United States Department of Labor
Employees' Compensation Appeals Board

MARIANELA BERMUDEZ, Appellant	)	
and	)	**Docket No. 05-1862**
	)	**Issued: May 17, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Walnut Creek, CA, Employer	)	

Appearances:
Marianela Bermudez¸ 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 September 6, 2005 appellant filed a timely appeal of an August 8, 2005 merit decision of the Office of Workers' Compensation Programs that found she had not established periods of total disability beginning June 18, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has established intermittent periods of total disability beginning June 18, 2003.

FACTUAL HISTORY

On October 6, 2003 appellant, then a 49-year-old distribution clerk, filed a claim for compensation for an occupational disease. She attributed the severe pain of her low back and left leg to unloading mail trucks and to standing all day when working with flats beginning in 1998. In an October 14, 2003 report, Dr. Alok K. Bhattacharyya, a Board-certified neurologist, stated that he first saw appellant on January 9, 2001 for low back pain radiating to her lower

extremities that started gradually while unloading mail trucks. He described her duties and the physical activities involved in unloading trucks, sorting flats and distributing letters and noted that she was presently on light duty. Dr. Bhattacharyya diagnosed lumbosacral radiculopathy and stated that her low back pain radiating to the legs was most likely due to a disc herniation. He stated that this was "a result of the type of work she does and the activities she does at work, lifting, pushing, bending and stooping, all repetitive motions."

On December 17, 2003 the Office advised appellant that it had accepted that she sustained lumbar radiculopathy in the performance of duty, and advised her to file a claim for any time she lost from work due to this condition. Appellant filed claims for compensation for intermittent periods of wage loss from June 18 to September 12, 2003, and for continuous wage loss beginning September 22, 2003, when she stopped working. She claimed compensation for portions of days on June 18, 19, 24 and 26, July 29, August 1 and 7, 2003 and for entire days on June 27, June 28 to July 22, August 14, 18 and 19, and September 8, 9, 11 and 12, 2003. She stated that she returned to light duty on July 25 and August 22, 2003 and from September 13 to 20, 2003.

Appellant submitted additional medical evidence. A June 26, 2003 emergency department note indicated that appellant should rest, apply heat to her low back and be excused from work until June 30, 2003. In a July 3, 2003 note, Dr. Andrew Ness, a Board-certified family practitioner, stated that she was seen for leg neuropathy and leg pain, and that she was advised not to return to work until July 7, 2003. Dr. Bhattacharyya reported that nerve conduction studies and electromyography of appellant's left lower extremity performed on July 8, 2003 were within normal limits with no significant evidence of neuropathy, nerve entrapment syndrome or radiculopathy. In a July 8, 2003 report, he stated that examination revealed mild dysesthesia of the left leg, tenderness over the left thigh and leg and left paravertebral muscles, restricted spine mobility, and normal motor tone and power. Dr. Bhattacharyya noted that the electrodiagnostic tests did not reveal any pathology and that lumbosacral x-rays showed some degenerative multilevel process and associated possible underlying spinal stenosis. He recommended moist heat, massage, anti-inflammatory medication as needed, physical therapy, and rest. In another July 8, 2003 report, he set forth a history of some left low back pain with intermittent radiation to the left hip and leg area without weakness, and some problem with prolonged sitting and standing when working. Dr. Bhattacharyya diagnosed left lower extremity lumbosacral radiculopathy or nerve root irritation, and stated, "Because of worsening of her problem she has had a loss of work time between July 8 and 15, 2003, as she would not perform her duties."

In a July 29, 2003 note, Dr. Ness stated that appellant was not to bend or lift, and was only to case letters until October 1, 2003. In an August 19, 2003 report, Dr. Bhattacharyya diagnosed spinal stenosis with radicular symptoms, as per the lumbosacral spine x-rays. In a September 19, 2003 report, he stated that a magnetic resonance imaging (MRI) scan showed left spinal stenosis, and that her problems were related to prolonged standing at work. In September 23 and October 20, 2003 reports, Dr. Ness stated that appellant was seen for left leg and hip pain and was advised not to return to work until October 20, 2003, then November 9, 2003. In an October 17, 2003 report, Dr. Bhattacharyya diagnosed left lumbosacral nerve root irritation syndrome and associated left sacroiliac joint dysfunction. In November 13, 2003 reports, he stated that her neurological status was stable with left sacroiliac joint pain and

left radicular pain, and that because of worsening of her problem she had a loss of work time between November 13 and December 15, 2003, as she would not perform her duties. In a November 18, 2003 report, Dr. Bhattacharyya indicated that appellant was temporarily totally disabled until December 15, 2003. In December 16, 2003 reports, he diagnosed left lower extremity and lumbosacral radiculopathy or nerve root irritation syndrome, noted that she had some problem with working for prolonged sitting and standing. He stated that because of worsening of her problem she had a loss of work time between December 16, 2003 and January 9, 2004, as she would not perform her duties. Dr. Bhattacharyya repeated these statements in a January 16, 2004 report, changing only the dates of work loss, to January 16 to March 1, 2004.

By decisions dated February 26, 2004, the Office found that the medical evidence was not sufficient to establish that appellant was totally disabled for intermittent periods from June 18 to December 15, 2003, and that the evidence was not sufficient to establish a recurrence of disability from December 16, 2003 to February 6, 2004, as it did not establish that she was unable to perform limited duty.

Appellant requested a review of the written record, and submitted additional medical evidence. In a January 16, 2004 report, Dr. Bhattacharyya noted that appellant was still experiencing pain over her left hip radiating down to her left lower extremity, that she had started having left knee pain and bilateral shoulder pain, and that she was not able to return to work because of her problem. In a March 23, 2004 report, Dr. Ness stated that he had seen appellant for lower extremity and lumbosacral radiculopathy or nerve root irritation as a result of her work injury for the employing establishment, that she had not responded to physical therapy or anti-inflammatory drugs, and that she should avoid bending, lifting, pushing, and standing or sitting for prolonged periods of time. He concluded, "Because of her severe pain on her lower back and left leg, I have advised the patient not to return to work and be on total temporary disability for the periods July 1 to 7, 2003, July 18 to 21, 2003, September 29 to October 20, 2003, October 20 to November 9, 2003, and March 1, 2004 to April 1, 2004." In a March 23, 2004 report, Dr. Bhattacharyya stated that he had seen appellant for lower extremity and lumbosacral radiculopathy or nerve root irritation as a result of her work injury for the employing establishment, that she had not responded to physical therapy or anti-inflammatory drugs, and that she should avoid bending, lifting, pushing, and standing or sitting for prolonged periods of time. He concluded, "Because of her severe pain on her lower back and left leg, I have advised the patient not to return to work and be on total temporary disability for the periods July 8 to 15, 2003, November 13 to December 15, 2003, December 16, 2003 to January 16, 2004 and January 16 to March 1, 2004." In a March 29, 2004 report, Dr. Brian T. Andrews, a Board-certified neurosurgeon to whom Dr. Ness referred appellant for her persistent low back pain, described her employment duties and noted that she developed variable pain in her left thigh, groin, hip and knee regions in late 2000, which slowly worsened, with the pain occurring primarily with weight bearing on the left leg, especially with climbing stairs, preventing even light duty. He stated that the September 2003 MRI scan showed mild degenerative changes but no significant neural compression at any level, and that lumbar x-rays revealed minimal degenerative changes at L4-5 and L5-S1, normal hips, and striking degeneration and sclerosis of the sacroiliac joints bilaterally, left worse than right. Straight leg raising was negative on

examination, but maneuvers that stressed her left sacroiliac joint reproduced her pain in the groin and the left parasacral region. Dr. Andrews concluded:

> "It is my belief that [appellant] has a primary degenerative sacroiliac joint problem which is causing the majority of her symptoms, including parasacral pain, referred pain into the left groin and down the left thigh. The patient also has a degree of left hip bursitis. It is not my opinion whatsoever that she has a spinal problem per se. She does not have significant dis[c] pathology, neural compression, nor is she in need of any procedures or surgeries directed at the lumbar spine. Rather, I believe that she should be in treatment for her sacral disorder. This would include selective blocks of cortisone into the [sacroiliac] joints, physiotherapy directed at appropriate measures for the [sacroiliac] joints, avoidance of prolonged sitting or repetitive bending or stooping which provide stress to this joint, and possibly a trial of a trochanteric Cinch-belt."
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> "I am exceedingly pessimistic that this patient will return to her prior duties in the [employing establishment], given its physical nature."

By decision dated June 14, 2004, an Office hearing representative found that the medical evidence did not contain objective findings to support total disability beginning September 22, 2003 due to her accepted condition, and only supported payment of compensation for earlier dates on which she sought medical care: June 26, July 9, August 18 and 19, 2003.

On June 6, 2005 appellant requested reconsideration and submitted additional medical evidence. In a July 29, 2004 report, Dr. Gregg S. Sorensen, who is Board-certified in preventive medicine and in occupational medicine, described appellant's work history, reviewed her prior treatment and diagnostic studies. He noted her symptoms of constant low back pain, ranging from slight at rest to severe with standing more than 10 minutes, sitting more than 5 minutes, or walking more than 5 minutes, and mild paresthesias of the left lower extremity. Dr. Sorensen diagnosed lumbosacral degenerative joint disease, lumbar degenerative disc disease at L4-5 and L1-2, lumbar disc displacement at L4-5, and sacroiliac joint disease. He stated that the combination of these entities was very likely to produce significant low back pain on a frequent to constant basis, that the left lower extremity symptoms were consistent with the disc bulge, and that she could perform modified work with the opportunity to alternate between sitting, standing, and walking; minimal stooping and bending; and lifting, pushing and pulling limited to 15 pounds. In an October 12, 2004 report, Dr. William H. Baumgartl, who is Board-certified in pain medicine, stated that appellant's presentation with low back pain radiating to her left leg suggested a left L4 radiculopathy secondary to a disc bulge and foraminal irritation at the L4 nerve root, with a confounding finding of marked sclerosis at the sacroiliac joints with focal pain in that area. He reviewed her medical history, stating that an MRI scan showed a left L4 two to three millimeter posterolateral disc protrusion with mild foraminal stenosis, and noted that her pain was aggravated by carrying, lifting, pulling, pushing, bending forward and backward, repetitive movements, sitting, sleeping, standing, stooping, twisting, bending, walking, emotional upset or stress and menstruation. He pain was reduced by massage and relaxation. After describing her findings on physical examination, which included normal motor and sensory

function of the lower extremities, Dr. Sorensen diagnosed radiculitis, and stated that she felt she was currently unable to work because of her injury, and that, as treatment might result in improvement of her condition and her level of disability, he considered her totally temporarily disabled until the conclusion of her recommended treatments.

By decision dated August 8, 2005, the Office found that the medical evidence did not support the claimed periods of disability.

LEGAL PRECEDENT

Appellant has the burden of proving by the preponderance of the reliable, probative, and substantial evidence that he or she is disabled for work as a result of an employment injury or condition. This burden includes the necessity of submitting medical opinion evidence, based on a proper factual and medical background, establishing such disability and its relationship to employment.[1] Proceedings under the Federal Employees' Compensation Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation benefits, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[2]

ANALYSIS

The Office accepted that appellant sustained lumbar radiculopathy in the performance of duty. This acceptance was based on an October 14, 2003 report from Dr. Bhattacharyya, a Board-certified neurologist, diagnosing this condition and stating that it was a result of her work activities, which he accurately described. Dr. Bhattacharyya prepared two reports on July 8, 2003: one stated that electrodiagnostic testing did not show significant evidence of radiculopathy, the other diagnosed radiculopathy. Dr. Andrews, a Board-certified neurosurgeon, concluded in a March 29, 2004 report that appellant did not have a spinal problem, and that her symptoms, which consisted mostly of pain, were instead caused by a degenerative sacroiliac joint problem.

Dr. Bhattacharyya stated that in a March 23, 2004 report that appellant was disabled due to severe pain in her lower back and left leg from July 8 to 15, 2003, and November 13, 2003 to March 1, 2004. He provided no explanation for the prolonged period of disability during which the record indicates that he only saw appellant twice, on November 18 and December 16, 2003. Dr. Ness, a Board-certified family practitioner, also submitted a March 23, 2004 report, in which he used the exact same language contained in Dr. Bhattacharyya's report of that date, but listed different periods of disability: July 1 to 7 and 18 to 21, September 29 to November 9, 2003, and March 1 to April 1, 2004. Dr. Ness saw appellant during these periods he certified her as disabled on two occasions, July 3 and October 20, 2003. While pain from radiculopathy could cause periods of disability, the similarity of these reports and the consecutive nonoverlapping prolonged periods of disability cast doubt on their probative value.

[1] *David H. Goss*, 32 ECAB 24 (1980).

[2] *Isidore J. Gennino*, 35 ECAB 442 (1983).

Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues to be established by the preponderance of substantial medical evidence.[3] A physician's statement regarding an employee's ability to work which consists only of a repetition of the employee's complaints of pain without objective signs of disability are of diminished probative value.[4]

CONCLUSION

The medical evidence is insufficient to meet appellant's burden of proving she was disabled for the periods claimed.

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: May 17, 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

[3] *See Edward H. Horton,* 41 ECAB 301 (1989).

[4] *See Fereidoon Kharabi,* 52 ECAB 291 (2001); *John L. Clark,* 32 ECAB 1618 (1981).