United States Department of Labor
Employees' Compensation Appeals Board

T.P., Appellant	)	
and	)	**Docket No. 09-1997**
	)	**Issued: July 13, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Overland Park, KS, 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 August 3, 2009 appellant filed a timely appeal from a July 1, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. § 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant satisfied her burden of proof to establish that she sustained an injury in the performance of duty causally related to her employment.

FACTUAL HISTORY

On September 25, 2008 appellant, a 47-year-old sales, services and distribution clerk, filed an occupational disease claim (Form CA-2) alleging that performing her postal duties

caused upper back and neck pain.[1] She alleges that the modified position the employing establishment offered her exceeded her medical restrictions. Appellant first became aware of her condition and that it was caused by her employment on August 14, 2008.

On May 15 and 29 and July 9, 2008 the employing establishment offered appellant a modified position as a sales, services and distribution clerk at its Blue Valley facility. The position provided several restrictions, which, in pertinent part, restricted lifting activities using appellant's left arm to no more than 20 pounds and lifting activities using her right arm were restricted to no more than 10 pounds. These modified positions did not include a driving restriction. On May 29, 2008 appellant refused this position, asserting that it exceeded her medical restrictions because the Blue Valley facility was an hour and 20 minute drive from her home. Although appellant accepted the position on July 9, 2008, she continued to assert that the drive-time exceeded her work restrictions.

Appellant submitted an August 11, 2008 note in which Dr. Nick Navato, an orthopedist, diagnosed chronic musculoskeletal lower back pain, lumbar spine degenerative disc disease, lumbosacral spinal stenosis with radiculopathy. Dr. Navato opined that appellant could work four to five days per week, six to eight hours per day with restrictions. He restricted lifting activities to no more than 10 pounds for appellant's right arm and no more than 20 pounds for appellant's left arm. Dr. Navato advised appellant to avoid repetitive tasks requiring use of her right arm. He opined that appellant could drive to work, but restricted her to no more than one hour of driving, provided she took a break midway, in both directions, and that her job site could be no more than 50 miles from her home.

In September 11 and November 4, 2008 notes, appellant alleges the modified-duty sales, service and distribution clerk employment duties caused new back and neck injuries. She asserts that her current employment position exceeds the driving restriction recommended by her physician. Appellant relates that she configured her workstation at her prior duty assignment such that she was able to perform her duties without aggravating her medical conditions. Before she began working at the Blue Valley facility she spoke with a district manager and told him that she could not perform her duties unless she was provided a similarly configured workstation. When appellant began working at the Blue Valley facility, however, her workstation was not configured as she requested. Because she was unsuccessful in her attempt to reposition the equipment in her workstation, she alleges she performed reaching, bending and repetitive employment activities that produced neck and back injuries.

[1] Appellant has other workers' compensation claims. Under claim number xxxxxx782, the Office accepted that appellant sustained a right rotator cuff strain and rotator cuff tear in the performance of duty as of December 15, 2003. By decision dated November 28, 2005, appellant was awarded an 11 percent impairment rating for the right shoulder condition. Under claim number xxxxxx195, the Office accepted that appellant sustained a lumbosacral strain and developed psychogenic pain as a result of performing her March 30, 2004 duties. It accepted that appellant sustained a recurrence of disability as of October 4, 2005. Appellant is receiving partial wage-loss benefits under the 2004 injury claim in accordance with a November 8, 2006 loss of wage-earning capacity (LWEC) determination. The cases were combined in 2004, and the xxxxxx782 injury claim is considered the master file. Under the 2003 master claim, the Office, by decision dated January 8, 2009, denied modification of the 2006 LWEC determination and denied compensation entitlement from April to August 2008 and ongoing compensation beginning September 2008.

Appellant submitted reports dated September 18 and November 3, 2008, signed by Dr. Navato. In his history, Dr. Navato notes that appellant reported that since July 29, 2008 her employment duties exceeded her work restrictions. He relates that appellant's supervisor advised her that she needed to perform her assigned duties or she would face disciplinary action. Dr. Navato diagnosed chronic musculoskeletal lower back pain, lumbar degenerative disc disease, "possible piriformis syndrome," "possible right shoulder bursitis" and lumbrosacral spinal stenosis with radiculopathy. He opined that appellant could work 4 days per week, 6 hours per day, with 50-minute work hours, allowing appellant to rest and change positions or stretch. Dr. Navato reiterated the lifting restrictions outlined in his previous note and opined that appellant should not work more than 50 miles from home. He restricted her driving to no more than a total of one hour per day. Dr. Navato also opines that appellant is unable to perform the offered sales, service and distribution clerk position at the Blue Valley facility because working the window requires excessive twisting, bending, repetitive motions with her right arm and reaching over the counter.

In a September 24, 2008 note, the employing establishment relates that appellant was given a rehabilitation position which she worked for 60 days, at which point the Office issued a loss of wage-earning capacity (LWEC) determination. Due to operational changes, the employing establishment had to change appellant's work location and therefore offered her another rehabilitation position, which appellant accepted, though she argued that the new position was further away from her home and therefore exceeded her driving restrictions. Employees from this new duty location drove from appellant's home to the Blue Valley facility and reported that Blue Valley is actually closer to her residence than her prior duty assignment. The employing establishment reports that appellant's employment duties at the Blue Valley facility are no different than those at her previous duty station. At the Blue Valley location, appellant is still working the window selling postal products and sorting mail. The employing establishment opines that appellant is merely unhappy with her duty station's location.

In a November 17, 2008 statement, the employing establishment relates that appellant's transfer to the Blue Valley facility was due to the needs of the agency. The employing establishment asserts that appellant's complaint that her assigned duties exceeded her work restrictions is false as the position at the Blue Valley facility requires less work than she performed at her prior duty location. While the position at the Blue Valley facility included working the window, sorting mail and other office duties, appellant was not assigned to sort mail. Using MapQuest, an internet-based service, the employing establishment determined that the Blue Valley facility is 45.23 miles from appellant's home whereas her prior duty location was 46.20 miles from her home.

Further, the employing establishment noted that the activities associated with working the window are not "repetitive" because there are a variety of different tasks that the employee must perform, depending on the needs of the customer, and an employee has the option of performing these tasks with their right or left hand, arm or shoulder. Finally, the employing establishment reports that the window stations at Blue Valley are configured in a manner more suitable to appellant's condition. They note that the equipment at each station is on a more even and level surface than at her prior duty station. The monitor can be relocated to minimize reaching and the window counters are of a shorter height, further reducing any reaching activities

On November 21, 2008 Dr. John F. Eurich, a Board-certified diagnostic radiologist, reported findings following x-rays of appellant's cervical and thoracic spine. He diagnosed moderate degenerative changes at the C4-7 level and mild degenerative changes in appellant's thoracic spine.

In a November 24, 2008 report, Dr. Kenneth W. Peterson, an orthopedist, reviewed appellant's history of injury, reported findings on examination and diagnosed right shoulder pain.

On November 26, 2008 Dr. Michael B. Robertson, a Board-certified diagnostic radiologist, reported findings following a magnetic resonance imaging (MRI) scan of appellant's shoulder. He diagnosed medial subluxation of the medial long head bicep tendon, mild joint arthropathy, degenerative arthrosis of the glenohumeral joint and "probable slap tear at the posterior superior labrum."

Finding the evidence of record did not establish the identified employment factors caused the alleged medical condition, by decision dated December 24, 2008, the Office denied the claim.

On January 5, 2009 appellant, through her attorney, requested an oral hearing.

Appellant submitted a January 16, 2009 note in which Dr. Gregory P. Lynch, a Board-certified orthopedic surgeon, opined that appellant could return to light-duty work and restricted her to left hand employment tasks.

Following a hearing, conducted on April 16, 2009, by decision dated July 1, 2009, the Office affirmed its December 28, 2008 decision, finding that the evidence of record did not establish that the identified employment factors caused a medically-diagnosed condition or aggravation of a preexisting condition.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[3] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[4] As part of his burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[5] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality,

[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[4] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *G.T., supra* note 4; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[6]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[7]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[8]

ANALYSIS

Appellant identified bending, twisting, reaching, repetitive and driving work activities associated with her duty assignment at the Blue Valley facility as employment factors she considers responsible for her condition. Her burden is to demonstrate the identified employment factors caused a medically-diagnosed condition.[9] Causal relationship is a medical issue that can only be proven through production of probative, rationalized medical opinion evidence. Appellant has not submitted sufficient medical opinion evidence and, consequently, the Board finds she has not satisfied her burden of proof.[10]

Dr. Navato's reports are not based on a thorough and accurate history and therefore are of little probative value.[11] He opines that appellant is unable to perform the offered sales, service and distribution clerk position at the Blue Valley facility because working the window requires

[6] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[7] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

[8] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[9] Appellant submitted reports pertaining to treatment and examination in 2006, 2007 and early 2008. As these reports predate the date of her claim, they have no probative evidentiary value and do not satisfy her burden of proof.

[10] Appellant submitted a note bearing an illegible signature. Because the author of this note cannot be identified as a physician, it is of diminished probative value. *See R.M.*, 59 ECAB ___ (Docket No. 08-734, issued September 5, 2008); *Merton J. Sills*, 39 ECAB 572 (1988).

[11] *Douglas M. McQuaid*, 52 ECAB 382 (2001).

excessive twisting, bending, repetitive motions with her right arm and reaching over the counter. However, based on the evidence of record, Dr. Navato's opinion is based on inaccurate information. The employing establishment relates that appellant was originally provided a rehabilitation position which she worked for 60 days at the prior duty location. Due to operational changes, the employing establishment had to change appellant's work location and thus offered her another rehabilitation position at the Blue Valley facility. According to the employing establishment, appellant's duties at the Blue Valley facility were not only the same as those required of her at her prior duty station but, at the Blue Valley facility, apparently they actually require less work. The employing establishment reports that the duties of her position permit her to substitute other office-work tasks throughout the day. While the position at the Blue Valley facility included working the window, sorting mail and other office duties, appellant was not assigned to sorting mail at the Blue Valley facility.

Further, the employing establishment noted that appellant's employment duties are not "repetitive," rather there are a variety of different tasks that the employee must perform, depending on the needs of the customer, which an employee has the option of performing using their right or left hand, arm or shoulder.

Additionally, the employing establishment reports that Blue Valley's window station configurations are more suitable to appellant's condition. It notes that the equipment at each station at the Blue Valley facility is on a more even and level surface than at her prior duty position. The monitor can be relocated to minimize reaching and the window counters are of a shorter height, further reducing any reaching activities. Dr. Navato's reports make no mention of any of the afore-mentioned information and therefore are based on an inaccurate history.

Moreover, although Dr. Navato also opines that the Blue Valley position is not suitable because the daily commute exceeded appellant's driving work restriction, this too is based on inaccurate information. The employing establishment noted that, according to MapQuest, the Blue Valley facility is 45.23 miles from appellant's home whereas her prior duty location was 46.20 miles from her home and, thus, driving to the Blue Valley facility does not exceed the driving limitation. Consequently, without an accurate history, Dr. Navato's reports are not sufficient to meet appellant's burden of proof in establishing her claim for an occupational disease.

Finally, Dr. Navato's opinion also lacks adequate rationale. He diagnosed, among other conditions, chronic musculoskeletal lower back pain, lumbar spine degenerative disc disease, lumbrosacral spinal stenosis with radiculopathy. Dr. Navato did not, however, explain the causal relationship between the work restrictions he prescribed and the identified employment factors, nor did he explain, with adequate rationale, how the identified employment factors caused a new medically-diagnosed condition or aggravated a preexisting condition. These deficiencies reduce the probative value of Dr. Navato's notes such that they do not satisfy appellant's burden of proof.

The reports from Drs. Eurich, Peterson and Robertson have little probative value on causal relationship. They did not describe appellant's employment duties or provide a rationalized medical opinion explaining how the identified employment factors caused the conditions they diagnosed. As noted above, rationalized medical opinion evidence is medical

evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.[12] Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[13] Consequently, these physicians' reports are also substantively deficient such that they lack probative value on causal relationship and do not satisfy appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation.[14] Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[15]

Appellant has not submitted sufficient medical opinion evidence supporting her claim and, accordingly, the Board finds she has not satisfied her burden of proof to establish she sustained an injury in the performance of duty causally related to her employment.

CONCLUSION

The Board finds appellant has not satisfied her burden of proof to establish that she sustained an injury in the performance of duty causally related to her employment.

[12] *Supra* note 8.

[13] *Michael E. Smith*, 50 ECAB 313 (1999).

[14] *Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant's subjective symptoms and self-serving declarations do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature).

[15] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007)*; Ruth R. Price*, 16 ECAB 688, 691 (1965).

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 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