United States Department of Labor
Employees' Compensation Appeals Board

J.J., Appellant	)	
and	)	**Docket No. 08-138**
	)	**Issued: June 10, 2008**
U.S. POSTAL SERVICE, DELAWARE PROCESSING & DISTRIBUTION CENTER, New Castle, DE, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 18, 2007 appellant filed a timely appeal from two decisions of the Office of Workers' Compensation Programs, the August 6, 2007 decision denying a claim for wage-loss compensation, and the September 13, 2007 decision, denying her claim for recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that her claim for compensation for disability for two hours on July 20, 2007 is due to the accepted August 4, 2005 employment injury; and (2) whether appellant established that she sustained a recurrence of total disability commencing January 26, 2007 related to her accepted condition of contusion and sprain of the thoracic spine.

FACTUAL HISTORY

On August 4, 2005 appellant, then a 50-year-old clerk, sustained a traumatic injury when another employee hit her in the back with an all purpose container. She was disabled from work until September 22, 2005, when she began working a light-duty position. On October 4, 2005 the Office accepted her claim for contusion and strain of the thoracic spine. On October 11, 2005 appellant accepted the position of modified clerk, with restrictions against bending, stooping, twisting or lifting over 15 pounds.

On January 26, 2006 Dr. Rachael Smith, a Board-certified osteopathic physician specializing in physical medicine and rehabilitation, stated that appellant continued to experience symptoms in her mid-back. She noted that appellant's light-duty position required her to repetitively lift and transfer sacks of mail. Dr. Smith stated that this was an inhibiting factor and that a sedentary job would help her healing process. On February 6, 2006 appellant accepted a sedentary light-duty position casing mail. On March 9, 2006 Dr. Smith reported that appellant was feeling much better and was under less physical stress since switching jobs. Noting that repetitive lifting and bending would aggravate appellant's condition and prevent improvement, she recommended work restrictions. Based on Dr. Smith's findings, the employing establishment continued to provide appellant with a temporary sedentary position. In a report dated November 3, 2006, she stated that appellant was managing her chronic thoracic spine pain well and that her work restrictions should be made permanent.

On November 15, 2006 the Office referred appellant for a second opinion examination to determine the extent of her injury-related condition.

On December 28, 2006 Dr. Richard DuShuttle, a Board-certified orthopedic surgeon, reviewed the medical history and conducted a physical examination. He stated that appellant had a history of arthritis, but denied having back pain prior to her employment injury in August 2005. Dr. DuShuttle noted that she had been treated with medication and physical therapy. On physical examination he found that appellant had full cervical rotation with mild stiffness and tenderness to palpitation in the thoracic area. Dr. DuShuttle found no radiculopathy or neurological or sensory deficit. He diagnosed a thoracic strain, status post work injury. Dr. DuShuttle opined that appellant had reached maximum medical improvement and that, because of the continuing residuals of her employment injury, she should perform only light-duty work. He stated that appellant was capable of working eight hours per day with permanent restrictions against lifting more than 20 pounds.

On January 26, 2007 Dr. Smith modified appellant's permanent work restrictions to limit her to six hours of work per day and to require the use of the handicap case. The employing establishment offered appellant a light-duty position from January 26 to April 20, 2007 based on these restrictions.

On February 1, 2007 the Office provided the employing establishment with a copy of Dr. DuShuttle's report and asked that a permanent light-duty position of eight hours per day be provided for appellant.

On February 8, 2007 appellant submitted a claim for compensation for the two hours of leave without pay taken each day from January 26 to February 2, 2007. She filed a similar claim every two weeks thereafter.

In a letter dated February 13, 2007, the Office notified appellant that Dr. Smith had not provided any medical rationale for her six-hour work limitation. The Office requested medical evidence explaining why she was no longer capable of working eight hours per day.

On February 26, 2007 the employing establishment offered appellant the permanent light-duty assignment of sorting mail in the handicap case with use of a chair for eight hours per day. The offer included the notation that appellant was currently working six hours per day on her physician's recommendation pending approval by the Office. She accepted the position.

On March 3, 2007 Dr. Smith stated that appellant's six-hour work limit was medically necessary because the repetitive motion associated with her job increased her thoracic pain and muscle spasms. When appellant worked more than six hours in a day, the burning pain and spasms limited her capacity to continue working.

On March 13, 2007 the Office paid appellant for the leave without pay taken from January 26 to March 2, 2007. The Office continued to grant appellant's claims for wage-loss compensation on a regular basis thereafter.

On April 25, 2007 the Office found a conflict between the opinions of Dr. DuShuttle and Dr. Smith on the issue of how many hours appellant could work per day and how much weight she could lift. To resolve the conflict, the Office referred appellant to an impartial medical examiner.

On June 20, 2007 Dr. Jerry Case, a Board-certified orthopedic surgeon, examined appellant and reviewed her medical records. On physical examination, he found that she had thoracic and lumbar flexion to 90 degrees, extension to 20 degrees and lateral bending to 20 degrees bilaterally. Dr. Case noted mild tenderness in the upper thoracic area. He found no other clinical abnormalities, including muscle spasms, in the back or lower extremities. Dr. Case reviewed appellant's x-rays and noted widespread degenerative changes, most significantly in the lower thoracic spine, where she had no complaints of pain. He reported that an August 17, 2005 magnetic resonance imaging (MRI) scan showed multi-level degenerative changes, but no disc herniation. A bone scan conducted on September 14, 2005 revealed no abnormalities in the thoracic region.

Dr. Case diagnosed contusion and strain of the thoracic spine superimposed on preexisting degenerative arthritic changes. He noted that appellant's complaints were in her upper thoracic spine, which had very minimal findings of abnormality on the MRI scan and x-rays. Dr. Case could not explain why she would continue to have significant pain so long after her injury. He opined that appellant could work eight hours per day and lift up to 20 pounds, but that she should avoid repeated bending and twisting because of her arthritic findings and subjective complaints. Dr. Case found that appellant's condition was unlikely to improve.

On July 9, 2007 appellant filed a claim for compensation for leave without pay taken from June 25 to July 6, 2007.

By decision dated July 12, 2007, the Office denied appellant's claim for compensation for disability for two hours per day from June 25 to July 6, 2007. It found that Dr. Case's June 20, 2007 opinion, which was entitled to the special weight of the medical evidence, established that she could work eight hours per day, rather than six hours per day.

By decision dated July 19, 2007, the Office informed appellant that the conflict between Dr. Smith and Dr. DuShuttle had been resolved. It stated that, effective June 21, 2007, appellant was required to work eight hours per day with a 20-pound weight restriction. The Office requested that the employing establishment assign appellant a permanent light-duty position that met the limitations described by Dr. Case.

On July 23, 2007 appellant filed a claim for compensation for two hours of leave without pay taken each day from July 9 to 20, 2007.[1]

By decision dated August 6, 2007, the Office amended the July 19, 2007 decision. It granted appellant's compensation claims through July 19, 2007, the date she received official notice of the decision regarding her change in work status.[2]

On August 21, 2007 appellant filed a notice of recurrence of disability, Form CA-2a, alleging that she experienced a recurrence on January 26, 2007, when her physician reduced her hours from eight to six to stabilize and lessen the effects of her employment injury. She stated that her previous work restrictions did not improve the symptoms of her job-related injury and, by January 26, 2007, her repetitive motions and overhead reaching had exacerbated them.[3] Appellant also contended that the Office should have expanded her accepted conditions to include the aggravation of her preexisting thoracic disc disease.

In a report dated August 15, 2007, Dr. Smith provided an overview of appellant's course of treatment for mid-back pain since October 2005. She indicated that, during that time, the nature of appellant's complaints remained the same. Because appellant's condition improved after she began working in a sedentary position, Dr. Smith continued to recommend those restrictions. On November 3, 2006 she opined that the restrictions should be permanent. Dr. Smith stated that appellant called her on December 14, 2006 and requested that her work restrictions be adjusted to a maximum of six hours per day because of increased mid-back pain due to time spent driving and working. She made the requested change because she thought that it was reasonable.[4] On January 26, 2007 Dr. Smith added the use of the handicap case to

[1] Appellant also filed wage-loss claims for July 23 to August 31 and September 18 to 29, 2007. However, these claims were not in the record at the time of the Office's August 6, 2007 decision. As the Office has not issued a decision addressing the subsequent claims, the Board has no jurisdiction to consider them. *See* 20 C.F.R. § 501.2(c).

[2] Though the Office does not discuss the July 12, 2007 decision, it appears as if that decision was also superseded by the August 6, 2007 decision, because it denied compensation for a period prior to the accepted date of notice, which was July 19, 2007.

[3] Appellant indicated on the claim form that she continued to work six hours per day based upon her physician's recommendations. Thus, it appears that she is claiming compensation for disability for two hours per day.

[4] Dr. Smith seems to indicate that she changed the work restrictions on December 14, 2006, but there is no record of any such change until January 26, 2007, when she also recommended use of the handicap case.

appellant's work restrictions. She stated that appellant had "the same complaint" and that she provided "the same treatment" at the January 26, 2007 appointment and all subsequent appointments. Dr. Smith concluded her report by opining that appellant would not be able to return to regular duty, but was able to work within the restrictions she had outlined on January 26, 2007.

By decision dated September 13, 2007, the Office denied appellant's claim for recurrence of disability on the grounds that the evidence was not sufficient to establish a material worsening of her condition that rendered her unable to perform her assigned light-duty work. It noted that the impartial medical examiner's opinion, which carried the special weight of the medical evidence, established that appellant was capable of working eight hours per day and lifting 20 pounds.[5]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[6] has the burden of proving the essential elements of his claim by the weight of the evidence presented.[7] Compensation for wage loss is available only for periods during which an employee's accepted condition prevents her from earning her wages.[8] Even if the Office has accepted that appellant sustained an injury in the performance of duty, she still has the burden of establishing that her accepted condition resulted in disability during the specific periods for which she is claiming compensation.[9] The duration of a disability is a medical issue that must be proved by a preponderance of the reliable, probative and substantial evidence.[10]

When an employee claims compensation for leave used because of an alleged injury or disability, the Office has the responsibility of determining whether the employee was disabled during those periods.[11] The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the particular periods of disability for which compensation is claimed. To do so would have the effect of allowing employees to self-certify their disability and entitlement to compensation.[12] There is no requirement that an employee show an independent medical evaluation for each day of claimed disability, but the

[5] On October 9, 2007 appellant requested an oral hearing on this decision. On October 12, 2007 she withdrew her request for an oral hearing so that she could pursue an appeal with the Board.

[6] 5 U.S.C. §§ 8101-8193.

[7] *William A. Archer*, 55 ECAB 674 (2004); *Nathaniel Milton*, 37 ECAB 712 (1986).

[8] *Judith A Cariddo*, 55 ECAB 348 (2004); *see also* 20 C.F.R. § 10.500(a).

[9] *Dorothy J. Bell*, 47 ECAB 624 (1996).

[10] *Edward H. Horton*, 41 ECAB 301 (1989).

[11] *Glen M. Lusco*, 55 ECAB 148 (2003); *Laurie S. Swanson*, 53 ECAB 517 (2002).

[12] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

employee must provide some medical evidence that she was disabled on those days.[13] When dealing with an accepted employment injury, a narrative medical opinion directly addressing the dates of claimed disability is generally sufficient to demonstrate disability for those periods.[14]

The Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.[15] Likewise, the implementing regulations states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office must appoint a third physician to make an examination. This is called a referee examination and the Office is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[16] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.[17]

ANALYSIS -- ISSUE 1

The Office compensated appellant for all claimed periods of wage loss from January 26 through July 19, 2007. The issue to be established is whether appellant was disabled for the two hours on July 20, 2007 for which she sought compensation.

On December 28, 2006 Dr. DuShuttle, a Board-certified orthopedic surgeon acting as a second opinion physician, opined that appellant had reached maximum medical improvement related to her thoracic strain. He stated that she was capable of working eight hours per day with permanent restrictions against lifting more than 20 pounds. On January 26, 2007 appellant's treating physician, Dr. Smith, a Board-certified osteopathic physician specializing in physical medicine and rehabilitation, modified her permanent work restrictions. In addition to the existing restrictions against bending, stooping, twisting and lifting over 15 pounds, she included a limit of six hours of work per day and a requirement that appellant use a handicap case to sort mail. Dr. Smith later stated that the changes were necessary because the repetitive motions of appellant's job caused increased burning and spasms in her back when she worked more than six hours. The Office began compensating appellant for the two hours per day she no longer worked. However, it properly found that there was a conflict between Dr. DuShuttle and Dr. Smith on the issue of appellant's work restrictions and referred her to an impartial medical examiner to resolve the conflict.

[13] *Id.* (finding that "less than definitive medical evidence" may be adequate proof of disability when an employee has an accepted employment-related condition and a physician has provided a medical opinion that the effects of the condition are likely to reoccur).

[14] *See William A. Archer, supra* note 7.

[15] 5 U.S.C. §§ 8101-8193, 8123(a).

[16] 20 C.F.R. § 10.321.

[17] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

On June 20, 2007 Dr. Case, a Board-certified orthopedic surgeon, examined appellant and found that her thoracic and lumbar spine had flexion to 90 degrees, extension to 20 degrees and lateral bending to 20 degrees bilaterally. He noted mild tenderness in the upper thoracic area but no muscle spasms or other clinical abnormalities in the back or lower extremities. Dr. Case conducted a review of appellant's medical history. He found that her x-rays indicated widespread degenerative changes along the spine, most significantly in the lower thoracic area, where she had no complaints of pain. Dr. Case reported that an August 17, 2005 MRI scan showed multi-level degenerative changes, but no disc herniation and that a September 14, 2005 bone scan revealed no abnormalities in the thoracic region.

Dr. Case diagnosed contusion and strain of the thoracic spine superimposed on preexisting degenerative arthritic changes. He found that appellant's condition was unlikely to improve. Dr. Case noted that, despite her subjective complaints, her upper thoracic spine had very minimal findings of abnormality on the MRI scan and x-rays. He stated that he could not explain why she would continue to have significant pain so long after her injury occurred. Dr. Case opined that appellant could work eight hours per day and lift up to 20 pounds, but that she should avoid repeated bending and twisting because of the arthritis on her spine and her subjective complaints. The Board finds that the opinion of Dr. Case is entitled to the special weight of the medical evidence because it is sufficiently well rationalized and based on proper factual and medical background.

Appellant filed a claim for disability from work for two hours on July 20, 2007 due to her employment injury. However, Dr. Case's opinion, which resolved the conflict between Dr. DuShuttle and Dr. Smith on the issues of appellant's disability, indicates that she was capable of working eight hours per day. Appellant submitted no additional medical evidence specifically addressing her disability from work on July 20, 2007.

The Board finds that the special weight of the medical evidence, as represented by Dr. Case, establishes that there was no disability on July 20, 2007. Thus, the Board finds that appellant has not met her burden of proof to establish that she was disabled for two hours on July 20, 2007.

LEGAL PRECEDENT -- ISSUE 2

A claimant seeking compensation under the Act has the burden of establishing the essential elements of her claim by the weigh of reliable, probative and substantial evidence.[18] To establish a claim for recurrence of disability, a claimant must establish that she experienced a spontaneous material change in the employment-related condition without an intervening injury or new exposure to the work environment that caused the illness.[19]

An employee who is disabled from her date-of-injury position by employment-related residuals has the burden of establishing by the weight of reliable, probative and substantial evidence that she sustained a recurrence of disability such that she cannot perform her light-duty

[18] *Edward W. Spohr*, 54 ECAB 806 (2003).

[19] *Philip L. Barnes*, 55 ECAB 426 (2004); *Carlos A. Marrero*, 50 ECAB 117 (1998); 20 C.F.R. § 10.5(x).

position. As part of this burden of proof, the employee must show either 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.[20]

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained a thoracic strain and contusion on August 4, 2005. The issue to be resolved is whether appellant has established that she sustained a recurrence of total disability causally related to this injury. Because she has not alleged a change in her light-duty requirements, she must show a spontaneous change in the nature or extent of her employment-related condition.

Appellant alleged that Dr. Smith reduced her hours in January 2007 in an effort to stabilize her employment injury. She stated that her long-standing employment restrictions did not lessen the symptoms of her employment injury and that the repetitive motion and overhead reaching associated with her position exacerbated her condition. The Board notes that this claim, on its face, does not appear to meet the requirements for a recurrence of disability because the allegedly worsening condition was not spontaneous, but brought on by repetitive motions and overhead reaching. These activities constitute new exposure to the work environment and are therefore not the basis for a recurrence of disability claim, but rather, a new occupational disease claim.[21]

The Board finds that the medical evidence does not provide evidence of a change in appellant's condition commencing on January 26, 2007. In a report dated August 15, 2007, Dr. Smith indicated that the nature of appellant's complaints did not change over the course of her treatment. She stated, however, that appellant's condition improved after she began working in a sedentary position in March 2006. On November 3, 2006 Dr. Smith opined that the existing restrictions should be made permanent. On December 14, 2006 appellant telephoned Dr. Smith and requested that her work restrictions be adjusted to a maximum of six hours per day. She reported increased mid-back pain due to her driving and working hours. Dr. Smith stated that she made the requested change because it seemed reasonable given appellant's complaints of increased mid-back pain. However, she provided no objective clinical findings regarding a worsening of appellant's physical condition in December 2006 or January 2007 or any time thereafter. Dr. Smith stated only that appellant's complaints and the treatment offered were the same as previously and did not change going forward. The Board has held that medical evidence must include rationale explaining how the physician reached the conclusion she is supporting.[22] The Board finds that the opinion of Dr. Smith is insufficient to establish that appellant's condition changed in nature or extent commencing on January 26, 2007 because she provided no medical rationale explaining why a change to a six-hour work restriction was "reasonable" in appellant's case.

[20] *Terry R. Hedman*, 38 ECAB 222 (1986).

[21] *See Bryant F. Blackmon*, 56 ECAB 752 (2005) (change in appellant's condition was not spontaneous because exposure to new employment factors broke the chain of causation).

[22] *Beverly A. Spencer*, 55 ECAB 501 (2004).

The Board also notes that, as discussed above, the June 20, 2007 report of Dr. Case carries the special weight of the medical opinion evidence on the issue of appellant's work limitations. Though Dr. Case did not directly address the issue of recurrence of disability, he did opine that appellant was capable of working eight hours a day in a light-duty position and that there was no explanation for continued pain causally related to the August 4, 2005 employment-related injury. His factual findings do not support appellant's claim that she sustained a change in the nature or extent of her employment condition on January 26, 2007.

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of disability on January 26, 2007.

CONCLUSION

The Board finds that appellant has not established that her claim for compensation for two hours of disability on July 20, 2007 was due to the accepted August 4, 2005 employment injury. The Board also finds that she has not established that she sustained a recurrence of disability commencing January 26, 2007 related to her accepted condition of contusion and sprain of the thoracic spine.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 13 and August 6, 2007 are affirmed.

Issued: June 10, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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