United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 06-1180**
	)	**Issued: September 11, 2006**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Fort Buchanan, PR, Employer	)	

Appearances:
Susan M. Cordero-Ladner, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 24, 2006 appellant filed a timely appeal from a June 17, 2005 decision of the Office of Workers' Compensation Programs denying her claim for recurrence of disability and a March 22, 2006 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. § 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim and the March 22, 2006 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has established that she sustained a recurrence of disability commencing June 8, 2004 causally related to an accepted lumbar sprain, lumbar radiculopathy and cervical radiculopathy; and (2) whether the Office properly denied her December 12, 2005 request for reconsideration.

FACTUAL HISTORY

The Office accepted that on January 15, 2004 appellant, then a 46-year-old part-time store worker, sustained a lumbar sprain, lumbar radiculopathy and cervical radiculopathy when she lifted a case of orange juice. She stopped work on June 8, 2004 and did not return.

On August 13, 2004 appellant claimed compensation commencing June 16, 2004. In a June 16, 2004 report, Dr. Tomas Hernandez, an attending neurologist, opined that she was totally disabled for work from June 6 to 14, 2004 due to the accepted lumbar radiculopathy. He stated that appellant could return to restricted duty June 15, 2004.[1] In August 5 and September 9, 2004 reports, Dr. Hernandez diagnosed cervical radiculopathy and chronic situational anxiety due to the accepted injuries. In a July 9, 2004 report, Dr. Miguel A. Cubano, an attending Board-certified surgeon specializing in psychiatry, diagnosed major depression related to the January 15, 2004 injury. He found appellant totally disabled for work.

In a January 12, 2005 letter, the Office advised appellant to file a claim for recurrence of disability and informed her of the type of medical and factual evidence needed to establish the claim. The Office requested a rationalized statement from her physician supporting a causal relationship between the accepted injuries and the claimed periods of disability.

On January 18, 2005 appellant claimed a recurrence of disability commencing June 8, 2004 while working full duty. She submitted reports dated November 2, 2004 to February 28, 2005 from Dr. Hernandez, finding her totally and permanently disabled due to the accepted lumbar radiculopathy.

On June 15, 2005 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Fernando Rojas, a Board-certified orthopedic surgeon, to determine whether she sustained a recurrence of disability as alleged.

By decision dated June 17, 2005, the Office denied appellant's claim for recurrence of disability on the grounds that the medical record was insufficient. The Office found that Dr. Hernandez's reports were insufficient to show that her condition worsened on June 8, 2004 such that she was totally disabled for work.

Following issuance of the June 17, 2005 decision, the Office received a July 5, 2005 report from Dr. Rojas regarding his July 1, 2005 second opinion evaluation. He provided a history of injury and treatment and reviewed the statement of accepted facts. On examination Dr. Rojas found severely restricted lumbar and cervical motion with significant paraspinal spasm. He diagnosed L5-S1 radiculopathy related to the accepted injury and C5-6 radiculopathy due to other causes. Dr. Rojas found appellant totally disabled for work for three to six months as she had not yet received proper treatment for the January 15, 2004 injuries.

[1] A June 8, 2004 electromyography (EMG) and nerve conduction velocity (NCV) testing showed severe right and moderate left carpal tunnel syndrome, left cervical nerve root involvement and bilateral L5-S1 radiculopathy. A June 8, 2004 lumbar magnetic resonance imaging (MRI) scan showed degenerative disc disease with disc bulges at T12-L1 and L5- S1.

In a December 12, 2005 letter and brief, appellant requested reconsideration. She submitted additional evidence and copies of evidence previously of record.[2] Appellant submitted new medical evidence.

In a July 7, 2004 report, Dr. Hernandez opined that appellant was totally and permanently disabled from June 16, 2004 onward due to unspecified causes. In August 5, 2004 and September 26, 2005 reports, he diagnosed bilateral lumbar radiculopathy, cervical radiculopathy and bilateral carpal tunnel syndrome secondary to the January 15, 2004 injury. In a November 26, 2005 report, Dr. Hernandez diagnosed major depression. In an October 4, 2005 report, Dr. Hector Cott Dorta, an attending psychiatrist, opined that appellant was totally disabled due to major depression related to the accepted injuries.

By decision dated March 22, 2006, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review. The Office found that the statements of appellant's attorney were irrelevant and that the medical evidence submitted either duplicated or reiterated evidence previously of record.

LEGAL PRECEDENT -- ISSUE 1

The Office's implementing regulations define a recurrence of disability as "an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."[3] When a claimant claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician, who on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury. Moreover, sound medical reasoning must support the physician's conclusion.[4] An award of compensation may not be based on surmise, conjecture or speculation or on a claimant's unsupported belief of causal relation.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained cervical and lumbar injuries on January 15, 2004 in the performance of duty. On January 18, 2005 she claimed a recurrence of disability commencing June 8, 2004. On June 15, 2005 the Office requested Dr. Rojas, a Board-certified

[2] Appellant submitted copies of her claim forms, June 8, 2004 test reports, Dr. Cubano's report and Dr. Hernandez's June 16 and September 9, 2004 reports.

[3] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- *Claims*, Recurrences, Chapter 2.1500.3.b(a)(1) (May 1997). *See also Philip L. Barnes*, 55 ECAB ___ (Docket No, 02-1441, issued March 31, 2004).

[4] *Ricky S. Storms*, 52 ECAB 349 (2001).

[5] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

orthopedic surgeon, to provide a second opinion regarding whether appellant sustained a recurrence of disability as alleged. Prior to receiving Dr. Rojas' report, the Office denied her claim for recurrence of disability by decision dated June 17, 2005, finding that appellant submitted insufficient medical evidence.

It is well established that proceedings under the Federal Employees' Compensation Act[6] are not adversarial in nature.[7] While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[8] The Office has an obligation to see that justice is done.[9] In this case, the Office referred appellant to Dr. Rojas for a second opinion examination to answer the medical question as to whether she sustained a recurrence of disability as alleged. As the Office undertook development of the medical evidence by referring her for a second opinion examination on the recurrence of disability issue, it should have secured Dr. Rojas' report before issuing a decision on the recurrence claim.[10] The Office denied appellant's claim before Dr. Rojas submitted his report. The case will be remanded to the Office for appropriate development, including a review of his medical opinion. The Office shall then issue an appropriate decision in the case.

As the case must be remanded for further development on the issue of whether appellant sustained a recurrence of disability, the Board finds that the second issue regarding the denial of reconsideration is moot.[11]

CONCLUSION

The Board finds that the case is not in posture for a decision. The case will be remanded for further development as to whether appellant sustained a recurrence of disability commencing June 8, 2004.

[6] 5 U.S.C. §§ 8101-8193.

[7] *John J. Carlone*, 41 ECAB 354 (1989).

[8] *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[9] *Donald R. Gervasi*, 57 ECAB ___ (Docket No. 05-1622, issued December 21, 2005); *William J. Cantrell*, 34 ECAB 1233 (1983).

[10] *See Peter C. Belkind*, 56 ECAB ___ (Docket No. 05-655, issued June 16, 2005).

[11] Appellant asserted in an August 21, 2004 letter, in her January 18, 2005 claim form and in her December 12, 2005 request for reconsideration, that she sustained a consequential emotional condition. As the Office has not yet issued a decision regarding an emotional condition in this case, the issue is not before the Board on the present appeal.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Worker's Compensation Programs dated March 22, 2006 and June 17, 2005 are set aside and the case remanded for further development consistent with this opinion.

Issued: September 11, 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