United States Department of Labor
Employees' Compensation Appeals Board

CAROLYN R. GRAY, Appellant	)	
and	)	**Docket No. 05-1700**
	)	**Issued: June 20, 2006**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, LITTLE CREEK COMMISSARY, Norfolk, VA, Employer	)	

Appearances:
Wallace Dillard, for the appellant
Miriam D. Ozur, Esq., for the Director

Oral Argument April 18, 2006

DECISION AND ORDER

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

JURISDICTION

On August 9, 2005 appellant, through her representative, filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated January 18 and June 28, 2005 denying appellant's entitlement to wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that she is entitled to compensation for the period July 30 through November 16, 2003; and (2) whether appellant has established that she is entitled to total disability compensation from November 17, 2003 forward.

FACTUAL HISTORY

On July 27, 2003 appellant, then a 38-year-old commissary support clerk, filed a traumatic injury claim alleging that on July 24, 2003 she pulled a muscle and sustained a sprain in her lower back while stepping on a crate to lift a bottle of Purex. The employing

establishment controverted the claim. By letter dated November 26, 2003, the Office accepted appellant's claim for right shoulder sprain/strain and lumbar sprain/strain.

In a September 30, 2003 note, Dr. Roland Bercasio, a Board-certified family practitioner, excused appellant from work September 30 to October 6, 2003 due to persistent low back pain. On November 7, 2003 Dr. Bercasio indicated that he first saw appellant on September 16, 2003, at which time she complained of low back pain. He noted that appellant indicated that she lost her balance on July 24, 2003 when attempting to lift a case of Purex detergent from overhead while standing on a crate. Dr. Bercasio prescribed medication, advised her to apply heat or cold compresses, and restricted her lifting to a maximum weight of 20 pounds. In follow up visits on September 30, October 1 and 15 and November 4, 2003, appellant complained of continuing back pain. Dr. Bercasio advised her to continue work restrictions to avoid lifting, pushing and pulling more than 10 pounds. He referred appellant to Dr. Ron Gharbo, an osteopath, for further evaluation. Dr. Bercasio noted that appellant's prognosis was undetermined.

On December 17, 2003 appellant filed a claim for intermittent disability for the period July 30 through November 17, 2003 and for total disability for the period commencing November 17, 2003. By letter to appellant dated December 31, 2003, the Office requested further information.

In a letter dated November 17, 2003, the employing establishment informed appellant that she was terminated as of that date due to general lack of suitability including her lack of cooperativeness and ongoing failure to follow instructions which negatively impacted the efficiency of the store operations.

By decision dated February 20, 2004, the Office denied appellant's claim for compensation for the period July 30 through November 15, 2003 (with the exception of the period from October 1 to 5, 2003) and for wage-loss compensation after November 17, 2003 as she was terminated from her position effective November 17, 2003 for cause and not as a result of her work-related accepted conditions of July 24, 2003.

In a medical report dated January 13, 2004, received by the Office on February 23, 2004, Dr. Gharbo listed his impression as chronic right trapezial myofascial pain due to injury on July 24, 2003. He indicated that, as appellant has had neck pain for a protracted period of time without significant relief, a magnetic resonance imaging (MRI) scan was warranted. Dr. Gharbo also noted that stress was an exacerbating feature of her pain.

On March 12, 2004 appellant requested an oral hearing which was held on October 21, 2004.

In a report dated March 9, 2004, Dr. Gharbo indicated that appellant was currently under treatment for chronic myofascial pain related to an injury of July 24, 2003. He opined, "It is my understanding that she does not have a job to return to at this time; however, she could return to a light-duty job right now and possibly with some time maybe medium duty." In medical reports dated May 3 and 27 and July 26, 2004, Dr. Gharbo listed his impression as myofascial right trapezial pain. In a report dated November 8, 2004, Dr. Gharbo listed his impression as myofascial right trapezial pain and musculoligamentous low back pain.

By decision dated January 18, 2005, the hearing representative affirmed the Office's decision. The hearing representative found that appellant's work stoppage on or after November 17, 2003 was not the result of a worsening of her condition or an inability to perform her limited-duty position, but rather she was removed for reasons unrelated to her medical condition. Accordingly, he found that appellant did not establish a recurrence of her condition on November 17, 2003 causally related to the original work injury of July 24, 2003.

Appellant filed a request for reconsideration on March 15, 2005.

In a medical report sent to appellant's union representative and received by the Office on March 18, 2005, Dr. Bercasio summarized his treatment of appellant and stated that he had also followed appellant for nonrelated problems. He noted that appellant had not been able to perform her regular job duties due to continuing neck and low back pain.

Appellant continued to see Dr. Gharbo. In a February 21, 2005 medical report, he diagnosed chronic myofascial trapezial pain as well as chronic musculoligamentous low back pain related to the work-related injury on July 24, 2003. He noted that appellant was currently undergoing physical therapy and spinal manipulation therapy and adjustments to multiple medications. Dr. Gharbo indicated that appellant was ready to return to employment "for some time" but with a 30-pound lifting restriction indefinitely.

In a decision dated June 28, 2005, the Office denied modification of the January 18, 2005 decision.

LEGAL PRECEDENT -- ISSUE 1

As used in the Federal Employees' Compensation Act,[1] the term disability is defined as the incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in a loss of wage-earning capacity.[2]

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[3] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. The opinion of a physician 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.[4] When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical

[1] 5 U.S.C. § 8102.

[2] *Sean O'Connell*, 56 ECAB ____ (Docket No. 04-1746, issued December 20, 2004).

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

[4] *Id.*

opinion on the issue of disability or a basis for payment of compensation.[5] The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[6]

ANALYSIS -- ISSUE 1

In the instant case, appellant has failed to establish disability during the period July 30 through November 15, 2003. In his note of September 30, 2003, Dr. Bercasio excused appellant from work due to persistent low back pain from September 30 until October 6, 2003. However, he provided no explanation on the causal relationship of her disability to the accepted injury. Dr. Bercasio did not state that appellant was disabled, did not provide a rationalized explanation as to why appellant could not perform her job duties and did not explain the relationship between the alleged disability and the accepted July 24, 2003 injury. Accordingly, this note is insufficient to establish any periods of intermittent disability. In subsequent reports, Dr. Bercasio provided work restrictions but never stated that appellant was disabled from her employment. No other physician indicated that appellant was disabled for intermittent periods between July 30 and November 16, 2003. Accordingly, appellant has failed to provide medical evidence establishing entitlement to compensation for intermittent periods between July 30 and November 16, 2003.[7]

LEGAL PRECEDENT -- ISSUE 2

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.[8]

Office regulations provide that a recurrence 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.[9] This term also means an inability to work that

[5] *Id.*

[6] *Id.*

[7] *See Fereidoon Kharabi, supra* note 3.

[8] *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[9] 20 C.F.R. § 10.5(x).

takes place when a light-duty assignment is withdrawn except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or reduction-in-force.[10]

ANALYSIS -- ISSUE 2

In the instant case, the employing establishment terminated appellant for misconduct unrelated to her work injury. The Board has held that, when a claimant stops work for reasons unrelated to her accepted employment injury, she has no disability within the meaning of the Act.[11] The Office informed appellant that she was terminated due to lack of cooperativeness and ongoing failure to follow instructions. There is no rationalized medical evidence which indicates that appellant could not perform the duties of her job.

Appellant contends that she was improperly terminated from her position. Although she disagreed with the employing establishment's characterization of her actions, she has not alleged nor does the record establish that she was dismissed for reasons other than misconduct. Appellant did not submit any evidence to establish that her termination was in error or withdrawn. As the withdrawal of her position was premised on the misconduct, the loss of her position under these circumstances does not establish a recurrence of disability.[12] Therefore, the Office properly determined that appellant was not entitled to compensation for total disability after November 17, 2003.

CONCLUSION

The Board finds that appellant has not established that she is entitled to intermittent compensation for the period July 30 through November 16, 2003 and that appellant has not established that she is entitled to total disability compensation from November 17, 2003 forward.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(1)(c) (May 1997); *see also John W. Normand*, 39 ECAB 1378 (1988).

[11] *Id.*

[12] *See Lester Covington*, 47 ECAB 539, 542 (1996); *Major W. Jefferson, III*, 47 ECAB 295, 298 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 28 and January 18, 2005 are affirmed.

Issued: June 20, 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