United States Department of Labor
Employees' Compensation Appeals Board

MANUEL RODRIQUEZ, Appellant	)	
and	)	**Docket No. 06-429**
	)	**Issued: July 10, 2006**
DEPARTMENT OF THE ARMY, WILLIAM BEAUMONT ARMY MEDICAL CENTER, El Paso, TX, Employer	)	

Appearances:
Manuel Rodriquez, pro se
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 December 16, 2005 appellant timely appealed merit decisions dated May 23 and September 20, 2005 of the Office of Workers' Compensation Programs, which denied his recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.[1]

ISSUE

The issue is whether appellant met his burden of proof to establish a recurrence of disability on or after March 6, 2000 causally related to his accepted work injury.

[1] The record contains a December 22, 2005 Office decision, which reissued its September 20, 2005 decision to reflect that the accurate date of a prior recurrence decision was September 14, 2000, not July 21, 2000. Appellant filed his appeal with the Board on December 16, 2005. It is well established that the Board and the Office may not exercise concurrent jurisdiction over the same issue in the same case. *Cathy B. Millin*, 51 ECAB 331 (2000); *Douglas E. Billings*, 41 ECAB 880 (1990). Therefore, the Office's December 22, 2005 decision is null and void.

FACTUAL HISTORY

This claim has previously been on appeal. In a June 15, 2004 decision, the Board vacated a November 6, 2002 decision of the Office, which denied appellant's request for an oral hearing as untimely. The case was remanded to the Office's Branch of Hearings and Review for a hearing on the denial of his recurrence claim.[2] The record reflects that the Office accepted appellant's claim for a right shoulder impingement syndrome, right shoulder arthroscopy, right wrist tendinitis and right carpel tunnel release arising from his work as a meat cutter on or before February 19, 1996. Appellant returned to modified work on December 6, 1999 and stopped work on March 6, 2000. The facts of the case, as set forth in the Board's prior decision, are incorporated herein.

Appellant returned to work in a modified position based upon the medical opinion of Dr. Rene Arredondo, a Board-certified orthopedic surgeon selected as the impartial medical specialist. He opined that appellant was capable of working eight hours a day with restrictions. Appellant began working limited duty on December 6, 1999 in accordance to the duties set forth in the limited-duty offer of November 9, 1999 and a set of duties assigned by Major Guy A. Desmond, a supervisor. In a March 10, 1999 statement, Major Desmond advised that appellant worked the full scope of the limited-duty position for one week, which included intermittent cash register work.

Appellant submitted several reports from Dr. Antonio A. Ghiselli, a treating physician and Board-certified orthopedic surgeon. In office notes of December 15, 1999, Dr. Ghiselli stated that appellant went back to work, but was doing cash register work and that he could not reach with his right hand. He noted that Dr. Arredono had restricted appellant from any reaching or lifting above his shoulder with his right arm and stated that it was a necessary activity with a cash register as appellant does it at eye level. Dr. Ghiselli noted his physical examination findings and advised that appellant was given a form to explain to his supervisors that working at the cash register required him to reach with his arm, which was painful. In a January 5, 2000 report, Dr. Ghiselli noted that appellant was doing paperwork, but stated: "it is repetitive type of work. It bothers him a lot." He noted that appellant had continued pain and soreness of the right upper extremity. In a March 3, 2000 report, Dr. Ghiselli diagnosed carpel tunnel syndrome and overuse syndrome of the right shoulder and right arm. He stated that appellant continued to perform repetitive type of work and that his shoulder bothered him as well as his arm and wrist/hand area. Dr. Ghiselli stated that appellant was "struggling a lot" with work and was in constant pain. He took appellant off work for one week due to the repetitive nature of his work. In a May 23, 2000 report, Dr. Ghiselli stated that appellant was unable to return to work because of right arm pain and because of the repetitive nature of his work. In a July 21, 2000 report, Dr. Ghiselli stated that appellant was unable to work as the work which was available to him was of a repetitive nature and required repetitive movement. He explained why appellant could not perform cashier work and opined that since appellant's condition was permanent and appellant could not perform that sort of work, he would be out of work due to his condition.

[2] Docket No. 04-137 (issued June 15, 2004).

In an August 2, 2000 letter, the Office informed appellant that if he was claiming a recurrence of disability commencing March 6, 2000 due to the February 19, 1996 employment injury, additional information was needed including a narrative report from his treating physician explaining how his work-related condition worsened. Appellant submitted copies of physical therapy reports.

By decision dated September 14, 2000, the Office denied appellant's claim for a recurrence of disability commencing March 6, 2000 on the grounds that the evidence did not establish that his disability was due to his work-related injury.[3] In a letter dated August 28, 2001, the Office acknowledged receipt of appellant's July 30, 2001 claim for total disability from March 6, 2000 through May 1, 2001 and advised that it could not process the claim as his recurrence of disability claim was denied in the September 14, 2000 decision.

In a letter dated September 20, 2001, appellant requested review of his claim by the Office Branch of Hearings and Review. He submitted medical reports from Dr. Ghiselli dated September 20, 2000 and August 7, 2001. On September 20, 2000 Dr. Ghiselli stated that the effects of the work injury had not ceased and appellant's prognosis regarding recovery was poor. He stated that appellant could not use his right arm and shoulder for repetitive motions and was unable to work. On August 7, 2001 Dr. Ghiselli stated that appellant had reached maximum medical improvement on July 30, 2001 and opined that appellant had an eight percent permanent impairment to his right upper extremity.

By decision dated November 6, 2002, the Office Branch of Hearings and Review denied appellant's request for an oral hearing as untimely. It noted that appellant's request could be addressed by requesting reconsideration from the Office and submitting new evidence.

In an August 23, 2003 letter, appellant requested reconsideration, contending that when he returned to work on December 6, 1999 he was placed in a cashier position in direct conflict with the recommendations of his physicians that he not perform repetitive motion. Appellant also contended that the Office had ignored his medical restrictions and limitations and requested that his recurrence of total disability from March 6, 2000 to August 28, 2001 be approved.

By decision dated September 29, 2003, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. As noted, the Board remanded the case for an oral hearing which was held on February 15, 2005. At the hearing, appellant testified that he returned to modified duty in a clerical position in the Nutrition Department and worked as a cashier for 15 days before he was given new duties which met his restrictions. His new duties required him to walk around and give out diet questionnaires and menus. He also answered the telephone and made copies of menus. Appellant also stated that he performed the clerical position from mid-December and stopped work in March 2000 as he felt pain in his shoulder and arm. He additionally stated that his doctor also felt that he could not perform the repetitive duties of the light-duty position.

[3] The Board notes that the Office in its May 23 and September 20, 2005 decisions, had incorrectly referred to the Office's September 14, 2000 decision as being issued on July 21, 2000.

By decision dated May 23, 2005, an Office hearing representative affirmed the July 21, 2000 denial of the recurrence claim.

In a letter dated June 9, 2005, appellant requested reconsideration and submitted a duplicative copy of Dr. Ghiselli's July 21, 2000 report and a June 1, 2005 note from Dr. Ghiselli, who stated that appellant experienced pain because of repetitive work he performed at the cash register and the clerical work in the Nutrition Department. He stated that this repetitive work was the main cause of the recurrence of disability and why he took appellant off work. He advised that appellant had a permanent injury to his right shoulder and right hand.

By decision dated September 20, 2005, the Office denied modification of its May 23, 2005 decision.

LEGAL PRECEDENT

As used in the Federal Employees' Compensation Act,[4] the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[5] Arecurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6]

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence establishes that he can perform the limited-duty position, the employee has the burden of proof to establish a recurrence of total disability and that he cannot perform such limited-duty work. As part of this burden of proof, the employee must show a change in the nature or extent of the injury-related condition or a change in nature and extent of the light-duty job requirements.[7] 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 reasoning.[8] An award of compensation may not be made on the basis of surmise, conjecture, speculation or on appellant's unsupported belief of causal relation.[9]

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

[4] 5 U.S.C. §§ 8101-8193.

[5] 20 C.F.R. § 10.5(f) (1999); *see Prince E. Wallace*, 52 ECAB 357 (2001); *see e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

[6] 20 C.F.R. § 10.5(x).

[7] *See John I. Echols*, 53 ECAB 481 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[8] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[9] *Patricia J. Glenn*, 53 ECAB 159 (2001).

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 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.[10] Medical conclusions unsupported by medical rationale are of diminished probative value and are insufficient to establish causal relation.[11]

ANALYSIS

The Office accepted appellant's claim for right shoulder impingement syndrome, right shoulder arthroscopy, right wrist tendinitis and right carpal tunnel. Appellant claimed a recurrence of disability commencing March 6, 2000, while on light duty, which he attributed to work being assigned outside of his medical restrictions and the repetitive nature of the work. In order to prevail, appellant must establish either a worsening of his accepted conditions as of February 19, 1996 or a change in the nature and extent of his light-duty job requirements such that he could no longer perform the position.[12]

The Board finds a lack of rationalized medical evidence supporting that appellant could not perform the duties required by the light-duty position or that appellant's disability status had changed following his return to work. Appellant has submitted medical reports from Dr. Ghiselli, who attributed appellant's disability to cash register work and the repetitive nature of the clerical work in his limited-duty job. The record reflects that appellant had worked at the cash register intermittently for no more than two weeks[13] and then only performed clerical duties. Although Dr. Ghiselli's December 15, 1999 report indicated that appellant's work at the cash register was outside the restrictions of Dr. Arredono, the impartial medical specialist, Dr. Ghiselli has not provided a rationalized medical opinion relating appellant's disability to the limited amount of cash register work appellant performed. It does not appear that the physician knew that appellant no longer performed said work at the cash register after he rendered his report of December 15, 1999 or that the physician had an accurate understanding of appellant's actual duties in his modified job. The Board notes that Dr. Ghiselli based his opinion that appellant could not do the light-duty position based on appellant's statements that his work was repetitive in nature. The factual evidence of record, however, does not demonstrate that appellant's clerical duties of handing out and photocopying menus and dietary questionnaires and answering the telephone were repetitive or outside of the restrictions set by Dr. Arredono. The Board has held that medical opinions which are based on an incomplete or inaccurate factual

[10] *Conard Hightower*, 54 ECAB 796 (2003).

[11] *Albert C. Brown*, 52 ECAB 152 (2000).

[12] *Id*.

[13] The Office hearing representative found that the employing establishment and appellant disagreed as to the length of time he performed cashier duties. Appellant contended that he performed cashier duties for intermittent periods for approximately 15 days, while the employing establishment advised that appellant only performed such cashier duties for five days.

background are entitled to little probative value in establishing a claim.[14] In his reports contemporaneous to the claimed period of disability, Dr. Ghiselli advised that appellant could not work due to pain and soreness, but did not provide any objective findings. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[15] For these reasons, Dr. Ghiselli's reports are of diminished probative value to establish appellant's claim.

The Board finds that Dr. Ghiselli failed to provide sufficient medical opinion to support a worsening of appellant's injury-related condition or that appellant's disability status had changed following his return to work or that the limited amount of time appellant had worked the cash register caused appellant to have a recurrence of disability in March 2000. Appellant also did not submit factual evidence establishing a change in the nature and extent of his light-duty job requirements.

Appellant was advised of the medical and factual evidence needed to establish his claim for recurrence of disability. However, he did not submit such evidence. The Office properly found that appellant submitted insufficient evidence to meet his burden of proof in establishing the claimed recurrence of disability commencing March 6, 2000.

CONCLUSION

The Board finds that appellant has not established a recurrence of disability on or after March 6, 2000 causally related to his accepted work injury as the medical evidence of record does not support any employment-related disability.

[14] *Frank Luis Rembisz*, 52 ECAB 147 (2000).

[15] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated September 20 and May 23, 2005 are affirmed.

Issued: July 10, 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