United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 07-335**
	)	**Issued: October 1, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Canoga Park, CA, Employer	)	

Appearances:
Stephen Millard, 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 20, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated March 30 and July 27, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a recurrence of disability on July 29, 2005 due to his December 13, 2001 employment injury; and (2) whether appellant met his burden of proof in establishing that he sustained a recurrence of disability on January 12, 2006 due to his December 13, 2001 employment injury.

FACTUAL HISTORY

This is the second appeal before the Board. On May 15, 2002 appellant, then a 51-year-old custodian, filed a traumatic injury claim alleging that he injured his back on December 13, 2001 when he fell in the performance of duty. The Office accepted this claim for herniated disc with sciatica on September 27, 2002. Appellant underwent spinal surgery on December 6, 2002

and the Office entered him on the periodic rolls on March 13, 2003. He underwent a second surgery on January 7, 2004 to treat his continuing low back symptoms consisting of provocative lumbar discogram and microdecompressive endoscopic lumbar discectomy of L4 and L5 due to recurrent herniated discs with radiculopathy. Appellant's attending physician, Dr. John C. Chiu, a Board-certified neurosurgeon, opined that on December 31, 2004 he could return to work with restrictions. The employing establishment made a light-duty job offer on January 5, 2005 consistent with appellant's restrictions as set out by Dr. Chiu. By decision dated March 1, 2005, the Office found that as appellant had not accepted the light-duty position he had refused to cooperate with vocational rehabilitation efforts and reduced his compensation benefits to zero. Appellant appealed this decision to the Board. By decision dated September 30, 2005,[1] the Board reversed the Office's March 1, 2005 decision and returned the claim for the Office to retroactively reinstate his compensation benefits. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Dr. Chiu completed a work restriction evaluation on December 31, 2004 and indicated that appellant could work eight hours a day with restrictions on sitting, walking, standing, reaching, twisting, bending, stooping, pushing, pulling, lifting, squatting, kneeling and climbing. He indicated that appellant should have a 15-minute break every 2 hours. On June 6, 2005 Dr. Chiu examined appellant and stated that neurologically he was unchanged. He noted that appellant had some subjective complaints of intermittent low back and leg pain.

Appellant returned to full-time light-duty work at the employing establishment on July 19, 2005 in the light-duty job previously offered which complied with Dr. Chiu's stated work restrictions. In a form report dated July 27, 2005, Dr. Chiu noted that appellant returned to work on July 19, 2005 and described an increase in back pain. He noted that neurologically appellant was unchanged. Dr. Chiu recommended that appellant reduce his work hours to six hours a day for six weeks.

On August 15, 2005 appellant filed a claim for compensation requesting compensation for loss hours from July 29 to August 20, 2005. In a letter dated August 25, 2005, the Office requested additional medical evidence in support of appellant's claim for a recurrence of disability.

Dr. Chiu submitted a report dated August 31, 2005 noting that physical therapy had reduced appellant's low back and leg pain. He again noted that neurologically appellant was "essentially stable." Dr. Chiu stated that appellant could continue working six hours a day until October 3, 2005.

By decision dated September 26, 2005, the Office denied appellant's July 29, 2005 claim for compensation. The Office stated that appellant's claim for recurrence of disability was denied as Dr. Chiu failed to provide reasoning in support of his reduction of appellant's work hours.

On October 3 and 10, 2005 Dr. Chiu indicated that appellant could increase his work hours to six and a half hours a day.

[1] Docket No. 05-1363 (issued September 30, 2005).

By decision dated October 20, 2005, the Office denied appellant's request to change physicians. On October 26, 2005 the Office issued appellant's retroactive compensation for the period February 20 to July 17, 2005 in accordance with the Board's September 30, 2005 decision.

Appellant, through his attorney, requested an oral hearing of the October 20 and 26, 2005 decisions on October 31, 2005.[2] He withdrew these requests on March 10, 2006.

On December 19, 2005 appellant, through his attorney, requested reconsideration of the September 26, 2005 decision denying his claim for recurrence of disability. In support of this request, he submitted a report dated December 5, 2005 from Dr. Chiu stating that appellant experienced increasing low back, right leg and hip pain "precipitated and aggravated" by his work beginning on July 19, 2005.

Dr. Jeffrey J. Buenjemia, a psychiatry resident, completed a report on January 18, 2006 and diagnosed adjustment disorder. He stated that appellant experienced a hostile work environment and that job stress may have caused a recurrence of his depression and adjustment disorder. Dr. Buenjemia indicated in a note of the same date that appellant was totally disabled from January 12 to 18, 2006 due to adjustment reaction with depressed mood.

Appellant filed a claim for compensation requesting wage-loss compensation from January 12 to 18, 2006. In a letter dated January 31, 2006, the Office noted that adjustment reaction with depressed mood was not an accepted condition. The Office noted that if appellant felt his emotional condition was due to a hostile work environment he should file a notice of occupational disease claim. On the other hand, the Office noted that, if appellant felt his emotional condition was due to his accepted employment injury, he should submit a detailed rationalized medical report explaining the causal relationship between this condition and appellant's accepted employment injuries. The Office allowed appellant 30 days for a response. Appellant's attorney responded on February 13, 2006 and asked that the Office expand appellant's claim to include the emotional condition aspect. She submitted a report dated September 1, 2004 from Dr. Deborah Reynolds, a psychiatry resident, noting that appellant had a history of "depression with anxiety following stressor of back injury and stress from work…." Dr. Reynolds diagnosed recurrent major depressive disorder in partial remission as well as an anxiety disorder.

By decision dated March 30, 2006, the Office denied modification of its September 26, 2005 decision finding that appellant had not submitted the necessary medical opinion evidence to establish that he sustained a recurrence of disability on July 29, 2005 such that he was capable of working only six hours a day.

In a note dated January 12, 2006, appellant stated that he reported to work at 7:00 a.m. on that date and the postmaster instructed him to leave at 9:45 a.m. due to his psychiatric diagnosis. He stated that on January 13, 2006 he received a letter that medical clearance regarding his

[2] As these decisions dated October 20 and 26, 2005 were issued more than one year prior to the date of appellant's appeal to the Board on November 20, 2006, the Board will not address these issues on appeal. 20 C.F.R. § 501.3(d)(2).

emotional condition was required by the employing establishment before he could return to work. Dr. Buenjemia completed a report on January 18, 2006 diagnosing adjustment disorder with depressed mood. He noted that appellant required paperwork to return to work. Dr. Buenjemia noted appellant's history of injury on December 13, 2001 and his statement that work was harassing him. He noted that appellant began to feel more threatened and persecuted by his job in December 2005.

Appellant's attorney informed the Office on June 22, 2006 that appellant claimed total disability from January 12 to May 6, 2006 due to a withdrawal of light-duty assignment. By decision dated July 27, 2006, the Office denied appellant's claim for compensation beginning January 12, 2006 finding that he had failed to submit the necessary medical evidence to establish that his emotional condition was causally related to his December 13, 2001 employment injury or that his disability on that date was otherwise due to his accepted employment injury. The Office noted that there was no evidence that the employing establishment withdrew appellant's light duty, but rather that the employing establishment had an administrative requirement regarding medical documentation of an emotional condition before allowing him to return to work.[3]

LEGAL PRECEDENT -- ISSUES 1 & 2

A recurrence of disability is the 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 which caused the illness. The 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 (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.[4]

Appellant for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provided by preponderance of the reliable probative and substantial medical evidence.[5]

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. 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 hurts too much to work, without objective signs of disability being shown, the

[3] Following the Office's July 27, 2006 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[4] 20 C.F.R. § 10.5(x).

[5] *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[6]

ANALYSIS -- ISSUE 1

Appellant filed a claim for compensation alleging that on July 29, 2005 he was no longer able to perform his light-duty position for eight hours a day. He alleged that he was only capable of working six hours a day. In support of this allegation, appellant submitted several reports from Dr. Chiu, a Board-certified neurosurgeon, regarding his ability to work. On July 27 and August 31, 2005 Dr. Chiu indicated that appellant had increased subjective complaints of back pain. He recommended that appellant reduce his work hours from eight to six hours a day. These reports are not sufficient to establish that appellant was unable to perform his employment duties for eight hours a day. Dr. Chiu did not provide any clear medical rational for appellant's inability to work. He did not describe a change in the nature and extent of appellant's accepted employment-related condition, instead noting that appellant was neurologically unchanged. In essence, Dr. Chiu statements regarding appellant's ability to work only six hours a day consist only of a repetition of his complaints that he hurt too much to work and lacked objective signs of disability. Therefore, he has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[7]

In the December 5, 2005 report, Dr. Chiu attributed appellant's increased low back pain to his work. He stated that appellant's pain was "precipitated and aggravated" by the employment duties. This report also fails to meet appellant's burden of proof as Dr. Chiu did not provide the necessary specifics of which employment duties he felt aggravated appellant's back condition and did not provide any medical reasoning explaining why and how the specific duties aggravated appellant's accepted employment injury such that he was no longer able to work eight hours a day. Without a detailed and rationalized medical report explaining how and why appellant could no longer perform his full-time light-duty job, he has not submitted the necessary medical opinion evidence to meet his burden of proof.

ANALYSIS -- ISSUE 2

Appellant filed a second claim for compensation for the period January 12 to 18, 2006. Dr. Reynolds, a psychiatry resident, submitted a report dated September 1, 2004 noting that appellant had a history of depression with anxiety following his back injury. She diagnosed recurrent major depressive disorder and anxiety disorder. Although Dr. Reynolds attributed appellant's current emotional condition to his accepted employment injury, she did not provide any medical reasoning explaining how and why his back injury resulted in the emotional condition. She also failed to provide any period of disability due to this emotional condition. Dr. Reynolds' report does not prove by a preponderance of the reliable, probative and substantial evidence that appellant is disabled for work as a result of his employment injury.[8]

[6] *Id.*

[7] *Id.*

[8] *Id.*

In support of this claim, appellant submitted medical evidence from Dr. Buenjemia, a psychiatrist resident, dated January 18, 2006 diagnosing adjustment disorder with depressed mood. He attributed this condition to a hostile work environment and job stress escalating in December 2005. These reports do not indicate that appellant's emotional condition was due to his December 13, 2001 employment injury. Dr. Buenjemia instead attributed appellant's emotional condition to additional job exposures. Therefore, appellant has not established by a preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury.[9]

Appellant's attorney alleged that the employing establishment improperly withdrew appellant's light-duty assignment on January 12, 2006 by requiring that he submit additional medical evidence regarding his fitness to work as a result of his emotional condition before returning to work on and after January 12, 2006. He has not shown that the employing establishment withdrew his limited-duty job assignment, denied a request for light duty or otherwise notified appellant that light duty within his restriction was no longer available on or about January 12, 2006. The employing establishment merely requested that he provide fitness-for-duty information regarding his diagnosed emotional condition. It is appellant's failure to provide the requested information which resulted in his failure to work. The Board has held that, when a claimant stops work for reasons unrelated to his accepted employment injury, he has no disability with in the meaning of the Federal Employees Compensation Act.[10]

CONCLUSION

The Board finds that appellant has failed to submit the necessary medical opinion and factual evidence to establish his alleged periods of disability beginning July 29, 2005 and January 12, 2006.

[9] *Id.*

[10] *John W. Normand*, 39 ECAB 1378 (1988). The implementing regulations of the Act define disability as "the incapacity, because of employment injury, to earn the wages the employee was receiving at the time of the injury." 20 C.F.R. § 10.5(f).

ORDER

IT IS HEREBY ORDERED THAT the July 27 and March 30, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 1, 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