U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEANNIENE L. YATES and U.S. POSTAL SERVICE,
POST OFFICE, Duluth, GA

Docket No. 02-374; Submitted on the Record;
Issued July 17, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained a recurrence of total disability on November 1, 1999 causally related to her August 10, 1998 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On August 13, 1998 appellant, then a 47-year-old flat sorter machine operator filed notice of occupational illness and notice of compensation (Form CA-2), alleging the pain and discomfort in her hands was causally related to her federal duties.

The claim was accepted for carpal tunnel syndrome, bilateral and fibromyalgia and compensation was paid for temporary total disability. On January 9, 1999 appellant returned to work at limited duty and the Office reduced appellant's compensation accordingly. On June 21, 1999 she stopped work for authorized bilateral carpal tunnel release surgery.

On August 5, 1999 appellant accepted a limited-duty job as a modified clerk, 10:30 p.m. to 6:00 a.m. The job restrictions included limited use of the right hand, no lifting, pushing, or pulling over 5 pounds continuously and no lifting over 20 pounds intermittently. There would be no use repetitive use of the hands and she would have limited use of her left hand.

On November 1, 1999 appellant filed a claim for recurrence of total disability alleging that the stress of her duties resulted in flare up of her fibromyalgia.

In a March 14, 2000 decision, the Office denied appellant's recurrence claim finding the evidence failed to establish that it was causally related to the August 10, 1998 injury.

The Board finds that the decision of the Office hearing representative dated and finalized on January 31, 2001 is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the Office hearing representative.

In an August 14, 2001 letter, appellant requested reconsideration of her claim of recurrence of total disability after November 1, 1999. She submitted several documents in support of her request including additional medical evidence, a rebuttal of the hearing representative's decision and a personal statement that she described as a new legal argument.

The new and relevant medical evidence included a February 6, 2001 note from Dr. Nicholas A. Tiliakos, a rheumatologist, who indicated that appellant suffers from fibromyalgia "which interferes with her work when she works at night. This will last indefinitely."

A June 4, 2001 report from Dr. Tiliakos diagnosed carpal tunnel syndrome, fibromyalgia syndrome, depression, overuse hand syndrome and cervical spondylosis and indicated her conditions were chronic and would fluctuate with symptoms.

A December 21, 1999 family medical leave form completed by Dr. Tiliakos that said appellant suffers from fibromyalgia and should avoid stressful situations.

A November 24, 2000 note from Dr. Tiliakos said appellant "suffers from intractable fibromyalgia syndrome with constant symptoms. Although she is not totally disabled she MUST (Emphasis in the original.) work only day time in order to take medications at bedtime."

Appellant also submitted a May 27, 1999 form signed by Dr. Al Rosenthal that indicated that she could work but should limit her repetitive activity and under "restrictions" he wrote "by shift."

A June 6, 1999 medical form with an illegible signature lists as restrictions "limit repetitive motion and day time job."

A November 2, 1999 note from Dr. Meena Shah that diagnosis "stress/palpation" and indicates appellant is temporarily disabled from November 1 to 7, 1999.

Non medical evidence included an October 6, 2000 grievance statement from Wardell J. Gillbeaux Jr., a union representative, who writes that appellant was subject to disparate treatment by the employing establishment because she was not given her requested shift change.

Appellant also submitted a letter from the Equal Employment Opportunity Commission (EEOC) indicating that appellant has filed several claims that are currently being reviewed by the EEOC.

In her response to the hearing representative's decision, appellant addressed certain points and claimed certain medical evidence was ignored.

In an October 15, 2001 decision, the Office denied appellant's claim after a merit review finding the medical evidence does not establish that on November 1, 1999 appellant's medical condition worsened to the point that she could no longer perform her restricted position. The nonmedical evidence was found to be insufficient to establish that appellant's restricted duties changed or that the employing establishment withdrew the position.

In an October 20, 2001 letter, appellant requested reconsideration arguing that the October 15, 2001 decision was made in error and was based on inaccurate facts. He pointed to the fact that, the claims examiner in the October 15, 2001 decision had typographical errors that were crossed out and corrected by handwriting. No new medical evidence was submitted.

In a November 6, 2001 decision, the Office in a nonmerit review denied reconsideration finding typographical errors, absent any new legal argument or evidence insufficient to warrant reconsideration.

The Board finds that the Office properly denied appellant's recurrence claim.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she 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 or she cannot 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]

The new medical evidence appellant submitted on reconsideration reiterated that appellant suffered from the accepted condition of fibromyalgia. Her burden was to show not just that she still had the condition or that it worsened, but to show through rationale medical evidence that it worsened to the point where she was totally disabled from her restricted-duty job. None of the medical reports submitted do so. The reports and treatment notes from Dr. Tiliakos and Dr. Rosenthal indicated that she is not totally disabled and said she should avoid repetitive motion and work the day shift so she can take medication before she sleeps. There is no rationalized discussion on why she must take the medication after her evening shift or how her current duties and shift have rendered her totally disabled.

The treatment note from Dr. Shah diagnoses "stress" but that is not an accepted condition.

Additionally, the nonmedical evidence does not establish that appellant's job duties changed or that her position was withdrawn. The grievance statement by Mr. Gullibeaux argues that appellant was subject to disparate treatment, but that issue is before the EEOC and the evidence in the record indicates no final determination has been made. Additionally, no claim for stress or harassment has been made by appellant and there is no medical evidence supported by rationalized medical evidence on how stress or harassment caused her alleged recurrence.

Appellant's own statement clarifying points in the hearing representative's decision or reinterpreting the evidence is insufficient to meet appellant's burden of proof because appellant is not a physician under the Federal Employees' Compensation Act and her facts are not supported with corroborating evidence.

[1] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

The Board further finds that the Office properly denied appellant's October 20, 2001 reconsideration request.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[2] the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[3] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).[4]

Appellant's October 20, 2001 reconsideration request met none of these criteria. She submitted no new evidence and raised no new legal argument. Appellant argued that the October 15, 2001 decision was in error because it contained typographical errors. The Board notes these errors were corrected in handwriting resulting in no harm and a review of the decision clearly indicates it was appellant's case being reviewed.

The decisions of the Office of Workers' Compensation Programs dated November 6, October 15 and January 13, 2001 and March 14, 2000 are hereby affirmed.

Dated, Washington, DC
July 17, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[2] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[3] 20 C.F.R. §§ 10.606(b)(2) (i-iii).

[4] 20 C.F.R. § 10.608(a).