U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LYLE E. DAYBERRY and U.S. POSTAL SERVICE,
SEATTLE BULK MAIL CENTER, Federal Way, Wash.

Docket No. 95-3065; Submitted on the Record;
Issued March 2, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established entitlement to continuation of pay for the period of March 16 through 28, 1995.

On March 16, 1995 appellant, then a 47-year-old postal worker, filed a claim for traumatic injury alleging that he strained or pulled a muscle, limiting his neck rotation, on March 15, 1995 while in the course of his federal employment. Appellant stopped working on March 16, 1995 and returned on March 29, 1995.

Sandra Verlander, a physician's assistant, treated appellant on March 15, 1995 and stated that he could return on March 20, 1995. She diagnosed cervical strain. She completed a duty status report on March 21, 1995 stating that appellant was not able to perform his regular work. The limitations given on the report were subsequently changed by a person signing his or her name illegibly who indicated that appellant was incapable of performing any work.

By letter dated March 16, 1995, appellant indicated that while at work on March 15, 1995 he had to remove jammed parcels from machinery. Subsequently, he informed his supervisor that he could not move his head due to neck pain. He stated that he finished his work and went home where the pain got worse and he had to seek medical treatment.

Ms. Verlander completed an attending physician's report on March 22, 1995 in which she diagnosed cervical strain and found that the condition was caused or aggravated by appellant's employment. She stated that appellant would be totally disabled from March 15, 1995 until an unknown date. Ms. Verlander's report was countersigned by an individual with an illegible signature.

A March 24, 1995 statement from the employing establishment indicated that appellant drove to and attended carpentry classes on March 15 through 17, 1995 and on March 20, 1995. The employing establishment indicated that appellant's carpentry instructor advised that

appellant did not do heavy physical work, but helped out as much as he could without pain. It further indicated that appellant said he could sit, walk and drive. The employing establishment submitted statements from three supervisors supporting its assertions that appellant attended carpentry classes, that he could sit, walk and drive and that he was told to provide a physician's opinion establishing total disability.

In a March 27, 1995 letter, the employing establishment restated that appellant's activities of driving and attending carpentry classes were inconsistent with the diagnosis of total disability.

In a report dated March 28, 1995, Ms. Verlander again indicated that appellant was totally disabled from March 15 through 28, 1995. She again diagnosed cervical strain. Dr. M. Kozakowski, an osteopath, signed his name below Ms. Verlander's.

By letter dated March 29, 1995, the Office gave appellant 20 days to submit additional medical evidence, including a physician's opinion, supported by medical rationale, describing the causal relationship between appellant's disability and the injury reported.

On April 18, 1995 the Office accepted the claim for cervical strain, however, it stated that continuation of pay was being controverted because of evidence that appellant attended school from March 15 through 17, 1995 and on March 20, 1995. The Office noted that appellant was diagnosed as temporarily totally disabled from March 15 through 28, 1995. Appellant was given 30 days to respond prior to the Office rendering a decision regarding continuation of pay entitlement.

In an April 29, 1995 letter, appellant stated that he did not know the exact prohibitions he was required to uphold until March 21, 1995 at 3:00 p.m. He said when he found out he was restricted, he adhered to his restrictions rigidly. Appellant stated that he was not disabled on March 15, 1995 until he was injured. He stated that he thought it was fine to attend class, which involved sitting and standing, until March 21, 1995 at 3:00 p.m., when he learned of his physical restrictions.

In a decision dated July 6, 1995, the Office determined that appellant was not entitled to continuation of pay during his absence from work for the period of March 16 through 28, 1995. The Office noted that Ms. Verlander did not initially report a need for appellant to miss any time from work secondary to the injury and that she provided an equivocal and inconsistent opinion on March 22, 1995 by indicating that appellant would be required to miss work from "[March 15, 1995] to ?" The Office further indicated that Ms. Verlander was not a "physician" pursuant to 5 U.S.C. § 8101(2), and that her March 22, 1995 report was not verifiably countersigned by a physician as the signature below hers on the report was illegible. The Office noted that appellant admitted he was not restricted until March 21, 1995. The Office noted that Ms. Verlander's March 21, 1995 duty status report was also illegibly countersigned. It further stated that she provided no explanation for changing the physical restrictions on the form and failed to indicate when the restrictions were changed. The Office further indicated that appellant's attendance at carpentry school contradicted the physical limitations expressed by Ms. Verlander.

The Board finds that this case is not in posture for a decision and must be remanded for further evidentiary development.

Section 8118 of the Federal Employees' Compensation Act provides for the continuation of pay of an employee who has properly filed a claim for a period of wage loss due to traumatic injury.[1] The regulations implementing the statute applicable to this case state that an employee who sustains a disabling, job-related traumatic injury is entitled to the continuation of his or her regular pay for a period not to exceed 45 days[2] and that the 45 days starts at the beginning of the first full shift during which the disability begins, provided such disability began within 90 days of the occurrence of the injury.[3]

As used in the Act, the term "disability" means incapacity, because of employment injury, to earn wages that the employee was receiving at the time of the injury.[4] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[5] An employee who has had a physical impairment causally related to his or her federal employment, 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 and is not entitled to compensation for loss of wage-earning capacity.[6] When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing his or her employment, he or she is entitled to compensation for any loss of wage-earning capacity resulting from such capacity.[7]

In the instant case, Ms. Verlander, a physician's assistant, submitted a March 22, 1995 report, indicating that appellant suffered a cervical strain caused or aggravated by his employment, and a March 28, 1995 report establishing total disability from March 15 through 28, 1995. The report of a physician's assistant, however, is entitled to no weight because physician's assistants are not physicians pursuant to section 8101(2) of the Act.[8] Ms. Verlander's March 28, 1995 report was countersigned by Dr. Kozakowski, an osteopath and, therefore, constitutes medical evidence pursuant to section 8101(2) of the Act which the Office must consider. In contrast, the March 22, 1995 report indicating a diagnosis of cervical strain and a causal relationship between appellant's injury and his employment, however, was illegibly countersigned by an unknown individual. This report would constitute medical evidence supporting appellant's claim if the report was countersigned by a physician. Proceedings under

[1] 5 U.S.C. § 8118.

[2] 20 C.F.R. § 10.201(a), *revised at* 52 FR 10515, effective June 1, 1987.

[3] *Id.* § 10.201(b), *revised at* 52 FR 10516, effective June 1, 1987.

[4] *Frazier V. Nichol*, 37 ECAB 528 (1986).

[5] *See Fred Foster*, 1 ECAB 21 at 24-25.

[6] *See Gary L. Loser*, 38 ECAB 673 (1987).

[7] *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

[8] 5 U.S.C. § 8101(2).

the Act[9] are not adversarial in nature and the Office shares responsibility in the development of evidence and has an obligation to see that justice is done.[10] In this case, the Office must determine whether the March 22, 1995 report was signed by a physician and, if so, weigh this additional medical evidence to determine whether appellant has met his burden of proof. Accordingly, the Board remands this case to the Office to clarify this evidence.

The July 6, 1995 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings in accordance with the decision.

Dated, Washington, D.C.
March 2, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[9] 5 U.S.C. §§ 8101-8193.

[10] *John J. Carlone*, 41 ECAB 354 (1989).