United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 07-792**
	)	**Issued: October 11, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Albany, NY, Employer	)	

Appearances:
Appellant, pro se
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 January 30, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 9, 2007 with respect to disability as of June 17, 2000. 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 established an employment-related disability commencing June 17, 2000.

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated June 9, 2005, the Board remanded the case for further development of the medical evidence.[1] As the Board noted, appellant had been working full time in a light-duty position and on June 17, 2000, she began to

[1] Docket No. 04-134 (issued June 9, 2005).

work four hours per day. The medical evidence from Dr. Rudolph Buckley was sufficient to require further development as to whether appellant sustained a recurrence of disability. The history of the case is provided in the Board's prior decision and is incorporated herein by reference.

In a report dated July 25, 2005, Dr. Buckley provided a history of appellant's job duties, noting that from October 1999 to June 17, 2000 she worked as a window clerk as well as a manual letter operator and sorter. He stated that this job required repetitive flexion and extension, and this job "led to aggravation of the originally accepted chronic cervical strain and degenerative disc disease. The wear and tear of the disc, ligaments and facet joints have caused increased pain therefore causing her decreased range of motion and inflammation." Dr. Buckley noted that this was seen objectively on x-rays. He stated, "Therefore, to allow this individual to continue to work, we recommended that she go back to four hours a day instead of the eight hours a day that we had tried with the second job that we had placed her in, to try to decrease the amount of flexion and extension in her cervical spine." Dr. Buckley indicated that he placed appellant on a 20-pound lifting restriction to slow the progression of the degenerative disc disease.

The medical records were referred to an Office medical adviser for review. In response to a question as to whether the July 25, 2005 report showed a worsening of appellant's condition around June 2000, the medical adviser stated, "Yes, Dr. Buckley indicated a recurrence of disability on June 17, 2000" and noted x-ray findings. In response to a question as to whether the report supported a reduction to four hours per day of work, the medical adviser stated, "No, the report only indicates a subjective desire to work [fewer] hours not hard physical evidence." The medical adviser indicated that the reduction appeared to be therapeutic in nature.

By decision dated September 16, 2005, the Office denied the claim for a recurrence of disability commencing June 17, 2000. The Office stated that degenerative disc disease was not an accepted condition and therefore Dr. Buckley's report was based on an incorrect premise. The Office also stated that the reduction in hours was therapeutic and the fear of future injury is not compensable.

Appellant requested a review of the written record. By decision dated February 14, 2006, an Office hearing representative set aside the September 16, 2005 decision. The hearing representative indicated that aggravation of cervical degenerative disc disease had been accepted by the Office, and therefore the information provided to Dr. Buckley was inaccurate. According to the hearing representative, it was unclear whether Dr. Buckley believed that appellant "was physically unable to perform her work duties for eight hours per day or whether he reduced her work hours merely as a prophylactic measure to alleviate the claimant's underlying condition." The case was remanded for further development.

The Office referred appellant to Dr. Richard Mutty, a Board-certified orthopedic surgeon. In a report dated May 1, 2006, Dr. Mutty provided a history and results on examination. He opined that work duties caused a permanent aggravation of degenerative cervical disc disease. Dr. Mutty was asked whether appellant had been physically unable to work eight hours or whether her hours were reduced "as a prophylactic measure to alleviate her underlying condition." Dr. Mutty responded, "The issue of decreasing the work hours from eight hours a

day to four hours a day was an attempt to try to limit the factors, which predisposed her to symptoms of neck pain, so on that basis, this was based on what a reasonable physician would normally recommend and was meant as a way to try and control the symptoms."

By decision dated May 26, 2006, the Office determined that the evidence was not sufficient to establish a recurrence of disability commencing June 17, 2000. The Office stated that Dr. Mutty's report indicated that the reduction in hours was due to an attempt to control pain symptoms, which is equivalent to reducing hours for prophylactic measures and fear of future injury is not an acceptable basis for a recurrence.

Appellant requested a hearing, which was held on October 23, 2006. By decision dated January 9, 2007, the hearing representative affirmed the May 26, 2006 decision. The hearing representative stated that there was no rationalized medical evidence in support of appellant's contention that her disability on or after June 17, 2000 was causally related to the employment injuries and Dr. Mutty indicated that appellant was capable of performing her modified duties.

LEGAL PRECEDENT

When the Office refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, the Office should secure an appropriate report on the relevant issues.[2]

ANALYSIS

As noted above, on a prior appeal the Board remanded the case for a supplemental report from Dr. Buckley. The Office found that Dr. Buckley's supplemental report was not based on an accurate background, as the statement of accepted facts did not identify the accepted employment-related conditions. Appellant was then referred to Dr. Mutty.

It appears that the Office interpreted Dr. Mutty's report as finding that any work restrictions were "prophylactic" in nature, that is, were designed to prevent a future injury. The Board has recognized the general principle that the fear of a future injury is not compensable under the Act.[3] In the context of an accepted aggravation, the Board has also held that, when an employment-related aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.[4] Dr. Mutty's report cannot reasonably be interpreted as finding that appellant had a temporary aggravation that resolved. He clearly stated that work duties had caused a permanent aggravation.

There remains, however, the question of whether a permanent aggravation caused partial disability for the light-duty job as of June 17, 2000. If there was no change in appellant's condition and the reduction in hours was an attempt to prevent a future worsening of the

[2] *See Robert Kirby*, 51 ECAB 474, 476 (2000); *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

[3] *See, e.g., Manuel Gill*, 52 ECAB 282, 286 (2001).

[4] *See Mary A. Moultry*, 48 ECAB 566 (1997); *Ann E. Kernander*, 37 ECAB 305, 310 (1986).

aggravation, then this would fall under the general principle of a fear of future injury. If, however, the aggravation had progressed to the point where appellant could no longer perform the light-duty job full time, then there is compensable disability. The Office attempted to draw this distinction in the question posed to Dr. Mutty. The Board notes that the Office did not specifically identify June 17, 2000 as the relevant time period, nor did Dr. Mutty specifically discuss this date. Moreover, Dr. Mutty did not provide a rationalized medical opinion on the issue. He referred generally to the work restrictions as reasonable, but he does not clearly explain whether he believed the employment-related aggravation prevented appellant from working the light-duty position full time as of June 17, 2000.

Since the Office referred appellant to Dr. Mutty, it does have an obligation to secure a probative medical opinion on the issue. The case will be remanded for a supplemental report from the second opinion examiner. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The second opinion physician did not provide a rationalized medical opinion on the issue presented and the case will be remanded to the Office.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 9, 2007 and May 26, 2006 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 11, 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