United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 10-1575**
	)	**Issued: April 4, 2011**
U.S. POSTAL SERVICE, POST OFFICE, East Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 25, 2010 appellant filed an appeal from a December 23, 2009 decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] and 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 met her burden of proof to establish that she was disabled for the period December 17, 2008 to March 11, 2009.

FACTUAL HISTORY

On August 3, 1994 appellant, then a 31-year-old letter carrier, filed an occupational disease claim alleging that work duties caused neck and wrist conditions. The claim was accepted for cervical radiculopathy and left carpal tunnel syndrome. Appellant underwent a left carpal tunnel release in May 1996. She thereafter worked at modified duty. On March 26, 1998

[1] 5 U.S.C. §§ 8101-8193.

appellant was granted a schedule award for a 13 percent permanent impairment of the left upper extremity. On February 12, 2002 awarded an additional nine percent.[2] Appellant accepted a modified-duty assignment on November 15, 2007. The duties were administrative and included answering the telephone, computer input, preparing reports and audits and giving service talks. The physical requirements were sitting with fine manipulation for five hours daily, walking for two and driving for one hour each day.

In a work capacity evaluation dated November 7, 2008, Dr. Jeffrey C. Kirschman, an attending physician Board-certified in family and occupational medicine, advised that appellant could work eight hours a day with restrictions of four hours walking and lifting; two hours standing, reaching, operating a motor vehicle at work, and repetitive wrist movements; and one hour of reaching above the shoulder, twisting, bending, stooping, pushing and pulling; with a 10-pound lifting restriction. A November 10, 2008 modified job offer included duties of casing mail for two hours; picking up/delivering express mail for two hours; providing office assistance such as answering telephones and lobby sweeping for six to eight hours, with restrictions of simple grasping for up to six hours, reaching above shoulder for up to two hours and driving for up to two hours. Appellant began these new job duties on November 11, 2008.

The Office referred appellant to Dr. Karl V. Metz, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a November 14, 2008 report, Dr. Metz reviewed the history of injury and noted appellant's complaints of upper neck and back pain. He performed a physical examination and found that appellant did not have residuals of the accepted left carpal tunnel syndrome and that the claim for cervical radiculopathy was not supported by objective studies. Dr. Metz concluded that appellant could not return to a letter carrier position but could work eight hours a day with restrictions of two to three hours of sitting, standing, and lifting; four hours of walking; two hours of reaching, reaching above the shoulder, twisting, bending, stooping, repetitive movements of the wrists and elbows, pushing and pulling; and one hour of squatting and kneeling, with no operating a motor vehicle at work and a 20-to 30-pound weight restriction of pushing and pulling, and a 10-pound restriction on lifting.

In December 17, 2008 reports, Dr. Kirschman reviewed his examinations of appellant beginning March 18, 2008 and noted moderate tenderness in the posterior neck and paraspinal region and mild hand tenderness. Appellant had been treated for a work-related neck condition since 1994 with progressively worsening neck pain, radiating down the upper extremities with upper extremity weakness, especially on the left. Dr. Kirschman advised that appellant could work full duty because of the multiple interventions such as physical therapy, pain medications and a transcutaneous electrical nerve stimulator (TENS) unit, and that carrying activities involving walking or casing activities involving the use of arms at or above shoulder level caused problems. He advised that over the last several months appellant had also developed ongoing and progressive mid-to-low back pain and spasm, and that her congenital thoracolumbar scoliosis and degenerative facet arthropathy, combined with her poor response to conservative measures, contributed to her difficulty in performing work duties. Dr. Kirschman diagnosed left

[2] Appellant filed additional schedule award claims on May 9, 2003 and August 15, 2006 that were denied by the Office in December 9, 2003 and October 11, 2006 decisions, respectively. By decision dated October 16, 2008, the Office denied her claim for disability compensation for the period May 12 through 14, 2008. Appellant did not file an appeal with the Board of these decisions.

carpal tunnel syndrome, cervical radiculopathy, brachial neuritis, lumbar degenerative disc disease, lumbar facet arthropathy, congenital thoracolumbar scoliosis, and thoracic facet arthropathy. Dr. Kirschman advised that appellant was unable to work in any capacity due to her left upper extremity condition. On February 20, 2009 he reviewed Dr. Metz's report and disagreed with his conclusions. Dr. Kirschman advised that appellant was totally disabled from all work due to weakness in the left upper extremity that required increasing intervention. By report dated March 3, 2009, he noted that her condition was unchanged.

Appellant filed claims for compensation for the period December 17, 2008 to March 27, 2009. She retired on disability effective March 12, 2009.

By decision dated June 4, 2009, the Office denied appellant's claim for compensation from December 17, 2008 to March 11, 2009. It found that the medical evidence was insufficient to establish that she was disabled for work due to the accepted conditions.

On June 15, 2009 appellant, through her attorney, requested a telephone hearing.

The Office determined that a conflict in medical opinion arose between Dr. Kirschman and Dr. Metz regarding objective findings and the need for permanent work restrictions. On June 18, 2009 it referred appellant to Dr. Robert C. Corn, a Board-certified orthopedist, for an impartial medical evaluation. Appellant submitted additional reports from Dr. Kirschman who provided findings on examination. Her condition remained unchanged.

In a July 29, 2009 report, Dr. Corn noted his review of the work injury and medical record. He reported that appellant had worked in a modified capacity for many years and stopped work six months prior because, by her report, the employer lifted her restrictions. Dr. Corn described appellant's ongoing symptoms of pain, especially with repetitive use of the left arm, even with activities of daily living. Examination of the cervical spine demonstrated no spasm, dysmetria, or muscular guarding, with full flexion and hyperextension. Right lateral rotation was normal and left lateral rotation was diminished. Examination of the left elbow was normal. Tinel's sign was positive and Phalen's mildly positive. Sensory examination was diminished in the thumb, index and middle finger and the lateral aspect of the left ring finger. Dr. Corn diagnosed mild brachial plexus irritation and mildly positive left carpal tunnel syndrome with both objective and subjective neurological findings. He advised that appellant could return to full-time modified duty with a permanent lifting restriction of 10 pounds. Sitting continuously was restricted to three hours per day if driving; kneeling intermittently to one hour per day and no repetitive reaching over the shoulder level.

At the October 8, 2009 hearing, appellant testified that she began work at a new facility on November 11, 2008 and was told that she had to work her regular job duties. On November 13, 2008 she sorted flats and cased mail for four hours but this activity made her painful condition worse. Appellant filed a new claim, adjudicated under file number xxxxxx380. Following her work activities on November 13, 2008, she had no job activities and sat in an office and read. Dr. Kirschman took appellant off work because her restrictions were not being honored. In correspondence dated October 28, 2009, appellant advised that Dr. Kirschman took her off work because she was injured while performing duties outside her physical restrictions.

By decision dated December 23, 2009, an Office hearing representative found that appellant did not establish that she was totally disabled December 17, 2008 to March 11, 2009 due to the accepted 1994 employment injury. The hearing representative found that, when appellant returned to work in November 2008, the position was a modified assignment and not full duties, and that when she was unable to perform the duties of the position, she filed a new claim, which constituted an intervening injury. The hearing representative advised that appellant should pursue any claim for wage loss under the November 2008 injury, adjudicated under file number xxxxxx380.

LEGAL PRECEDENT

Under the Act, the term "disability" is defined as incapacity, because of 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 the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act,[4] and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[5] Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.[6]

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[7] Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.[8]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[9] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed

[3] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[4] *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

[5] *Donald E. Ewals*, 51 ECAB 428 (2000).

[6] *Tammy L. Medley*, 55 ECAB 182 (2003); *see Donald E. Ewals, id.*

[7] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[8] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[9] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

condition and the specific employment factors identified by the claimant.[10] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[11]

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that she was totally disabled for the period December 17, 2008 to March 11, 2009 due to the accepted 1994 employment injury. When she stopped work on December 17, 2008, she was performing a modified position.

Dr. Kirschman, an attending family physician, provided a work capacity evaluation on November 7, 2008, and the modified position offered appellant on November 10, 2008 complied with these restrictions. Moreover, in a work capacity evaluation dated November 14, 2008, Dr. Metz, an Office referral orthopedist, also provided restrictions that comported with the modified position appellant was performing in November 2008, with the exception that he restricted her driving. Appellant, however, testified that she had no job duties outside the employing establishment facility.

While Dr. Kirschman subsequently advised in reports dated December 17, 2008 and February 20, 2009 that appellant was totally disabled from all work due to weakness in the left upper extremity that required increasing intervention, the physician did not demonstrate any specific knowledge of the requirements of the modified position appellant was performing in November-December 2008 or provide a rationalized explanation as to why she could not perform limited-duty work. The Board has long held that medical conclusions unsupported by rationale are of diminished probative value and insufficient to establish causal relationship.[12] Dr. Kirschman's opinion is therefore insufficient to establish that appellant was totally disabled for this period. Furthermore, he advised on December 17, 2008 that over the last several months appellant had developed ongoing and progressive mid-to-low back pain and spasm that contributed to her difficulty in performing work duties. A lower back condition has not been accepted as employment-related under the instant claim. Dr. Kirschman also diagnosed brachial neuritis, lumbar degenerative disc disease, lumbar facet arthropathy, congenital thoracolumbar scoliosis, and thoracic facet arthropathy, also not accepted as employment related. As there is no rationalized medical evidence contemporaneous with the period of claimed disability, appellant failed to establish entitlement to wage-loss compensation for the period December 17, 2008 to March 11, 2009.[13]

Appellant testified at the October 8, 2009 hearing that she began work at a new facility on November 11, 2008 and that on November 13, 2008 she sorted flats and cased mail for four

[10] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[11] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[12] *See Albert C. Brown*, 52 ECAB 152 (2000).

[13] *See Tammy L. Medley*, *supra* note 6.

hours and that this activity made her painful condition worse. She then filed a new claim, and stated that she performed no work activities between November 13 and December 17, 2008, merely sat and read at work. In correspondence dated October 28, 2009, appellant reiterated her claim that she was reinjured performing duties outside her restrictions. 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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[14] The record supports that appellant did not suffer a spontaneous material change in her employment-related condition on November 13, 2008 but rather sustained a new injury caused by the job duties she was performing that day. Appellant has filed a separate claim for this injury, adjudicated under file number xxxxxx380. Thus, any disability claimed after that time should be filed under file number xxxxxx380.

Lastly, the Board notes that Dr. Corn did not serve as an impartial specialist with regard to the period of disability claimed in this case.[15] The Office did not refer appellant to Dr. Corn until June 18, 2009 and he was asked to resolve the conflict regarding ongoing accepted objective findings, and the need for permanent work restrictions. Further, the report did not provide an opinion as to whether appellant was totally disabled for the period in question. Accordingly, his report is of little probative value as to disability for the specific time period.

For the foregoing reasons, the Board finds that appellant did not meet her burden of proof to establish that she was entitled to wage-loss compensation for the period December 17, 2008 to March 11, 2009.

CONCLUSION

The Board finds that appellant did not establish that she was disabled from December 17, 2008 to March 11, 2009 due to her 1994 claim accepted for left carpal tunnel syndrome and cervical radiculopathy.

[14] 20 C.F.R. § 10.5(x); *see B.B.*, Docket No. 09-1858 (issued April 16, 2010).

[15] 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 December 23, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 4, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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