United States Department of Labor
Employees' Compensation Appeals Board

SHARON E. ROBLES, Appellant	)	
and	)	**Docket No. 05-274**
	)	**Issued: July 11, 2005**
U.S. POSTAL SERVICE, OTAY MESA STATIONS, San Diego, CA, Employer	)	

Appearances:
Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 18, 2004 appellant, through her representative, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated August 4, 2004, denying modification of a February 14, 2003 decision, which denied her claim for wage-loss compensation based on partial disability beginning July 22, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly denied appellant's claim for wage-loss compensation commencing July 22, 2002.

FACTUAL HISTORY

On August 8, 1986 appellant, a 23-year-old city letter carrier, filed a traumatic injury claim alleging that she sustained an acute lumbar strain on July 30, 1986 due to carrying mail.[1]

[1] This was assigned claim number 13-0803994. The record contains evidence of another injury sustained on July 15, 1997. This was assigned claim number 13-1146784 and was accepted for right leg radiculopathy resolved.

The Office accepted the claim for low back strain, which it subsequently expanded to include aggravation of degenerative facet joint disease. On August 27, 1987 appellant accepted a limited-duty position working eight hours a day.

On February 2, 2001 the Office accepted appellant's claim for intermittent wage-loss compensation for the period October 19 through November 27, 2000.

In a report dated April 4, 2002, Dr. Thomas R. Dorsey, a second opinion Board-certified orthopedic surgeon, concluded that appellant was capable of working eight hours.

In a report dated July 17, 2002, Dr. Peter Low, a treating Board-certified physiatrist, diagnosed permanent aggravation of lumbar spine degenerative joint disease. He stated that appellant's "job activities do not appear to be aggravating her symptoms," but "the stress at work appears to be aggravating her symptoms." Based upon the aggravation of her symptoms due to stress, Dr. Low opined that appellant could not work an eight-hour day. Dr. Low noted that it was "medically reasonable that stress would precipitate lumbar muscle spasm, which would certainly aggravate preexisting lumbar symptoms and pain." In concluding, the physician restricted appellant work to six hours per day "to assess whether that would improve" her condition.

On July 26, 2002 the Office referred appellant to Dr. Louis Lurie, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Dorsey, a second opinion physician and Dr. Low, on the issue of whether appellant had any continuing disability due to her accepted employment injury and whether appellant was capable of working eight hours per day.

On September 9, 2002 appellant filed a claim for compensation for partial disability for the period July 22 to August 30, 2002, claiming wage loss for two hours a day.

On September 17, 2002 appellant filed a claim for compensation for partial disability, (two hours per day) for the period September 2 to 13, 2002.

On October 2, 2002 the Office received a work capacity evaluation (Form OWCP-5c) and report dated August 12, 2002 by Dr. Lurie, who diagnosed lumbar syndrome and degenerative disc disease at L4-5 due to the July 30, 1986 employment injury. He opined that appellant continued to have residuals of this injury. Dr. Lurie stated that appellant was only capable of working six hours per day with restrictions on the work capacity evaluation form.

On October 24, 2002 appellant filed a claim for compensation for partial disability (two hours a day) for the period September 16 to 27, 2002. On October 28, 2002 appellant filed a claim for compensation for partial disability (for two hours a day) for the period September 30 to October 11, 2002.

On November 5, 2002 the Office received an October 24, 2002 report by Dr. Lurie. With regard to appellant's work hours, Dr. Lurie stated:

> "The six-hour workday had been granted to the patient prior to my report. She felt that she could comfortably carry out her duties with a six-hour workday. She

had this in the past and is not a new recommendation by me. She herself knows her limits and what she can do. She stated emphatically in the interview that[,] if she exceeds the six hours, her symptoms begin to increase in terms of pain to a level which would not allow her to perform her duties. She has titrated (sic) her ability to work and is able to function up to six hours with comfort, but exceeding that produces symptoms of a higher level which she states are incompatible with her ability to work. Therefore, there are no objective findings to establish this limit of six hours. There is no CT (computerized tomography), MRI (magnetic resonance imaging), neurological test, electrical test or x-ray which would allow this quantification. The patient's history is valid in all cases and her observation is quite precise with regard to the number of hours she is able to work. This is valuable information which I have no reason to doubt and I consider it to be valid in terms of a recommendation. If a prophylactic basis means that working hours number seven and eight produces significant symptoms, then yes, a six-hour workday is prophylactic. In terms of increasing her disease state and accelerating her anatomical degeneration of the spine, it is felt that is not a significant factor."

On November 9, 2002 appellant filed a claim for compensation for partial disability (two hours a day) for the period October 14 to November 8, 2002.

On November 26, 2002 the Office received appellant's claim for a recurrence (Form Ca-2a) of disability dated October 15, 2002. Appellant claimed a recurrence of partial disability beginning July 22, 2002 for two hours a day due to worsening of her original symptoms of her accepted July 30, 1986 employment injury.

By decision dated February 14, 2003, the Office denied appellant's claim for a recurrence of partial disability beginning July 22, 2002 "with related disability for two hours per day." The Office relied upon the opinion of Dr. Lurie, the impartial medical examiner, who opined the reduction of appellant's work hours to six hours in her light-duty job was for prophylactic reasons. The Office found that the weight of the medical evidence failed to establish appellant's "recurrence claim of disability with a reduction in hours beginning on July 22, 2002 and ongoing."

In a letter dated March 17, 2003, appellant's counsel requested reconsideration of the denial of recurrence claim.

In a letter dated April 10, 2003, the Office requested clarification from Dr. Lurie regarding appellant's restriction of working six hours per day. The Office asked Dr. Lurie if the restriction was due to a worsening of appellant's condition or was to prevent future injury.

In a letter dated April 30, 2003, the Office requested Dr. Lurie to verify its interpretation of his opinion that he had restricted appellant to a six-hour workday to prevent future injury. The Office also requested Dr. Lurie to respond to the April 10, 2003 letter, if the reduction in work hours was due to an objective worsening of appellant's condition.

In a May 1, 2003 addendum, Dr. Lurie stated "your assumptions are correct regarding the six-hour workday" in response to an April 30, 2003 letter.

On May 13, 2003 the Office received a May 8, 2003 report from Dr. Low. He checked "no" to the questions as to whether appellant was capable of working an eight-hour workday and that this was a permanent restriction. On May 27, 2003 the Office received a May 9, 2003 report by Dr. Low, who diagnosed permanent aggravation of lumbar spine degenerative joint disease. He stated that appellant "was made permanent and stationary in the past for this injury and was given additional work restrictions on [August] 19, 2002."

By decision dated May 30, 2003, the Office denied modification of the February 14, 2003 decision.

Subsequent to the May 30, 2003 decision, the Office received additional medical evidence. In a January 23, 2004 letter, Dr. Low stated that the work restrictions were "preventative in nature as she develops increased pain when exceeding the six[-]hour time frame." Dr. Low noted that there were "no objective findings to support the work restriction and it is strictly considered preventative in nature."

By letter dated May 3, 2004, appellant's counsel requested reconsideration and submitted evidence in support of her request.

In a January 28, 2004 report, Dr. John B. Dorsey, a Board-certified orthopedic surgeon of professorial rank, diagnosed lumbosacral sprain/strain with facet arthrosis at L4-5 and degenerative disc disease at L4-5. A physical examination revealed normal posture, normal flexion, extension, right and left lateral flexion and right and left rotation. He also reported that appellant had no pain complaints with her neck range of motion. Dr. John B. Dorsey disagreed with Dr. Thomas R. Dorsey regarding the diagnosis of resolved lumbar musculoligamentous sprain and his opinion that appellant no longer had any residual due to her accepted employment injury. He stated that he found appellant to "be disabled to the point where she would have the limitations posted by" Dr. Lurie's August 12, 2002 report. With regard to the six-hour work restriction, Dr. Dorsey opined that it was "not a prophylactic preclusion" and was "an exact preclusion in view of the fact that … she could not tolerate working in excess of six hours per day due to her pain level."

On August 2, 2004 the Office received a July 21, 2004 report by Dr. Low. Diagnoses included slight improvement in the lumbosacral strain and slight improvement in the permanent aggravation of lumbar spine degenerative joint disease. With regard to appellant's work restrictions, Dr. Low reiterated his opinion that appellant had been "declared permanent and stationary by me on [August] 19, 2002 with permanent work restrictions."

By decision dated August 4, 2004, the Office denied modification of the May 30, 2003 decision.

LEGAL PRECEDENT

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 establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this

burden of proof, the employee must show either 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]

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[3]

ANALYSIS

In this case, the Board finds that appellant has not shown a change in the nature and extent of her injury-related condition or of the light-duty requirements. The record shows that appellant returned to light-duty work on or about August 27, 1987. The record does not establish nor did appellant allege that the claimed partial disability on or about July 22, 2002, was caused by a change in the nature or extent of her light-duty job requirements.

With respect to appellant's alleged partial disability from work, the Office determined that a conflict existed in the record between Dr. Low, appellant's treating physician and Dr. Thomas R. Dorsey, a second opinion physician, regarding her capacity for working eight hours with restrictions. The Office referred appellant for an impartial medical evaluation with Dr. Lurie, who opined that appellant had residuals from a lumbar syndrome and degenerative disc disease at L4-5, which he attributed to appellant's work injury. Dr. Lurie opined that appellant was capable of working with restrictions in his August 12, 2002 report. In an October 24, 2002 addendum, Dr. Lurie stated that he recommended a six-hour workday based upon appellant's belief that "she could comfortably carry out her duties with a six-hour workday" and that she was unable to work more than six hours due to pain. In response to an Office request for clarification regarding whether the six-hour work restriction was to prevent future injury and to explain whether there was a material worsening in appellant's condition, Dr. Lurie stated that the Office's "assumptions are correct regarding the six-hour workday" in a May 1, 2003 addendum.

The Board finds that Dr. Lurie's impartial medical opinion negated a finding that appellant was unable to work eight hours a day with restrictions. Dr. Lurie specifically stated that the six-hour work restriction he had recommended was preventative in nature and there was no material worsening of her condition. In addition, he stated that he based the six-hour work restriction upon appellant's emphatic statement that she could not work more than six hours without having pain. Accordingly, the Board finds that Dr. Lurie's opinion constituted the special weight of the medical evidence to support the Office's August 4, 2004 decision, which denied appellant's request for modification of a February 13, 2003 decision claim, appellant's claim for wage-loss compensation based on recurrence of partial disability beginning July 22, 2002 and continuing. Appellant has therefore failed to discharge her burden of proof to establish

[2] *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

[3] 5 U.S.C. § 8123(a); *see Thomas J. Fragale*, 55 ECAB ___ (Docket No. 04-835, issued July 8, 2004).

her claim that she was entitled to wage-loss compensation based on a recurrence of partial disability.

In support of her May 3, 2004 request for modification, appellant submitted a January 28, 2004 report by Dr. John B. Dorsey, who diagnosed lumbosacral sprain/strain with facet arthrosis at L4-5 and degenerative disc disease at L4-5 and concluded that appellant was incapable of working more than six hours per day. In his report, Dr. John B. Dorsey noted his disagreement with Dr. Thomas R. Dorsey regarding his diagnosis and opinion that appellant could work eight hours a day. In addition, Dr. John B. Dorsey noted his agreement with Dr. Lurie's August 12, 2002 report, regarding the limitations noted in that report. With regards to the six-hour work restriction, Dr. John B. Dorsey opined that it was "not a prophylactic preclusion" and was "an exact preclusion in view of the fact that … she could not tolerate working in excess of six hours per day due to her pain level." Dr. John B. Dorsey's opinion is insufficient to create a conflict with the opinion of Dr. Lurie regarding whether appellant was capable of working eight hours a day and whether the six-hour work restriction noted by Dr. Lurie was merely prophylactic. Dr. John B. Dorsey indicated that his work restriction was based upon appellant's pain level and her opinion that she was unable to work more than six hours. The Board has held that a diagnosis of "pain," without more in the way of medical rationale, does not constitute the basis for the payment of compensation.[4] Thus, Dr. John B. Dorsey's report is insufficient to support appellant's claim that she was entitled to wage-loss compensation based on a recurrence of partial disability or create a conflict with Dr. Lurie.

CONCLUSION

The Board finds that appellant is not entitled to compensation for partial disability for the period July 22, 2002 and continuing causally related to her accepted July 30, 1986 injury.

[4] *Robert Broome*, 55 ECAB ___ (Docket No. 04-93, issued February 23, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 4, 2004 is affirmed.

Issued: July 11, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member