United States Department of Labor
Employees' Compensation Appeals Board

RAMONA GUZMAN, Appellant	)	
and	)	**Docket No. 06-32**
	)	**Issued: June 9, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Lompoc, CA, Employer	)	

Appearances:
Sally F. LaMacchia, 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

JURISDICTION

By letter dated September 28, 2005, appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 28, 2004, denying her claim for lost wages in 2002 and 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant was totally disabled from January 11 to May 3 and May 5 to 6, 2002 due to her October 18, 2001 employment injury; and (2) whether she sustained a recurrence of total disability on May 9, 2002.

FACTUAL HISTORY

On January 11, 2002 appellant, then a 41-year-old part-time flexible letter carrier, filed a traumatic injury claim alleging that she sustained a back injury beginning on October 18, 2001 caused by repetitive motions in her job. On April 11, 2002 the Office accepted her claim for

temporary aggravation of spondylolisthesis at L5-S1.[1] Appellant worked for 2.17 hours on January 14, 2002 and 1.42 hours on January 16, 2002. She did not return to work with the exception of one day in April[2] and two hours each day on May 4 and 8, 2002.[3] Appellant filed compensation claims for temporary total disability for the periods January 11 to November 22, 2002 and January 24 to March 25, 2003. She requested sick leave or leave under the Family Medical Leave Act (FMLA) or was in leave-without-pay (LWOP) status to care for her son on January 15, 18, 19 and 22,[4] May 7 and June 5, 2002.[5]

In a January 14, 2002 report, Dr. Cory B. Gusland, an attending Board-certified family practitioner, stated that appellant had been experiencing back pain for six months and could not perform her regular job requirements but he did not indicate that she was totally disabled. He diagnosed mechanical back pain with underlying spondylolisthesis. Dr. Gusland recommended that appellant consult an orthopedic specialist.

By letter dated March 20, 2002, the employing establishment advised appellant that she needed to provide medical documentation indicating that she was totally disabled and she should make a written request for limited duty.

In reports dated January 22 to May 1, 2002, Dr. Colvin C. Wellborn, an attending Board-certified orthopedic surgeon, diagnosed a one-year history of intermittent low back pain which worsened in October 2001 due to appellant's mail delivering duties. He provided findings on examination and diagnosed Grade 1 spondylolisthesis. Dr. Wellborn indicated that appellant could perform limited-duty work beginning January 22, 2002, with no mail carrying, lifting, bending, stooping or twisting of the neck. He prescribed a course of physical therapy and anti-inflammatory medication.

On May 8, 2002 Dr. Wellborn approved a temporary limited-duty position offered to appellant on May 7, 2002.[6] The position involved casing mail intermittently for two to four

[1] "Spondylolisthesis" is the forward displacement of one vertebra over another, usually of the fifth lumbar vertebra over the sacrum or of the fourth lumbar over the fifth, generally due to a developmental defect in the pars interarticularis. *See* DORLAND'S *Illustrated Medical Dictionary* (27th ed. 1988), 1567.

[2] Appellant worked one day the week of April 13 to 19, 2002, but the record does not indicate which day.

[3] Appellant, as a part-time flexible carrier, was guaranteed only two hours of work a day.

[4] In addition to the days in January when appellant took leave to care for a child, she used annual leave for January 11 and 12; 2002 worked January 14 and 16, 2002, was in LWOP status for January 23 to 26 and 29 to 31, 2002 and her regular days off were January 13, 17, 20, 21, 27 and 28, 2002. The record does not indicate appellant's work status for January 1 to 10, 2002 but she did not file a claim for work-related disability for this period. She alleged that the employing establishment sent her home on January 11, 2002 with instructions to see her physician.

[5] By letter dated November 29, 2001, appellant stated that she was a single mother of two children, one of whom had multiple handicaps and she indicated it was difficult for her to work the Saturday, Sunday and holiday schedule required for part-time employees due to child care issues. Appellant asked that she not be required to work Sundays or holidays.

[6] As noted, the Office accepted only a temporary aggravation of appellant's underlying spondylolisthesis at L5-S1.

hours and physical requirements included intermittent standing, pivoting with the feet to turn and face the letter case, forward reaching and reaching above the shoulder with up to one pound of mail, simple grasping and fine hand manipulation. A rest break was provided and the employing establishment noted that physical assistance would be provided when necessary such as lifting trays of mail to a level that did not require appellant to bend or twist. Dr. Wellborn indicated that appellant could pull or push up to 20 pounds for up to 2 hours at a time.

In a June 3, 2002 report, Dr. Richard D. Kahmann, an attending Board-certified orthopedic surgeon, provided a history of appellant's condition and findings on physical examination. He diagnosed chronic lower back pain and Grade 1 spondylolisthesis at L5-S1. Dr. Kahmann stated that appellant should be restricted from lifting over 15 pounds and repetitive bending or twisting or prolonged sitting and standing. In reports dated July 18 and August 14, 2002, Dr. Kahmann stated that appellant could work full time in a limited-duty capacity. On August 14, 2002 he reduced the 15-pound weight restriction to 10 pounds.

By letter dated August 22, 2002, the Office advised appellant that the medical evidence did not establish that she was temporarily totally disabled. It noted that Dr. Wellborn approved a May 7, 2002 job offer and Dr. Kahmann also approved her for limited duty. The employing establishment clarified that appellant's limited-duty job would entail casing mail for no more than 2 hours a day and indicated that she would not be casing mail above her shoulder for more than 15 minutes continuously.

In a letter received by the Office on September 3, 2002, appellant stated that she did not receive a written job offer from the employing establishment and no work was offered to her between January 11 and April 11, 2002, the date her claim was accepted, although she provided her medical restrictions. She stated that, after her claim was accepted, she reported to work for five days and her assignment was to watch videotapes.

In an October 2, 2002 report, Dr. Kahmann provided a history of appellant's condition, test results and findings on physical examination. He diagnosed Grade 1 spondylolisthesis at L5-S1 and degenerative disc disease of the lumbar spine. In a work capacity evaluation dated October 2, 2002, Dr. Kahmann opined that appellant could sit and stand for 2 hours a day, walk, push, pull, reach above her shoulder and lift no more than 5 pounds for 1 hour a day, operate a motor vehicle for 4 hours a day and squat for 30 minutes, but could not kneel, climb, twist or carry a satchel on her shoulder.[7] He indicated that she was working two hours a day at the employing establishment.[8]

On October 16, 2002 the employing establishment offered appellant a modified part-time flexible city carrier position for four hours a day within Dr. Kahmann's October 2, 2002 restrictions. The job involved sedentary administrative work for 4 hours a day with physical restrictions of sitting or standing for up to 2 hours; up to 1 hour of walking, reaching above

[7] Only the October 2, 2002 work capacity evaluation was signed by Dr. Kahmann. His dictated October 2, 2002 narrative reports were not signed and apparently not reviewed by him.

[8] As noted, appellant stopped work as of May 9, 2002.

shoulder, pushing, pulling or lifting up to 5 pounds; squatting for up to 30 minutes and no twisting, kneeling, climbing or carrying a satchel.

On December 10, 2002 the employing establishment sent Dr. Kahmann a copy of a revised limited-duty position for appellant for an eight-hour workday, noting that the work capacity evaluation he signed on October 2, 2002 did not indicate a restriction on total work hours. The position included the same physical restrictions provided by Dr. Kahmann in his October 2, 2002 work capacity evaluation. The employing establishment asked him to review the job description and indicate whether appellant was able to perform the duties of the offered position. It also sent a copy of the job offer to appellant.

On December 11, 2002 appellant rejected the employing establishment's job offer, stating that it was not consistent with Dr. Kahmann's work restrictions. She did not indicate which restrictions were inconsistent. Appellant alleged that the employing establishment sent her home with instructions to see her physician on January 11, 2002. Appellant contended that the Office was required to determine whether the job offer constituted suitable work before she was required to accept the offer or provide her reasons for refusing it.

On December 18, 2002 Dr. Kahmann indicated that appellant was not able to perform the December 10, 2002 position. In a March 12, 2003 form report, he indicated that she was totally disabled.

In a February 20, 2003 letter, the employing establishment advised the Office that appellant was offered modified work subsequent to her October 18, 2001 date of injury in accordance with her physicians' work restrictions. It noted that prior to her October 18, 2001 employment injury appellant took time off work intermittently or worked less than a full schedule due to issues relating to the FMLA and her child. The employing establishment noted that she was guaranteed only two hours of work a day as a part-time flexible employee but averaged six hours a day one year prior to the October 18, 2001 employment injury. It stated that appellant stopped work on May 9, 2002 without medical documentation and did not return to work.

On April 8, 2003 the Office advised Dr. Kahmann that appellant's claim was accepted for a temporary aggravation of spondylolisthesis at L5 to S1. The Office stated:

> "In your initial evaluation of [appellant] on June 3, 2002, you indicated that she was unable to return to her usual and customary work as a [l]etter [c]arrier, but she could work in a modified capacity. [She] was referred to you … by Dr. … Wellborn, [who] on January 22, 2002 … did not find her temporarily totally disabled from work and prescribed work restrictions…. Dr. Wellborn found [appellant] capable of returning to limited[-]duty work and approved a job offer made to [her] on May 7, 2002. On October 2, 2002 you reported that [she] was working two hours a day at the [employing establishment]. This is contrary to what the [employing establishment] has reported to us. She has been off work since January 2002 and the records indicate [that] she reported to work for two hours on two separate days in May 2002. The work [appellant] was involved in was totally sedentary in nature. By her statement, she watched videotapes. Other

than the two reported days, she has not worked since January 2002. That is 15 months ago."

The Office asked Dr. Kahmann to provide a rationalized explanation as to what material changes caused appellant to become totally disabled.

By decision dated July 22, 2003, the Office denied her claim for wage loss, beginning January 11, 2002, on the grounds that the medical evidence did not establish that she was disabled due to her accepted temporary aggravation of spondylolisthesis.

Appellant requested an oral hearing that was held on July 28, 2003. She testified that the lifting requirements of the jobs offered by the employing establishment exceeded her physical restrictions and also argued that the Office was required to make a suitability determination regarding the job offers.

By decision dated August 10, 2004, an Office hearing representative reversed the July 22, 2003 decision.

By letter dated September 16, 2004, the employing establishment advised that it never withdrew any limited duty from appellant and noted that her absence from work appeared to be due to child care issues rather than the inability to work modified duties at the employing establishment.

By decision dated September 28, 2004, the Office denied appellant's claim for disability for the periods January 11 to November 22, 2002 and January 24 to March 25, 2003 on the grounds that the evidence did not establish either that she was totally disabled or that she was partially disabled and the employing establishment failed to accommodate her medical work restrictions.[9]

LEGAL PRECEDENT -- ISSUE 1

Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she was disabled for work as the result of an employment injury.[10] Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.[11] Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues which must be proved by a preponderance of reliable, probative and substantial medical evidence.[12]

[9] Appellant submitted additional evidence with her appeal to the Board. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board has no jurisdiction to consider this evidence for the first time on appeal.

[10] *Thomas M. Petroski*, 53 ECAB 484 (2002).

[11] *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

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

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.[13]

ANALYSIS -- ISSUE 1

Appellant claimed compensation for total disability from January 11 to May 3 and 5 to 6, 2002 due to her October 18, 2001 employment injury, a temporary aggravation of spondylolisthesis.

Appellant alleged that the employing establishment sent her home with instructions to see her physician on January 11, 2002. However, the evidence is insufficient to establish that she was off work on January 11, 2002 due to her accepted employment injury. The employing establishment did not indicate that it refused to provide work and sent appellant home on January 11, 2002. Additionally, she gave contradictory information regarding this date. In appellant's compensation claim for the period January 11 to July 26, 2002, she indicated that she was in LWOP status, but she indicated on her employing establishment log sheet that she used annual leave for January 11, 2002. Further, in her January 11, 2002 occupational disease claim form, she did not indicate that the employing establishment sent her home on that date. For the period that includes January 12 to 13, 15, 17 to 22 and 27 to 28, 2002, these dates were either days used to care for her child or were her regularly scheduled days off. Appellant worked on January 14 and 16, 2002. For the remainder of her days off work, January 23 to 26 and 29 to May 3 and 5 to 6, 2002, the medical evidence does not establish that she was totally disabled due to her accepted October 18, 2001 temporary aggravation of spondylolisthesis.

In reports dated January 22 to May 8, 2002, Dr. Wellborn indicated that appellant could perform limited-duty work as of January 22, 2002 with no mail carrying, lifting, bending, stooping or twisting of the neck. On May 8, 2002 he approved a temporary limited-duty position offered to appellant on May 7, 2002. The position involved casing mail intermittently for two to four hours. Physical requirements included intermittent standing, pivoting with the feet to turn and face the letter case, forward reaching and reaching above the shoulder with up to one pound of mail, simple grasping and fine hand manipulation. A rest break was provided and the employing establishment noted that physical assistance would be provided when necessary such as lifting trays of mail to a level that did not require appellant to bend or twist. The reports from Dr. Wellborn do not establish that appellant was totally disabled from January 23 to 26 and 29 to May 3 and 5 to 6, 2002 due to her October 18, 2001 employment injury.

LEGAL PRECEDENT -- ISSUE 2

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty or limited-duty position[14] or the medical

[13] *Walter D. Morehead*, 31 ECAB 188 (1979).

[14] Light duty is offered by the employing establishment for a nonwork-related medical condition. Limited duty is offered for an accepted work-related condition.

evidence of record establishes that she can perform the light-duty or limited-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 that she cannot perform the light-duty or limited-duty position. 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 or limited-duty job requirements.[15]

A "recurrence of disability" is defined under the Office's implementing federal regulations as the 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.[16]

ANALYSIS -- ISSUE 2

The record shows that, following her October 18, 2001 employment injury, appellant returned to work in a limited-duty position on May 4, 2002 and also worked May 8, 2002 before stopping work. To be entitled to compensation for total disability, beginning May 9, 2002, appellant must provide medical evidence establishing that she was totally disabled due to a worsening of her accepted work-related condition, a temporary aggravation of spondylolisthesis, or a change in her job duties such that she was unable to perform her limited-duty work.

On December 11, 2002 appellant stated that she rejected the employing establishment's job offer because it was not consistent with Dr. Kahmann's work restrictions. However, she did not explain how the position violated the restrictions provided by Dr. Kahmann. Appellant also contended that the Office was required to determine whether the job offer was suitable before she was required to accept the offer or provide her reasons for refusing it. However, the accepted condition in this case is a temporary aggravation of spondylolisthesis. The job offer from the employing establishment was for a temporary limited-duty position. The case was not in posture for a suitability determination because there was no permanent position being offered by the employing establishment; rather the job offer was a limited-duty position offered to accommodate appellant's temporary partial disability.

On May 8, 2002 Dr. Wellborn approved a temporary limited-duty position offered to appellant on May 7, 2002. The position involved casing mail intermittently for two to four hours and physical requirements included intermittent standing, pivoting with the feet to turn and face the letter case, forward reaching and reaching above the shoulder with up to one pound of mail, simple grasping and fine hand manipulation. A rest break was provided and the employing establishment noted that physical assistance would be provided when necessary. Dr. Wellborn also indicated that appellant could pull or push up to 20 pounds for up to 2 hours at a time. Dr. Wellborn did not opine that appellant was totally disabled from work, only partially disabled. Therefore, this evidence does not establish appellant's claim for a recurrence of total disability beginning May 9, 2002.

[15] *Bryant F. Blackmon*, 57 ECAB ___ (Docket No. 04-564, issued September 23, 2005); *Terry R. Hedman*, 38 ECAB 222 (1986).

[16] 20 C.F.R. § 10.5(x).

In a June 3, 2002 report, Dr. Kahmann stated that appellant should be restricted from heavy work activity with no lifting over 15 pounds and the avoidance of repetitive bending or twisting or prolonged sitting and standing. In reports dated July 18 and August 14, 2002, Dr. Kahmann stated that appellant could work full time in a limited-duty capacity. On August 14, 2002 he reduced the 15-pound weight restriction to 10 pounds. In the October 2, 2002 work capacity evaluation, Dr. Kahmann indicated that appellant could sit and stand for 2 hours a day, walk, push, pull, reach above her shoulder and lift no more than 5 pounds for 1 hour a day, operate a motor vehicle for 4 hours a day and squat for 30 minutes, but could not kneel, twist, climb or carry a satchel.[17] The evidence from Dr. Kahmann does not establish that appellant sustained a recurrence of total disability because he approved limited-duty work for her, indicating that she was only partially disabled.

On October 16, 2002 the employing establishment offered appellant a modified part-time position for four hours a day within Dr. Kahmann's October 2, 2002 work capacity evaluation restrictions. On December 11, 2002 she rejected the employing establishment's job offer for the reason that it was not consistent with Dr. Kahmann's work restrictions. In his October 2, 2002 work capacity evaluation, Dr. Kahmann opined that appellant could sit and stand for 2 hours a day, walk, push, pull, reach above her shoulder and lift no more than 5 pounds for 1 hour a day, operate a motor vehicle for 4 hours a day and squat for 30 minutes, but could not kneel, twist, climb or carry a satchel. The position offered by the employing establishment on October 16, 2002 involved sedentary administrative work for 4 hours a day and included restrictions of sitting or standing for up to 2 hours, up to 1 hour of walking, reaching above shoulder, pushing, pulling or lifting up to 5 pounds, squatting for up to 30 minutes and no twisting, kneeling, climbing or carrying a satchel. Therefore, the December 10, 2002 job offer was consistent with Dr. Kahmann's October 2, 2002 work capacity evaluation.

On December 18, 2002 Dr. Kahmann indicated that appellant was not able to perform the December 10, 2002 position and on March 12, 2003 he indicated that she was totally disabled. Although the Office asked Dr. Kahmann to provide a rationalized explanation as to what changes took place in her accepted medical condition which caused her to be totally disabled, he did not respond. The record shows that the work restrictions set forth in Dr. Kahmann's October 2, 2002 work capacity evaluation are the same as the restrictions in the December 10, 2002 position. He provided no explanation as to why he had changed his mind regarding the work restrictions that he provided for appellant in his October 2, 2002 work capacity evaluation. Dr. Kahmann did not opine that there was a change in nature and extent of appellant's accepted temporary aggravation of spondylolisthesis such that she was totally disabled. As he did not opine that appellant was totally disabled due to a change in the nature and extent of her accepted condition or a change in the nature or extent of her limited-duty job requirements, his reports do not establish that appellant sustained a recurrence of total disability on May 9, 2002.

Appellant failed to establish that she sustained a recurrence of total disability on May 9, 2002 due to a worsening of her accepted work-related condition, a temporary aggravation of spondylolisthesis or a change in her job duties such that she was unable to perform her limited-

[17] These work restrictions are consistent with the position approved by Dr. Wellborn on May 8, 2002.

duty work. Therefore, she failed to meet her burden of proof and the Office properly denied her claim for a recurrence of total disability.

CONCLUSION

The Board finds that appellant failed to establish that she was totally disabled from January 11 to May 3 and 5 to 6, 2002 due to her October 18, 2001 employment injury. The Board further finds that appellant failed to meet her burden of proof to establish that she sustained a recurrence of total disability on May 9, 2002 causally related to her October 18, 2001 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 28, 2004 is affirmed.

Issued: June 9, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board