United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 09-1276**
	)	**Issued: February 4, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Glendale, CA, Employer	)	

Appearances:
Parsanian Zepuor, 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 April 17, 2009 appellant filed a timely appeal from a December 30, 2008 merit decision of the Office of Workers' Compensation Programs denying her claim for a recurrence of disability and a February 10, 2009 nonmerit decision denying her request for an oral hearing as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant established that she sustained a recurrence of disability on September 19, 2008 causally related to her March 29, 2001 employment injury; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely.

On appeal, appellant contends that she was never informed that her case was closed in June 2001 and that she is still in need of a modified job. She stated that she was trained and worked as a sales associate for six years and that she always complied with her employer's requests and requirements for medical documentation. Appellant further claimed that she attempted to perform a carrier position but that she experienced significant pain and discomfort.

FACTUAL HISTORY

On June 18, 2001 appellant, then a 33-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that, on March 29, 2001, while delivering mail, she reached across a table on a porch and felt a pull on the right side of her back. The Office accepted the claim for lumbar strain and authorized a period of physical therapy until July 31, 2001 and diagnostic testing as directed by appellant's treating physician.

Appellant began working light duty on March 29, 2001 with work restrictions including no climbing, kneeling, bending, stooping, twisting, pushing or pulling, no lifting or carrying over five pounds, no standing or walking over one hour a day and no reaching above the shoulder or driving a vehicle for more than one hour a day. In a November 8, 2001 medical report, appellant's treating physician stated that appellant had reached a permanent and stationary status regarding her March 29, 2001 work injury. The physician reiterated her work restrictions. Appellant continued to provide current medical reports from her treating physician stating that she was partially disabled and providing work restrictions.

The record contains numerous medical reports submitted to the Office during the period May through November 2001. One of the reports addressed to the Office, dated September 28, 2001, noted: "Pursuant to your request for a supplemental report on the above-captioned individual, I hereby submit the following." Moreover, by facsimile dated September 5, 2001 the Office authorized specific diagnostic testing for appellant.

On November 1, 2006 the employing establishment offered appellant a position as a modified letter carrier with general duties including carrier office duties, express mail delivery and window services. Physical restrictions of the position included no lifting over five pounds, walking, pushing and pulling limited to one hour, no lifting above the shoulders for more than five hours, no driving a vehicle for more than four hours and no climbing, kneeling, bending, stopping or twisting. Appellant's treating physician approved the position on November 23, 2006 and appellant accepted the job offer on December 1, 2006. The record does not reflect any communication with the Office concerning this position.

On August 13, 2008 the employing establishment offered appellant a position as a modified letter carrier with the same physical restrictions and generally the same duties as the prior position but during a different shift. Appellant's treating physician approved the position and appellant accepted the job offer on August 14, 2008.

By letter dated August 15, 2008, the employing establishment forwarded the job offer to the Office for a suitability determination. The Office, on September 10, 2008, notified the employing establishment that appellant's claim had been closed on June 27, 2001 and that suitability decision on the offered position "hardly seems necessary." Following a telephone contact from appellant, it advised her that she would need to file either a claim for recurrence or for a new injury.

On October 28, 2008 appellant filed a claim for a recurrence of disability (Form CA-2a) related to her accepted March 29, 2001 employment injury, beginning September 19, 2008. She alleged that her work limitations from the employment injury were ongoing and she was unable

to lift, carry, bend, twist or walk for long periods of time. Appellant contended that she experienced recurring pain, stiffness and spasms frequently and that she was taking pain and inflammation medication. The employing establishment stated on the form that she had been working limited duty since March 29, 2001 and that she stopped working on September 27, 2008. It further noted: "Statement to follow," but the record does not include any further statement from the employing establishment.

In an October 15, 2008 medical report, Dr. Morris Baumgarten, a Board-certified orthopedic surgeon, stated that he originally treated appellant on February 15, 2002 for low back pain. Physical examination at that time showed a lumbosacral spasm, some disruption to her lumbo-pelvic rhythm, a positive straight leg raising test at about 45 degrees and a magnetic resonance imaging (MRI) scan demonstrating an L2-3 disc with nerve root impingement. Dr. Baumgarten maintained that he had treated appellant periodically and last saw her on August 14, 2008. He opined that appellant's physical examination and subjective complaints had not changed.

By letter dated November 4, 2008, the Office notified appellant of the deficiencies in her claim and requested she submit additional evidence to establish her claim.

In an undated medical report, Dr. Dee Ann Nason, a chiropractor, stated that she initially treated appellant on July 13, 2007 for severe back pain. Appellant had reported that her condition was due to a March 2001 employment injury while she was bending over a table. A May 2001 MRI scan revealed lumbar disc protrusion, derangement and foraminal impingement at L2-3 and an L5-S1 right lateral disc bulge. The condition never resolved and appellant reported some degree of pain, managed with medication and stretching. Appellant could not carry mail due to work restrictions and instead worked the counter, which made her condition more tolerable. Dr. Nason opined that the nature of appellant's condition was progressive and that her disc protrusions and impingement would deteriorate over time. She stated that appellant did not fully recover from her original injury and work restrictions in place reflected this.

At a follow-up November 5, 2008 visit with Dr. Nason, appellant further reported that on September 19, 2008 her duties were changed and that she was carrying mail, which she had not done for the prior seven years. Appellant attempted to perform the new duties but her back pain immediately got worse. Dr. Nason opined that the altering of appellant's work duties reaggravated her original condition and that she was unable to perform her regular duties. She stated that appellant had the same diagnosis as that provided in June 2001, but with progression.

In a November 7, 2008 statement, appellant stated that she had worked light duty since March 29, 2001. In November 2002, she was labeled permanent and stationary and given a modified job offer. In August 2008, appellant was given a new job offer with the same restrictions but with a change-of-duty station. Several weeks later, the Office notified the employing establishment that her case was closed. Appellant stated that she returned to regular mail carrier duties on September 19, 2008. She claimed that she was only working three to four hours a day since returning to regular duty but that she experienced terrible pain.

By decision dated December 30, 2008, the Office denied appellant's recurrence claim finding that she did not establish that she sustained a spontaneous return or increase of disability

due to her accepted lumbar strain. It found the medical evidence of little probative value as it was six years after the original injury and, as appellant had been in three different positions since 2001, each of these positions would have been considered an intervening injury.

In a request postmarked January 30, 2009 and received by the Office on February 3, 2009, appellant requested an oral hearing before an Office hearing representative.

By decision dated February 9, 2009, the Office denied appellant's request for an oral hearing before an Office hearing representative as untimely on the grounds that the request was not made within 30 days of the December 30, 2008 decision. Further, it found that the issue could be equally well addressed by requesting reconsideration and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.[2] In this case, appellant has the burden of establishing that a recurrence of a medical condition causally related to her employment injury.

The Office's regulations define the term recurrence of disability as follows: "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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."[3]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a

[1] 5 U.S.C. §§ 8101-8193.

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

[3] *J.F.*, 58 ECAB 607 (2006); *Elaine Sneed*, 56 ECAB 373, 379 (2005); 20 C.F.R. § 10.5(x).

change in the nature and extent of the light-duty requirements.[4] Office procedures provide that a recurrence of disability can be caused by withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar strain on March 29, 2001 in the performance of duty and according to her and the employing establishment she began working light duty that same day. The issue is whether appellant sustained a recurrence of disability beginning September 19, 2008 when the employing establishment allegedly returned her to her date-of-injury position. The Board finds that this case is not in posture for decision.

The evidence established that appellant began working light duty after her employment injury with work restrictions including no climbing, kneeling, bending, stooping, twisting, pushing or pulling, no carrying or lifting over five pounds, no standing or walking over one hour a day and no reaching above the shoulder or driving a vehicle for more than one hour a day. The evidence is not clear, though, on whether that light-duty position was created as a result of the employment injury. There are no documents in the record regarding that position. On November 8, 2001 appellant's physician stated that appellant's restrictions were permanent and that she had reached a stationary status regarding her March 29, 2001 work injury. The employing establishment confirmed that appellant had been in a light-duty position since March 29, 2001 according to a note written by the employment establishment on the CA-2a form. There were two other light-duty positions that were provided to her in 2006 and 2008, but it is unclear from the record as to whether they were put into place as a result of the lumbar strain of March 29, 2001. Appellant alleges that she was returned to her date-of-injury position as a mail carrier without restrictions after September 19, 2008. There is no evidence from the employing establishment as to whether her light-duty position was withdrawn; but, even assuming that her light-duty position had been withdrawn, there remains no evidence from the employing establishment as to why the position was withdrawn.

A claimant may be considered disabled when a light-duty assignment made specifically to accommodate an employee's physical limitations due to her work-related injury or illness is withdrawn, except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force.[6] The Board is unable to render a decision on this matter

[4] *Albert C. Brown*, 52 ECAB 152, 154-155 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986); 20 C.F.R. § 10.5(x) provides, "*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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(c) (January 1995).

[6] *See K.C.*, 60 ECAB ___ (Docket No. 08-222, issued July 23, 2009).

without further information as to whether the light-duty position was created because of her accepted lumbar strain in 2001 and whether and why the light-duty assignment was withdrawn. Proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[7]

According to the Office procedure manual, if the employing establishment has withdrawn a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury and the withdrawal did not occur for cause, the claims examiner need only establish continuing injury-related disability for regular duty to accept the recurrence.[8] The Office needs to further develop this case and following such further development, as appropriately consistent with this decision, render a new merit decision.

In the Office decision dated December 30, 2008, it stated: "Medical treatment is not authorized and prior authorization, if any, is terminated." To terminate authorization for medical treatment, the Office must show that such treatment is no longer warranted.[9] As the Office has not made such a finding, termination of medical benefits is reversed.

CONCLUSION

The Board finds that this case is not in posture for decision and must be remanded for further development. In light of the Board's disposition on the first issue, the second issue, regarding the denial of the oral hearing request, is moot.[10]

[7] *William J. Cantrell*, 34 ECAB 1223 (1983).

[8] *See* Federal (FECA) Procedure Manual, *supra* note 5, Chapter 2.1500.7a(4) (October 2009).

[9] *See Franklin D. Haislah*, 52 ECAB 457 (2001); *Alfredo Rodriguez*, 47 ECAB 437 (1996).

[10] *See e.g., M.L.*, Docket No. 07-2392 (issued July 2, 2008).

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision.

Issued: February 4, 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