U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CINDY F. McGUIRE and U.S. POSTAL SERVICE,
POST OFFICE, Pasco, WA

Docket No. 02-1439; Submitted on the Record;
Issued March 24, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant established a recurrence of disability causally related to her accepted work injury; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for merit review.

Appellant's claim, filed on October 5, 1999 after she hurt her back while bending over and twisting, was accepted for a lumbosacral strain. She underwent a discectomy at L4-5 on March 2, 2000. Appellant's treating physician, Dr. A.K. Sen, Board-certified in internal medicine, released her to return to limited duty for 4 hours a day with restrictions of no twisting, bending or stooping and no lifting more than 20 pounds.

Appellant returned to work on June 6, 2000 and increased her hours to six a day on June 23, 2000 and to full time in August 2000. Subsequently, she returned to half-time work due to increasing back pain and underwent physical therapy and injection treatment.

On March 29 and May 7, 2001 the Office asked Dr. Sen to comment on the report of the second opinion physician, Dr. Scott Van Linder, a Board-certified orthopedic surgeon, who recommended an updated magnetic resonance imaging (MRI) scan and stated that appellant should not have fusion surgery. Dr. Sen reviewed the MRI scan dated June 7, 2001 and found no significant abnormalities and no evidence of a recurrent or residual disc herniation at L4-5. He added that no further surgical treatment was justified and recommended that appellant attend a chronic pain management clinic.

The Office authorized a pain evaluation, which was done on August 13, 2001. The report by Dr. Shelley P. Lowenstein, Board-certified in family practice, recommended referral to a neurologist and a pain management program. On October 15, 2001 appellant stopped work and claimed total disability.

On January 22, 2002 the Office denied appellant's recurrence of disability claim on the grounds that the medical evidence was insufficient to show that appellant was unable to work four hours a day on light duty.

Appellant requested reconsideration and submitted a February 4, 2002 form report from Dr. Beverly Harn, Board-certified in family practice, who diagnosed a herniated disc based on a December 7, 2001 MRI scan and S1 nerve root radiculopathy shown by a November 20, 2001 electromyogram. On March 26, 2002 the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant merit review.

The Board finds that appellant has failed to meet her burden of proof to establish a recurrence of disability causally related to the accepted work injury.

When an employee, who is disabled from the job he or she held when injured, returns to a limited or light-duty position or the medical evidence establishes that the employee can perform the duties of such a position, the employee has the burden to establish by the weight of reliable, probative and substantial evidence, a recurrence of total disability.[1] As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the injury-related condition.[2]

A recurrence of disability is defined as a spontaneous material change in the employment-related condition without an intervening injury.[3] A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which he claims compensation is causally related to the accepted employment injury.[4] To meet this burden of proof, a claimant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[5]

Causal relationship is a medical issue,[6] and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. This consists of 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.[7] The physician's opinion 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.[8]

In this case, the Office informed appellant on October 29, 2001 of the type of evidence necessary to establish that either the requirements of her limited-duty job had changed or that her

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

[2] *Glenn Robertson*, 48 ECAB 344, 352 (1997).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(a)(1) (May 1997).

[4] *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

[5] *Helen K. Holt*, 50 ECAB 279, 282 (1999).

[6] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[7] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[8] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

work-related condition had worsened, resulting in a recurrence of disability causally related to the accepted work injuries. The Office also informed appellant that reports from Ida Campbell, a nurse practitioner, had no probative value because she was not considered a physician.[9]

Following her work stoppage, appellant submitted no evidence that the requirements of her limited-duty position had changed. The medical evidence she submitted consisted of an October 1, 2001 report from Dr. Harn, who stated that appellant had had chronic back problems since her discectomy, but had no evidence of central disc protrusion. Dr. Harn diagnosed chronic pain syndrome but did not discuss any causal relationship of this condition to appellant's work or her accepted lumbar strain. Therefore, her report is insufficient to meet appellant's burden of proof.[10][11]

The Board also finds that the Office acted within its discretion in refusing to reopen appellant's claim for merit review.

Section 8128(a) of the Federal Employees' Compensation Act[12] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[13] Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[14]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[15] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[16]

[9] 5 U.S.C. § 8101(2); *see Linda Thompson*, 51 ECAB 694, 696 (2000) (finding that form reports submitted by a chiropractor had no probative value in establishing appellant's entitlement to disability compensation).

[10] *See Calvin E. King*, 51 ECAB 394, 400 (2000) (numerous form reports from a physician who checked a "yes" box indicating a causal relationship between appellant's spinal stenosis and his employment had little probative value absent supporting rationale and was insufficient to establish causation).

[11] *See Kim Kilitz*, 51 ECAB 349, 354 (2000) (finding that two physicians' reports did not establish that appellant's work-related condition had worsened to the point where he was disabled for his limited-duty assignment).

[12] 5 U.S.C. §§ 8101-8193.

[13] 5 U.S.C. § 8128(a) ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[14] *Veletta C. Coleman*, 48 ECAB 367, 368 (1997).

[15] 20 C.F.R. § 10.608(a) (1999).

[16] 20 C.F.R. § 10.606(b)(1)-(2).

Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[17]

With her request for reconsideration, appellant submitted the February 2002 report from Dr. Harn, but she failed to address the relevant issue of a causal relationship between appellant's current back condition and her accepted injury. Therefore, this report is irrelevant and thus insufficient to require the Office to reopen appellant's claim.[18]

Further, appellant has failed to show that the Office erred in interpreting the law and regulations governing schedule awards. Nor has she advanced any relevant legal argument not previously considered by the Office. Inasmuch as appellant failed to meet any of the three requirements for reopening her claim for merit review, the Office properly denied her reconsideration request.[19]

The March 26 and January 22, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.[20]

Dated, Washington, DC
March 24, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[17] 20 C.F.R. § 10.608(b).

[18] *See Kim Kilitz*, 51 ECAB 349, 354 (2000) (finding that two physicians' reports did not establish that appellant's work-related condition had worsened to the point where he was disabled for his limited-duty assignment).

[19] *See Thomas J. Engelhart*, 50 ECAB 322, 324 (1999) (appellant's legal contention regarding concurrent payment of schedule awards and wage-loss benefits was insufficient to require merit review because the Office previously addressed the issue in line with long-standing contrary Board precedent).

[20] On January 14, 2002 the Office issued a wage-earning capacity determination, which it rescinded on July 31, 2002. Neither decision is before the Board.