

**United States Department of Labor
Employees' Compensation Appeals Board**

J.D., Appellant)
and) Docket No. 07-06
U.S. POSTAL SERVICE, POST OFFICE,) Issued: November 19, 2007
Coppel, TX, Employer)

)

Appearances: Case submitted on the record
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On September 28, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated September 14 and June 7, 2006 which denied modification of the Office's June 4, 2003 wage-earning capacity determination. 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 met her burden of proof to establish disability for the periods January 28 to 29, 2006 and February 13 to March 31, 2006.

FACTUAL HISTORY

On November 8, 1996 appellant, then a 41-year-old mail handler was injured while opening sacks of mail and throwing the mail. The Office accepted that the injury caused

bilateral wrist and forearm sprains. Appellant returned to modified duty following her November 8, 1996 injury and did not stop work¹

On July 30, 2002 Dr. Louis D. Zegarelli, a Board-certified osteopath specializing in family practice, completed a work-capacity evaluation. He opined that appellant could return to limited duty for four hours per day, with an estimated return to eight hours per day in three to six months. Appellant's restrictions included sitting, reaching, pushing, pulling and lifting for no more than four hours and walking, standing, bending, kneeling, squatting and climbing for no more than one hour. The weight restrictions included pushing and pulling of no more than 10 pounds for two to four hours and lifting of no more than 5 pounds for two to four hours. On April 4, 2003 appellant accepted a modified-duty assignment working four hours per day as a modified mail handler, based upon the work restrictions provided by Dr. Zegarelli.

On June 4, 2003 the Office issued a loss of wage-earning capacity (LWEC) decision effective April 4, 2003 finding that her actual wages as a modified mail handler for four hours per day fairly and reasonably represented her wage-earning capacity. The Office reduced her compensation benefits accordingly.

In a December 14, 2005 treatment note, Dr. Zegarelli noted that appellant informed him that her psychiatrist did not believe that she should return to work as she was psychologically "unstable." He advised follow up in a month. On January 20, 2006 Dr. Zegarelli updated appellant's work restrictions to include an ergonomic chair. He restricted her to working no more than four hours daily. On January 25, 2006 Dr. Zegarelli noted that appellant had returned to work on January 23, 2006. Appellant informed him that she had continuous problems in that she was being harassed, her employer not working with her, her ergonomic chair was taken and that the chair she was using aggravated her back. Dr. Zegarelli requested an ergonomic chair to replace the former one. In a disability certificate dated January 31, 2006, he opined that appellant was medically unable to work on January 28 and 29, 2006, but that she could resume work on January 30, 2006. On February 8, 2006 Dr. Zegarelli recommended that appellant continue working four hours per day within her restrictions.

In reports dated February 16, 2006, Dr. Zegarelli opined that appellant was medically unable to work until further notice. He stated that she "feels that there are hostile employees at work who are acting against her to make her return to work [as] difficult as possible." Dr. Zegarelli diagnosed chronic cervical and lumbar pain and multiple areas of chronic pain and placed appellant off work beginning February 13, 2006 until further notice. On February 23, 2006 Dr. Zegarelli noted that appellant had chronic persistent mechanical lumbosacral pain syndrome with recent exacerbation. He opined that she also suffered from acute anxiety and depression, chronic persistent mechanical cervicothoracic pain, right/left upper and lower extremity paresthesias, neurodermatitis and somatosensory dysfunction. Dr. Zegarelli advised that appellant could not handle stressors at work or home and that she could not work due to a multitude of problems related to her work activities. In a February 27, 2006 treatment note,

¹ On November 1, 1997 appellant sustained a second injury. The Office accepted that the injury caused muscle spasms of the neck and back. Appellant stopped work from January 24 through May 22, 1998. She returned to work with restrictions and stopped work completely on October 22, 1998 when she tripped over a U-cart. The Office accepted the claim for a right hip contusion. The Office placed these claims under File No. 160306463.

Dr. Zegarelli advised that appellant not work until she could be cleared by a psychologist and her work environment controlled. He noted that she was attempting to obtain a referral for a chronic multidisciplinary pain management program.

On March 4, 2006 the Office received several CA-7 claim forms for wage-loss compensation on January 28 and 29, February 13 to 17 and February 18 to March 3, 2006. Appellant also filed CA-7 forms for continuing wage-loss compensation for the period March 4 to 31, 2006.

In a March 10, 2006 treatment note, Dr. Zegarelli recommended appellant's referral to chronic pain management due to the significance of her persistent symptoms. He noted that she was emotionally distraught, had anxiety, became easily agitated when discussing work and continued to complain of pain and depression. Dr. Zegarelli indicated that appellant was regularly seen by a psychologist, as she needed more aggressive in depth therapy. On March 29, 2006 he opined that appellant was "medically incapacitated to work until further notice due to aggravated pain [resulting from the] work injury."

By letters dated April 5, 2006, the Office advised appellant that it had received her compensation claims. It noted that Dr. Zegarelli discussed anxiety, depression and insomnia, which were not accepted conditions. The Office requested medical evidence establishing her disability for work for the claimed period.

In an April 6, 2006 treatment note, Dr. Zegarelli advised that appellant was recently seen by her psychologist, who was working with her regarding chronic pain. He indicated that appellant related that certain individuals at work had been "fired due to the poor handling of employees." On April 19, 2006 Dr. Zegarelli recommended continued psychiatric/psychological counseling, continued use of medications to help control her symptoms and advised that appellant remain off work due to her work injuries. In an April 20, 2006 report, he noted that appellant attempted to return to work after a significant period of time and her work restrictions were exceeded. Dr. Zegarelli advised that appellant related that her supervisor was obstructive and alleged that appellant aggravated her injuries which led to further evaluation. He indicated that the new diagnostic studies revealed "evidence of pathology that would support [appellant's] complaints of pain/dysfunction." Dr. Zegarelli indicated that he had returned appellant to "off work status due to her deteriorated condition."

By decision dated June 7, 2006, the Office denied appellant's claim for intermittent disability compensation during the period January 28 through March 31, 2006. The Office found that the evidence did not establish that appellant's condition had materially changed such that it precluded her from working in her position as a modified mail handler, that the wage-earning capacity established on June 4, 2003 was in error or that appellant had rehabilitated herself.

By letters dated July 3 and 5, 2006, appellant requested reconsideration and submitted additional evidence. In a May 19, 2006 report, Dr. Zegarelli advised that appellant remain off work. A June 8, 2006 functional capacity evaluation indicated that appellant could perform light duty. In a July 3, 2006 report, Dr. Zegarelli noted that a lumbar spine MRI scan study of April 12, 2006 revealed new findings which were more significant in comparison to previous MRI scans. He opined that appellant had deteriorated to the point which she was experiencing

significant dysfunction. Dr. Zegarelli requested that the Office revisit its decision pertaining to the time frame from January 28 through March 31, 2006. He submitted periodic reports advising that appellant remain off work. An April 18, 2006 electromyogram (EMG) read by Dr. Richard S. Ahn, a Board-certified neurologist, revealed neuropathy and myopathy.

Appellant submitted copies of previously received documents. She submitted several statements from individuals at the employing establishment. In a July 2, 2006 statement, Wilbert Davis, a mail handler, indicated that since June 1993 he had only observed appellant perform level four mail handler craft work. In a July 5, 2006 statement, Dorothy Garrett, a coworker, indicated that appellant had been in flats working buckets of mail and had not done any "clerk work (casing mail) since 1992." In a July 5, 2006 statement, Eileen Mills, a union president, indicated that appellant was assigned to case letter mail since 1992 and that in 2003 she began repairing flat mail, which required her to work out of buckets as well as remove and place them into all purpose containers (APC), as well as repairing parcels and other damaged mail. In letters dated June 25 and July 5, 2006, appellant alleged that she had never worked in casing letters but instead worked in flats, which included lifting heavy or overweight stuffed buckets. In an August 2, 2006 letter to her representative, appellant indicated that on February 13, 2006 she went to the emergency room as a result of a tear of muscle caused by over stretching due to lifting heavy objects in her job, including buckets from 2003 to February 13, 2006. Appellant also alleged that she was working in flats from 2003 to 2006 lifting flats and carrying buckets and twisting and bending with no help at all the majority of the time.

By letter dated July 27, 2006, the Office requested additional information.

In an August 8, 2006 report, Dr. Zegarelli noted that appellant had chronic pain due to her November 8, 1996 injury and her additional injuries incurred on November 1, 1997 and October 22, 1998. He diagnosed chronic persistent mechanical cervicothoracic pain syndrome, chronic persistent mechanical lumbosacral pain syndrome, polyneuropathy in the right and left arm and right and left leg, bilateral ulnar neuropathy at the elbow, left carpal tunnel syndrome, EMG consistent with neuropathy and myopathy of upper/lower extremities, cervical degenerative spondylosis, cervical facet arthropathy and lumbar facet arthropathy. Dr. Zegarelli noted that despite appellant's chronic pain she was able to return to a limited-duty job with the goal of gradually increasing her from four hours to six hours and eventually eight hours as she became accustomed to work and reaccustomed to the workforce. He advised that upon returning to work on January 16, 2006 for four hours per day appellant began experiencing flare-up symptoms, but persevered and continued to work through her flare ups. Dr. Zegarelli noted that on February 13, 2006 appellant was assigned work that exceeded her restrictions and as she engaged in this activity, she experienced an aggravation of her injuries to her neck and upper and low back region. He noted that appellant went to the emergency room where she was diagnosed with a muscle tear caused by over stretching her back and opined that this was the "direct cause and effect present in which [appellant] was engaging in work activities and suffered a tear of muscles in her back resulting in her increased pain and the reoccurrence (sic) of her work injury."

In a letter dated August 15, 2006, appellant noted that on February 13, 2006 she went to the emergency room. She alleged that she had been working outside of her restrictions in flats under the supervision of Don Craig. Appellant stated that, when she returned to work, her

limited-duty assignment changed and became more demanding. She alleged that she was lifting heavy overloaded buckets of flats out of APC's over her eye level and weight restrictions. Appellant alleged that, by doing extensive reaching, twisting, bending and stooping at all times, her ergonomic chair was broken and she started having sharp, shooting pains in her neck, upper and lower back, both hands, wrists and forearms, pains shooting from her hands, under her armpits to her shoulders and sharp pains in her lower back to her tailbone and hip, which became severe when she was working and prompted her to seek emergency help.

By decision dated September 14, 2006, the Office denied modification of its June 7, 2006 decision.

LEGAL PRECEDENT

The Board notes that the term "disability," as used in the Act means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.² For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the 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 proved by a preponderance of probative and reliable medical opinion evidence.³ The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.⁴ The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify her disability and entitlement to compensation.⁵

ANALYSIS

The Office accepted that appellant sustained bilateral wrist and forearm sprains and muscle spasms of the neck and back as a result of her federal employment. After returning to a modified-duty position on April 4, 2003, appellant then filed several claims for compensation alleging that intermittent periods of wage loss from January 28 to March 31, 2006 were causally related to the accepted employment injuries.

The record contains several reports from appellant's treating physician, Dr. Zegarelli. In a December 14, 2005 treatment note, Dr. Zegarelli indicated that appellant's psychiatrist recommended that she not return to work as she was "unstable" psychologically. His February 27, 2006 treatment note placed her off work until she was cleared by her psychologist and her work environment controlled. The Board notes that appellant's claim was not accepted

² *Patricia A. Keller*, 45 ECAB 278 (1993).

³ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁴ *Manuel Garcia*, 37 ECAB 767 (1986).

⁵ *Amelia S. Jefferson*, 57 ECAB ____ (Docket No. 04-568, issued October 26, 2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

for any psychological condition and these reports are insufficient to establish that she was totally disabled on the aforementioned dates due to her accepted physical conditions.

On January 20 and 31, 2006 Dr. Zegarelli opined that appellant was unable to work on January 28 and 29, 2006 but could resume work on January 30, 2006. He offered no opinion as to why appellant was disabled or unable to work on these dates. Dr. Zegarelli did not explain whether appellant's injury-related condition had worsened or whether she was capable of performing her modified position. These reports are insufficient to meet appellant's burden of proof.⁶ On February 8, 2006 Dr. Zegarelli opined that appellant could resume working for four hours per day within her restrictions.

In reports dated February 16 and 23, and March 10 and April 6, 2006, Dr. Zegarelli placed appellant off work due to chronic cervical and lumbar pain. He also noted that she had anxiety and depression, which were not accepted conditions. Dr. Zegarelli did not explain how her symptoms arose from her accepted conditions. These reports are insufficient to meet appellant's burden of proof as they do not establish a change in the nature and extent of her injury-related conditions or explain how appellant became totally disabled such that she could not work her modified position for four hours per day.

In an August 8, 2006 report, Dr. Zegarelli noted that appellant had chronic pain related to her injury of November 8, 1996 and her additional injuries incurred on November 1, 1997 and October 22, 1998. He advised that, when appellant returned to work on January 16, 2006 for four hours per day, she began experiencing a flare-up of symptoms but persevered and continued to work through her flare ups. Although he indicated that on February 13, 2006, appellant was assigned work that exceeded her restrictions, which caused an aggravation of her injuries to her neck and upper and low back region, he did not indicate that appellant was totally disabled on any of the aforementioned dates. Thus, this report is insufficient to meet appellant's burden of proof as it does not show a change in the nature and extent of the injury-related conditions or indicate that appellant was totally disabled such that she could not work her modified position for four hours per day.

As appellant has not submitted the requisite medical evidence establishing total disability on the aforementioned dates, she has not met her burden of proof.

CONCLUSION

For the reasons stated above, the Board finds that appellant failed to sustain her burden of proof in establishing that she was totally disabled due to her accepted employment conditions from January 28 to 29 and February 13 through March 31, 2006

⁶ *Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury).

ORDER

IT IS HEREBY ORDERED THAT the September 14 and June 7, 2006 decisions of the Office of Workers' Compensation Programs are affirmed, as modified.

Issued: November 19, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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