U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of SANDRA S. BURCH and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 02-44; Submitted on the Record;*
*Issued July 8, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained a recurrence of disability beginning June 10, 1999 causally related to her accepted employment injuries, such that she could no longer perform her light-duty job four hours a day; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board finds that appellant has failed to meet her burden to establish that she sustained a recurrence of disability beginning June 10, 1999, causally related to her accepted employment injuries, such that she could no longer perform her light-duty job four hours a day.

On April 18, 1990 appellant, then a 41-year-old clerk, filed an occupational disease claim (Form CA-2), alleging that she sustained injuries to her right wrist as a result of keying in the performance of duty. Appellant's claim was accepted for right carpal tunnel syndrome and she underwent carpal tunnel release surgery on April 2, 1992. The Office subsequently expanded its acceptance of appellant's claim to include herniated nucleus pulposus and appellant underwent anterior cervical fusion of C5-6 and C6-7 in April 1995. On May 9, 1998 appellant sustained a back injury when she bent over a hamper to pick up a bundle of mail. The Office accepted her claim for a lumbar strain. Following this second injury, appellant stopped work on May 13, 1998 and returned to work on September 8, 1998 as a modified distribution clerk, four hours a day.

On August 12, 1999 appellant filed a claim (Form CA-2a), alleging that she sustained a recurrence of disability on June 10, 1999. She stated that her May 9, 1998 back injury had actually resulted in a ruptured disc and that the increased pain and weakness prevented her from working. In an accompanying narrative statement, appellant also alleged that the employing establishment had never adhered to her light-duty restrictions.

By decision dated October 4, 1999, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability beginning June 10, 1999, causally related to her accepted employment injuries.

In a letter dated July 26, 2000, appellant requested reconsideration of the Office's decision and submitted additional medical evidence in support of her request. By decision dated September 7, 2000, the Office found the newly submitted evidence insufficient to warrant modification of the prior decision.

By letter dated January 19, 2001, appellant again requested reconsideration and submitted additional evidence in support of her request. In a decision dated March 26, 2001, the Office found the evidence and arguments submitted on reconsideration to be insufficient to warrant further merit review of appellant's claim.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he can not perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[1] This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[2] Causal relationship is a medical issue[3] and the medical evidence required to establish a causal relationship is rationalized medical evidence. 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 condition and the specific employment factors identified by the claimant.[4]

In the present case, appellant has not shown that her June 10, 1999 recurrence of disability was due to a change in the nature and extent of the light-duty job requirements. The record shows that on September 8, 1998 appellant returned to work in a light-duty capacity, four hours a day, with certain work restrictions. She worked until June 10, 1999, when her physician took her off work. In a narrative statement dated August 12, 1999, appellant alleged that the employing establishment never adhered to her light-duty restrictions. By letter dated August 25, 1999, the Office asked the employing establishment to comment on appellant's allegations. In a

[1] *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

[2] *Frances B. Evans*, 32 ECAB 60 (1980).

[3] *Mary J. Briggs*, 37 ECAB 578 (1986).

[4] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

response dated October 1, 1989, the employing establishment elaborated on the duties of appellant's position and the accommodations that had been made for her injuries and stated that the duties of the position were completely within her medical restrictions. As the employing establishment has refuted appellant's allegations and as she has submitted no evidence in support of her assertions, the record does not establish that the claimed June 10, 1999 recurrence of total disability was caused by a change in the nature or extent of the light-duty job requirements.

Appellant has also failed to establish through medical evidence that she was disabled from her light-duty position due to a change in the nature or extent of her accepted employment-related injuries. In support of her claim, appellant submitted periodic reports from her treating physicians, Dr. Peter M. Shedden and Dr. Rebecca L. Plumer. In a report dated June 10, 1999, Dr. Shedden, a Board-certified neurological surgeon, stated that recent diagnostic testing, including myelograms, computerized tomography scans and electromyography, suggested right L5 radiculopathy for which he recommended a right L4-5 discectomy. In an accompanying disability slip also dated June 10, 1999, Dr. Shedden indicated by check mark that appellant was unable to return to work until further notice. In a follow-up report dated September 9, 1999, he stated that appellant was still suffering from right L4-5 radiculopathy, which was related to an apparent May 9, 1998 work-related injury when she bent over to pick up a package and felt a sharp pain in her back. Dr. Shedden stated that he recommended a right L4-5 hemi-laminectomy, medial facetectomy, foraminotomy and discectomy. In a report dated October 21, 1999, he reiterated his recommendation that appellant undergo a right L4-5 hemilaminectomy, as well as his conclusion that this was an employment-related condition.

While Dr. Shedden indicated that appellant was totally disabled, his reports are insufficient to support her claim for a recurrence of disability, as he did not provide any medical rationale for his decision to take appellant off work beginning June 10, 1999, or otherwise explain his conclusion that appellant was unable to perform her part-time light-duty job.

Appellant also submitted periodic reports from her primary treating physician, Dr. Rebecca L. Plumer, a Board-certified physiatrist. In a June 16, 1999 treatment note, the report most contemporaneous with appellant's June 10, 1999 claimed recurrence, she stated that Dr. Shedden had taken appellant off work and that a lumbar surgical procedure was anticipated. Dr. Plumer added that appellant had continued neck, shoulder and low back pain, but that her physical examination was essentially unchanged. In a June 24, 1999 attending physician's report, Form CA-20a, Dr. Plumer diagnosed a disc injury and lumbar radiculopathy and indicated by check marks that appellant was totally disabled and that her condition was causally related to her employment. In treatment notes dated July 21, August 26 and September 29, 1999, Dr. Plumer reiterated her prior statements that physical examination did not reveal any changes in appellant's condition and that she was off work on Dr. Shedden's recommendation. In treatment notes dated October 27 and November 17, 1999, Dr. Plumer stated that appellant's low back condition was caused or exacerbated by her May 9, 1998 employment injury and concurred with Dr. Shedden's recommendation that appellant undergo surgery. However, Dr. Plumer further noted that while she would defer to Dr. Shedden's opinion that appellant was temporarily totally disabled pending surgery, she personally felt appellant could perform her light-duty job. In follow-up reports dated December 22, 1999 and January 19, February 16, March 15 and August 16, 2000, Dr. Plumer reiterated that she had cleared appellant for sedentary work, but she remained on temporary total disability as per Dr. Shedden's recommendation.

While the medical evidence from Dr. Plumer lends support to a finding that appellant continues to have pain from her accepted injuries and may in fact have, at some point, developed a herniated disc as a result of her May 9, 1998 employment injury, rather than just a lumbar strain as accepted by the Office, her reports are insufficient to support appellant's claim for a recurrence of disability, as she clearly stated that appellant was off work beginning June 10, 1999 on Dr. Shedden's recommendation and that she herself felt that appellant could perform her light-duty job.

Finally, appellant submitted a partially favorable July 14, 2000 Social Security Administration (SSA) decision, finding that appellant had been under a "disability" beginning May 9, 1998. However, the Board has held that findings under the SSA are not determinative of disability under the Federal Employees' Compensation Act as the SSA and the Act have different standards of medical proof on the question of disability.[5]

As appellant has failed to establish that she had a change in the nature or extent of her modified duties and did not submit a rationalized medical report based on a complete factual and medical background establishing a change in the nature or extent of her employment injury such that beginning June 10, 1999 she could no longer perform her part-time light-duty job, the Board finds that she has failed to discharge her burden of proof.[6]

The Board further finds that the Office did not abuse its discretion in denying appellant's request for further merit review on March 26, 2001.

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[7] Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[8]

In support of her January 19, 2001 request for reconsideration, appellant submitted several copies of documents previously contained in the record which, therefore, are duplicative. She also submitted a January 2, 2001 report from Dr. Plumer, in which she repeated her earlier statement that she personally had never felt that appellant was temporarily totally disabled and a January 18, 2001 report from Dr. Shedden, in which he also repeated his earlier conclusion that appellant remained unable to work. Material, which is repetitious or duplicative of that already

[5] *Daniel Deparini*, 44 ECAB 657 (1993).

[6] *Alberta S. Williamson*, 47 ECAB 569 (1996).

[7] 20 C.F.R. § 10.606(b).

[8] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[9] New to the record, however, is a March 12, 2001 report from Dr. Donald L. Kramer, who took over appellant's care from Dr. Plumer. Dr. Kramer stated that he felt that appellant was currently capable of performing sedentary work, but did not offer any opinion as to whether she sustained a recurrence of disability beginning June 10, 1999. Finally, the record contains some February 14, 2001 treatment notes from The Hand Center, which pertain to treatment for appellant's accepted carpal tunnel syndrome but also do not contain any discussion of appellant's claimed June 10, 1999 recurrence of disability. Evidence, which does not address the particular issue involved does not constitute a basis for reopening the claim.[10] As all of the evidence submitted by appellant was either duplicative, repetitious or did not address the relevant issue and as appellant failed to raise substantive legal questions, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The decisions of the Office of Workers' Compensation Programs dated March 26, 2001 and September 7, 2000 are hereby affirmed.

Dated, Washington, DC
July 8, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[9] *See James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

[10] *Richard L. Ballard*, 44 ECAB 146, 150 (1992).