menkowitz submitted treatment notes dating from August 4, 2001 to May 9, 2002.

of the September 9, 2000 employment injury and advised that her chronic back pain became so severe in November 2002 that she could not work.

By decision dated January 12, 2004, an Office hearing representative remanded the case to the Office. The hearing representative noted that Dr. Stempler had acted as a second opinion examiner with regard to the recurrence of disability beginning November 19, 2002 but that he was not provided with a proper factual background regarding appellant's regular and limited-duty employment and thus did not provide a reasoned opinion. On remand, the Office was to prepare a new statement of accepted facts which included descriptions of appellant's limited-duty and date-of-injury jobs and refer it along with relevant medical evidence to Dr. Stempler and request that he provide a supplementary report regarding the nature and extent of appellant's injury-related disability, especially whether she was disabled from the job duties she was performing on November 19, 2002.

On February 9, 2004 appellant submitted job descriptions of the nixie mail and color coding positions[4] and on May 4, 2004 the Office prepared a revised statement of accepted facts which included job descriptions for both the nixie mail color coding positions. The Office had determined that Dr. Stempler was not available as a referral physician and on May 25, 2004 the Office referred appellant, along with the statement of accepted facts, the medical record and a set of questions to Dr. Draper, a Board-certified in orthopedic surgery, for a second opinion evaluation. By report dated July 1, 2004, Dr. Draper noted his review of the medical record including the revised statement of accepted facts and MRI scan and EMG studies. He diagnosed lumbar strain and preexisting degenerative lumbar disc disease at L5-S1. Dr. Draper advised that, based on his review of the medical records and his examination, appellant would have been capable of performing her job duties during the time of the claimed recurrence of disability, stating that, while she had some preexisting degenerative lumbar disc disease, there was no medical evidence to support any worsening due to the work injury and her back condition was rather due to the normal aging process. In an attached work capacity evaluation, he advised that appellant could work eight hours a day with no restrictions to her physical activity.

By decision dated July 12, 2004, the Office denied appellant's claim that she sustained a recurrence of disability beginning November 19, 2002.[5] Appellant, through her attorney, requested a hearing that was held on April 6, 2005. She did not appear at the hearing. Appellant's attorney submitted Dr. Menkowitz' treatment notes dating from March 4, 2003 to June 15, 2004 and a report dated August 4, 2004, in which the physician reiterated his opinion that appellant suffered residuals of the work injury, stating that since the original work injury she had chronic back pain and suffered a worsening of her condition beginning on November 19, 2002 through her return to work on March 7, 2003. Counsel argued that Dr. Menkowitz' reports were sufficient to establish that appellant sustained a recurrence of disability or, at a minimum, to establish a conflict in medical evidence. By decision dated July 20, 2005, an Office hearing representative affirmed the July 15, 2004 decision.

[4] The employing establishment did not furnish job descriptions.

[5] On July 12, 2004 the Office also issued a notice or proposed termination. The record, however, does not contain a final termination 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 had 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 his or 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 his or her established physical limitations.[7]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[8]

Under the Federal Employees' Compensation Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.[9] Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[10]

ANALYSIS

The Board finds that the weight of the medical evidence rests with the opinion of Dr. Draper, the second opinion examiner who reviewed the revised statement of accepted facts which included descriptions of both the nixie mail and color coding job descriptions. In his report dated July 1, 2004, Dr. Draper advised that, based on his review of the medical records and his examination, appellant would have been capable of performing her job duties during the time of the claimed recurrence of disability stating that, while she had some preexisting

[6] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB ____ (Docket No. 04-887, issued September 27, 2004).

[7] *Id.*

[8] *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

[9] *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[10] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

degenerative lumbar disc disease, there was no medical evidence to support any worsening due to the work injury. He opined that her back condition was due to the normal aging process. In an attached work capacity evaluation, Dr. Draper advised that appellant could work eight hours a day with no restrictions to her physical activity.

The MRI scan and EMG studies submitted by appellant did not contain an opinion regarding the cause of the diagnosed conditions or regarding any disability there from. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[11] Moreover, Dr. Menkowitz did not provide a rationalized explanation of why appellant could not perform her light-duty work beginning November 19, 2002. Although he submitted a number of reports, in none did he demonstrate any knowledge or understanding of appellant's job duties in either the nixie mail or color coding positions and merely stated that her pain increased in November 2002 and she could not work. Dr. Menkowitz' reports are, therefore, insufficient to establish that her absence from work beginning on November 19, 2002 was caused by the employment injuries.[12]

It is appellant's burden of proof to submit the necessary medical evidence to establish a claim for a recurrence. A mere conclusion without the necessary medical rational explaining how and why the physician believes that a claimant's accepted exposure would result in a diagnosed condition is not sufficient to meet the claimant's burden of proof. The medical evidence must also include rationale explaining how the physician reached the conclusion he or she is supporting.[13] The record in this case does not contain a medical report providing a reasoned medical opinion that appellant's claimed recurrence of disability was caused by the accepted conditions or was sufficient to establish a conflict in medical opinions.[14]

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a recurrence of disability on November 19, 2002 causally related to her accepted employment injuries.

[11] *Willie Miller*, 53 ECAB 697 (2002).

[12] *Leslie C. Moore*, 52 ECAB 132 (2000).

[13] *Beverly A. Spencer*, 55 ECAB ____ (Docket No. 03-2033, issued May 3, 2004).

[14] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight. *Manuel Gill*, 52 ECAB 282 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 20, 2005 is hereby affirmed.

Issued: September 20, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board