U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL A. URICO and U.S. POSTAL SERVICE,
POST OFFICE, West Sacramento, CA

Docket No. 00-1742; Submitted on the Record;
Issued June 7, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that she was totally disabled for the period November 15 through December 21, 1999.

On July 2, 1999 appellant, then a 57-year-old rural carrier, filed a claim alleging that on or around June 22, 1999 she became aware that she had developed possible carpal tunnel syndrome, with pain and weakness in both wrists and thumbs. Appellant did not stop work.

By decision dated September 28, 1999, the Office of Workers' Compensation Programs denied appellant's claim finding that she failed to submit any supporting medical evidence.

By letter dated December 13, 1999, appellant requested reconsideration of the September 28, 1999 decision and in support she submitted a November 17, 1999 form report from Dr. Scott Russo, a chiropractor. Dr. Russo diagnosed "cervical sprain" due to repetitive work casing mail, indicated that appellant was totally disabled and noted that chiropractic spinal adjustments were performed.

In a response dated December 16, 1999, the Office advised appellant that chiropractors were deemed to be physicians only to the extent that their reimbursable services were limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.

Thereafter appellant submitted a December 22, 1999 report from Dr. Ernest H. Agresti, an osteopathic family practitioner, which noted that her first day of treatment for bilateral hand and upper extremity pain was August 9, 1999 and which indicated that "[a]t that time [appellant] stated she was not in enough pain to stop working and wanted to continue working." Dr. Agresti diagnosed "[b]ilateral wrist tendonitis, [b]ilateral upper extremity radiculopathy, [c]ervicalgia [and] [c]ervical strain and sprain with overuse syndrome and cumulative use syndrome left side worse," and noted that appellant was next seen on October 18, 1999 with the same diagnoses. He indicated that appellant continued to work, but at a December 22, 1999 visit Dr. Agresti

noted that she was taken off work on November 15, 1999 by her chiropractor, Dr. Russo. He stated that appellant would "continue her management of her injury with Dr. Russo."

On January 3, 2000 the Office advised appellant that it had accepted her claim for tendinitis of both wrists and cervical strain, but noted that Dr. Russo's report had no probative value in establishing her claim for wage loss.

A January 5, 2000 disability slip signed by Dr. Agresti indicated that appellant was to continue off work due to injury tentatively until February 7, 2000.

Appellant also submitted a January 14, 2000 Form CA-20, attending physician's report, signed by Dr. Agresti, which noted the diagnoses "carpal tunnel syndrome -- cervicalgia -- upper extrem[ity] radiculitis, cervical strain [and] sprain -- cervical cephalgia." He checked "yes" to the question of whether the condition found was caused or aggravated by an employment activity and noted "per patient history cumulative trauma." Dr. Arresti indicated dates of treatment as including August 9 and December 22, 1999 and January 5, 2000, but noted appellant's period of disability as being November 15, 1999 through February 7, 2000. He noted that appellant "also has been under care with a chiropractor, [appellant] was taken off work by him."

On January 27, 2000 the Office received a State of California workers' compensation form from Dr. Agresti dated January 12, 2000, which noted appellant's physical examination findings at that time, restated the previously given diagnoses and indicated that appellant could return to sedentary work on March 7, 2000.

Also submitted was a February 4, 2000 disability slip signed by Dr. Agresti, which stated that appellant "will be tentatively fully discharged pending results of testing being negative as of February 14, 2000."

By letter dated February 15, 2000, appellant stated that she wanted to appeal the Office decision not to pay her compensation for the period November 15 to December 22, 1999.

On February 23, 2000 the Office issued a formal final decision, on that issue finding that appellant's claim for compensation for the period November 15 to December 21, 1999 was denied. The Office found that there was no probative medical evidence of record to support that appellant was totally disabled for that period. It indicated that Dr. Russo was not considered to be a physician under the Federal Employees' Compensation Act for the purposes of his treatment of appellant during that period and that Dr. Agresti's Form CA-20, attending physician's report, contained no discussion or rationale as to how appellant's condition changed causing total disability commencing November 15, 1999.

Thereafter appellant submitted further factual and medical evidence which is not now before the Board on this appeal.[1]

[1] *See* 20 C.F.R. § 501.2(c). (The review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision).

The Board finds that appellant has failed to establish that she was temporarily totally disabled for the period November 15 through December 21, 1999.

As used in the Act,[2] the term "disability" means 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 wages.[4] An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he 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.[5] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

In this case, the Office accepted that appellant sustained bilateral wrist tendinitis and cervical strain, of which she became aware on or around June 22, 1999. However, while the Office accepted that appellant sustained an employment injury, appellant still has the burden of establishing that her accepted conditions resulted in disability for work for the specific claimed periods.[6] To meet this burden for the period November 15 through December 21, 1999 appellant must submit medical evidence that establishes that the residuals or sequelae of her accepted conditions, bilateral wrist tendinitis and/or cervical strain, were such that, from a medical standpoint, they prevented her from continuing in her employment beginning November 15, 1999 and continuing through December 21, 1999. Appellant has not submitted such medical evidence in this case.

In the instant case, the only medical evidence submitted on examination and/or treatment at any time during the period in question was the November 17, 1999 report from Dr. Russo, a chiropractor. He diagnosed "cervical sprain" due to repetitive work casing mail, indicated that appellant was totally disabled and noted that chiropractic spinal adjustments were performed. No x-rays were obtained and no period of disability was specified.

Under section 8101(2) of the Act, chiropractors are only considered to be physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as

[2] 5 U.S.C. §§ 8101-8193.

[3] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

[4] *See Fred Foster*, 1 ECAB 21 at 24-25 (1947) (finding that the Act provides for the payment of compensation in disability cases upon the basis of the impairment in the employee's capacity to earn wages and not upon physical impairment as such).

[5] *See Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

[6] *See Dorothy J. Bell*, 47 ECAB 624 (1996).

demonstrated by x-rays to exist.[7] Therefore, unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist, a chiropractor cannot be considered to be a physician under the Act and his report cannot be considered to be probative medical evidence.[8]

In this case, Dr. Russo did not obtain x-rays and did not diagnose a spinal subluxation, such that he cannot be considered a physician under the Act and his report does not constitute probative medical evidence. Therefore, appellant has not submitted any contemporaneous probative medical evidence supporting total disability commencing November 15, 1999 and running through December 21, 1999.

In his December 22, 1999 narrative report, Dr. Agresti merely noted that appellant had been taken off work by Dr. Russo on November 15, 1999 and did not offer any opinion as to appellant's medical status at that time or at any time prior to his own examination on December 22, 1999. As this report did not directly address any change in appellant's condition or ability to work between November 15 and December 21, 1999, it is not probative on that issue.

In the January 14, 2000 Form CA-20, attending physician's report, Dr. Agresti also did not discuss any change in appellant's condition or ability to work prior to December 22, 1999, but merely concluded that appellant's period of total disability began on November 15, 1999 and continued through February 7, 2000. The Board has frequently explained that a physician's conclusion on a form report, without explanation and unsupported by rationale, is of little probative value.[9] Further, the Board has held that the report of a physician who does not examine an appellant contemporaneous with the alleged onset of total disability, but examines him or her after the fact and speculates as to the date of onset, is of reduced probative value.[10]

As Dr. Agresti's opinion as to when appellant became totally disabled for work was not supported by a contemporaneous examination, was presented as a conclusion without explanation or rationale and was based upon the determination of a practitioner not considered to be a physician under the Act, it is insufficient to establish that appellant experienced onset of temporary total disability commencing November 15, 1999 and continuing through December 21, 1999.

Therefore, appellant has failed to submit any probative medical evidence to support her claimed period of total disability from November 15 through December 21, 1999 and she has not established her entitlement to compensation for wage loss for that period.

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[7] 5 U.S.C. § 8101(2); *see also Mary A. Wright*, 48 ECAB 240 (1996); *Linda Holbrook*, 38 ECAB 229 (1986).

[8] *See Kathryn Haggerty*, 45 ECAB 383 (1994).

[9] *See Bernard Snowden*, 49 ECAB 144 (1997); *Jacguelyn L. Oliver*, 48 ECAB 232 (1996); *Ruth S. Johnson*, 46 ECAB 237 (1994); *William C. Thomas*, 45 ECAB 591 (1994).

[10] *See Eileen R. Kates*, 46 ECAB 573 (1995). (A physician's contemporaneous medical opinion is of greater probative value on appellant's ability to work than the opinion of another physician who did not examine appellant until later); *see also Linda I. Sprague*, 48 ECAB 386 (1997); *Jennifer Beville*, 33 ECAB 1970 (1982); *Leonard J. O'Keefe*, 14 ECAB 42 (1962).

Accordingly, the February 23, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 7, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member