United States Department of Labor
Employees' Compensation Appeals Board

S.F., Appellant	)	
and	)	**Docket No. 07-2287**
	)	**Issued: May 16, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Norwood, MA, Employer	)	

Appearances:
John L. Whitehouse, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 5, 2007 appellant filed a timely appeal from the July 16, 2007 merit decision of the Office of Workers' Compensation Programs' hearing representative, which denied her recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant sustained a recurrence of total disability on March 15, 2002.

FACTUAL HISTORY

On January 28, 1994 appellant, then a 40-year-old distribution clerk, filed a claim alleging that her neck, back and arm pain was a result of her federal employment. The Office

accepted her claim for cervical radiculopathy and herniated disc. Appellant underwent an anterior cervical discectomy and fusion at C5-6.[1]

On August 27, 1994 appellant sustained an injury in the performance of duty when she fell and hit a stool. The Office accepted her claim for cervical and lumbar strain.[2] In December 1999, appellant accepted a rehabilitation-duty assignment as a modified clerk. Her duties included answering telephones, performing lobby sweeps, filing within the restrictions outlined by her physician, performing "hot case sweeps," handling second notices, clearing carriers, issuing accountable and performing accountability research. The job offer noted that appellant's current limitations included no reaching above shoulder, no repetitive motion of left arm and lifting up to 10 pounds as tolerated.

On April 24, 2002 appellant filed a claim alleging that she sustained a recurrence of disability on March 15, 2002 as a result of her August 27, 1994 employment injury. She described how the recurrence happened: "Always was in pain when returned to work from original injury. Would cry from the pain -- but tried to work -- cannot stand the pain any longer." Appellant remained off work for approximately two-and-a-half years.

On April 1, 2002 Dr. Paul B. Rizzoli, the attending neurologist, indicated that appellant was totally disabled for work beginning March 15, 2002. He reported that her limitations were no repetitive work and light duty. On July 1, 2002 Dr. Rizzoli addressed appellant's disability for work in a narrative report:

> "In October 1999, [appellant] continued to report symptoms related to activity at work. [She] continued to require medications and trigger point injections. There was no overall change in this pattern as of June 2001, however, [appellant] returned in March 2002 with report increased symptoms and increased requirement for injections. [She] had missed a couple of days of work because of the symptoms. [Appellant] related the increased symptoms to increase activity at work.
>
> "[Appellant's] examination throughout has never changed.
>
> "We had a long discussion. Since the beginning, [appellant] has never been free of symptoms, off medication and able to work without restriction. After six years of medication and repetitive injections to keep [her] working light duty, she was finally advised to discontinue this work because of continued adverse effects on her health. [Appellant's] original disability of August 27, 1994 was for cervical strain, cervical radiculopathy and lumbosacral strain. [Her] current symptoms are a direct result of these conditions with additional diagnosis of overuse syndrome to clarify the activity-related worsening of the symptoms that she reports. From a medical perspective, it is no longer considered appropriate to manage [appellant's] symptoms in this way because of long-term complications that could

[1] Office File No. 010317501.

[2] Office File No. 010322741.

ensue. [She] has made every effort to return to full duty, when she could have claimed total disability initially, but has failed to achieve a symptom-free state and be able to work. Thus, after attempting to manage her situation for many years, I am forced to the conclusion that [appellant] is totally disabled for this occupation and I respectfully request that you consider a favorable disposition in this matter."

On August 26, 2002 Dr. Rizzoli responded to the Office's request for additional information. He stated:

"Please see the original report of July 1, 2002. You have requested a report detailing objective findings that convinced me that the condition has worsened. There are no such findings. There never have been. [Appellant's] physical examination has never been particularly helpful in determining her clinical course. This, of course, is not unusual in these circumstances and does not reflect upon the patient. I did not order any studies. My determination was based on having followed the patient for some six years and being familiar with the tempo of her illness. By [appellant's] report, symptoms increased after a change in duties at work. I did not detail these changes. Also, [appellant's] usage of medication dramatically increased after a long period of stable medication usage.

"I am therefore left with a clinical judgment that [appellant's] disability has increased based on her complaints and on her medication usage. In addition, she reports that her job duties changed.

"It was this information and the concerns that are detailed in the original report that lead to my recommendation for total disability."

In a decision dated September 18, 2002, the Office denied appellant's recurrence claim.

Appellant requested an oral hearing before an Office hearing representative. Following the hearing, the employing establishment's injury compensation specialist responded to appellant's testimony:

"I would like to point out that, per [appellant's] testimony, when she was having trouble uncovering cages she asked for assistance. She also states that she would ask for help lifting anything heavy. Again, when [appellant] had trouble with change of address cards, she would ask for assistance. When she was having trouble putting trays in carts for distribution to letter carriers, her supervisor filled the cart and then the carriers would take the trays out of the cart for their routes. In the [p]arcel [p]ost section [appellant] states, 'I just left the heavy stuff in the bucket.' She indicates that she could n[o]t lift buckets in the box section and she would let the customer in to pick up their own buckets. It appears that [appellant] did not work outside her limitations by requesting assistance as stated above nor was she required to work outside of her limitations.

"[Appellant] describes a variety of work assignments throughout her period of limited[-]duty assignments, which appear to have a variety of physical

> requirements, not outside of her limitations. To clarify this point, [she] repeatedly indicates [that] she could not do repetitive work, however, it appears [that] she was provided with a variety of tasks to insure she did not do one particular task repetitively."

Appellant submitted statements from several coworkers. One noted that the task of withdrawing and handling trays on a "bakery cart" proved to be extremely painful to her, so she asked him if he could withdraw his own trays when she arrived at his workstation. "Sensing [appellant's] obvious pain and discomfort, I did consent and did so for her on a daily basis up until I retired." Another coworker stated that, when appellant returned to light duty, she was asked to perform work that was both heavy and repetitive. "[She] would be told to do postage due, process trays and tray of loop mail and to pull down mail from sorting cases, all of which were against her limits." This coworker noted that appellant was told to help out with the windows, which would entail getting tubs of mail, packages and other heavy pickups for customers. A third coworker noted that appellant initially answered the telephone, which was a full-time job, but when management changed, she was asked to do jobs she could not do, such as crossing out bar codes on the loop mail. Appellant was also told to look up express mail failures do the postage due mail. The coworker described these tasks as repetitive. She stated that appellant was also asked to notify customers that they had packages too large to place in the post office boxes: "[Appellant] would have to lift those packages up on to a shelf which would entail reaching above her head and that was really excruciatingly painful for her." The coworker added that appellant complained to management, but management told her to do it anyway.

On July 28, 2003 the hearing representative remanded the case for further development of the factual and medical evidence. The Office obtained additional information from the employing establishment on appellant's actual duties since 1999. One supervisor stressed to appellant that it was her responsibility to adhere to her restrictions and that if she needed assistance at any time or was asked to perform a task outside her restrictions she should inform him immediately. He stated that at no time did appellant ever approach him to ask for assistance or claim that she was being required to work outside her restrictions. Another supervisor responded to appellant's testimony. He stated that he never recalled seeing appellant sort letters or flats. He stated that she would receive on average about 35 to 50 certify letter for one day and that counting postage due mail could be done in a sitting position with the right hand. He added that any job appellant was asked to do could be modified to accommodate her condition, such as lifting a smaller amount of mail at a time. Any filing, he explained, could be done with the right arm and she was never required to case mail above her shoulders and never sorted mail at a case like a distribution clerk. The supervisor described appellant's normal routine:

> "Her normal routine would be to sort out accountable mail in the morning (2 hours) and then roll a cart to pass out mail (1 to 1.5 hours). If [appellant] needed to obtain any mail from the case a fellow clerk could obtain the mail if it was above her shoulder height. After that she would write first and second notices including box mail, which could be done with her right hand. [Appellant] would then line out barcodes [one] to [two] hours a day again within her limitation done with her right hand. [She] would then have varying duties which included checks on express mail for [two] hours a day. I worked Saturday and was in charge of the window clerks and rarely directed her to pass out hold mail.

> However, if something was too heavy I would have another employee take care of the customer. Tubs can be broken down to reduce the weight thus eliminating any danger to the employee."

The Office referred appellant to Dr. Richard A. Alemian, an orthopedic surgeon, for a second opinion. Dr. Alemian reported, however, that he could not comment on appellant's state in March 2002 "since I did not see her at that time and that is someone else's observation and not mine." The Office asked Dr. Gopala Dwarakanath, a specialist in pain management, to review appellant's record and a statement of accepted facts. He was to provide an opinion as to whether appellant was totally disabled beginning March 2002 as a result of her two work injuries. Dr. Dwarakanath responded:

> "No. [Appellant] was not totally disabled any time between March 2002 and the present. [She] was totally disabled from August 1994 to January 1995. [Appellant] was partially permanently impaired January 1995 to present. [She] is able to work eight hours a day, light duty. [Appellant's] restrictions are to change duties every two hours and no overhead lifting.
>
> "Upon reviewing these medical records thoroughly and looking at the various treatments that have been used and the efforts the postal authorities have made to accommodate her light duty, in my medical opinion and with reasonable medical certainty, I can state that [appellant] is not totally disabled as a result of her myofascial pain. [She] did have a herniated disc, which was operated on and the left arm pain seems to have subsided. After the surgery no mention is made of any left arm pain."

In a decision dated April 30, 2004, the Office denied appellant recurrence claim.

On February 17, 2005 an Office hearing representative affirmed. The Board set aside both these decisions on the grounds that a loss of wage-earning capacity determination was in place when appellant filed her claim of recurrence, so the Office should have adjudicated the case as a request for modification of an established loss of wage-earning capacity.[3]

In a decision dated December 22, 2006, the Office denied modification of its September 1, 1995 loss of wage-earning capacity determination. In a decision dated July 16, 2007, an Office hearing representative reversed, finding that the loss of wage-earning capacity determination was, in fact, erroneous. The hearing representative then found that appellant did not meet her burden of proof to establish a recurrence of disability beginning March 15, 2002.

LEGAL PRECEDENT

The Federal Employees' Compensation Act pays compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[4]

[3] Docket No. 05-888 (issued September 29, 2005).

[4] 5 U.S.C. § 8102(a).

"Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6] When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a light-duty position or the medical evidence establishes that she can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. 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 light-duty job requirements.[7]

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[8] The Board has held that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt 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.[9]

ANALYSIS

Appellant returned to work in a rehabilitation-duty assignment as a modified clerk in December 1999. She claims a recurrence of total disability beginning March 15, 2002 as a result of her August 27, 1994 employment injury. Appellant therefore has the burden of proof to show a change in the nature and extent of her injury-related condition or a change in the nature and extent of her limited-duty job requirements.

In support of her claims, appellant submitted the reports of her treating neurologist, Dr. Rizzoli. When asked to address the objective findings that supported disability as of March 15, 2002, Dr. Rizzoli noted that there had never been any, nor did he order any studies. Dr. Rizzoli noted that appellant's condition had worsened based on her diagnostic complaint of increased symptoms in March 2002, and increased medication usage. Appellant also told him that her duties at work had changed. Dr. Rizzoli noted only that he had followed appellant for six years and that the "tempo" of her illness had changed.

[5] 20 C.F.R. § 10.5(f) (1999).

[6] *Id*. at § 10.5(x).

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

[8] *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

[9] *John L. Clark*, 32 ECAB 1618 (1981).

Dr. Rizzoli's opinion on disability is little more than a repetition of appellant's subjective complaints of pain. With no findings on examination to document any change in the nature and extent of the injury-related condition, he has essentially allowed appellant to self-certify her disability for work. The Office cannot accept this kind of evidence as a basis for the payment of compensation. The Board finds that the medical evidence appellant submitted to support her claim of recurrence is of diminished probative value and is not sufficient to discharge her burden of proof. The record review provided by Dr. Dwarakanath, the Office's consulting specialist in pain management, only weakens appellant's claim.

In the absence of a disabling change in the nature and extent of her injury-related condition, appellant may still establish a recurrence by showing a disabling change in the nature and extent of her limited-duty job requirements. Although appellant's rehabilitation duties may not have originally included handling postage due mail, crossing out bar codes or helping out with the windows, the evidence does not establish that such duties violated her current medical limitations. Statements from coworkers that appellant was asked to perform heavy or repetitive work are not particularly useful because these descriptions are vague and general in description. The Board notes that, when appellant accepted the assignment in December 1999, her limitations included no repetitive motion with her left arm. As the employing establishment has indicated, she could perform any activity that might be regarded as repetitive, such as counting postage due mail or filing, by simply using her right arm and any lifting that might be regarded as heavy could be broken down into manageable portions. One of the coworkers noted that appellant had asked him to remove his own trays from the bakery cart and he did so on a daily basis. This was what appellant was expected to do. As the employing establishment noted, appellant testified that she did ask for assistance when she was having trouble uncovering cages or lifting anything heavy or having trouble with change of address cards or putting trays in carts. She testified that she "just left the heavy stuff in the bucket" in the parcel post section and would let customers into the box section to pick up their own buckets. The Board has carefully reviewed the factual evidence bearing on the duties she performed and finds that the weight of the evidence fails to establish a disabling change in the nature and extent of appellant's limited-duty job requirements.

Appellant has not met her burden of proof. The evidence does not establish a disabling change in the nature and extent of her injury-related condition or a disabling change in the nature and extent of her limited-duty job requirements. The Board will affirm the Office's July 16, 2007 decision denying appellant's claim of recurrence.

CONCLUSION

Appellant has not met her burden of proof to establish that a recurrence of disability on March 15, 2002.

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 2008
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