United States Department of Labor
Employees' Compensation Appeals Board

S.A., Appellant	)	
and	)	**Docket No. 09-915**
	)	**Issued: December 1, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Dayton, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2009 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated June 24, 2008 and January 6, 2009 that denied her claim for compensation. 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 that she was entitled to wage-loss compensation for four hours a day beginning November 30, 2007 and continuing. On appeal, her attorney asserts that the Office decisions are contrary to fact and law.

FACTUAL HISTORY

On June 9, 2003 appellant, then a 41-year-old flat sorter operator, filed a Form CA-2, occupational disease claim, alleging that work duties caused cervical spondylosis and bone spurs in the cervical spine. She stopped work on May 8, 2003 and on July 30, 2003 the Office

accepted the conditions of aggravation of spinal stenosis and disc herniation at C5-7.[1] On September 29, 2004 Dr. Amongero performed an anterior cervical discectomy at C5-6 and C6-7. By report dated August 4, 2005, he advised that appellant could return to work on July 20, 2005 with no restrictions. On September 1, 2005 the Office proposed to terminate appellant's wage-loss compensation, based on Dr. Amongero's report, and on October 6, 2005, he advised that appellant was unable to work. It referred appellant to Dr. E. Gregory Fisher, for a second opinion evaluation, and in an October 31, 2005 report, he advised that appellant could return to work eight hours daily with restrictions. On December 14, 2005 appellant filed an occupational disease claim for degenerative disc disease of the lumbar spine.

In April 2006, the Office determined that a conflict existed between Drs. Amongero and Fisher regarding appellant's ability to work when both the cervical and lumbar spine were considered, and referred her to Dr. Roger V. Meyer, for an impartial evaluation. In reports dated May 1 and 8, 2006, Dr. Meyer advised that appellant could return to work for eight hours a day with physical restrictions. On June 22, 2006 the Office accepted the condition of aggravation of lumbar facet arthritis and degenerative disc disease. By report dated December 12, 2006, Dr. Jeffrey R. McCutchen, an osteopath, advised that appellant could return to work on December 18, 2006, for four hours daily for the first two weeks and then work up to full time.

Appellant returned to modified duty for four hours per day on December 21, 2006 and received compensation for four hours per day. In a duty status report dated March 5, 2007, Dr. McCutchen advised that she could work one to four hours a day with restrictions to her physical activity. On March 21, 2007 she began working eight hours per day. By decision dated May 22, 2007, the Office determined that appellant's full-time modified position fairly and reasonably represented her wage-earning capacity and reduced her compensation to zero.[2] In a report dated May 24, 2007, Dr. Amongero advised that appellant's job caused neck pain and that she also had low back symptoms. He opined that appellant should find another line of work because she would never be satisfied with "either her job or where she [i]s at." Dr. Amongero stated that he followed the same restrictions previously provided by her family physician and submitted a duty status report similar to that provided by Dr. McCutchen, advising that appellant could work one to four hours daily. On June 6, 2007 the employing establishment sent appellant home after four hours of work each day.[3]

On June 12, 2007 appellant submitted a Form CA-2a, recurrence of disability claim, that was accepted by the Office on July 9, 2007. On July 12, 2007 the employing establishment offered appellant a full-time modified clerk position. On July 21, 2007 appellant stated "under protest not accepting nor rejecting at this time." By letter dated August 28, 2007, the Office advised appellant that the position offered was suitable. Appellant was notified that, if she failed

[1] In April 2004, the Office determined that a conflict in medical evidence had been created between the opinions of appellant's attending physician, Dr. Marcus Amongero and Dr. Ronald J. Moser, who performed a second opinion evaluation for the Office, regarding her ability to work. It referred appellant to Dr. James H. Rutherford, who advised on May 10, 2004 that appellant remained temporarily totally disabled.

[2] The Board notes that the cover letter of the decision is dated March 8, 2007. The decision itself, however, is clearly dated May 22, 2007.

[3] The record indicates that appellant was sent home, based on the reports of her treating physicians.

to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106 of the Federal Employees' Compensation Act,[4] her right to compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond.

In correspondence dated September 6, 2007, the Office of the Inspector General of the employing establishment noted that an investigation of appellant had been undertaken regarding possible fraudulent representation of her ability to work. The investigative report indicated that both Dr. McCutcheon and Dr. Amongero had been interviewed and that each stated that appellant would bring completed medical forms to be signed. Both physicians advised that appellant could work eight hours a day. Dr. McCutcheon gave the inspectors a letter prepared by appellant, in her handwriting, that she had given him as a sample of the information he should provide the Office regarding her medical condition. Appellant continued to work four hours daily and receive wage-loss compensation for four hours a day. On September 28, 2007 she was placed on administrative leave pending removal.

By letter dated October 9, 2007, the Office informed appellant that the fact that she was on administrative leave did not preclude her from accepting suitable work. Appellant was given an additional 15 days to respond. In a letter dated October 20, 2007, her attorney informed the Office that appellant had accepted the offered position and submitted an employing establishment form showing that she accepted the offered position on October 10, 2007. Appellant was terminated by the employing establishment effective November 30, 2007 for misrepresentation of her medical restrictions.

In December 2007, the Office referred appellant to Dr. Rudolf A. Hofmann, for a second opinion evaluation. In reports dated January 10 and 11, 2008, Dr. Hofmann noted his review of the medical records and statement of accepted facts, including descriptions of the duties of appellant's regular position as a flat sorter operator and her modified clerk duties. He reported appellant's complaints of radiating neck and low back pain and provided findings on physical examination. Examination of the cervical spine demonstrated no evidence of a neurologic deficit consistent with an objective cervical radiculopathy or compression mononeuropathy of either of the upper extremities and revealed that appellant continued to have mechanical neck pain and limited active range of motion of the cervical spine. Regarding the lumbar spine, Dr. Hofmann noted painfully limited range of motion and magnetic resonance imaging scan findings consistent with age of multilevel disc degeneration but no evidence of neurocompressive pathology. He advised that appellant continued to have residuals of her accepted conditions and that, while she could not perform the duties of flat sorter machine operator, she could perform the duties of the modified clerk position for eight hours a day. By report dated March 25, 2008, Dr. Amongero advised that, after his review of Dr. Hofmann's report, he agreed that appellant could perform the duties of a modified clerk.

By decision dated June 24, 2008, the Office found that appellant was not entitled to wage-loss compensation for the period November 30, 2007 and continuing because the evidence established that she was physically capable of performing modified work as provided by the employing establishment until she was dismissed for cause. Appellant remained entitled to

[4] 5 U.S.C. §§ 8101-8193.

medical benefits. On June 26, 2008 appellant's attorney requested a telephonic hearing, that was held on October 15, 2008. At the hearing, appellant testified that her removal was in the grievance process and was going to arbitration. She stated that she could work four hours a day but had problems with working eight hours daily. Appellant's attorney argued that until a final adjudication had been made as to whether she was terminated for cause, the issue of continuing disability should be held in abeyance.[5] On October 24, 2008 appellant filed a schedule award claim. In a January 6, 2009 decision, an Office hearing representative affirmed the June 24, 2008 decision.[6]

LEGAL PRECEDENT

Under the Act,[7] the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[8] Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act,[9] and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[10] Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative and substantial medical evidence.[11]

Compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury,[12] and whether a particular injury caused an employee disability from employment is a medical issue, which must be resolved by competent medical evidence.[13] 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 employees to self-certify their

[5] On October 24, 2008 appellant filed a schedule award claim and by letter dated November 20, 2008, the Office informed her of the type evidence needed in support. The record before the Board does not contain a final schedule award decision.

[6] All physicians above are Board-certified in orthopedic surgery with the exception of Dr. McCutchen who is a Board-certified osteopath specializing in emergency medicine.

[7] 5 U.S.C. §§ 8101-8193.

[8] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[9] *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

[10] *Donald E. Ewals*, 51 ECAB 428 (2000).

[11] *Tammy L. Medley*, 55 ECAB 182 (2003); *see Donald E. Ewals, id.*

[12] *W.P.*, 59 ECAB ____ (Docket No. 08-202, issued May 8, 2008).

[13] *Carol A. Lyles*, 57 ECAB 265 (2005).

disability and entitlement to compensation.[14] Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.[15]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[16] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[17] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[18]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the wage-earning capacity determination.[19] The Office is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.[20]

ANALYSIS

The Board finds that appellant did not establish that she was entitled to wage-loss compensation beginning November 30, 2007 and continuing. When a claimant stops working at the employing establishment for reasons unrelated to an employment-related physical condition, he or she has no disability within the meaning of the Act.[21] Section 10.5(x) of the Office's regulations provides that there is no recurrence of disability when withdrawal of light duty occurs for reasons of misconduct, nonperformance of job duties or reduction-in-force.[22] The facts in this case indicate that appellant stopped work on September 28, 2007 when she was

[14] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[15] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

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

[17] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[18] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[19] *P.C.*, 58 ECAB ___ (Docket No. 06-1954, issued March 6, 2007).

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

[21] *Richard A. Neidert*, 57 ECAB 474 (2006).

[22] 20 C.F.R. § 10.5(x).

placed on administrative leave by the employing establishment pending removal. Appellant was terminated for cause effective November 30, 2007. Thus, the record supports that her inability to earn wages was not due to a worsening of her accepted conditions such that she was unable to perform the duties of her modified position. Furthermore, there is no probative medical evidence demonstrating either total or partial disability beginning November 30, 2007.[23] Dr. Hofmann, in his January 10 and 11, 2008 reports, clearly advised that appellant could perform the duties of the modified position and appellant's attending orthopedist, Dr. Amongero, agreed that appellant could perform the modified clerk position. Accordingly, the Office properly denied appellant's claim for wage-loss compensation.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she was entitled to wage-loss compensation for four hours a day beginning November 30, 2007 and continuing.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2009 and June 24, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: December 1, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[23] The Board notes that while both Dr. Amongero and Dr. McCutchen had limited appellant to one to four hours of limited duty a day in their March 5 and May 24, 2007 reports, the probative value of these reports was called into question by the subsequent investigation by the employing establishment.