U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERI L. VILLERS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, MILWAUKEE OFFICE, Milwaukee, Wis.

Docket No. 97-1223; Submitted on the Record;
Issued March 11, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established total disability for work for the period December 8 to 22, 1992 causally related to an accepted aggravation of right cubital tunnel syndrome; (2) whether appellant established total disability for the period April 12 to December 3, 1994 causally related to the accepted aggravation of right cubital tunnel syndrome, requiring ulnar nerve transposition surgery on January 18, 1993; and (3) whether the Office of Workers' Compensation Programs properly modified appellant's date of maximum medical improvement for schedule award purposes from August 9, 1993 to June 1, 1994.

The procedural history of the case is as follows. On January 7, 1993 appellant, then a 25-year-old timekeeper, filed a notice of occupational disease for cubital tunnel syndrome sustained on or before January 1, 1991, as well as a claim for recurrence of disability. Appellant also mentioned that she was depressed. She stopped work on December 4, 1992. The Office accepted that appellant sustained an aggravation of right cubital tunnel syndrome on or before January 1, 1991, requiring right anterior submuscular transposition of the ulnar nerve on January 18, 1993.[1]

Appellant claimed that she was totally disabled for work from December 8 to 22, 1992. The Office denied this claim by decision dated January 31, 1996 on the grounds that appellant submitted insufficient medical evidence to substantiate total disability for work for that period causally related to the accepted condition. Appellant then claimed total disability for work for the period April 12 to December 3, 1994. By decision dated February 23, 1995, the Office

[1] The record indicates that appellant had a concurrent condition of right carpal tunnel syndrome with surgical release in October 1989, released from treatment at maximum medical improvement on April 16, 1991 by Dr. David Olson, an attending orthopedist. An April 23, 1992 nerve conduction velocity study showed improvement in right median nerve function from September 1990, within normal limits. Dr. Robert M. Stern, an attending orthopedic surgeon, diagnosed "myofascial pain syndrome that appears to be related to her work activities."

denied appellant's claim for total disability from April 12 to December 3, 1994, again on the grounds of insufficient medical evidence.

Appellant claimed a schedule award on June 7, 1994, accepted by the Office by decision dated March 25, 1995, for a 10 percent permanent impairment of the right upper extremity, with the period of the award running from August 9, 1993 to March 15, 1994. Partial disability benefits previously paid during this period were converted to the schedule award.[2] Appellant disagreed with all three decisions, and asserted that she did not reach maximum medical improvement until June 1994. She requested an oral hearing, held June 19, 1996.

By decision dated and finalized September 16, 1996, the Office affirmed the February 23, 1995 and January 31, 1996 decisions, but modified the March 21, 1995 schedule award, finding that the medical record substantiated June 1, 1994 as the date of maximum medical improvement.[3] Appellant disagreed, again asserting that the date of maximum improvement should be changed to September 1994. By decision dated December 11, 1996, the Office affirmed the September 16, 1996 modification, finding that the date of maximum medical improvement was June 1, 1994.

Appellant then requested reconsideration of the decisions concerning the periods of alleged total disability. By decision dated January 21, 1997, the Office denied modification on the grounds that the medical evidence was insufficient to demonstrate total disability related to accepted employment factors from December 8 to 22, 1992 or April 12 to December 3, 1994.

Regarding the first issue, the Board finds that appellant has not established that she was totally disabled for work due to an accepted aggravation of right cubital tunnel syndrome from December 8 to 22, 1992.

When an employee claims a period of disability causally related to an accepted employment injury, he or she has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed disability for work is causally related to the accepted injury. As part of this burden, appellant must submit rationalized medical evidence based on a complete and accurate factual and medical background showing causal relationship.[4] An award of compensation may not be made on the basis of surmise, conjecture, or speculation or on appellant's unsupported belief of causal relation.[5] In this case, appellant has

[2] The award was also based on a November 11, 1994 report from Dr. Janet Elliot, an Office medical adviser, who reviewed the medical record, including the reports of Drs. Klopfstein and McCabe. According to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, page 54, Table 15, the ulnar nerve is 40 percent; referring to Table 11, page 48 for subjective complaints only, a maximum of 25 percent. Multiplying 25 percent times 40 percent results in a 10 percent permanent impairment of the right upper extremity.

[3] The award was paid by a lump sum check for $4,175.83, equivalent to $8,158.80 minus the $3,982.97 previously paid on March 3, 1995.

[4] *See Armando Colon*, 41 ECAB 563 (1990).

[5] *Ausberto Guzman*, 25 ECAB 362 (1974).

the burden of submitting medical evidence establishing total disability for work for the period December 8 to 22, 1992. The Board finds that appellant did not submit such evidence.

In support of her claim, appellant submitted reports from Dr. Ronald H. Stark, an attending hand surgeon who performed the January 18, 1993 ulnar nerve transposition. In a November 24, 1992 report, Dr. Stark diagnosed right cubital tunnel syndrome with marked interosseous muscle weakness and early signs of atrophy," "[p]ossible secondary residual carpal tunnel syndrome or pronator teres syndrome," and "[p]ossible myofascial pain syndrome." He noted appellant's job duties of typing, filing and writing, could have aggravated or accelerated her condition. Other than recommending that appellant avoid putting pressure on her right elbow, Dr. Stark did not indicate that appellant was unable to perform her job duties or that she was totally disabled for work.[6] In a March 5, 1993 letter, he stated that appellant would be disabled from clerical work for 8 to 14 weeks after the January 18, 1993 surgery,[7] but did not comment on appellant's condition from December 8 to 22, 1992 prior to surgery. Dr. Stark submitted progress notes through June 1, 1993, noting continued myofascial pain in both upper extremities, and light-duty restrictions until June 15, 1993. These notes do not address whether appellant was totally disabled for work from December 8 to 22, 1992.

Appellant also asserted, in an undated letter, that she was held off work from December 8 to 22, 1992 by Ramona Powers, a social worker, who was counseling appellant for depression. The Office did not accept an emotional condition in this case. Also, as Ms. Powers does not qualify as a physician under the Federal Employees' Compensation Act, her reports do not constitute medical evidence.[8]

Thus, appellant did not submit sufficient medical evidence to establish that she was totally disabled for work from December 8 to 22, 1992 causally related to the accepted aggravation of right cubital tunnel syndrome.

Regarding the second issue, the Board finds that appellant had not established that she was totally disabled for work for the period April 12 to December 3, 1994 causally related to the accepted condition.

Appellant contends that she should have received compensation for total disability for the claimed period, whereas the Office paid only for medically substantiated periods of wage loss.

[6] Dr. Jennifer N. Klopfstein, an attending anesthesiologist, performed December 15, 1992 electromyography and nerve conduction velocity, showing "no evidence of any compression neuropathy at the level of the wrist or level of the elbow. The multiphasics that were seen in the abductor quinti indicates there may have been some axonal degeneration with sprouting back to muscle fibers."

[7] Appellant returned to work four hours per day as of March 29, 1993, and to full-time regular duty on June 21, 1993, as released by Dr. Klopfstein.

[8] 5 U.S.C. § 8101(2).

The Office paid appellant four hours per day in wage-loss compensation from August 9, 1993 to March 29, 1994.[9] Based on appellant's participation in a work-hardening "power" program prescribed by Dr. Klopfstein, the Office paid six hours per day wage-loss compensation for the period March 30 to April 2, 1994, and seven hours per day from April 3 to May 2, 1994.[10] From May 3 to December 3, 1994, the Office paid appellant 4 hours per day in wage-loss compensation. Appellant returned to work in January 1995.

There is considerable evidence of record that appellant did not work from April 12 to December 3, 1994 due to personal reasons, including attending paralegal studies classes, rather than a physician's opinion of total disability. Dr. Klopfstein noted that appellant telephoned on August 9, 1993 "stating that she was able to work only four hours a day due to pain," and had taken "herself off from work in a leave of absence as of October 8, 1993 until April 1994." Dr. Klopfstein then "wrote a return to work for [four] hours a day" at appellant's request. The employing establishment granted four hours per day leave without pay (LWOP) through April 7, 1994, with a possible six-month extension.[11] Appellant then enrolled in paralegal and business studies classes at a technical college. In a November 29, 1994 report, Dr. Gerald R. Harned, an attending orthopedic surgeon, released appellant to work without restrictions as of December 5, 1994, finding that the right upper extremity was "grossly unremarkable." Dr. Harned noted that appellant then telephoned, requesting that her return to work date be changed to January 3, 1995 so that she could finish paralegal studies classes "without financial penalty," and not due to any medical disability for work.[12]

Also, the medical record does not contain sufficient, rationalized medical evidence establishing that appellant was totally disabled for work from April 12 to December 3, 1994 due to the accepted aggravation of right cubital tunnel syndrome and subsequent surgery.

Dr. Klopfstein submitted several reports from March 17 to November 1, 1994 diagnosing a myofascial pain syndrome without objective findings.[13] In an April 21, 1994 report, Dr. Klopfstein indicated that appellant should not return to work as her symptoms were exacerbated by the power program, but did not set forth any objective findings of disability.

[9] In a July 28, 1993 report, Dr. Klopfstein diagnosed myofascial pain syndrome, and on August 9, 1993 limited appellant to working 4 hours per day, with activities limited to 30 minutes at one time. Dr. Klopfstein submitted reports through January 18, 1994 diagnosing myofascial pain syndrome and restricting appellant to four hours work per day due to increased complaints of pain in both her arms.

[10] In a May 6, 1994 letter, the Office advised appellant that there would be no further compensation after May 2, 1994 until Dr. Klopfstein submitted objective findings of disability due to the accepted conditions.

[11] In a December 2, 1993 letter, Mr. James Polcyn, a claims examiner, noted that appellant did not work from October 3 to November 13, 1993, but that the medical record indicated she was capable of working four hours per day for that period. Mr. Polcyn advised that further rationalized medical evidence was needed to establish entitlement to additional compensation.

[12] In a March 24, 1995 report, Dr. Harned noted pain in the right elbow and left hand, a negative Tinel's on the ulnar groove, no atrophy of the forearm or hand musculature, and good grip strength.

[13] March 17, 1994 repeat nerve conduction velocity studies showed no compression neuropathy at either the wrist or elbow on the right, obviating the need for EMG studies.

Also, Dr. Klopfstein noted that appellant was able to attend "three classes two nights per week" at the technical college, but needed "someone to take her notes because she cannot sit and take notes for the three hours classes that she is in." In May 26, 1994 reports, she stated that appellant had a permanent disability solely due to bilateral upper extremity pain. The Board has held that complaints of pain, in the absence of objective findings, are not a basis for the payment of compensation.[14] In a November 1, 1994 report, Dr. Klopfstein restricted appellant to 2 minutes of typing then a rest period, and 35 to 40 minutes filing during an 8-hour day, indicating that appellant was capable of performing light duty and not totally disabled for work.[15]

Dr. Harned, in a March 11, 1994 report, noted objective findings of the right upper extremity, including decreased grip strength, decreased sensation of the thumb and fingers, a "significantly positive Phalen['s] test producing median neuropathy on the right and a fairly significant Tinel['s] positivity with tapping of the ulnar groove." Dr. Harned stated an impression of "[r]ecurrent carpal tunnel syndrome" and "[t]ardy ulnar nerve palsy." He stated appellant's history and symptoms appeared legitimate, and that surgical reexploration of the carpal tunnel and ulnar nerve might be worthwhile. Although Dr. Harned found objective abnormalities on examination, he did not state that appellant was totally disabled for work for any interval from April 12 to December 3, 1994 due to those findings.

Dr. Robert W. McCabe, a Board-certified orthopedic surgeon and second opinion physician, submitted September 20 and October 6, 1994 reports finding appellant capable of full-time employment with "common sense restrictions against overuse injuries." Dr. McCabe diagnosed status post surgery for ulnar nerve entrapment without functional deficit in the right arm, and neurotropic right arm pain due to an unknown cause. He commented that appellant's subjective complaints were out of proportion to objective findings, but that appellant did have greater than a seven percent permanent impairment of the right upper extremity. Dr. McCabe noted "no evidence of a severe or hidden condition that render[ed] her unable to work."

Thus, there is insufficient medical evidence indicating that appellant was totally disabled for work for any interval from April 12 to December 3, 1994.

Regarding the third issue, the Board finds that the Office properly found that the date of maximum medical improvement was June 1, 1994.

[14] *John L. Clark*, 32 ECAB 1618 (1981).

[15] In a November 22, 1994 letter, the Office advised appellant that she would receive four hours wage-loss compensation per day for the period October 2 to November 12, 1994 and continuing, but that further medical evidence supporting total disability would be required before wage-loss compensation for total disability could be authorized.

Section 8107 of the Federal Employees' Compensation Act[16] and section 10.304 of the implementing regulations[17] provide that schedule awards are payable for permanent impairment of specified body members, functions or organs, but do not specify how to determine the percentage of impairment. Therefore, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as a standard for determining the percentage of impairment and the Board has concurred in such adoptions.[18] The preliminary step in assessing the percentage of permanent impairment is the medical determination that maximum medical improvement has been reached, such that any remaining deficit would be considered as permanent.[19]

In a June 13, 1994 form report, Dr. Klopfstein, an attending anesthesiologist and pain specialist, stated that appellant had reached maximum medical improvement as of June 1994, and assessed a 5 percent impairment of the right upper extremity due to wrist pain, and 5 percent due to elbow pain, equaling a 10 percent impairment of the right upper extremity.[20]

Appellant contends that she reached maximum medical improvement in September 1994, as Dr. McCabe mentioned in a September 20, 1994 report that appellant had greater than a seven percent permanent impairment of the right arm. However, Dr. McCabe noted and did not dispute Dr. Klopfstein's finding of maximum medical improvement as of June 1994. Dr. Klopfstein's assessment of June 1994 as the date of maximum medical improvement is not rebutted by persuasive medical evidence asserting a later date. Thus, the Office's September 16, 1996 modification, affirmed by December 11, 1996 decision was proper.

[16] 5 U.S.C. § 8107.

[17] 20 C.F.R. § 10.304.

[18] *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

[19] 20 C.F.R. § 10.5(a)(19).

[20] In a June 28, 1994 letter, the Office advised appellant that effective May 3, 1994, her compensation would be reduced to four hours per day, "based on medical information from Dr. Klopfstein which indicates" appellant was no longer "in the recommended power program."

The decisions of the Office of Workers' Compensation Programs dated January 21, 1997, December 11 and September 16, 1996 are hereby affirmed.[21]

Dated, Washington, D.C.
March 11, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[21] The Board notes that the Office's September 16, 1996 and January 21, 1997 decisions comment that appellant was not totally disabled for work while in school in 1994, because she "undoubtedly encountered the using of her hands or arms" in taking notes, writing papers or preparing assignments, and that she studied court reporting which required the same hand and wrist motions as typing. The Board finds these comments to be both improper and inaccurate. In an April 21, 1994 report, Dr. Klopfstein stated that appellant needed "someone to take her notes because she cannot sit and take notes for the three hours classes that she is in." Thus, the record explicitly shows that appellant did not take her own class notes. Also, appellant submitted a copy of her technical college academic plan for the 1994 to 1995 academic year, showing business law, paralegal studies, English and psychology courses, but no court reporting. This document is sufficient evidence to substantiate that she did not study court reporting. Moreover, there is no indication of record that the Office claims examiner or hearing representative are physicians under the Act, and as laypersons, their opinions regarding what degree of impairment is indicated by appellant's activities are utterly without probative value. *Susan M. Biles*, 40 ECAB 420 (1988). However, as the Office's decisions are based on the lack of medical evidence establishing total disability for the claimed periods causally related to the accepted condition, the Office's comments are nondispositive and are considered as harmless error.