United States Department of Labor
Employees' Compensation Appeals Board

I.P., Appellant	)	
and	)	**Docket No. 06-338**
	)	**Issued: November 15, 2006**
OFFICE OF PERSONNEL MANAGEMENT, EMPLOYEE & LABOR RELATIONS, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Miriam D. Ozur, for the Director

Oral Argument September 20, 2006

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 2, 2005 appellant timely appealed a September 29, 2005 merit decision of the Office of Workers' Compensation Programs denying his claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has established that he sustained a recurrence of disability on and after May 5, 2003 causally related to his accepted employment injuries of January 11, 1995.

FACTUAL HISTORY

The record reflects that appellant, a program analyst (retired), sustained several employment injuries which have been combined and placed in the current claim. These include: a May 15, 1992 traumatic injury, which the Office accepted for a medial meniscus tear of the right knee and authorized appropriate benefits, including arthroscopic surgery; a January 11, 1995 traumatic injury for a slip and fall, which the Office accepted for the conditions of right

shoulder impingement and internal derangement of the right knee; and a March 6, 2000 occupational disease claim, which the Office accepted for bilateral carpal tunnel syndrome. Appropriate benefits were authorized for the bilateral carpal tunnel syndrome claim and included a right carpal tunnel release and a left ulnar nerve transposition and left carpal tunnel release. The record reflects that appellant returned to light-duty work following each of his carpal tunnel surgeries.

The record additionally reflects that appellant received schedule awards for his accepted employment injuries. By decision dated April 26, 2000, the Office issued appellant schedule awards for a 10 percent loss of use of the right lower extremity and for 9 percent loss of use of the upper right extremity. By decision dated December 20, 2000, the Office denied modification of appellant's schedule award claims and by decision dated September 21, 2000, the Office issued appellant a schedule award for 10 percent permanent impairment to the left lower extremity.

Following appellant's return to work after his left ulnar nerve transposition and left carpal tunnel release, the Office, in a June 14, 2002 letter, requested that the employing establishment provide information regarding appellant's work situation. In a January 28, 2003 response, the employing establishment indicated that appellant's work was largely done on the computer, with no heavy lifting, bending or physical exertion required. The employing establishment stated that in order to accommodate appellant's symptoms, it entered into a telecommuting agreement where appellant works from home four days a week. It also provided appellant with voice-recognition software to facilitate the use of his personal computer given his bilateral carpal tunnel restrictions. Additional specialized equipment was also bought at appellant's request. The employing establishment further noted that, due to the "various affects of his injuries," it limited appellant's need to coordinate with others and given him increasingly fewer assignments with greater completion time. The employing establishment also indicated that it provided all necessary and reasonable accommodations for appellant to perform his work duties and would continue to accommodate appellant as long as he was employed and performing fully successfully.

In an undated letter, appellant informed the Office that his application for disability retirement had been approved on February 27, 2003. He noted that he would be on sick leave from March 17 through May 30, 2003 and requested that the Office place him on their rolls effective May 31, 2003. In a March 11, 2003 letter, the Office advised appellant that it was not a retirement program and persons were placed on the periodic rolls for disability compensation if supported by factual medical evidence and/or lack of accommodation by the employing establishment. The Office stated that he did not qualify for placement on the disability periodic rolls based on a review of his medical evidence. The Office noted that, although appellant's physician indicated that he had limited use of his hand, the employing establishment made every accommodation by ensuring that his work assignments required limited use of his hands, was sedentary in nature and had voice-operated equipment. The Office also indicated that there was no evidence to establish that appellant was unable to work in his current position as a program analyst.

On May 30, 2003 appellant filed a claim for recurrence of disability commencing on or about May 5, 2003 causally related to his accepted employment injuries. He additionally claimed depression after he returned to work.

By letter dated June 12, 2003, the Office noted that appellant's records indicated that he was capable of working prior to his retirement. Appellant was advised of the definition of a recurrence of disability and was informed that more information, including a physician's rationalized medical report addressing his inability to work even with accommodations, was necessary to establish whether the reason he stopped working was related to the accepted work injury.

Appellant submitted a June 16, 2003 report from Dr. Michael A. McClinton, a hand surgeon, who stated that appellant had extensive surgery on both hands and that he was symptomatic in both hands making it extremely difficult to work. Dr. McClinton noted that although accommodations at work were tried in different ways, it was not successful. He also stated that appellant was not a candidate for further surgical treatment. Thus, Dr. McClinton opined that appellant was not able to return to his previous job, even with accommodations. In a prior report of January 31, 2003, he had advised that appellant was restricted from heavy lifting and repetitive activities with the hands.

In a July 15, 2003 report, Dr. McClinton noted that appellant was seen on July 9, 2003 with continued symptoms of "pain in both upper extremities, pain in the left shoulder, difficulty and largely impossibility using the hands." He noted that he had nothing further to offer appellant. Dr. McClinton stated that appellant "remains unable to do his job, even with accommodations." He requested that appellant obtain a functional capacity evaluation (FCE) with respect to the upper extremities. A July 22, 2003 FCE, noted appellant's history of injury with respect to his bilateral carpal tunnel and appellant's complaints of numbness, throbbing and weakness limiting his ability to use his right upper extremity and hand for any functional activities. The report concluded that appellant performed at the sedentary physical demand category. A work hardening program was not recommended based on appellant's "high level of symptom magnification, uncooperative behavior and various complaints of pain."

In a July 23, 2003 letter, the Office advised Dr. McClinton that the evidence was insufficient to establish that appellant's work stoppage in February 2003 was due to an objective material worsening of his original work injuries or that the employing establishment failed to accommodate his medical restrictions. The Office further advised Dr. McClinton that he had not provided objective examination findings to support a material worsening of appellant's work-related condition and requested that Dr. McClinton submit an additional medical narrative report which included his opinion regarding the relationship between appellant's inability to work and the accepted work-related conditions and why appellant is unable to work, even with the accommodations provided.

By decision dated August 7, 2003, the Office issued appellant a schedule award for an additional 35 percent loss of use of the right arm and 20 percent loss of use of the left arm.[1]

[1] The period of the award was from January 25, 2002 to May 10, 2005.

In an October 15, 2003 report, Dr. McClinton advised that appellant's symptoms remained "consistent, stable and bothersome to him." He indicated that he had nothing further to offer appellant for his hands or elbows. In another report dated October 15, 2003, Dr. McClinton clarified the medical history regarding appellant's work-related left shoulder complaints and noted that, on June 19, 2003, in a nonwork-related incident, appellant was pushed and thrown on the ground by a security guard and had experienced increasing discomfort in the left shoulder. He noted that appellant was seeing his associate, Dr. Keith Segalman, a hand surgeon, for his left shoulder problems, who had evaluated appellant and determined that he was a candidate for arthroscopic treatment of the left shoulder. Dr. McClinton additionally stated that appellant continued to have "chronic symptoms of the right hand, secondary to the right work-related carpal tunnel syndrome for which he underwent carpal tunnel release wherein damage to the median nerve occurred. He also has had some symptoms of pain in the left shoulder and elbow, despite open decompression of the left median nerve at the wrist and ulnar nerve at the elbow." Dr. McClinton further stated that appellant had developed a reactive depression to this chronic pain and disability and that "it is certainly aggravating the physical symptoms of the bilateral upper extremities."

On June 26, 2003 appellant filed an appeal with the Board. The appeal was dismissed in an order dated February 10, 2005.

In a September 9, 2005 letter, the Office noted that it had previously advised appellant of the information needed to support his recurrence claim in its letters of June 12 and July 23, 2003 and had requested additional information from Dr. McClinton in its letter of July 23, 2003. The Office stated that additional factual and medical information were required and requested that appellant submit such information within two weeks.

Appellant responded in September 13 and 19, 2005 electronic mailings. No further medical evidence was received.

By decision dated September 29, 2005, the Office denied appellant's recurrence claim, finding that the factual and medical evidence provided did not establish that the claimed recurrence resulted from the accepted work injury.[2]

At oral argument before the Board, appellant argued that his claim was not a recurrence of disability as he never recovered from his carpal tunnel surgery. He also stated that he did not consider the duties that the employing establishment provided as work.[3]

[2] The Board notes that the record contains medical reports from Dr. Catherine I. Brophy, a Board-certified specialist in family medicine, concerning appellant's depression and Dr. Segalman concerning left shoulder complaints arising from a June 19, 2003 nonwork-related incident. The Office did not raise or address the issue of whether appellant's depression or left shoulder conditions were causally related to his accepted employment injuries; thus, these matters are not properly before the Board. 20 C.F.R. § 501.2(c).

[3] Appellant also submitted new evidence with his appeal. The Board may not consider new evidence which was not before the Office at the time of its final decision. *See* 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB ___ (Docket No. 05-1622, issued December 21, 2005). Appellant may resubmit this evidence to the Office, together with a formal request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b).

LEGAL PRECEDENT

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 requirements.[4]

Whether a particular injury causes disability for work is primarily a medical question.[5] A physician must provide a reasoned opinion on the issue of causal relationship that is based upon a complete and accurate factual and medical history.[6]

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. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[7]

ANALYSIS

The evidence reflects that appellant sustained several injuries accepted by the Office and that he returned to light-duty work. In order to accommodate appellant's physical restrictions, the employing establishment allowed appellant to work at home four days per week and provided him with voice-activated computer software. The employing establishment also indicated that it would continue to accommodate appellant. Appellant retired on medical disability effective February 2003 and claimed a recurrence of disability commencing on or about May 5, 2003. In the instant case, appellant has not submitted sufficient evidence to support a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.

Appellant submitted several reports from Dr. McClinton, who opined that appellant was unable to perform his work duties even with the voice-activated computer. In his reports of

[4] *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

[5] *See Laurie S. Swanson*, 53 ECAB 517 (2002).

[6] *See Carol S. Madsen*, 54 ECAB 331 (2003).

[7] 20 C.F.R. § 10.5(x).

June 16 and July 15, 2003, Dr. McClinton opined that appellant remained symptomatic in both hands making it extremely difficult to carry on his work. However, he failed to provide any objective examination findings to support a material worsening of appellant's work-related condition or explain how or why employment factors caused or aggravated a recurrence on or after May 5, 2003 due to appellant's accepted employment injuries.[8] Even after the Office advised Dr. McClinton of what was required to support that appellant's work stoppage was due to a recurrence of disability, Dr. McClinton merely reiterated that appellant was unable to perform his duties. In his October 15, 2003 reports, Dr. McClinton continued to advise that appellant's symptoms remained "consistent, stable and bothersome to him" and that he was unable to work. Again, he did not explain how this was a change in the nature and extent of appellant's accepted employment conditions or why he was unable to work. Dr. McClinton did not explain how appellant's work injuries prevented him from performing specific aspects of his modified duties. Thus, his reports are insufficient to support a causal relationship between appellant's work stoppage and his accepted employment conditions.[9] There is no further relevant medical evidence of record.

Appellant testified that, although the employing establishment accommodated him, he was unable to perform the work duties assigned and, thus, retired on medical disability. When a claimant stops working at the employing establishment for reasons unrelated to his employment-related physical condition, he has no disability within the meaning of the Act.[10] Appellant did not contend that his inability to work was caused by lack of reasonable accommodations. Moreover, he was working in a light-duty position when he voluntarily retired from the employing establishment. There is no credible evidence substantiating that appellant had a change in the nature and extent of his light-duty requirements or was required to perform duties that exceeded his medical restrictions. Also, the employing establishment noted that the light-duty position would have remained available to appellant. Thus, by definition, appellant has not sustained a recurrence of disability. Moreover, appellant has not established a change in the nature and extent of the light-duty requirements which would prohibit him from performing the light-duty position he assumed after he returned to work.

The Board also notes that, on September 18, 2006, it received appellant's motion to strike and dismiss the Director's memorandum in justification of the Office's decision and the Director's appearance at oral argument. Appellant specifically objected to the Director's August 21, 2006 memorandum in justification of the Office's decision on the grounds that it was filed in violation of 20 C.F.R. § 501.4, which states that the Director shall file a statement in support of his decision, or other pleading, as appropriate within 60 days of being served with a copy of the application for review. However, the Board's procedures provide no sanction for failing to submit such a pleading within 60 days. Indeed, the Board's procedures do not require

[8] *See Laurie S. Swanson*, 53 ECAB 517 (2002) (where a physician's report does not indicate an objective worsening of a claimant's condition, and the physician's statements regarding a claimant's ability to work consist primarily of a repetition of the claimant's complaints that she hurt too much to work, this is not a basis for payment of compensation).

[9] *See Carol S. Madsen, supra* note 6.

[10] *Richard A. Neidert*, 57 ECAB ___ (Docket No. 05-1330, issued March 10, 2006).

the Director to file a pleading at all.[11] Proceedings before the Board are informal in nature and the Board's procedures are intended to assist the Board in considering cases on appeal.[12] Accordingly, at oral argument, the Board denied appellant's motion and proceeded with the scheduled oral argument.

CONCLUSION

The Board finds that appellant failed to establish that he sustained a recurrence of disability on or about May 5, 2003 causally related to his accepted employment injuries of January 11, 1995.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated September 29, 2005 is affirmed.

Issued: November 15, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[11] *Thomas D. Mooney*, 44 ECAB 241 (1992). *See also Rebecca O. Bolte*, 57 ECAB ___ (Docket No. 05-495, issued July 20, 2006) (the Board's regulations do not require the Director to file a pleading in any case and do not provide for any sanctions should a pleading be untimely or not otherwise received).

[12] *See also John J. Benson*, 4 ECAB 465 (1951).