U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANA M. ESTRELLA and U.S. POSTAL SERVICE,
POST OFFICE, Ridgefield, NJ

Docket No. 03-954; Submitted on the Record;
Issued August 28, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on or after April 26, 2000; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for consideration of the merits on October 1, 2002.

Appellant, a 31-year-old mail carrier, filed a notice of traumatic injury on January 10, 2000 alleging that a branch fell from a tree and struck her while she was in the performance of duty. Appellant returned to light-duty work on January 11, 2000. The Office accepted appellant's claim for cervical strain on March 7, 2000.

Appellant filed a notice of recurrence of disability on May 11, 2000 alleging that on April 26, 2000 she could no longer perform the light-duty work. Appellant stated that she could no longer drive due to physician prescribed pain medication. On the reverse of the form, appellant's supervisor stated that appellant's limited-duty assignment included answering the telephone, verifying carrier forwards, computer input and an occasional drive to the bank for change or to deliver a late express mail. He indicated that most of appellant's duties were sitting down. The employing establishment noted that appellant vacationed from April 3 to 16, 2000 and that, after her vacation, appellant developed additional problems with her neck.

The Office requested additional factual and medical evidence from appellant in a letter dated July 11, 2000. On August 8, 2000 appellant stated that her physician increased her dosage of pain medication on April 25, 2000 and stated that she could no longer drive while under medication. Appellant asserted that she could no longer perform her light-duty job requirements. By decision dated March 22, 2001, the Office denied appellant's claim finding that she failed to establish a change in her condition or in her light-duty requirements.

Appellant requested reconsideration on August 17, 2001. By decision dated November 6, 2001, the Office declined to reopen appellant's claim for consideration of the merits. Appellant requested reconsideration on December 12, 2001. By decision dated May 1, 2002, the Office

reviewed appellant's claim on the merits and denied modification of its prior decisions. Appellant requested reconsideration on July 17, 2002. In a decision dated October 1, 2002, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that the evidence submitted was repetitious.[1]

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained a recurrence of disability on or after April 26, 2000.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that 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 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 requirements.[2]

In support of her claim for a recurrence of total disability due to a change in her injury-related condition, appellant submitted a form report dated January 21, 2000 from Dr. Mustafa M. Sidali, an osteopath, who diagnosed cervical sprain and checked "yes" to indicate that appellant's condition was caused by her employment. He stated that appellant should not lift, push, pull, bend or twist. This report is not sufficient to establish a recurrence of total disability as Dr. Sidali did not opine that appellant was totally disabled. He provided appellant's work restrictions, which indicates that he believed that appellant was capable of light-duty work. Therefore, his report does not establish recurrence of total disability through a change in the nature and extent of appellant's employment injury.

On February 24, 2000 Dr. Ormond L. Wilkie, a Board-certified physiatrist, completed a report noting appellant's history of injury and opining that appellant was still severely symptomatic. Dr. Wilkie diagnosed status-post strain/sprain injury to the cervical spine with residual limited range of motion secondary to pain plus fibromyositis. He did not offer an opinion regarding appellant's disability for work. As Dr. Wilkie does not opine that appellant was totally disabled, his report is not sufficient to meet her burden of proof in establishing a recurrence of total disability. Without a clear opinion that appellant is totally disabled and that such disability is due to a change in the nature or extent of her light-duty job requirements or to a change in the nature and extent of appellant's employment injury, this report is not sufficient to meet appellant's burden of proof.

Dr. Thomas R. Ortiz, a Board-certified family practitioner, completed a note diagnosing cervical radiculopathy and opining that appellant was totally disabled from April 22 to 26, 2000. Dr. Ortiz did not provide a history of injury and did not explain why he believed that appellant

[1] On appeal to the Board, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

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

was totally disabled. As this report lacks any factual background and medical reasoning it is insufficient to establish appellant's claim for a recurrence of total disability.

Dr. Sidali completed a note on May 9, 2000 and diagnosed cervical radiculopathy due to trauma. He stated that appellant was experiencing significant side effects as a result of her treatment for pain, specifically drowsiness. Dr. Sidali stated: "I recommend that she be kept off her light[-]duty responsibilities." He noted that he instructed appellant not to drive for three months until she completed physical therapy and further evaluation. Although Dr. Sidali opined that appellant was totally disabled, he did not explain how and why he believed that appellant's accepted employment injury of cervical strain resulted in cervical radiculopathy, a change in the nature and extent of her accepted employment injury and did not explain why and how appellant's drowsiness prevented her from performing her light-duty job requirements. Without the necessary medical reasoning explaining the change in appellant's condition and how it rendered appellant totally disabled, this report is not sufficient to establish appellant's claim.

In an attending physician's report (Form CA-20) dated May 9, 2000, Dr. Sidali diagnosed cervical radiculopathy as the result of being struck by a falling branch and indicated that appellant was totally disabled from January 10 to 21, 2000 and partially disabled from April 26 to August 1, 2000. He stated: "Employee is unable to perform her duties due to adverse effects of medications, specifically drowsiness." This report also fails to provide the causal relationship between appellant's accepted employment-related cervical strain and the change in her condition resulting in cervical radiculopathy. Dr. Sidali also failed to explain why appellant's drowsiness prevented her from performing her light-duty position.

Dr. Diana C. Dumitrascu, an internist, completed a report on June 7, 2000 diagnosing cervical radiculopathy. Dr. Dumitrascu stated that appellant was on analgesic medication, which caused drowsiness. She stated that appellant should be kept off her light-duty responsibilities and that she instructed appellant not to drive while she was on medication. Dr. Dumitrascu stated that appellant could return to work on September 1, 2000. She stated: "[Appellant] is on large amounts of analgesics required to control her pain which are causing her to be drowsy and dizzy."

On August 7, 2000 Dr. Ortiz diagnosed cervical radiculopathy and stated that he prescribed analgesic medication, which caused appellant to be drowsy. He recommended that appellant refrain from her work duties and instructed appellant not to drive. Dr. Ortiz opined that appellant should not work for at least two months. He repeated these findings and conclusions on February 15 and June 25, 2001.

The reports from Drs. Dumitrascu and Ortiz, also failed to meet appellant's burden of proof. Neither physician offered a reasonable explanation for the change in the nature and extent of appellant's condition from a cervical strain, which allowed her to perform light duty, to the additional condition of cervical radiculopathy, which required extensive medications rendering appellant dizzy and drowsy. The physicians also failed to explain why appellant was unable to perform the duties of her light-duty position due to dizziness and drowsiness. Without the necessary medical rationale explaining how and why appellant's condition changed such that she became totally disabled, appellant has not submitted sufficient medical opinion evidence to meet her burden of proof.

Appellant also submitted two reports signed by Donna Heinzen, a physician's assistant on June 29 and December 18, 2001. As a physician's assistant is not considered a physician for the purposes of the Federal Employees' Compensation Act,[3] these reports do not constitute medical evidence and are, therefore, of insufficient probative value to meet appellant's burden of proof in establishing a recurrence of total disability.

The Board further finds that this case is not in posture for decision on appellant's reconsideration request.

The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument, which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.[4]

In support of her July 17, 2002 request for reconsideration, appellant submitted a report dated July 29, 2002 from Dr. Ortiz, a Board-certified family practitioner. In this report, Dr. Ortiz noted appellant's history of injury on January 10, 2000. He stated that appellant experienced severe neck pain and muscle discomfort and that he prescribed a number of analgesic medications to control her pain, discomfort and soothe the muscle spasm caused by trauma to her neck. Dr. Ortiz stated that the medications that he initially prescribed were not sufficient to control appellant's symptoms and that he increased the dosage relieving her symptoms. However, Dr. Ortiz noted that appellant experienced side effects including drowsiness, dizziness and numbness impairing her sensory and motor skills. He stated: "It was hazardous for [appellant] to operate a vehicle while under the influence of these medications. [Appellant] was advised not to operate a vehicle during this time due to the fact that she was not functioning at normal physical capacity. [Appellant] was not able to drive herself to work, while taking the medication. Because public transportation involved a lengthy commute involving two trains, two buses and walking, this was not a viable option due to her physical state of drowsiness, dizziness and numbness."

The Board finds that this report from Dr. Ortiz constitutes relevant new medical evidence requiring the Office to reopen appellant's claim for consideration of the merits. Prior to this report there was no medical evidence from a physician providing a history of injury and opining that appellant's condition had changed due to the necessity of increased medications such that she was totally disabled.

Ms. Heinzen, a physician's assistant, signed reports from Dr. Ortiz's office dated June 24 and 29 and December 18, 2001 and received by the Office prior to the July 17, 2002 request for reconsideration. These reports contain substantially the same information as Dr. Ortiz's July 29, 2002 report. However, section 8101(2) of the Act[5] provides that the term "physician" includes

[3] 5 U.S.C. §§ 81-1-8193, 8102; *John D. Williams*, 37 ECAB 238 (1985).

[4] 5 U.S.C. §§ 10.609(a) and 10.606(b).

[5] 5 U.S.C. §§ 8101-8193, 8101(2).

surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners. The Board has found that a physician's assistant is not a physician for the purposes of the Act.[6] Therefore, as Ms. Heinzen is not a physician for the purposes of the Act, her reports do not constitute medical evidence and Dr. Ortiz's report, which is medical evidence, cannot be considered as duplicative of these reports. Dr. Ortiz's July 29, 2002 report, constitutes relevant new evidence and entitles appellant to a review of the merits of her claim. On remand, the Office should conduct a merit review of appellant's claim and issue an appropriate decision.

The October 1, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded for further development consistent with this opinion of the Board. The May 1, 2002 decision of the Office is hereby affirmed.

Dated, Washington, DC
August 28, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[6] *John D. Williams, supra* note 3.