United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	**Docket No. 09-1365**
	)	**Issued: April 1, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, 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:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 5, 2009 appellant, through counsel, filed a timely appeal of the June 23 and September 25, 2008 and April 3, 2009 merit decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that she was totally disabled from October 6, 2007 through June 20, 2008 and from July 5 through 18, 2008.

FACTUAL HISTORY

On September 3, 2007 appellant, then a 60-year-old mail handler, filed a traumatic injury claim alleging that on that date she sustained a pinched nerve in her neck, pain in her neck, right shoulder and right arm, a headache and numb fingers when a colleague forcefully bumped her right arm and side when walking past her. She stopped work on the date of the injury.

By letter dated October 10, 2007, the employing establishment informed the Office that appellant accepted a modified assignment as of September 26, 2007 and that she performed her duties successfully from September 28 through October 5, 2007.[1] The employing establishment noted that she abandoned her job as of October 6, 2007.

Although the Office initially denied appellant's claim, by letter dated May 16, 2008, the Office accepted her claim for cervical sprain, resolved; aggravation of lumbosacral sprain; and aggravation of preexisting cervical arthritis. It instructed her as to the proper procedure to file a claim for wage loss and paid appropriate medical benefits.

On May 22, 2008 appellant filed a claim for compensation for the period October 6, 2007 through May 9, 2008. On May 23, 2008 she filed a claim for compensation for May 10 through 23, 2008.

By letter dated May 28, 2008, the Office noted that it could not approve appellant's claim for compensation at this time as there was no medical evidence to support that she was totally disabled from working any capacity beginning September 3, 2007 due to her work injury. Appellant was given 30 days from the date of the letter to submit additional evidence.

In a June 5, 2008 work capacity evaluation and a June 6, 2008 addendum report, Dr. Gregory Fisher, a Board-certified orthopedic surgeon, who initially performed a second opinion evaluation of appellant on April 24, 2008, discussed her work capacity. Dr. Fisher stated that her preexisting cervical arthritis was aggravated by the industrial injury. He opined that appellant was capable of performing work in a restricted-duty capacity. Dr. Fisher noted that she would have been capable of working in a restricted-duty capacity approximately four to six weeks after the original injury of September 3, 2007. He indicated that appellant had no restrictions in walking, standing or sitting. Dr. Fisher noted that she should avoid bending since that would aggravate her neck condition. He also noted that appellant should avoid activities that require her to work over her head with her head extended and that she should have a weight limitation of 10 pounds frequently and 15 pounds occasionally. Dr. Fisher noted that these restrictions were temporary in duration and that it was too early to determine if they were permanent.

In a letter dated June 6, 2008, a representative of the employing establishment indicated that appellant interpreted her restrictions as not allowing any standing or walking, even indicating that she would have to be taken to the bathroom. She indicated that appellant returned to work on September 28, 2008 where she worked productively until October 6, 2008, on which date she worked for 2½ hours then abandoned her job and has not retuned to work. The employing establishment contended that her modified-job offer of September 26, 2007 was still valid as long as her restrictions applied. However, the representative of the employing establishment indicated that she has not made any contact with her supervisor or provided any updated medical documentation. She noted that the employing establishment can accommodate any restrictions, short of bed rest, including an employee taking narcotic pain medication.

[1] This position involved repairing damaged mail for eight hours per day.

By decision dated June 23, 2008, the Office denied appellant's claim for compensation for the period October 6, 2007 through June 20, 2008. It found that there was no medical evidence to support total disability during this time period.

In a June 24, 2008 attending physician's form report, Dr. Luis F. Pagani, appellant's Board-certified treating neurologist, indicated that he treated appellant from November 27, 2007 through June 24, 2008. He opined that she had a cervical and lumbar strain and cervical arthritis. In response to a question as to whether her condition was caused or aggravated by her employment activity he marked "yes" in the box. Dr. Pagani indicated that appellant's period of total disability was from September 10, 2007 through the present. In an accompanying note, he indicated that she was unable to work from June 24 through August 24, 2008. In a duty status form report of the same date, Dr. Pagani indicated that appellant had the following restrictions: lifting limited to 10 pounds; standing limited to three to four hours; walking limited to two hours; and climbing limited to one hour. He prohibited her from kneeling, bending/stooping, twisting, pushing/pulling, driving a motor vehicle, simple grasping and operating machinery. However, Dr. Pagani indicated that appellant could sit, perform fine manipulation and carry 10 pounds for eight hours a day.

By letter dated June 30, 2008, the Office requested clarification from Dr. Pagani with regard to appellant's restrictions.

By letter dated July 5, 2008, appellant argued that the employing establishment had not made a good faith effort at reasonable accommodation. She contended that there was a possibility that the Vicodin that she takes to alleviate her pain would require her to need short periods of time for rest off the workroom floor but that the employing establishment refused to meet this condition.

On July 18, 2008 appellant filed a claim for compensation for the period July 5 through 18, 2008.

By letter dated July 23, 2008, the Office informed appellant that her claims for compensation for lost time from July 5 through 18, 2008 could not be accepted at that time as there was no medical evidence to support that she was totally disabled from work during the claimed period.

Appellant received treatment from Dr. David A. Cord, a chiropractor, from July 8 through September 16, 2008, who treated her with myofascial release, electrical muscle stimulation and ultrasound to the cervical paraspinal musculature.

In a decision dated September 25, 2008, the Office determined that there was no medical evidence to support appellant's claim for total disability beginning October 6, 2007 and continuing. It also found that there was insufficient evidence supporting temporary total disability from work July 5, 2008 and continuing.

By letter dated September 28, 2008, appellant requested a telephonic hearing before an Office hearing representative. A telephonic hearing was held on October 15, 2008 at which time she testified that the sole reason she was taking Vicodin was due to her employment injury. Appellant indicated that she could not perform her sedentary work because she was in pain and

took Vicodin which made her drowsy. She testified that management would not let her take a rest if she needed it. Appellant noted that, if she did not take her medication, she was in too much discomfort to perform even modified duty. She noted that she was released to return to work on July 18, 2008.

In an October 15, 2008 note, Dr. Jeffrey Schuler, a physician Board-certified in occupational medicine, indicated that as of October 2, 2007 he recommended that appellant do light sedentary work only. He noted that she was advised not to drive or operate machinery within six hours of taking her pain medication. Dr. Schuler indicated that he advised appellant that she could take her pain medicine while she was at work as long as she was not driving or operating machinery. He stated that he also advised her that she may need to rest or lay down if needed due to potential sedation from the medication. Dr. Schuler noted that, if the employing establishment was unable to accommodate these restrictions, appellant should be off work. He noted that he referred her to a neurologist and that he has not seen appellant since October 2, 2007.

In an October 31, 2008 report, Dr. Pagani noted that he saw appellant on October 23, 2007, that she was taking pain medication that has a side effect of sleepiness, that, if she fell asleep on the job, she could be danger to herself and to others and that, since her request for an accommodation to rest was refused, she was totally disabled during that period of refusal.

By decision dated April 3, 2009, the hearing representative affirmed the September 25, 2008 decision. The Office determined that the case record was devoid of medical opinion evidence supporting the claimed disability is causally related to the accepted work injury.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of her claim by the weight of the evidence.[3] For each period of disability claimed, the employee has the burden of establishing that she was disabled for work as a result of the accepted employment injury.[4] 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.[5]

Under the Act the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[6] Disability is, thus, not

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

[4] *See Amelia S. Jefferson*, *supra* note 3; *see also David H. Goss*, 32 ECAB 24 (1980).

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

[6] *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

synonymous with physical impairment which may or may not result in an incapacity to earn wages.[7] An employee who has a physical impairment causally related to her federal employment, but who nonetheless has the capacity to earn the wages she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.[8] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wages.

A claimant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor(s).[9] The opinion of the physician must be based on a complete factual and medical background, 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.[10]

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 their disability and entitlement to compensation.[11]

ANALYSIS

Appellant has an accepted injury for cervical sprain, resolved; aggravation of lumbosacral sprain; and aggravation of preexisting arthritis. She has claimed total disability from October 6, 2007 through May 23, 2008 and from July 5 through 18, 2008. Appellant has the burden of proof to establish through probative medical evidence that she was totally disabled causally related to her accepted injury.

The Board finds that appellant has not established that she was totally disabled due to her accepted injury. Dr. Pagani did indicate in his June 24, 2008 report that she was totally disabled from November 27, 2007 through June 24, 2008 and further indicated that she was unable to work from June 24 through August 24, 2008. In a duty status report of the same date, however, he indicated that appellant could work with restrictions. Accordingly, Dr. Pagani's reports are inconsistent. Moreover, the only discussion of causal relationship of appellant's condition to the employment was the physician's checkmark in the "yes" box on the attending physician's form. The Board has held that the checking of a box is of little probative value in establishing causal

[7] *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

[8] *Merle J. Marceau*, 53 ECAB 197 (2001).

[9] *A.D.*, 58 ECAB 149 (2006).

[10] *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

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

relationship.[12] In a report dated October 31, 2008, although Dr. Pagani elaborated on his previous reports, indicating that appellant's pain medication caused sleepiness and that, if an accommodation to rest was refused, she was totally disabled but there was no discussion as to the etiology of her restrictions. The employing establishment indicated that it did provide her employment within these restrictions. Without more, appellant has not met her burden of proof.

Similarly, Dr. Schuler indicated that appellant could do light sedentary work only. He noted that she should not drive or operate machinery within six hours of taking her pain medication and that she may need to rest. Dr. Schuler did not indicate that appellant was totally disabled. Dr. Fisher opined that she was capable of performing work in a restricted-duty capacity and noted no restrictions on walking, standing or sitting. He noted that appellant should avoid bending or working over her head with her neck extended and should have a weight limitation of 10 pounds frequently and 15 pounds occasionally. Accordingly, Dr. Fisher also indicated that appellant could perform limited duty.

The remaining medical evidence of record does not address whether appellant had employment-related disability during the periods claimed. Without reasoned medical evidence supporting that appellant was totally disabled during the claimed periods, she has not met her burden of proof to establish wage loss.

CONCLUSION

The Board finds that appellant has not established that she was totally disabled from October 6, 2007 through June 20, 2008 and from July 5 through 18, 2008 due to the accepted September 3, 2007 employment-related injuries.

[12] *Barbara J. Williams*, 40 ECAB 649, 656 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 3, 2009 and September 25 and June 23, 2008 are affirmed.

Issued: April 1, 2010
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