United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 08-2416**
	)	**Issued: August 5, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Belen, NM, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 8, 2008 appellant filed a timely appeal from a July 8, 2008 decision of the Office of Workers' Compensation Programs that affirmed the denial of her claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant had any disability beginning March 8, 2007 causally related to her accepted right hand condition.

FACTUAL HISTORY

On January 30, 1997 appellant, then a 40-year-old rural mail carrier, filed an occupational disease claim alleging that her repetitive work duties caused her to develop right carpal tunnel syndrome. She stopped work on January 31, 1997 and worked intermittently thereafter. The Office accepted the claim for tenosynovitis of the right hand.

Appellant was treated by Dr. Stephen U. Cohen, a Board-certified family practitioner, who diagnosed tendinitis and strain of the short adductor muscles of the thenar musculature. Dr. Cohen opined that her condition was work related and recommended conservative treatment.

Appellant sought treatment from Dr. Robert H. Wilson, a Board-certified orthopedic surgeon, from August 12, 2004 to March 9, 2005. Dr. Wilson diagnosed right lateral and medial epicondylitis and first dorsal interosseous chronic strain. He advised that appellant reached maximum medical improvement on January 20, 2005. Dr. Wilson referred her for a functional capacity evaluation which was performed on March 1, 2005. It revealed that appellant could work at a medium level for eight hours per day subject to restrictions.[1]

On March 29, 2005 the employing establishment offered appellant a limited-duty position from 8:30 a.m. to 5:00 p.m., which she accepted on May 3, 2005. The job duties included: answering telephones, box or case mail within restrictions, deliver express mail as needed, assist in performance growth management, maintain general delivery log and records, time cards and time sheets for rural routes and other duties as assigned within restrictions including assisting in bit section, labeling and recording. The physical requirements of the job were bending/stooping intermittently for 1 hour per day, fine manipulation for 3 hours per day, lifting for .5 hours per day up to 34 pounds to waist, pushing/pulling for .5 hours per day, reaching above the shoulders for 1 hour per day, simple grasping for 6 hours per day, sitting for 8 hours per day, standing for 3 hours per day and walking for 4 hours per day. All job requirements were to be performed intermittently.

Appellant submitted reports dated March 6 to August 17, 2006 from Dr. Wilson, who diagnosed right thumb joint osteoarthritis. On August 17, 2006 she reported that her employer was not honoring her work restrictions and he referenced the prior functional capacity evaluation.

On July 31, 2006 the employing establishment offered appellant a modified rural carrier position effective August 1, 2006. The duties of the position included casing the assigned route for two to three hours, carrying the route for five to six hours and routine duties associated with carrying and casing the assigned route. The physical requirements of the modified assignment were performing the duties with a 24-pound lifting restriction. Appellant rejected the position noting that the assignment did not conform with her restrictions.

Appellant submitted reports dated September 28, 2006 to January 17, 2007 from Dr. Donald Vichick, a Board-certified orthopedic surgeon, who treated her for right thumb pain, weakness and numbness. Dr. Vichick diagnosed postural degradation with shoulder imbalance syndrome and associated neurogenic thoracic outlet syndrome on the right, extensor tenomyalgia, moderate, chronic and recalcitrant and probable writer's cramp of the right hand with myalgia. He referred appellant for physical therapy and recommended continued modified duty. On March 8, 2007 Dr. Vichick noted that her condition was unchanged and she could

[1] The restrictions included occasionally lifting 34 pounds from floor to waist and 24 pounds from waist to eye level, carrying 49 pounds two-handed, carrying 29 pounds with the right or left hand, pushing with 50 pounds of force, pulling with 32 pounds of force, frequently standing, working with arms overhead, bending, stooping, kneeling, squatting and crouching and could constantly sit.

continue working with restrictions. On March 22, 2007 Dr. Cohen diagnosed tenosynovitis of the right hand and wrist and noted with a checkmark "yes" that her condition was caused or aggravated by an employment activity. He advised that appellant was totally disabled from July 9, 2004 to May 2005 and partially disabled since May 2005. Dr. Cohen noted that she could resume full-time limited-duty work in May 2005 subject to restrictions.

Appellant submitted claims for total disability from March 8 to April 27, 2007. The employing establishment submitted several time analysis forms, noting that she used leave or was on leave without pay for all work beginning March 8, 2007. It contended that appellant refused a job offer within her restrictions.[2]

In a letter dated April 20, 2007, the Office requested that appellant submit medical evidence establishing her total disability for work beginning March 8, 2007.

In a decision dated May 9, 2007, the Office denied appellant's claim for compensation as of March 8, 2007, finding that the medical evidence was not sufficient to establish that she was totally disabled due to her accepted work injury.

In a May 2, 2007 letter, appellant indicated that she did not stop work but rather her employer sent her home after she refused a limited-duty job. She contended that it exceeded her work restrictions. A March 7, 2007 email from an employing establishment compensation specialist recommended that appellant be sent home based on her rejection of the job offer and her ongoing refusal to perform the duties outlined in her job offer. On May 10, 2007 Dr. Vichick noted that she reached maximum medical improvement in 2005 and returned to work pursuant to restrictions under a functional capacity evaluation. He diagnosed persistent pain in the first dorsal interosseous muscle of the right hand compatible with writer's cramp and chronic dysfunction of the right shoulder syndrome. Apart from some improvement with her right shoulder, appellant's overall condition was unchanged since 2005. Dr. Vichick advised that he would not change the work restrictions provided by Dr. Wilson following the functional capacity evaluation because of her history of pain and ongoing positive physical findings.

Appellant submitted a Form CA-7, claim for compensation, for total disability for the period April 30 to May 25, 2007. In a letter dated June 11, 2007, the Office requested that she submit medical evidence establishing total disability.

Appellant submitted physical therapy notes from September 28, 2006 to January 12, 2007. In March 8, 2007 report, Dr. Vichick noted an essentially normal physical examination. He diagnosed dysfunctional right shoulder syndrome with neurological thoracic outlet syndrome improved pain with use of the right hand and left elbow pain. Dr. Vichick recommended continued modified duty.

On July 10, 2007 appellant reiterated her contention that the employing establishment sent her home on March 7, 2007 after she refused to sign a modified job offer. On

[2] On April 20 and June 28, 2007 the Office issued letters to appellant finding that the job offer constituted suitable work. However, it did not issue a decision terminating compensation due to a refusal of suitable work.

September 12, 2007 she noted that she accepted the July 31, 2006 job offer in protest because her restrictions were not met.

In an October 26, 2007 decision, the Office denied appellant's claim for wage-loss compensation commencing March 8, 2007.

On April 25, 2008 appellant requested reconsideration and submitted return to work forms from Dr. Vichick dated January 23 and May 22, 2008. Dr. Vichick noted that her condition and diagnosis was unchanged and that she could work with restrictions. On January 23, 2008 he reiterated that appellant reached maximum medical improvement in 2005 and returned to work pursuant to permanent restrictions set forth in the functional capacity evaluation and there was no change in her diagnoses. On May 22, 2008 Dr. Vichick treated her for trigger finger of the right hand. He diagnosed persistent work-related myalgia, first dorsal interosseous, right hand unchanged and flexor tendinosis of the right ring and little fingers. Dr. Vichick opined that the trigger finger condition was not work related but consistent with idiopathic trigger fingers.

In a decision dated July 8, 2008, the Office denied modification of the October 26, 2007 decision.

LEGAL PRECEDENT

A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.[3] Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.[4] The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.[5]

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 his or her disability and entitlement to compensation. 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.[6]

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

[4] *Id.*

[5] *See Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[6] *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ANALYSIS

The Office accepted appellant's claim for tenosynovitis of the right hand. The Board finds that the medical evidence is insufficient to establish that she was disabled as of March 8, 2007 due to her accepted condition.

Dr. Vichick diagnosed dysfunctional right shoulder syndrome, thoracic outlet syndrome, pain with use of the right hand and left elbow pain. He recommended modified duty. In forms dated March 1 and 8, 2007, Dr. Vichick advised that appellant's condition was unchanged and she could continue working with restrictions as set forth in the 2005 functional capacity evaluation. On May 1, 2007 he again noted that she reached maximum medical improvement in 2005 and had returned to work pursuant to the March 1, 2005 work restrictions. Dr. Vichick opined that appellant's overall condition was unchanged since she was placed on maximum medical improvement by Dr. Wilson in 2005. Although he noted that she had symptoms of right hand pain, he did not specifically address whether she sustained employment-related disability commencing March 8, 2007 causally related to her accepted condition. Rather, Dr. Vichick found that appellant could work full time subject to the restrictions specified in March 2005. Additionally, Dr. Vichick attributed appellant's symptoms to dysfunctional right shoulder syndrome, thoracic outlet syndrome and writer's cramp, which the Office has not accepted as causally related to her January 1997 work injury.[7] Moreover, appellant has not established her assertion that the job offer of July 31, 2006 was outside her work-related restrictions. Therefore, the medical evidence is insufficient to meet her burden of proof.

In 2008 Dr. Vichick again noted that appellant was returned to work pursuant to the 2005 work restrictions. He continued the permanent restrictions as previously noted. Dr. Vichick advised that appellant's diagnoses was unchanged. His reports do not support disability due to the accepted condition of tenosynovitis of the right hand causally related to her January 1997 employment injury. Rather, Dr. Vichick opined that appellant could continue to work full time subject to the restrictions set forth in March 2005. These reports are insufficient to discharge her burden of proof.

Appellant submitted an attending physician's report from Dr. Cohen dated March 22, 2007. Dr. Cohen diagnosed tenosynovitis of the right hand and wrist and noted that her condition was caused or aggravated by her work. He noted that appellant was totally disabled from July 9, 2004 to May 2005 and partially disabled as of May 2005. However, Dr. Cohen failed to address her disability for work as of March 8, 2007. Rather, he noted that appellant was capable of performing full-time duty work in May 2005. Therefore, this report is insufficient to establish her claim.

Appellant submitted physical therapy notes from September 28, 2006 to January 2007. The Board has held that therapists are not physicians and are not competent to render a medical

[7] *See 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).

opinion under the Federal Employees' Compensation Act.[8] Therefore, these reports are insufficient to meet her burden of proof.

On appeal, appellant asserts that the July 31, 2006 job offer was not suitable as it was not within her work restrictions. The Board notes that the Office did not issue a suitable work determination. This issue is not presently before the Board.[9] To the extent appellant stopped work because she felt that performing the duties of the job would cause injury, the Board has held that the possibility of a future injury does not form a basis for the payment of compensation.[10]

Appellant also asserted by being sent her home on March 7, 2007, she sustained a recurrence of disability beginning March 8, 2007. This argument is without merit. The record indicates that the work requirements of the July 31, 2006 offer were consistent with the restrictions set forth in the March 1, 2005 functional capacity evaluation. The medical evidence does not support appellant's contention that the limited-duty job exceeded her restrictions.[11] Dr. Vichick noted multiple visits that her condition was unchanged since 2005 and he continued her work restrictions. The reports of Drs. Wilson and Cohen also recommended that appellant work full time within her restrictions. The physicians did not address how any particular duty in the July 31, 2006 job offer was inconsistent with her work restrictions.

CONCLUSION

The Board finds that appellant has failed to establish that she was totally disabled as of March 8, 2007 causally related to the employment injury of January 1997.

[8] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act); 5 U.S.C. § 8101(2) (this subsection defines a ''physician'' as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

[9] *See* 20 C.F.R. § 501.2(c) (the Board only has jurisdiction over final decisions of the Office).

[10] *T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009).

[11] *See Terry R. Hedman*, 38 ECAB 222 (1986); *see also* 20 C.F.R. § 10.5(x) for the definition of a recurrence of disability. The Board finds that there is no credible evidence which substantiates that appellant experienced a change in the nature and extent of the light-duty requirements or was required to perform duties which exceeded her medical restrictions.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 8, 2008 and October 26, 2007 are affirmed.

Issued: August 5, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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