United States Department of Labor
Employees' Compensation Appeals Board

JOAN L. WALKER, Appellant	)	
and	)	
U.S. POSTAL SERVICE, LAKEWOOD BRANCH POST OFFICE, Lakewood, CO, Employer	)	**Docket No. 04-1672** **Issued: February 8, 2005**

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 21, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated June 7, 2004, which denied her claim for a recurrence of disability commencing February 2, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of the case.[1]

ISSUE

The issue is whether appellant established that she sustained a recurrence of disability commencing February 2, 2002 causally related to her accepted neck and right shoulder conditions.

[1] An April 3, 2003 decision approving an attorney's fee is not before the Board as it was issued more than one year prior to the date appellant filed her appeal.

FACTUAL HISTORY

The Office accepted that on or before February 10, 2001 appellant, then a 46-year-old distribution clerk, sustained cervical disc disease, an aggravation of degenerative cervical disc disease and right shoulder tendinitis due to repetitive motion and repeated heavy lifting at work. Appellant was off work beginning February 10, 2001 and returned to work on February 26, 2001 in a light-duty position. She used sick and annual leave to cover intermittent work absences from May 19 to August 29, 2001. Appellant was again off work and received wage-loss compensation from August 30 to October 11, 2001. She returned to work on October 12, 2001 as a modified distribution clerk, a position approved by Dr. John Brugman, an attending Board-certified orthopedic surgeon.[2] Appellant was placed in a leave without pay status on February 2, 2002.

In a February 22, 2002 report, Dr. Douglas Hemler, an attending Board-certified physiatrist, noted that physical therapy had significantly reduced appellant's pain symptoms and improved her range of cervical and right shoulder motion. He proscribed lifting, pulling, pushing or reaching above the shoulder and continuous fine manipulation. In response to these restrictions, on March 1, 2002 the employing establishment offered appellant a light-duty position checking labels, checking bundles again print-outs, cutting off "nixie mail," answering the telephone and stamping mail. The position did not require lifting, pulling, pushing or reaching above the shoulder. Appellant refused the job, asserting that stamping mail violated her restriction against repetitive motion and that the other tasks required forward reaching. Dr. Hemler held her off work from March 18, 2002 due to anxiety and possible agoraphobia. He recommended a functional capacity evaluation.

On March 21, 2002 appellant elected disability retirement through the Office of Personnel Management (OPM).

In an April 8, 2002 report, Dr. Bert S. Furmansky, an attending Board-certified psychiatrist, noted appellant's dislike of her work schedule and assignments prior to her retirement. Appellant asserted that on an unspecified date, she was transferred to "no value mail" which she alleged was "actually heavier than her usual assignment" and that she overheard a supervisor stating that it would be "a while before [appellant would get] her restrictions." Dr. Furmansky noted appellant's allegations of a secret criminal conspiracy and that she was "set up by her employer to fail." He diagnosed chronic pain disorder with psychological factors affecting a general medical condition, general anxiety disorder and major depressive disorder with psychosis, all employment related. Dr. Furmansky also noted a possible paranoid delusional disorder "causally related to her accepted physical work injuries." He found appellant totally disabled due to her psychotic mood and anxiety.

[2] Dr. Brugman treated appellant beginning in August 2000 and diagnosed degenerative disc disease at C4-5 and C5-6.

Dr. Furmansky submitted periodic reports through January 13, 2003, finding appellant totally disabled for work on March 2, 2002 for an indefinite period due to the diagnosed psychiatric conditions.[3]

In an April 17, 2002 report, Dr. Hemler stated that as the Office refused to authorize a functional capacity evaluation, this gave him a "nice out" to find appellant "permanently disabled from any employment within" the employing establishment from March 18, 2002 onward. He explained that his finding of total disability would continue unless the Office granted his requests.

In a September 17, 2002 report, Dr. Elias P. Kotsovolos commented that appellant's "continued complaints of pain and her continued report of deterioration was difficult to explain if, indeed, the injury was created and caused by the [employing establishment]" as she had retired several months ago. He opined that appellant was medically stable and recommended a pain management program. In periodic reports through February 6, 2003, Dr. Hemler noted her continuing neck and right shoulder symptoms and psychiatric issues. He found her totally disabled for work until such time as the Office would authorize a functional capacity evaluation and pain management program.

On January 26, 2003 appellant filed claims (Form CA-7) for intermittent wage-loss compensation beginning May 10, 2000 and for total disability from February 2, 2002 onward. In a June 13, 2003 letter, she asserted that the employing establishment was unable to accommodate her medical restrictions against lifting, pulling, pushing, fine manipulation and reaching above the shoulder. The Office construed appellant's claim for wage loss as a claim for a recurrence of total disability commencing February 2, 2002.

In an August 14, 2003 report, Dr. Hemler noted appellant's continued symptoms of right shoulder and neck pain, but that she was "doing more daily activities around her home" including helping her husband sort pine branches. Dr. Hemler found appellant "capable of working in the sedentary/light category of physical demand." He submitted periodic reports through May 10, 2004 recommending continued medication and physical therapy.

On September 25, 2003 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Anthony J. LoGalbo, a Board-certified orthopedist, for a second opinion examination. In an October 7, 2003 report, he opined that she had reached maximum medical improvement. Dr. LoGalbo diagnosed cervical disc disease and right shoulder tendinitis, permanently aggravated by work factors. He commented that appellant's condition would allow her to "engage in any number of physical activities, such as gardening and housework" if she took a 10 minute rest break each hour. Dr. LoGalbo limited lifting, pulling and pushing to 20 pounds no more than 2 hours a day and proscribed reaching above the shoulder. He noted that

[3] In a May 28, 2002 letter, the Office advised appellant to file a separate occupational disease claim (Form CA-2) in order for the Office to issue a decision "on acceptance of a work-related psychiatric illness." In June 19, 2002 and February 7, 2003 letters, appellant, through her attorney, stated that she did not wish to file an occupational disease claim for an emotional condition but requested that her psychiatric diagnoses be accepted as consequential injuries.

appellant's psychiatric conditions would entail additional restrictions but that he would defer to a psychiatrist to determine them.

In February 17, April 15 and May 10, 2004 letters, appellant, through her attorney, asserted that her claims for wage loss were based on her "physical restrictions alone" and not her psychiatric conditions.[4] The Office then undertook development of the emotional condition issue by referring her to a psychologist and a psychiatrist.[5]

By decision dated June 7, 2004, the Office denied appellant's claim for compensation beginning February 2, 2002 on the grounds that she had not submitted medical evidence establishing that the claimed period of disability was related to her accepted neck and right shoulder conditions.[6] The Office noted that the medical evidence indicated that appellant was "taken off work for psychological factors" not accepted as occupationally related.[7]

LEGAL PRECEDENT

As used in the Federal Employees' Compensation Act,[8] the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[9] 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.[10] This includes the necessity of furnishing 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 employment factors and supports that conclusion with sound medical

[4] In a May 10, 2004 affidavit of earnings and employment (Form EN1032), appellant noted performing clerical volunteer work at a retirement center on nine occasions from February 6 to 26, 2004, but that she was unable to continue due to neck pain.

[5] On May 4, 2004 the Office referred appellant to Dr. Richard F. Grenhart, a psychologist, for testing. On June 7, 2004 the Office referred her to Dr. Steven Dworetsky, a Board-certified psychiatrist, for a second opinion examination. The reports of these physicians are not of record. There is no final decision of record adjudicating the emotional condition issue.

[6] The Office's June 7, 2004 decision did not adjudicate appellant's claim for intermittent wage loss beginning May 10, 2000.

[7] Following issuance of the Office's June 7, 2004 decision, appellant submitted additional evidence. This evidence has not been considered by the Office. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

[8] 5 U.S.C. §§ 8101-8193.

[9] *Prince E. Wallace*, 52 ECAB 357 (2001).

[10] *Albert C. Brown*, 52 ECAB 152 (2000); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

reasoning.[11] An award of compensation may not be made on the basis of surmise, conjecture, speculation or on appellant's unsupported belief of causal relation.[12]

While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such an opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to the federal employment and that such a relationship must be supported with affirmative evidence, explained by medical rationale and be based on a complete and accurate medical and factual background of the claimant.[13] Medical conclusions unsupported by medical rationale are of diminished probative value and are insufficient to establish causal relation.[14]

ANALYSIS

The Office accepted that appellant sustained cervical disc disease, an aggravation of degenerative cervical disc disease and right shoulder tendinitis on or before February 10, 2001. Appellant performed light duty with intermittent absences through February 2, 2002, when she was placed in a leave without pay status. She retired from the employing establishment on March 21, 2002. On January 26, 2003 appellant filed a claim for total disability commencing February 2, 2002, at which time she was working light duty. She asserted that she stopped work as the employing establishment could no longer accommodate her physical restrictions. In order to prevail, appellant must demonstrate either a change in the nature and extent of her accepted neck and right shoulder conditions or in her light-duty job requirements.[15]

Appellant submitted several medical reports regarding her condition on and after February 2, 2002. Dr. Hemler, an attending Board-certified physiatrist, found her totally disabled for work from March 18, 2002 to August 13, 2003. He attributed appellant's disability from March 18 to April 17, 2002 to anxiety and possible agoraphobia, psychiatric conditions not accepted as work related.[16] Beginning April 17, 2002, Dr. Hemler held appellant off work as he felt unable to formulate specific work restrictions. As of September 17, 2002, he doubted that her physical symptoms were caused by the accepted conditions as she had retired six months

[11] *Ronald A. Eldridge*, 53 ECAB ___ (Docket No. 01-67, issued November 14, 2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[12] *Patricia J. Glenn*, 53 ECAB ___ (Docket No. 01-65, issued October 12, 2001; *Ausberto Guzman*, 25 ECAB 362 (1974).

[13] *Conard Hightower*, 54 ECAB ___ (Docket No. 02-1568, issued September 9, 2003).

[14] *Albert C. Brown*, *supra* note 9.

[15] *Albert C. Brown*, *supra* note 9; *Terry R. Hedman*, *supra* note 9.

[16] While the record indicates that the emotional condition issue was under development at the time of the June 7, 2004 decision, there is no decision of record adjudicating the emotional condition claim.

before. Yet, he continued to find her totally disabled in reports through February 6, 2003. Dr. Hemler then released appellant to sedentary or light duty as of August 14, 2003. Dr. LoGalbo, a Board-certified orthopedist and second opinion physician, concurred with Dr. Hemler's opinion, finding appellant able to perform light-duty work as of his October 7, 2003 examination.[17]

Dr. Hemler did not find an objective worsening of appellant's accepted cervical disc disease and right shoulder tendinitis. Instead, he attributed the claimed periods of disability to nonoccupational psychiatric causes, doubting that appellant's continuing symptoms were work related. The Board finds that Dr. Hemler's reports provided insufficient rationale to support a change in the nature and extent of appellant's injury-related conditions commencing February 2, 2002.[18]

Appellant also submitted reports from Dr. Furmansky, an attending Board-certified psychiatrist, who found her totally disabled for work from March 2, 2002 onward due to chronic pain disorder, anxiety disorder, depression and psychosis. However, the Office did not accept any psychiatric conditions as work related. Dr. Furmansky attributed his finding of disability to nonoccupational causes and his reports do not establish a worsening of the accepted conditions. Appellant has not submitted sufficient medical evidence to establish a change in the nature and extent of her accepted conditions commencing February 2, 2002.

Appellant also alleged a change in the nature and extent of her light-duty position. On April 8, 2002 she related to Dr. Furmansky that on an unspecified date, she was transferred to no value mail and assigned heavier work than her usual assignment. Appellant also alleged that she overheard a supervisor stating that it would be "a while before [appellant would get] her restrictions." However, she did not provide the date on which her assignment changed or any evidence to establish these allegations. Appellant alleged in a June 13, 2003 letter that the employing establishment could not accommodate her light-duty restrictions. She did not explain, however, which aspects of her assigned duties were outside of her medical restrictions. The Board notes that there is no evidence of record that appellant actually performed a position offered to and refused by her on March 1, 2002 which she asserted violated her restrictions. She has submitted insufficient evidence to establish a change in the nature and extent of her light-duty job assignment such that she could no longer perform it as of February 2, 2002.

The Board finds that the arguments and evidence submitted by appellant in support of her claim are insufficient to establish that she sustained a recurrence of total disability as alleged.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a recurrence of disability on the grounds that she submitted insufficient evidence of a change in her medical condition or in the nature and extent of her light-duty job requirements.

[17] Dr. LoGalbo noted that, while appellant may have required additional limitations due to her psychiatric conditions, he would defer the formulation of those restrictions to a mental health professional.

[18] *Albert C. Brown*, *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 2005
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member