U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAURIE S. SWANSON and U.S. POSTAL SERVICE,
POST OFFICE, Nashville, NC

Docket Nos. 01-1406 & 02-765; Submitted on the Record;
Issued May 2, 2002

DECISION and ORDER

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

The issues are: (1) whether appellant has established that she had employment-related disability for intermittent periods from February 11 to September 16, 2000; and (2) whether appellant sustained a recurrence of disability on February 6, 2001 causally related to her accepted condition.

On December 14, 1995 appellant, then a 33-year-old part-time flexible distribution/window clerk, filed a claim for an occupational disease for an injury to her neck, right shoulder and right arm that she first became aware of on December 1, 1995. She attributed her condition to distributing mail in the letter case, which she stated she did three to four hours per day, six days a week.

The Office of Workers' Compensation Programs accepted that appellant sustained a herniated disc at C5-6 and paid appellant compensation from December 13, 1995, when she stopped work until December 18, 1995, when she returned to limited-duty performing office work and training a new window employee.

On March 8, 1996 appellant underwent an anterior cervical microdiscectomy and fusion at C5-6, as authorized by the Office, which resumed payment of compensation for temporary total disability. On February 24, 1998 appellant underwent a laminotomy and foraminotomy, as authorized by the Office.

On May 19, 1998 appellant returned to limited duty at the employing establishment for four hours a day.

By decision dated March 9, 1999, the Office found that appellant's position as a limited-duty clerk fairly and reasonably represented her wage-earning capacity effective May 9, 1998. The Office's compensation for disability was based on appellant working 20 hours a week, 18 hours fewer than she worked as a part-time flexible clerk at the time of her injury.

On September 27, 2000 appellant filed a claim for compensation, claiming compensation in the form of leave buy back during intermittent periods of leave usage from February 11 to September 16, 2000. Appellant attached a list of the number of hours of leave and leave without pay used in each pay period from the one beginning February 12, 2000 to the one ending on September 22, 2000. The employing establishment reviewed appellant's pay records and compiled a list of appellant's hours worked and the amount and type of leave used for each date from February 11 through September 22, 2000, on which it indicated whether compensation was claimed for each day's leave or leave without pay was used. This list indicated that the specific dates for which appellant claimed compensation were February 25; March 7 through 13; March 16 through April 5; April 13 through 21; May 13 through 16; June 2, 3, 8 and 17; July 5 through August 14; and August 24 through September 12, 2000.

By letter dated November 9, 2000, the Office advised appellant: "At this time the dates of disability that we have sufficient medical evidence to support are the dates on which you received nerve blocks on March 7, March 24, April 13 and May 12, 2000 and the periods of recovery that followed these blocks. Since you are only working 4 hours a day, other medical visits for treatment should be made during the time that you are not at work." The Office's letter further stated that, if she stopped work because of a worsening of her employment-related condition, she must submit a medical report from her physician describing "the objective findings which convinced him your condition had worsened and explain how you can no longer perform the duties you were performing when you stopped work."

By decision dated February 26, 2001, the Office found:

> "In order for our agency to process your claim for leave buy back, medical evidence is required from your physician indicating you were seen during the above periods for your work[-]related injury. On February 6, 2001 we were informed by the employing establishment that you failed to provide medical evidence for your claim for leave buy back. Therefore, they will not authorize leave buy back for the above period [February 11 through September 16, 2000]."

On March 5, 2001 appellant filed a claim for a recurrence of disability beginning February 6, 2001 related to her December 13, 1995 employment injury.

By letter dated March 27, 2001, the Office advised appellant that, in order to establish that she sustained a recurrence of disability, she must submit medical evidence from her attending physician indicating that her employment-related condition had worsened.

By decision dated May 2, 2001, the Office found that appellant failed to establish a recurrent disability beginning February 6, 2001 that was causally related to her original employment injury.

The Board finds that the Office, in situations where compensation is claimed for periods where leave was used, has the authority and the responsibility to determine whether the employee was disabled during the period for which compensation is claimed.

By proposed rule published in the *Federal Register* on December 23, 1997,[1] the Department of Labor proposed revisions to its regulations governing the administration of the Federal Employees' Compensation Act. Among the proposals was one to remove the regulation regarding leave buy back on the basis that this process was not authorized or required by the Act and not controlled by the Office.[2] The final rule published in the *Federal Register* on November 25, 1998, after noting the comments received in response to the proposed rule's removal of the leave buy-back provision, states:

> "The reasons for removal of the leave buy-back provision have not changed. However, since the Office does in fact have a procedure for paying compensation when leave is restorable, a brief mention of this process in this rule is considered warranted and it is being added as new § 10.425. … Current practice is not altered."[3]

The Office's new regulations were effective January 4, 1999. The new regulations, at 20 C.F.R. § 10.425, titled "May compensation be claimed for periods of restorable leave?" states: "The employee may claim compensation for periods of annual and sick leave which are restorable in accordance with the rules of the employing establishment. Forms CA-7 and CA-7b are used for this purpose."

The Office's February 26, 2001 decision implies that the employing establishment determines whether the medical evidence is sufficient to establish disability during the period for which leave buy back is claimed. Allowing the employing establishment to make this determination would be an alteration of the prior practice[4] and inconsistent with the provisions of the Office's procedure manual issued after January 4, 1999.[5] The Office should continue to determine whether the medical evidence establishes that an employee is disabled by an employment-related condition during the period claimed for leave buy back, after which the employing establishment will determine whether it will allow the employee to buy back the leave used.

The Board finds that the evidence establishes that appellant's absences from work on February 25 and from March 7 to 13, 2000 were due to her employment-related condition.

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[1] 62 Fed. Reg. 67120 (to be codified at 20 C.F.R. Parts 10 and 25).

[2] This regulation, found at 20 C.F.R. § 10.310, provided in part: "If the employee uses leave during a period of disability caused by an occupational disease or illness and a claim for compensation is approved, the employee may, with the approval of the employing establishment, 'buy back' the used leave and have it recredited to the employee's account."

[3] 63 Fed. Reg. 65304 (1998).

[4] *See, e.g., James R. Rowell*, 39 ECAB 869 (1988); *Bonnie D. Jefferson*, 34 ECAB 1426 (1983).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.19 (July 2000) indicates the Office is responsible for reviewing the medical evidence to determine if it establishes entitlement to compensation for periods during which leave buy back is claimed.

Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she was disabled for work as the result of an employment injury.[6] Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury[7] and whether a particular employment injury causes disability for employment and the duration of that disability are medical questions that are in the realm of medical evidence.[8]

As evidenced by its November 9, 2000 letter, the Office found that the medical evidence was sufficient to establish disability on the dates on which appellant received nerve blocks, which the Office listed as March 7 and 24, April 13 and May 12, 2000. She also received a nerve root block on February 25, 2000 and the Office should authorize compensation for that date. Employees are entitled to disability compensation for loss of wages incurred while receiving treatment and for loss of wages incidental to treatment for which pay was not received.[9]

The medical evidence establishes that appellant had an adverse reaction to the March 7, 2000 nerve root block. In a March 22, 2000 report, Dr. Michael R. Sunderman noted that the March 7, 2000 right nerve root block administered by Dr. Stephen R. Rogers "was a problem and she had trouble with her right arm being numb, heavy and painful literally from the beginning. She was at bed rest for a few days after the injections then went back to work on what I think was March 13, [2000]." In a March 7, 2000 note, Dr. Rogers stated that appellant should be excused from work until March 13, 2000. This medical evidence is sufficient to show that appellant was disabled from March 7 to 13, 2000 due to her employment-related condition, as disability resulting from treatment authorized by the Office is compensable.[10]

The Board finds that the evidence does not establish employment-related disability on February 11 or May 5, 2000 or from March 16 to 23, 2000.

There is no medical evidence addressing appellant's ability to work on February 11 or May 5, 2000 and no indication she received medical treatment those dates. The record contains a March 16, 2000 note from Dr. Julian R. Taylor stating that appellant was unable to work from March 16 to 22, 2000, but this note, from a physician not previously reporting on treatment of appellant, does not show any findings on examination or any other basis for a finding that appellant was disabled for work.

The Board finds that the case is not in posture for a decision on whether appellant had employment-related disability from March 24 to April 5, April 13 to 21 and May 13 to 16, 2000.

[6] *David H. Goss*, 32 ECAB 24 (1980).

[7] *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

[8] *Edward H. Horton*, 41 ECAB 301 (1989).

[9] *Henry Hunt Searls, III*¸ 46 ECAB 192 (1994).

[10] *Carmen Dickerson*, 36 ECAB 409 (1985).

In its November 9, 2000 letter, the Office advised appellant that "the dates of disability that we have sufficient medical evidence to support are the dates on which you received nerve blocks on March 7, March 24, April 13 and May 12, 2000 and the periods of recovery that followed these blocks." Neither this letter nor any other document in the case record delineates which days during the period claimed from March 24 to April 5, April 13 to 21 and May 13 to 16, 2000 were accepted by the Office for employment-related disability and which days were denied. Without such information, the Board is unable to make an informed decision whether the Office properly determined the periods of employment-related disability. The Office's action with respect to these periods also does not comply with 20 C.F.R. § 10.126, which requires that an Office decision "shall contain findings of fact and a statement of reasons." The case will be remanded to the Office for a decision containing findings on which days employment-related disability was approved during March 24 to April 5, April 13 to 21 and May 13 to 16, 2000.

The Board finds that the evidence does not establish employment-related disability on June 2, 3, 8 or 17; July 5 to August 14; or August 24 to September 12, 2000.

On June 2, 2000 appellant was examined by Dr. Paul P. DiMartino, who recommended electrodiagnostic studies of her right upper extremity. His June 2, 2000 report did not indicate that appellant was disabled for work and his June 2, 2000 note, that states in its entirety "out of work June 2 to June 3, 2000. Doctor's appointment," is not sufficient to show appellant had employment-related disability for those days. Appellant was examined by Dr. Rogers on June 8, 2000, but his report of that date indicates appellant's physical examination was unchanged and does not indicate that appellant was disabled for work. There is no medical evidence regarding appellant's condition or ability to work on June 17, 2000.

A July 5, 2000 report from Dr. Sunderman contains a history that appellant recently tried to catch her son and pulled a muscle under her right armpit and states, as part of the plan for appellant, "allow her to be out of work during the time frame that is being evaluated." This report does not clearly indicate a basis for keeping her out of work, or that she was being kept out of work for her employment-related condition as opposed to the pulled muscle she sustained catching her son. Dr. Scott K. Garrison examined appellant on July 10, 2000 but his report does not indicate that she was disabled for work. In a report dated August 11, 2000, Dr. Sunderman indicated that appellant could "work with some time restriction and with the limitation of strenuous activity and the ability to shift positions frequently…." These limitations would allow her to perform her limited-duty position. The medical evidence does not establish employment-related disability from July 5 to August 14, 2000.

The medical evidence also does not establish employment-related disability from August 24 to September 12, 2000. In an August 25, 2000 note, Dr. Sunderman stated that appellant had been out of work for two days with congestion, cough and low grade temperature of 99 degrees. She submitted notes from Dr. Sunderman dated August 28 and September 5, 2000 indicating that she could return to work on September 6, 2000, but these notes do not contain any basis to support a finding of disability up to that date. A September 8, 2000 report from Dr. Sunderman sets forth work tolerance limitations that would not preclude appellant from performing her limited-duty position.

The Board finds that appellant has not established that she sustained a recurrence of disability on February 6, 2001 causally related to her accepted condition.

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 establishes that the employee 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 to 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.[11]

Appellant stopped work on February 6, 2001 and filed a claim for a recurrence of disability. In a report dated February 6, 2001, Dr. Sunderman did not indicate appellant's condition had changed, or that she was disabled. A brief February 6, 2001 note from Dr. Sunderman's office states that appellant can return to work on February 12, 2001 but does not indicate any basis for a finding of disability before that date.

On February 22, 2001 appellant was examined by Dr. Timothy B. Garner, who performed her 1998 cervical spine surgery. In a February 22, 2001 report, he stated that appellant "continues to work four hours a day, but clearly her job is exacerbating her pain situation." Dr. Garner then stated that on examination appellant's right upper extremity reflexes were not quite as active as on his last prior examination, but this report does not indicate that appellant was disabled for work. A February 22, 2001 note from Dr. Garner states that appellant should be excused from work until further notice, but the note and report, even considered together, do not show that appellant's condition changed such that she could no longer perform her limited-duty position.

A March 5, 2001 report from Dr. Sunderman states that appellant's chronic neck and right arm had worsened significantly recently and, "Until her functional status is established, she will remain out of work." Dr. Sunderman's clinical chart, however, does not indicate that he examined appellant on March 5, 2001 or on any other date since February 6, 2001. Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled from work.[12]

In a report dated April 3, 2001, Dr. Garner noted that a recent magnetic resonance imaging (MRI) scan showed that appellant did not have spinal cord compression and that her "anatomy actually looks pretty good." Dr. Garner stated: "As you know, [appellant has] had continued trouble that has been progressive in terms of her symptoms since we sent her back to work albeit light duty. I do not see any evidence that things have gotten worse anatomically, but certainly she reports that she [is] much worse." As this report does not indicate an objective worsening of appellant's condition, it indicates that Dr. Garner's statements on appellant's ability

[11] *Terry R. Hedman*, 38 ECAB 222 (1986).

[12] *See Dean E. Pierce*, 40 ECAB 1249 (1989).

to work consist primarily of a repetition of appellant's complaints that she hurt too much to work, which is not a basis for payment of compensation.[13]

The May 2, 2001 decision of the Office of Workers' Compensation Programs is affirmed. The February 26, 2001 decision of the Office is affirmed in part, reversed in part and set aside in part as set forth in this decision of the Board.

Dated, Washington, DC
May 2, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[13] *Fereidoon Kharabi*, 52 ECAB ___ (Docket No. 00-273, issued March 7, 2001); *John L. Clark*, 32 ECAB 1618 (1981).