United States Department of Labor
Employees' Compensation Appeals Board

W.D., Appellant	)	
and	)	**Docket No. 07-77**
	)	**Issued: August 23, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Kalamazoo, MI, Employer	)	

Appearances:
Stuart H. Deming, Esq., for the appellant
Office of Solicitor, for the Director

Oral Argument July 19, 2007

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 10, 2006 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated July 12, 2006 finding that she had not established periods of total disability as claimed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she was disabled intermittently from October 3, 1999 through April 17, 2002.

FACTUAL HISTORY

On December 18, 2001 appellant, then a 36-year-old clerk filed an occupational disease claim alleging that her diagnosed condition of costochondritis was aggravated by repetitive motions in the performance of her federal job duties. She indicated that she first became aware of her condition in October 1999 and first attributed the aggravation of her condition to her

employment in August 2001. On February 26, 2002 the Office accepted appellant's claim for aggravation of costochondritis due to her employment activities.

Appellant filed a claim for compensation on March 21, 2002 and requested compensation benefits for intermittent periods of leave without pay taken from December 8, 2001 to February 6, 2002.

In a letter dated April 11, 2002, the Office requested additional information in support of appellant's claimed dates of disability. Appellant filed a second claim for compensation requesting compensation for leave without pay used from March 23 to April 5, 2002 and a third claim from April 6 to 19, 2002.[1]

Appellant's attending physician, Dr. Jill Winkler, a Board-certified family practitioner, completed a Family Medical Leave Act (FMLA) form report on January 23, 2001 and diagnosed costochondritis. She noted that this condition involved intermittent flares of pain and that appellant would be able to work only intermittently as a result of the condition. Dr. Winkler noted that appellant's absence from work could be from two to three days per episode and would occur on an as needed basis. She completed a work restriction evaluation on March 21, 2002 and indicated that appellant should work only five hours a day. Dr. Winkler completed a note on April 17, 2002 and stated that appellant was totally disabled from April 13 to 17, 2002 due to an exacerbation of her costochondritis and the necessity for pain medication.

By decision dated May 20, 2002, the Office denied appellant's claim for compensation beginning December 8, 2001. The Office stated that appellant had not established a recurrence of disability and that there was no medical rationale supporting a reduced workday beginning March 21, 2002. The Office denied appellant's claim for wage loss from December 18, 2001 to April 19, 2002.

In a treatment note dated April 17, 2002, Dr. Winkler diagnosed costochondritis and stated that appellant's pain became worse due to sorting and throwing mail and she was unable to work for the past few days. She noted that appellant had significant tenderness. Dr. Winkler completed a report on May 15, 2002 and diagnosed chronic costochondritis. She noted that appellant exhibited objective physical findings of pain on palpation along several of the rib joints in the costochondral region. Dr. Winkler stated that appellant's diagnosed condition could not be seen on x-ray and was a clinical diagnosis. She stated that when appellant experienced a "flare" she needed to return home, take pain medication and stop the activity which contributed to her condition. Dr. Winkler stated that appellant's condition would continue until she stopped the different motions that impacted her costochondritis. She stated, "[Appellant] was off work on several days December, January and February because of the flares of costochondritis."

[1] Appellant used eight hours of leave without pay on December 8 and 9, 2001 as well as January 15, 16, 19, 20, 23, 26 and 30, 2002. She used eight hours of leave without pay on February 2 and 3, 2002. Appellant used almost 4.75 hours of leave without pay on January 22, 2002 and 1.5 hours on February 6, 2002. She also used eight hours of leave without pay on March 23, 24, 25, 27 and 31, 2002 as well as April 2, 2002. Appellant used three hours of leave without pay on March 26 and 30, 2003 as well as April 1 and 3, 2003. She used eight hours of leave without pay on April 6, 7, 8, 13, 14, 15, 16 and 17, 2002. Appellant used three hours of leave without pay on April 9 and 5.50 hours on April 10, 2002.

Appellant completed a notice of recurrence of disability on May 22, 2002 and alleged that she sought medical treatment on February 1 and 7, 2002 as well as April 17 and May 14, 2002.

Appellant requested reconsideration on June 25, 2002. She noted that her pain level varied and that she required varying amounts of leave to reduce the pain. Appellant stated that she did not see her doctor with every period of increased pain. By decision dated July 15, 2002, the Office denied modification of the May 20, 2002 decision. The Office stated that the medical evidence was not sufficiently detailed and specific to support appellant's periods of disability.

By decision dated September 18, 2002, the Office denied appellant's May 22, 2002 claim for recurrence of disability and disability for the period April 21 to May 15, 2002.

Appellant submitted an additional form report diagnosing costochondritis and indicating that appellant would need intermittent time off when her condition exacerbated. Dr. Winkler completed form reports on June 2, 2000 and July 9, 2001 diagnosing costochondritis. She stated that appellant's condition was chronic and relapsing with incapacity of up to 48 hours at a time occurring seven to eight days a month depending on weather and stress. Dr. Winkler indicated that appellant would need to be absent for work on an "as needed basis."

On October 18, 2002 appellant completed a claim for compensation and requested leave without pay from October 23, 1999 to December 19, 2001.[2] By decision dated February 14, 2003, the Office denied appellant's claim for wage loss from October 3, 1999 through December 19, 2001. Appellant requested reconsideration of this decision through her attorney on February 24, 2004. Appellant's attorney alleged that the Office improperly denied her claim on the basis that there was no contemporaneous medical evidence supporting the alleged period of disability. He also asserted that the Office's denial of appellant's claim for compensation was in contradiction of the FMLA. Appellant's attorney argued that, because appellant was entitled to leave without pay under the FMLA, she was also entitled to compensation benefits for that period under the Federal Employees' Compensation Act[3] as her condition was work related. By decision dated April 28, 2003, the Office denied modification of the April 14, 2003 decision and noted that the FMLA was not binding on findings under the Act.

Appellant requested reconsideration on July 15, 2003 and submitted additional medical evidence. In notes beginning December 6, 2001, Dr. Winkler diagnosed costochondritis and indicated that appellant's work duties aggravated her condition. She noted on February 1, 2002 appellant's conditions of costochondritis and left shoulder pain. Dr. Winkler indicated that appellant should work only four hours a day. On March 21, 2002 she again noted appellant's complaints regarding her costochondritis and recommended that appellant change jobs. In a note

[2] Appellant claimed compensation on October 3, 1999, November 7, 19, 27 and 28, December 5, 19 and 26, 1999. She also claimed compensation for leave without pay on January 8, 9, 16, 29 and 30, 2000 as well as February 6, March 26, April 2 and 23, May 7 and 28, June 4 , 11, 17 and 18, July 9, August 26, 27 and 28, October 21 and 22, November 12, 18 and 19, 2000. Appellant claimed compensation on January 6 and 7, February 18, March 10, 11, 17 and 31, April 1, 7, 8, 9, 15, 28 and 29, May 12, 13, 19, 20, 26, 27 and 30, June 2, 3, 5, 16, 17, 18, July 29, September 15 and 16, October 7, 20, 21, 22, 23, 24, 27 and 31, 2001.

[3] 5 U.S.C. §§ 8101-8193.

dated April 17, 2002, Dr. Winkler stated that appellant was unable to work at sorting mail as this increased her pain and made her costochondritis worse. She noted that appellant stated that she was not able to work for the past few days. Dr. Winkler completed a report on July 26, 2002 and diagnosed costochondritis continually aggravated by repetitive motion of the arms. She stated that appellant's condition was chronic, that appellant was not going to heal and that appellant was unable to perform repetitive motion of her arms.

Appellant's attorney deposed Dr. Winkler on April 18, 2003. She stated that the treatment for costochondritis was rest, ice and anti-inflammatory medications. Dr. Winkler noted that reproducible pain at the site of costochondral margin was verification of costochondritis. She further noted that she did not recommend that appellant work while taking pain medication. Dr. Winkler stated that appellant's condition had worsened as she had more instances of pain and the pain lasted longer.

By decision dated August 11, 2003, the Office denied modification of the May 20 and July 15, 2002 decisions. The Office denied appellant's claim for intermittent periods of disability from December 8, 2001 through April 17, 2002. The Office stated that appellant did not receive medical treatment for the accepted condition on the intermittent dates claimed and that she was not therefore entitled to up to four hours of compensation on the dates in question. The Office further found that the medical evidence was not sufficient to meet appellant's burden of proof in establishing that she was disabled on the dates alleged.

Appellant requested reconsideration on April 30, 2004. In support of this request, she submitted a brief from her attorney addressing the FMLA and reviewing Dr. Winkler's deposition. Appellant also submitted treatment notes from Dr. James Hunt, a physician, dated April 27, 1999 through October 6, 1999 diagnosing costochondritis.[4] By decision dated June 24, 2004, the Office declined to reopen appellant's claim for consideration of the merits.

Appellant requested reconsideration on April 30, 2004 and the Office issued its decision on October 6, 2004. However, she filed an appeal of her claim with the Board on September 27, 2004. In an Order Granting Remand and Canceling Oral Argument dated November 2, 2005,[5] the Board agreed with the Director's motion to set aside the June 24 and October 6, 2004 decisions, cancel the scheduled oral argument and remanded for review of the merits of appellant's claim for compensation for the period October 3, 1999 through April 17, 2002.

By decision dated July 12, 2006, the Office reviewed appellant's claim for compensation on the merits and found that the medical evidence did not establish that appellant's physicians found her totally disabled for the periods in question. The Office also found that the medical evidence was not sufficiently rationalized to support partial disability for work of five hours a day on March 21, 2002.

[4] April 27, July 22 and September 22, 1999 and August 10, 2001.

[5] Docket No. 05-24 (issued November 2, 2005).

LEGAL PRECEDENT

An employee seeking benefits under the Act, has the burden of proof to establish the essential elements of his claim by the weight of the evidence. For each period of disability claimed, the employee has the burden of proving that she was disabled for work as a result of her accepted employment injury. Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be provided by a preponderance of the reliable, probative and substantial evidence.[6] Such medical evidence must include findings on examination and physician's opinion, supported by medical rationale, showing how the injury caused the employment disability for his or her particular work.[7] The Board has held that, when a physician's statements regarding an employee's ability to work consist only a repetition of the employee's complaints that he or she hurts too much to work without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[8]

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employee's to self-certify their disability and entitlement to compensation.[9]

ANALYSIS

Appellant has claimed disability for intermittent disability from October 3, 1999 through April 17, 2002 due to her accepted employment-related condition of costochondritis. In order to establish disability for work on the dates in question, appellant must submit rationalized medical opinion evidence establishing that she was unable to work on those dates due to her accepted employment-related condition. She submitted several reports from Dr. Winkler, a Board-certified family practitioner, in support of her claim for disability. Dr. Winkler found that appellant was unable to work April 13 to 17, 2002. However, in the April 17, 2002 work release and treatment note, she did not provide specific findings that established that appellant was totally disabled. Instead, Dr. Winkler merely noted that appellant stated that she was not able to work. As noted above, appellant's opinion that she could not work is not sufficient to establish her claim. She must submit rationalized medical opinion evidence addressing this issue. As Dr. Winkler did not provide her own opinion that appellant was totally disabled and did not support this opinion with medical reasoning, her April 17, 2002 notes are not sufficient to meet appellant's burden of proof.

In her March 21, 2002 work restriction, Dr. Winkler stated that appellant should work only five hours a day. She again failed to explain why appellant was not capable of performing

[6] *William A. Archer*, 55 ECAB 674, 679 (2004).

[7] *Dean E. Pierce*, 40 ECAB 1249, 1251 (1989).

[8] *William A. Archer*, *supra* note 6.

[9] *Id.; Fereidoon Kharabi*, 52 ECAB 291 (2001).

the duties of her position and without medical findings or rationale her report is not sufficient to establish that appellant was disabled for work.

On May 15, 2002 Dr. Winkler noted that appellant could not work several days in December 2001, January and February 2002 because of her costochondritis. This report is not sufficient to meet appellant's burden of proof as Dr. Winkler did not specifically mention the dates that appellant was totally disabled and did not include detailed physical findings and medical reasoning establishing that appellant was totally disabled due to her accepted employment-related condition.

The remainder of the medical evidence does not address a specific period of disability due to the accepted employment injury and is insufficient to meet appellant's burden of proof in establishing her claim.

Appellant argues that she should be entitled to wage-loss compensation under the Act because she was granted leave under the FMLA. The Board finds that the FMLA is a separate statutory scheme and that there is no indication that Congress explicitly, or implicitly, contemplated that there was, or should be, a linkage regarding eligibility for benefits under the Act. A supervisory decision in an employing agency to grant unpaid leave under the FMLA is not analogous to a decision by the Office to find eligibility for benefits under the rules of the Act and its regulations. The FMLA does not require the formal process of verification and adjudication which has been created under the Act. On the contrary, the FMLA allows a relatively flexible arrangement to be reached between employer and employee to allow for unpaid leave time for a variety of personal needs including, but not limited to, medical care. Under the Act, the Office and the Board are charged with reaching impartial decisions which are binding on the employing establishment and dispositive of the employee's right to medical care and compensation for work-related conditions. A substantial body of law, regulations and policy has come into being over decades to assure fairness and uniform evaluation of claims in all cases.

A finding of disability under another statute does not establish disability under the Act.[10] Under the Act, medical evidence submitted to document a condition pursuant to the FMLA will be evaluated under the same standards as any other evidence. It is the quality and relevance of the information, not its prior use, that establishes its weight. The Office compared the dates of appellant's medical examinations to the dates on appellant's time analysis forms and found that she was not entitled to compensation.[11] There is no indication that appellant's medical evidence, although previously offered to support her FMLA leave request, received insufficient consideration as support for her claim.

[10] *John E. Cannon*, 55 ECAB 585, 591 (2004)

[11] If a claimant has returned to work following an accepted injury or the onset of an occupational disease and must leave work and lose pay or use leave to undergo treatment, examination or test, compensation should be paid for wage loss under 5 U.S.C. § 8105 (compensation for total disability?) while undergoing the medical services and for a reasonable time spent traveling to and from the location where services were rendered. Any leave used cannot be compensated until it is converted to leave without pay. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.17.a (January 1991). For a routine medical appointment, a maximum of four hours of compensation is usually allowed. Injury Compensation for Federal Employees, Publication CA-810, *Initiating Claims*, Chapter 2.3.C.(2) (revised January 1999).

CONCLUSION

The Board finds that appellant has not established that she was disabled due to her accepted employment-related injury for any period.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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