United States Department of Labor
Employees' Compensation Appeals Board

A.T., Appellant	)	
and	)	**Docket No. 06-950**
	)	**Issued: September 18, 2006**
U.S. POSTAL SERVICE, REMOTE ENCODING CENTER, Allentown, PA, Employer	)	

Appearances:
A.T., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 9, 2006 appellant filed a timely appeal from the December 2, 2005 merit decision of the Office of Workers' Compensation Programs, which denied her recurrence claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the Office's decision.

ISSUE

The issue is whether appellant sustained a recurrence of disability on or about July 10, 1999.

FACTUAL HISTORY

The facts of this case as set forth in prior Board decisions are hereby incorporated by reference. Briefly, appellant, a data conversion operator, developed bilateral mild carpal tunnel syndrome in the performance of duty and was working a limited-duty miscellaneous clerk assignment in East Stroudsburg, Pennsylvania, when the employing establishment offered her a permanent modified clerk position in Lehigh Valley. In a decision dated August 16, 1999, the Office invoked 5 U.S.C. § 8106(c)(2) to terminate wage loss on the grounds that appellant

refused an offer of suitable work. The Board reversed, finding that the Office did not meet its burden of proof because an unresolved conflict in medical opinion on the suitability of the offered position arose prior to the termination decision.[1]

Appellant filed a Form CA-7 claiming compensation beginning July 10, 1999, the date she was to report to the Lehigh Valley office. The Office paid compensation for temporary total disability from August 14, 1999[2] to December 31, 2002. It issued a decision on October 4, 2004, finding that it had paid compensation in error because an impartial medical specialist resolved the conflict and established the suitability of the offered position. The Board subsequently reversed, finding that the Office did not meet its burden of proof to rescind its acceptance of temporary total disability for the period in question because the impartial medical specialist limited his opinion to appellant's capabilities as of December 5, 2003, the date of his examination.[3] This did not establish that the new position was medically suitable in July 1999, when she was to report to work. The Board noted that the Office should adjudicate appellant's claim that she sustained a recurrence of disability beginning July 10, 1999 when the employing establishment withdrew the limited duty she was performing in East Stroudsburg.

The Office asked the impartial medical specialist, Dr. Thomas DiBenedetto, a Board-certified orthopedic surgeon, to clarify appellant's work capacity:

> "Please advise if the claimant *could have* performed the duties of the rehabilitation position offered including driving 26 miles to the Lehigh Valley office *beginning on or about* July 10, 1999 based on your December 5, 2003 examination and review of the record. Please provide a well-reasoned medical rationale for the opinion expressed." (Emphasis in the original.)

In a report dated October 21, 2005, Dr. DiBenedetto reviewed additional medical records and an amended statement of accepted facts. He responded to the Office's request for clarification:

> "I had the opportunity to review my [i]ndependent [m]edical [e]valuation from December 5, 2003, where I believed that she could have performed the duties of a rehabilitation position offered including driving 26 miles to the Lehigh Valley office, beginning on or about July 10, 1999, based on my December 5, 2003 examination and more recent record review and by evidence, Dr. [Steven] Svabek [appellant's treating orthopedist] and [Office referral orthopedic surgeon] Dr. [Daniel E.] Muser's recommendations and agreement. I believe that [orthopedic hand surgeon] Dr. [Joseph E.] Cronkey's restrictions are only based

[1] Docket No. 03-163 (issued May 27, 2003).

[2] Appellant explained that she used leave to cover her absence from work from July 10 through August 13, 1999.

[3] Docket No. 05-532 (issued June 16, 2005).

on her subjective complaints and not any objective findings. On the date of my evaluation, on December 5, 2003 I found no reason in my physical examination that she would not be able to perform the position as offered on July 10, 1999.

"I, again, have given these opinions within a reasonable degree of medical certainty."

In a decision dated December 2, 2005, the Office notified appellant: "Your claim for compensation benefits for the alleged recurrence beginning July 10, 1999 has been disallowed for the reason stated in the enclosed copy of the [n]otice of [d]ecision." Noting that the issue was whether the evidence of record supported that, appellant sustained a compensable recurrence of disability as claimed, the Office found the weight of the medical evidence, was represented by Dr. DiBenedetto's opinion. It established that she was capable of performing the duties of the job offered in July 1999. The Office continued: "The job remained available and was not withdrawn by the [employing establishment.] She was removed from the rolls as part of a grievance settlement. Therefore, the claimant refused suitable employment when she did not report to the permanent rehabilitation job she accepted." The Office found that "entitlement to compensation is terminated effective January 1, 2003." The Office also found that evidence in support of the claimed recurrence of disability was insufficient because it did not demonstrate that appellant could not perform the permanent rehabilitation job offered.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.[4] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[5]

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.[6]

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-duty position, the employee has the burden to

[4] 5 U.S.C. § 8102(a).

[5] 20 C.F.R. § 10.5(f) (1999).

[6] *Id.* at § 10.5(x).

establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that she cannot perform such limited-duty work. 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 limited-duty job requirements.[7]

ANALYSIS

Appellant was no longer able to perform the duties of a data conversion operator, the position she held when she was injured. To accommodate the physical limitations resulting from her work-related injury, the employing establishment offered her a limited-duty miscellaneous clerk assignment in East Stroudsburg. Appellant performed the duties of this assignment with no wage loss prior to July 10, 1999. Had the employing establishment simply withdrawn this limited-duty assignment (not for reasons of misconduct, nonperformance of job duties or a reduction-in-force), such that limited duty was no longer available to appellant on or after July 10, 1999, the resulting inability to work would constitute a recurrence of disability entitling her to compensation.

In this case, the employing establishment made limited duty available to appellant on and after July 10, 1999 by reassigning her to a permanent modified clerk position in Lehigh Valley. However, as the Board found in its May 27, 2003 decision, a conflict in medical opinion arose between appellant's physician and an Office referral physician on whether the assignment in Lehigh Valley was suitable to the physical limitations resulting from her work-related injury. As the weight of the medical evidence did not establish the suitability of the new assignment, appellant was found not to have refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).[8] Moreover, so long as the suitability of this new assignment remained unresolved, limited duty was effectively no longer available to appellant on or after July 10, 1999.

The Office attempted to resolve the conflict by referring the case to an impartial medical specialist, Dr. DiBenedetto, whose first report did not address whether the physical limitations resulting from appellant's work-related injury disabled her on or about July 10, 1999 from performing the duties of the new assignment in Lehigh Valley. After the last appeal, the Office asked Dr. DiBenedetto for a supplemental report. The Office also asked Dr. DiBenedetto: "Please provide a well-reasoned medical rationale for the opinion expressed."

The Board finds that Dr. DiBenedetto did not provide adequate medical rationale for his stated conclusions. In his October 21, 2005 report, he indicated that appellant could have performed the duties of the rehabilitation position offered, including driving 26 miles to the Lehigh Valley office, beginning on or about July 10, 1999. But the only rationale he provided was that he believed Dr. Cronkey had based his restrictions only on subjective complaints and not on objective findings. Dr. DiBenedetto did not explain why he believed this. The Board

[7] *Terry R. Hedman*, 38 ECAB 222, 227 (1986); *see Jackie B. Wilson*, 39 ECAB 915, 919 (1988) (where the record established that light duty was no longer available to the claimant, the Board found that the nature and extent of his light-duty job requirements had changed and that the claimant was totally disabled for the job he held at the time that he was injured).

[8] This, in itself, did not mean that appellant was entitled to compensation.

notes that Dr. Cronkey conducted a clinical examination on July 26, 1999 and reported positive objective findings, including a positive Tinel's sign bilaterally at both the carpal tunnel and cubital tunnel areas with some discomfort, but not true radicular paresthesias, with tapping of the dorsal radial nerves of both forearms. He diagnosed entrapments of the median nerve at the wrists, the ulnar nerve at the elbow and the dorsal radial cutaneous nerve at the right forearm. He restricted appellant from any activities involving repetitive flexion and extension of the wrist or maintenance of the wrists in an nonneutral position, as well as any activities requiring pronation and supination and elbow flexion and extension.[9]

On July 27, 1999 Dr. James B. Kim, a physiatrist, examined appellant and also made positive objective findings. He reported tenderness over the lateral epicondylar regions bilaterally, under positive Tinel's sign bilaterally at the wrist, positive Phalen's sign, reverse Phalen's sign, loss of wrist motion and atrophy. Dr. Kim found that these findings were suggestive of bilateral carpal tunnel syndrome, lateral epicondylitis and possible underlying radial neuropathy. He agreed with Dr. Cronkey's restrictions against repetitive, constant or frequent use of the both upper extremities and specifically reported that appellant was to avoid repetitive casing of mail or lifting of mailboxes and trays.

When Dr. DiBenedetto summarized Dr. Cronkey's and Dr. Kim's reports, he did not discuss their findings on clinical examination. Dr. DiBenedetto stated that Dr. Cronkey based his restrictions solely on appellant's subjective complaints. But this is not an accurate representation of Dr. Cronkey's report. Dr. Cronkey did restrict appellant from lifting more than five pounds and driving more than 15 minutes, restrictions with which Dr. Kim agreed. Dr. DiBenedetto did not fully consider this history of her symptoms and findings. He also did not explain how his own findings on December 5, 2003 were relevant to the question of appellant's disability on or about July 10, 1999. Dr. DiBenedetto's lack of sound medical rationale diminishes the probative value of his opinion.[10]

Because Dr. DiBenedetto's opinion of October 21, 2005 does not resolve whether the new assignment in Lehigh Valley was suitable, the Board finds that appellant's limited-duty miscellaneous clerk assignment in East Stroudsburg was effectively withdrawn, such that limited duty was no longer available to her. The Board finds that appellant sustained a recurrence of disability on or about July 10, 1999. The Board will reverse the Office's December 2, 2005 decision denying appellant's claim of recurrence and terminating compensation effective January 1, 2003 and will remand the case for payment of appropriate compensation.

[9] The new assignment in Lehigh Valley required manually casing mail piece by piece with the ability to reach above shoulder level, removing sorted mail from the slots and placing the mail in trays, loading trays of mail weighing approximately 17 pounds onto a container, manually canceling some mail piece by piece using a hand stamp, fingering through trays of mail to make sure all the mail faced in the right direction and taping, bagging and labeling damaged mail.

[10] *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

CONCLUSION

The Board finds that appellant sustained a recurrence of disability on or about July 10, 1999. Her limited duty in East Stroudsburg was effectively withdrawn when the employing establishment reassigned her to a position in Lehigh Valley that is not established to have been suitable to her injury-related physical limitations.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2005 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further action consistent with this opinion.

Issued: September 18, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board