United States Department of Labor
Employees' Compensation Appeals Board

ROLAND F. SANCHEZ, Appellant	)	
and	)	**Docket No. 05-1475**
	)	**Issued: February 1, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Belen, NM, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 5, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 23, 2004 and June 6, 2005 merit decisions concerning his claim that he was entitled to compensation after December 6, 2001 due to employment-related disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant was not entitled to compensation on or after December 6, 2001 due to his May 2, 1994 employment injury.

FACTUAL HISTORY

On May 3, 1994 appellant, then a 30-year-old mail carrier, filed a traumatic injury claim alleging that he sustained a back injury when he twisted his back while reaching back to grab a bundle of mail at work on May 2, 1994. The Office accepted that appellant sustained a

lumbosacral strain and aggravation of a displaced lumbar disc at L5-6 and paid compensation for periods of total disability.[1]

On October 15, 1994 appellant returned to work 20 hours per week in a light-duty mail carrier position for the employing establishment. By decision dated April 20, 1995, the Office adjusted appellant's compensation to reflect its determination that his actual wages as a light-duty mail carrier represented his wage earning since October 15, 1994.[2]

On August 11, 2001 appellant returned to work for the employing establishment as a modified mail carrier.[3] The position restricted him from lifting more than 50 pounds, pushing or pulling for more than 1 hour per day, and reaching above the shoulders for more than 2 hours per day.[4]

In a September 25, 2001 memorandum, Harold Pittman, appellant's supervisor, stated that on August 28, 2001 appellant showed him a document which described the medications appellant was taking and which made him dizzy and drowsy. Mr. Pittman stated that he took appellant off work starting August 28, 2001 because he could not allow him to drive a postal vehicle if his medication made him dizzy and drowsy.

Appellant submitted a September 11, 2001 report in which Dr. Brian P. Delahoussaye, an attending physician Board-certified in physical medicine and rehabilitation, indicated that he should take Skelaxin instead of Soma and that he should continue taking Hydroconone.[5] Appellant advised the physician that his medications caused drowsiness and noted that it was not safe for him to drive at work without changing his medication regimen. In a report dated October 23, 2001, Dr. Delahoussaye indicated that appellant reported experiencing dizziness after taking Hydroconone and recommended a decrease in his dosage.

In a report dated November 6, 2001, Dr. Delahoussaye stated that he was changing appellant's work restrictions to indicate that he could only lift 10 pounds. In a report dated December 3, 2001, Dr. Delahoussaye again stated that appellant was only capable of lifting 10 pounds and continued to experience sedation several times per month. He continued appellant on Hydroconone and Soma and stated, "I advised him that I did not want him to take the medicines during the daytime if in fact they were affecting his ability to drive. I stated to him that I could not authorize the use of medicines that would affect his performance behind the

[1] Appellant was working approximately 30 hours per week at the time of his injury.

[2] By decision dated May 19, 1997, the Board affirmed the Office's wage-earning capacity determination.

[3] It is unclear from the record how many hours the position required appellant to work as the position description indicated that he would work 7:00 a.m. "until route is complete."

[4] By decision dated September 25, 2001, the Office adjusted appellant's compensation to reflect its determination that his actual wages in this position represented his wage earning since August 11, 2001.

[5] Dr. Delahoussaye reported that appellant had been taking both Soma and Hydroconone at the same time.

wheel." On March 8, 2002 Dr. Delahoussaye indicated that appellant should take Hydroconone and Darvocet[6] and completed a form report which indicated that he could only lift 10 pounds.

Appellant submitted periodic reports of Dr. Delahoussaye which were dated between April 2002 and June 2003. In these reports, he indicated that appellant reported low back and right leg pain and diagnosed chronic low back pain with right-sided sciatica or L5 radiculopathy. Dr. Delahoussaye reported appellant's descriptions of the efficacy of the medications he used and periodically changed the types and dosages of these medications.[7] In form reports dated December 13, 2002 and April 7, 2003, Dr. Delahoussaye indicated that appellant could only lift 10 pounds.

By decision dated August 23, 2002, the Office terminated appellant's compensation effective August 28, 2001 on the grounds that he abandoned suitable employment. Appellant asserted that he had sustained a recurrence of total disability beginning August 28, 2001. He argued that the employing establishment withdrew his modified mail carrier position on August 28, 2001 and that the medical evidence showed that his May 2, 1994 employment injury prevented him from performing the duties of the position even if it was available to him.

Appellant requested a hearing before an Office hearing representative which was held on May 15, 2003. By decision dated August 11, 2003, the Office hearing representative determined that the Office had improperly terminated appellant's compensation effective August 28, 2001. The hearing representative also found that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after August 28, 2001. By decision dated September 23, 2004, the Office affirmed the August 11, 2003 decision.

Appellant contended that he sustained a recurrence of total disability beginning August 28, 2001. He submitted an October 20, 2004 report in which Dr. Delahoussaye discussed his medical condition and performance of modified work duties. Dr. Delahoussaye indicated that he did not change appellant's lifting restriction to 10 pounds until he developed increased back and lower extremity pain. He stated:

> "When it became apparent that the type of medicine that he was on was causing side effects that would limit his ability to do the job I attempted to change the medicines. After working with him on these medicines I found that I could not find a combination that kept his symptoms under control that did not also have the side effects of drowsiness or sedation. Later I therefore determined that he would not be able to do the job that was offered to him because of the side effects of the medication. Also because of his increasing symptoms with complaints of

[6] Appellant had reported experiencing rashes with usage of Oxycontin. He later stopped using Darvocet as he reported that it "did not seem to be helping him."

[7] These medications included Hydroconone, Soma, Temazepam, and Neurontin.

numbness in his leg and sciatica I later changed his restriction to a 10[-]pound limit."[8]

By decision dated June 6, 2005, the Office modified its September 23, 2004 decision to reflect that appellant was entitled to compensation for the period August 28 to December 6, 2001 but was not entitled to compensation for any period thereafter. The Office stated:

> "The September 23, 2004 decision is modified to reflect that the modified rural carrier relief assignment was withdrawn effective August 28, 2001 pending a solution to prescription medication issue. Said solution was reached on December 6, 2001 when Dr. Delahoussaye stated that he did not want you taking your medication during the daytime if, in fact, they were affecting your ability to drive. Wage[-]loss compensation is payable for the period August 28, 2001 through December 6, 2001.
>
> "Wage[-]loss entitlement subsequent to the above[-]identified period remains denied as the evidence fails to establish that continuing wage loss is due to a material worsening of the accepted work injury."

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,[9] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[10] The Office may not terminate or modify compensation without establishing that the disability ceased or that it was no longer related to the employment.[11] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[12]

ANALYSIS

The Office accepted that appellant sustained a lumbosacral strain and aggravation of a displaced lumbar disc at L5-6. On August 11, 2001 appellant returned to work for the employing establishment as a modified mail carrier.[13] The position restricted him from lifting more than 50

[8] He also submitted reports dated beginning in late 2003, in which Dr. Ronald Takemoto, an attending physician Board-certified in physical medicine and rehabilitation, described his low back problems. Dr. Takemoto indicated that appellant could not lift more than 10 pounds.

[9] 5 U.S.C. §§ 8101-8193.

[10] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[11] *Id.*

[12] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[13] It is unclear from the record how many hours the position required appellant to work as the position description indicated that he would work 7:00 a.m. "until route is complete."

pounds, pushing or pulling for more than 1 hour per day, and reaching above the shoulders for more than 2 hours per day.

Appellant stopped working in his modified position on August 28, 2001. The record reflects that the employing establishment withdrew appellant's modified position on this date due to concerns that the medications he was taking for his employment injury caused drowsiness and dizziness which made it unsafe for him to operate his postal vehicle.

By decision dated August 23, 2002, the Office terminated appellant's compensation effective August 28, 2001 on the grounds that he abandoned suitable employment. By decision dated August 11, 2003, the Office determined that it had improperly terminated appellant's compensation effective August 28, 2001. In later decisions, the Office found that appellant was entitled to compensation for the period August 28 to December 6, 2001 because his modified position had been withdrawn during this period. However, the Office also found that appellant was not entitled to compensation after December 6, 2001 in that he did not meet his burden of proof to establish a recurrence of total disability due to his May 2, 1994 employment injury.[14] In reaching this conclusion, the Office reasoned that appellant did not have any problems with medications after December 6, 2001 and suggested that his modified position was available to him after that date.

The Board finds that the Office improperly determined that appellant was not entitled to compensation on or after December 6, 2001 due to his May 2, 1994 employment injury. In denying compensation after December 6, 2001, the Office found that appellant did not meet his burden of proof to establish that he sustained an employment-related recurrence of total disability after December 6, 2001. However, as the Office found that it had improperly terminated appellant's compensation effective August 28, 2001, it retained the burden to show that appellant was not entitled to compensation for any period thereafter.[15]

The Board notes that therefore the Office impermissibly shifted the burden of proof to appellant to establish that he had employment-related disability after December 6, 2001. The Office did not otherwise present evidence or argument which would be sufficient to meet its

[14] When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he 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 he 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. *Cynthia M. Judd*, 42 ECAB 246, 250 (1990). However, before the burden of proof shifts to a claimant under the foregoing principle, the evidence of record must establish that light duty consistent with the claimant's medical restrictions was in fact made available to the claimant. *Louise R. Silva*, 41 ECAB 176, 184 (1989).

[15] *See supra* notes 10 through 12 and accompanying text.

burden of proof to show that appellant did not have employment-related disability on or after December 6, 2001.[16]

The medical evidence of record indicates that beginning in late 2001 appellant was unable to perform his modified work due to residuals of his employment injury. In several reports dated beginning in late 2001, Dr. Delahoussaye noted that appellant was reporting drowsiness and dizziness in connection with the medications he was taking for his employment injuries. Dr. Delahoussaye repeatedly adjusted appellant's medications in an attempt to limit the side effects of drowsiness and dizziness which made it unsafe for him to operate a postal vehicle. In an October 20, 2004 report, Dr. Delahoussaye stated, "When it became apparent that the type of medicine that he was on was causing side effects that would limit his ability to do the job I attempted to change the medicines. After working with him on these medicines I found that I could not find a combination that kept his symptoms under control that did not also have the side effects of drowsiness or sedation." Beginning in November 2001, Dr. Delahoussaye determined that appellant was only able to lift 10 pounds due to increased back problems.[17] He concluded that appellant's medication problems and lifting restrictions prevented him from performing his modified work with the employing establishment.

For these reasons, the Office has not shown that appellant would not be entitled to total disability compensation after December 6, 2001 due to his employment injury.

CONCLUSION

The Board finds that the Office improperly determined that appellant was not entitled to compensation on or after December 6, 2001 due to his May 2, 1994 employment injury.

[16] Moreover, the Office's argument that appellant did not show employment-related disability on or after December 6, 2001 is unclear. For example, the Office suggested that appellant was not entitled to compensation after December 16, 2001 because modified work was available to him after that date. However, the record does not contain any evidence that the employing establishment had modified work available for appellant after December 6, 2001.

[17] The record also contains reports dated beginning in late 2003, in which Dr. Takemoto, an attending physician Board-certified in physical medicine and rehabilitation, indicated that appellant could not lift more than 10 pounds due to his low back problems.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 6, 2005 and September 23, 2004 decisions are reversed.

Issued: February 1, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board