United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
	)	
and	)	**Docket No. 07-79**
	)	**Issued: May 2, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Kalamazoo, MI, Employer	)	

Appearances:
Alan J. Shapiro, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 10, 2006 appellant, through counsel, filed a timely appeal from a September 12, 2006 merit decision of the Office of Workers' Compensation Programs' hearing representative affirming the denial of her recurrence claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has established that she sustained a recurrence of total disability effective March 22, 2004 causally related to her November 12, 2000 employment injury.

FACTUAL HISTORY

On November 30, 2000 appellant, then a 41-year-old mail processor, filed a traumatic injury claim alleging that on November 12, 2000 she injured her right shoulder and neck while lifting a heavy tray of mail. The Office accepted the claim for cervical strain, C5-6 herniated disc and C5-6 radiculitis. The Office authorized C5-6 anterior cervical discectomy and fusion

surgery which was performed on July 11, 2001. Appellant stopped work on November 25, 2000 and returned to light-duty work on February 10, 2001. She stopped again on May 12, 2001, returned to work on October 20, 2001 and stopped work again on January 26, 2002.

In a report dated October 30, 2003, Dr. David J. Brockman, a treating Board-certified physiatrist, reviewed and approved a proposed job offer. On December 13, 2003 the employing establishment offered appellant a modified position of automatic clerk working initially for four hours per day which she accepted on February 28, 2004. The physical requirements of the position, included no lifting or reaching for up to two hours per day and no extension of the neck. Appellant returned to a part-time modified job on March 17, 2004.

A February 23, 2004 magnetic resonance imaging (MRI) scan revealed slight bulging disc at C6-7, "postsurgical changes are seen at the C5-6 level (anterior dis[c]ectomy and fusion)" and C4-5 small left paracentral disc protrusion with "no compromise of the cord or exiting nerve roots. Under impression, Dr. Azzam S. Kanaan, a Board-certified neurologist, reported C4-5 and C6-7 degenerative changes with no neural structure compromise and C5-8 postsurgical changes seen with bilateral foraminal stenosis "at this level which could compromise the exiting C6 nerve roots."

On April 5, 2004 appellant filed a claim for a recurrence of total disability beginning March 22, 2004.[1] She alleged that the employing establishment failed to comply with her permanent restrictions and she was unable to perform the modified job duties.

On May 13, 2004 Dr. Kurt P. Helgerson, a treating Board-certified family practitioner, concluded that appellant was totally disabled based upon her inability to reach, pull and "look down due to neck pain." Due to appellant's inability to look down without severe pain, Dr. Helgerson concluded that she was unable to perform her modified job duties.

By decision dated May 25, 2004, the Office denied appellant's recurrence of disability claim.

In a letter dated May 28, 2004, appellant's counsel requested an oral hearing which was held on February 17, 2005.

On June 10, 2004 David N. Makowski, a treating Board-certified family practitioner, diagnosed significant neck pain with referred pain and numbness. He reported that an MRI scan was "consistent with C5-6 foraminal stenosis, which again influenced this referred pain down appellant's arms." Dr. Makowski opined that appellant was currently totally disabled from performing her modified job duties.

On September 30, 2004 Dr. Patrick R. Reddan diagnosed cervical radiculopathy, upper back myofascial pain and status post anterior cervical discectomy and fusion. A physical examination showed "multiple myofascial trigger points across the mid and upper back." Range of motion included 90 degrees passive abduction for the left arm, pain complaints "on the right at

[1] Appellant has not returned to work. On December 1, 2005 the employing establishment issued a notice of removal effective January 13, 2006.

approximately 60 degrees of abduction." A review of a February 23, 2004 MRI scan showed "a small left paracentral disc protrusion at C4-5 level," C5-6 bilateral foraminal stenosis and well-preserved disc space at C5-6 with a slight bulging disc.

On February 25, 2005 the Office received an April 29, 2004 report by Dr. Herman C. Sullivan, a Board-certified neurologist, finding no supportive neurological deficits to confirm a radiculopathy. A motor examination was normal. Dr. Sullivan reported appellant's complaints "of altered sensation in a nondermatomal pattern" under sensory examination. He stated that these complaints implicated "C5-6, C7-8 on the right side as well as the left side. Dr. Sullivan recommended an electromyography nerve conduction study.

By decision dated June 10, 2005, the Office hearing representative set aside the May 24, 2004 decision and remanded the case for further development of the medical evidence. The hearing representative found that the February 23, 2004 MRI scan provided evidence of a worsening of her accepted C5-6 herniated disc. The hearing representative found the reports of Dr. Helgerson and Dr. Makowski insufficient to support appellant's claimed recurrence as they contained inadequate rationale and there were no "physical findings on examination to support disability from work." He further noted that the record was devoid of any medical opinion addressing why appellant continued to have residuals of her accepted work injury in view of the fact that she only worked nine days in the past three and one-half years.

On June 23, 2005 the Office referred appellant to Dr. Bruce D. Abrams, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated July 18, 2005, Dr. Abrams presented findings based upon a physical examination, review of the objective and factual evidence and list of questions. He diagnosed status post C5-6 discectomy and fusion with right upper extremity radiculitis. Dr. Abrams noted that a 2004 MRI scan "shows the possibility of C6 nerve root foraminal stenosis." Physical examination revealed slight cervical spine range of motion, no evidence of cervical spasm, normal muscle strength and "subjective tenderness in the cervical area." Dr. Abrams opined that appellant was capable of working with restrictions. The restrictions included no elevation of her head, no overhead work and no lifting more than 10 to 15 pounds. In response to the Office's question, Dr. Abrams opined that appellant's subjective complaints were supported by objective findings. He opined that appellant continued to have residuals from her accepted employment injury but was not totally disabled.

In a letter dated August 24, 2005, the Office requested a supplemental report from Dr. Abrams based upon an enclosed surveillance videotape of appellant for the period July 18 to 26, 2005.

In a September 27, 2005, addendum, Dr. Abrams reviewed the surveillance videotape supplied by the Office. The activities he observed appellant engaging in appeared to be completely normal without any evidence of hesitation or restriction of motion. Dr. Abrams opined that appellant was capable of returning to full-time work with no restrictions or limitations. He stated that his opinion had changed based upon a review of the surveillance video. Dr. Abrams concluded that appellant's condition had not worsened due to the cervical spine surgery and, therefore, a modified job assignment working four hours per day was not required. He noted that the videotape showed that there was no significant range of motion restrictions. Dr. Abrams also reported that appellant appeared to have no problem lifting,

carrying, overhead work with her arm and bilateral use of her upper extremities. In an October 5, 2005 investigative report, Sarah Nerreter reported on surveillance of appellant from February 25 to July 27, 2005. During this period, Ms. Nerreter observed appellant performing various activities, including swimming, driving a pickup truck, lifting small children and grocery bags, weeding, sweeping, pulling up tent stakes and picking up lawn chairs.

On October 17, 2005 the Office requested Dr. Abrams to provide an addendum report to address an issue with respect to medical reports and diagnostic testing contemporaneous with her March 21, 2004 work stoppage. On December 8, 2005 Dr. Abrams noted his previous reports dated July 18 and September 27, 2005. In response to the question posed by the Office, he stated:

> "The review on page three of [appellant] her present complaints in the examination of July 18, 2005 combined with her examination on page four of that date does not at all correspond with the observed findings on the surveillance [videotape] reported in the September 27, 2005 supplemental report.
>
> "In answer to the questions posed in the note of October 17, 2005, it would be my opinion that there is no medical evidence to demonstrate any material worsening of [appellant's] accepted condition. At the time of the examination, she subjectively limited her range of motion and she expressed subjective complaints. This does not at all correspond with the observed findings on the surveillance tape, where [appellant] was able to extend her head fully, had a normal, full range of motion and showed no evidence of pain."

Dr. Abrams opined that appellant had symptom magnification and was capable of working eight hours with no restrictions.

By decision dated December 14, 2005, the Office denied appellant's claim for a recurrence of total disability beginning March 22, 2004.

In a letter dated December 20, 2005, appellant, through counsel, requested an oral hearing before an Office hearings representative. On May 12, 2006 appellant's counsel requested a review of the written record by an Office hearing representative.

On February 2, 2006 Dr. Makowski indicated that he has not seen appellant since September 20, 2004 and "she was effectively terminated from our office on November 9, 2004." He stated that appellant had complaints of terrible back and neck pain on her last visit.

By decision dated September 12, 2006, the Office affirmed the denial of appellant's claim for a recurrence of total disability beginning March 22, 2004.

LEGAL PRECEDENT

The Office's regulation defines the term recurrence of disability as follows:

> "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. This term also means an 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."[2]

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 of record establishes that he or 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 show that he or she cannot perform such light duty. As part of this burden, 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.[3] 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 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.[4]

ANALYSIS

The Office accepted the claim for cervical strain, C5-6 herniated disc and C5-6 radiculitis and authorized C5-6 anterior cervical discectomy and fusion surgery.

Appellant claimed compensation for a total recurrence of the accepted neck employment injury. She alleged that the employing establishment failed to comply with her restrictions and she was unable to perform the position. The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of total disability causally related to her November 12, 2000 employment injury.

Appellant returned to modified light-duty work on March 17, 2004 working four hours per day. Dr. Brockman, a treating Board-certified physiatrist, reviewed and approved the job offer on October 30, 2003. Appellant subsequently stopped work, claiming a recurrence of total disability as of March 22, 2004. She must demonstrate either that her condition has changed such that she could not perform the activities required by her modified job or that the requirements of light duty changed or were withdrawn. The record contains no evidence that the light-duty job requirements were changed or withdrawn.

In support of her claim for a recurrence of total disability, appellant submitted reports from Dr. Helgerson and Dr. Makowski. In a May 13, 2004 report, Dr. Helgerson concluded that

[2] 20 C.F.R. § 10.5(x).

[3] *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

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

appellant was totally disabled due to her inability to reach, pull and "look down due to neck pain." He attributed appellant's inability to perform her modified job duties due to severe pain. In a June 10, 2004 report, Dr. Makowski diagnosed significant neck pain with referred pain and numbness. He reported that an MRI scan was "consistent with C5-6 foraminal stenosis, which again influenced this referred pain down [appellant's] arms." Dr. Helgerson opined that appellant was currently totally disabled from performing her modified job duties. However, these reports are of limited probative value as neither Dr. Helgerson nor Dr. Makowski provided medical rationale explaining how appellant became disabled due to her accepted injury or was unable to continue work at her light-duty position beginning March 22, 2004. Dr. Helgerson provided a one paragraph report which did not report any finding based on a physical examination of appellant. Rather, he referred to these findings of Dr. Homon Sullivan. Similarly, Dr. Makowski submitted a brief note to support his finding of total disability. Without any explanation to support that appellant was disabled on or after March 22, 2004 due to her accepted injury, these reports are insufficient to meet her burden of proof.[5]

Appellant also submitted a report by Dr. Reddan in support of her claim. On September 30, 2004 Dr. Reddan diagnosed upper back myofascial pain, cervical radiculopathy and status post anterior cervical discectomy and fusion. A physical examination revealed multiple myofascial trigger points across upper and mid back. Dr. Reddan did not provide any opinion addressing whether appellant was disabled on or after March 22, 2004 due to her accepted November 12, 2000 employment injury. His report is of diminished probative value in establishing a recurrence of disability.

On June 23, 2005 the Office referred appellant to Dr. Abrams for a second opinion evaluation. In a report dated August 2, 2005, Dr. Abrams opined that appellant was capable of working with restrictions. He opined that she continued to have residuals from her accepted employment injury, but was not totally disabled. The Office requested a supplemental report from Dr. Abrams based upon a surveillance videotape of appellant. In a September 27, 2005 addendum, Dr. Abrams reviewed the surveillance videotape and noted the activities he observed appellant engaging in appeared to be completely normal with no evidence of restriction of motion or hesitation. Based upon a review of the surveillance videotape, Dr. Abrams opined that appellant was capable of returning to full-time work with no restrictions or limitations. He stated that his opinion hanged based upon a review of the surveillance videotape. Dr. Abrams concluded that appellant's condition had not worsened due to the cervical spine surgery and, therefore, a modified job assignment working four hours per day was not required. On October 17, 2005 the Office requested Dr. Abrams to further address the issue of appellant's March 22, 2004 work stoppage. Dr. Abrams opined that there was no medical evidence to support that her accepted condition had worsened. He reported that appellant subjectively limited her range of motion at the time of his examination and expressed subjective complaints. Dr. Abrams found that appellant's subjective complaints did not correspond with activities as demonstrated on the surveillance video tape which showed appellant fully extending her head with full range of motion and no evidence of pain. He opined that appellant had symptom

[5] *Richard A. Neidert*, 57 ECAB ___ (Docket No. 05-1330, issued March 10, 2006) (medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof).

magnification and was capable of working eight hours with no restrictions. The Board finds that Dr. Abrams' report is based on a full and accurate history of appellant's medical history and treatment. His report constitutes the weight of medical opinion

The Board finds that appellant has submitted insufficient evidence to show a change in the nature and extent of her physical condition, arising from the employment injury which prevented her from performing her light-duty position. There is no evidence showing that appellant experienced a change in the nature and extent of the light-duty requirements or was required to perform duties which exceeded her medical restrictions. The light-duty position performed by appellant was in conformance with the medical restrictions set forth by her then treating physician and the record is devoid of any evidence which would indicate that there was a change in the nature and extent of the light-duty requirements or that she was required to perform duties which exceeded her medical restrictions.

Appellant has not met her burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty requirements which would prohibit her from performing the light-duty position she assumed after she returned to work.

CONCLUSION

The Board finds that appellant has failed to establish that she had a recurrence of total disability on and after March 22, 2004.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 12, 2006 is affirmed.

Issued: May 2, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board