United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 09-1698**
	)	**Issued: June 1, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Ukiah, CA, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 25, 2009 appellant filed a timely appeal of a May 20, 2009 merit decision of the Office of Workers' Compensation Programs, which denied modification of a May 29, 2008 decision, which denied her claim for a recurrence. 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 was entitled to wage-loss compensation benefits as of June 10, 2004.

FACTUAL HISTORY

On December 30, 2002 appellant, then a 55-year-old rehabilitation clerk, filed an occupational disease claim alleging that she developed a lower lumbar strain in the performance of duty. She indicated that she first became aware of the injury and its relation to her work on December 14, 2001. Appellant returned to limited duty for four hours a day on January 9, 2003. On December 11, 2003 the Office accepted the claim for lumbago secondary to aggravation of

lumbar degenerative disc disease.[1] Appellant received wage-loss compensation for hours she did not work for certain periods including from December 29, 2003 to May 21, 2004.[2]

On February 2, 2004 the Office referred appellant for vocational rehabilitation services.

In a March 17, 2004 duty status report, Dr. Bob Dozor, Board-certified in family medicine and appellant's treating physician, indicated that appellant could work up to eight hours daily within restrictions.

On May 28, 2004 the employing establishment offered appellant a full-time limited-duty position as a distribution window clerk, which she accepted on May 28, 2004. The physical requirements were listed as sitting, standing and walking, intermittently; moderate lifting, 5 to 30 pounds and moderate intermittent twisting; sitting or standing with intermittent walking and occasional twisting with moderate lifting 5 to 20 pounds; sitting or standing; sitting or standing with moderate lifting, 1 to 30 pounds and sitting or standing with intermittent walking. The additional restrictions included: sitting only for one-hour continuously, maximum; walking for 20 minutes continuously; and standing for 20 minutes, continuously. Appellant returned to the limited-duty position on June 1, 2004.

In a June 10, 2004 report, Dr. Dozor advised that appellant's return to work was not successful and opined that she was totally unable to work within her particular job description at the employing establishment. He noted that "absent sitting in one position for prolonged periods doing repetitive work, her back is OK. Therefore, she does n[o]t need therapy as much as finding a different job description." Dr. Dozor diagnosed low back pain, obesity and osteoarthritis in the leg. He recommended that appellant stay away from the employing establishment as she could not do prolonged periods of repetitive work.

In a June 18, 2004 report, Dr. Dozor opined that he stood by his prior opinion. He noted that written job descriptions "are one thing and what is actually demanded in the workplace is another." Dr. Dozor characterized appellant's position as a "symphony orchestra conductor" noting that "her hands and arms are waving around handling 500 to 1,000 pieces of mail per day. This causes pain in low back radiating into thighs, which remits when she goes home each day." He opined that her return to the employing establishment was not going to work. Dr. Dozor noted that he reviewed the job description and advised that "she cannot stay in one position working repetitively, but needs to be in a variety of positions and to be able to choose them as her body dictates. He reiterated that appellant could not return to the employing establishment.

On June 21, 2004 appellant claimed a recurrence of disability on June 8, 2004 causally related to the December 14, 2001 employment injury. She stopped work on June 9, 2004. Appellant alleged that her recurrence occurred because she returned to the exact same duties previous to her injury and her duties increased to eight hours per day and she was under pressure

[1] It vacated the earlier decisions denying the claim.

[2] The record reflects that appellant's treating physician, Dr. Kenneth Wiesner, a Board-certified internist, recommended that a workstation consultant address appellant's issues related to discomfort in her back and knees. A recommendation to provide an ergonomic chair and a desk of proper height was made.

to perform from the postmaster. The employing establishment indicated that it complied with work restrictions and noted that she was observed reading "want ads" while on duty.

In a July 2, 2004 letter, Beatriz Camacho, an injury compensation specialist, indicated that, on June 8, 2004, appellant was disciplined by the postmaster because she was reading the local want ads. She indicated that, thereafter, appellant's physician placed her on temporary total disability. Ms. Camacho enclosed a copy of e-mail correspondence from the postmaster confirming the noted events.

On July 13, 2004 the Office advised appellant that additional factual and medical evidence was needed. It allotted her 30 days within which to submit the requested information. In another July 13, 2004 letter, the Office characterized appellant's work stoppage as a failure to participate in vocational rehabilitation. It advised her to participate in vocational rehabilitation or her compensation could be reduced.

In a letter dated August 2, 2004, appellant indicated that she was ordered by her physician not to work. She indicated that she would return to work once her physician released her. In a separate August 2, 2004 letter, appellant indicated that she prepared the mail per management's instruction on June 7, 2004. However, on June 8, 2004, she was directed to process the back logged mail until it was current. Appellant alleged that this violated her May 21, 2004 restrictions of a maximum of one-hour of continuous sitting, bending, lifting, pushing, pulling or twisting, which were supposed to be intermittent. She alleged that she was asked to work beyond her medical restrictions. Appellant also denied that her absence from work was due to discipline and noted that she did not receive any letter of warning or suspension. She also enclosed statements from witnesses to support that she was asked to remove the stacked up mail and work in a continuous manner. In an August 1, 2004 report, Dr. Dozor repeated his opinion that "prolonged sitting" was the cause of appellant's back pain.

On August 16, 2004 the Office reduced appellant's compensation to zero, effective August 12, 2004, as she refused to cooperate with her vocational rehabilitation program. It advised that its rehabilitation efforts placed her in an appropriate job and that she did not cooperate with these efforts.

In an August 17, 2004 decision, the Office denied appellant's claim for a recurrence of disability beginning June 12, 2004.

By letter dated August 12, 2005, appellant's representative requested reconsideration of the August 16 and 17, 2004 decisions.[3] The Office received additional evidence comprised of previously submitted medical reports, physical therapy reports and copies of previously submitted witness statements.

By decision dated November 17, 2005, the Office denied modification of the previous decisions.

[3] Appellant filed a new claim for an occupational disease on June 12, 2004. However, the claim was the same as the present claim and it was denied in January 31 and December 1, 2005 decisions. File No. xxxxxx286.

By letter dated February 2, 2006, appellant's representative requested reconsideration. His arguments included that appellant's workstation was not ergonomic as it was confined and her telephone was not within arm's reach. In a January 26, 2006 report, Dr. Dozor noted that while she was provided an ergonomic chair, the ergonomic recommendations, which included ensuing that the telephone was within arm's reach were not implemented. He indicated that as a result of appellant having to bend and stretch to reach the telephone approximately 10 times per hour, the back pain returned and her conditions exacerbated. Dr. Dozor also noted that she was "a very large woman" who worked in a caged area. He noted that the rest of her work space was cramped with a backlog of mall which made maneuvering almost impossible. Dr. Dozor added that sitting was one of the worst things appellant could do for her lower back condition. He opined that the position she returned to did not comply with his restrictions. Dr. Dozor opined that if appellant continued to work in these conditions, her disability would have become permanent.

By decision dated April 13, 2006, the Office denied modification of its prior decision.

By letter dated August 16, 2006, appellant requested reconsideration. She alleged that she was working beyond her restrictions and that her workstation was not ergonomic. In an August 7, 2006 report, Dr. Dozor opined that the employing establishment never rectified the prominent cause of her condition, which was that her workstation was not ergonomic. He explained that the employing establishment failed to institute an ergonomically appropriate workstation. Dr. Dozor noted that appellant had very specific restrictions, to include an ergonomically redesigned workstation. He indicated that from June 7 to 9, 2004 her back pain recurred and worsened daily until she left work on June 9, 2004. Dr. Dozor indicated that he saw appellant on June 10, 2004 and advised that it was her that had "suffered a recurrence of her previous back injury due to the exact same ergonomic inadequacies of her workstation." He opined that "it was not surprising that she was reinjured, which was a direct result of ignoring this recommendation. Had I understood, that the [employing establishment] could and would ignore this recommendation, I would never have sent her back to work."

In a letter dated February 5, 2007, appellant alleged that Dr. Dozor's recommendation and release of her to work was premised on the employing establishment providing her with an ergonomic workstation.

By decision dated March 13, 2007, the Office denied modification of its prior decisions.

On March 10, 2008 appellant requested reconsideration and submitted additional evidence. In a February 28, 2008 report, Dr. Dozor opined that his words were "misconstrued." He explained an ergonomic analysis and implementation of the ergonomic conditions were a condition of appellant's return to work. Dr. Dozor noted that when he saw her on June 10, 2004, the symptoms that she exhibited on the date required that he remove her from her work environment. He opined that: "[it] appears that absent sitting in one position for prolonged periods doing repetitive work, her back is OK." Dr. Dozor noted that appellant's back condition had steadily improved after being absent from her work environment. He explained that "minus [employing establishment] related activities of prolonged periods doing repetitive work, her back is OK. The reintroduction of the work scenario without the protective values afforded by ergonomics destroyed the improvement garnered over the previous 10 months and added

additional injury." Dr. Dozor explained that the employing establishment failed to implement an ergonomic work environment and on June 10, 2004, her back was symptomatic. He also explained that he was aware of appellant's nonwork-related ranch activities and they were not a factor. Dr. Dozor explained that those activities helped to offer muscle endurance, joint mobility, lowered blood pressure, weight control and reduce depression. He indicated that appellant had degenerative joint disease, (lumbago), exacerbated by work-related activity. Dr. Dozor indicated that, in June 2004, she was in the very early stages of stability and her injury was "exceedingly vulnerable to additional trauma." He indicated that, despite being offered a limited-duty position, it did not comport with the conditions of returning to work as the ergonomic recommendations were not implemented. Dr. Dozor opined that "the tissue irritant that first disabled [appellant] had recurred in her '(pseudo)new' position at the [employing establishment." He noted that the employing establishment returned appellant to the same poor ergonomics that exacerbated her initial injury and opined that "the failure to implement ergonomic principles on behalf of [appellant] assured her failure in her rehabilitation efforts and caused additional injury."

Appellant also submitted statements from friends and neighbors indicating that she did not perform strenuous activities in her home life.

By decision dated May 29, 2008, the Office denied modification of the March 13, 2007 decision. It found that the evidence did not establish a recurrence of disability beginning June 12, 2004.

In a January 21, 2009 report, Dr. Dozier opined that appellant's condition was related to the physical demands of her duties in June 2004. He explained that the ergonomics of her workplace clearly caused her back pain and advised that, while the chair was ergonomic, her work table, was not. Dr. Dozor explained that the work surface provided in the registry cage was that of a table. He noted that the working surface of a table is higher than the elbows of the seated individual. Dr. Dozor explained that the raising of one's hands above one's elbows to manipulate objects increased the load on the spine and caused the back muscles to contract to counter the increased load. He further noted that "over use of the back muscles increases muscle tension" and "in extension the intervertebral discs are flattened (pinched) at the posterior edge." Dr. Dozor indicated that the increased pressure and reduced circulation within the disc readily resulted in disc inflammation, (lumbago) and/or additional joint injury, including degenerative joint disease. He opined that the lumbar irritation/inflammation that appellant experienced was "consistent with a person manipulating objects at an excessive height, exacerbated by downward pressure (repetitive application of a rubber stamp). I am certain that this is the mechanism of her injury."

On February 11, 2009 appellant requested reconsideration. She alleged that upon her return to work in June 2004, she was assigned to the bulk mail workstation for the dates of June 1, 2, 3 and 4, 2004. Appellant noted that she was furnished with a chair that was specifically purchased for her use and advised that she experienced no physical difficulty on any of those dates. However, she explained that she was directed to the registry cage for the dates of June 7, 8 and 9, 2004 and the chair was moved to the registry cage for her use. However, appellant noted that the working surface available in the cage was that of a table and she was tasked to process "Return to Sender" mail. She alleged that the process required that she

manually apply a rubber stamp to each piece of mail. Appellant alleged that she began to suffer symptoms of low back pain and stiffness on June 8, 2004 and her pain was intolerable by early June 10, 2004. She provided a January 12, 2009 statement from Larry Olsen, a coworker, who indicated that her workstation was a letter carrier work table with the shelves removed and not a desk. Appellant also provided a January 28, 2009 statement from Bruce Robert Rustenhoven, a coworker, who indicated that when he worked in the cage with appellant, it contained a safe, a chair and a letter carrier table.

By decision dated May 20, 2009, the Office denied modification of its prior decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that, an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[4] Generally, the Office can meet this burden by showing that the employee returned to work; even if that work is light duty rather than the date-of-injury position, if thereafter the employee earns no less than he had before the employment injury.[5] A short-lived and unsuccessful attempt to return to duty, however, does not automatically discharge the Office's burden to justify termination of compensation.[6]

The Office's procedures require that, in cases where recurrent disability for work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability for work.[7]

ANALYSIS

The Office accepted that appellant sustained lumbago secondary to aggravation of lumbar degenerative disc disease and paid wage-loss compensation for hours of work missed.

Appellant returned to a limited-duty position on June 1, 2004. In its decision, the Office characterized her claim for compensation starting on June 12, 2004 as a claim for recurrence of total disability due to her employment injury. It placed the burden of proof for establishing disability on appellant indicating that she had the burden of proof to show that she was totally disabled from light-duty work. The Office found that she did not meet her burden of proof and did not pay wage-loss compensation after June 12, 2004. As noted, however, a short-lived return to work does not shift the burden of proof regarding employment-related disability. The Board

[4] *Vivien L. Minor*, 37 ECAB 541 (1986).

[5] *Billy Sinor*, 35 ECAB 419 (1983).

[6] *Fred Reese*, 56 ECAB 568 (2005).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, Recurrences, Chapter 2.1500.6(a) and (b) (September 2003).

has held that such a shift in burden of proof is not appropriate when there is a brief return to work and the medical evidence does not establish that the claimant could continue to perform the light-duty job.

The Board finds no probative medical evidence establishing that appellant's employment-related condition had ceased on or after June 10, 2004 or that her inability to perform the light-duty job was not related to her employment injury. Although Dr. Dozor initially indicated that she could return to light-duty work for eight hours a day, after she attempted to work full time, on June 10, 2004, he reported that her return to work was not successful and opined that she was totally unable to work within her particular job description at the employing establishment. He noted that "absent sitting in one position for prolonged periods doing repetitive work, her back is OK." Dr. Dozor recommended that appellant not return to the employing establishment as she could not do prolonged periods of repetitive work.

In a June 18, 2004 report, Dr. Dozor reiterated his prior opinion. He noted that the attempt to return to work was not successful. Dr. Dozor opined that appellant could not stay in one position working repetitively but needed to be in a variety of positions. He indicated that she could not return to the employing establishment. In his August 1, 2004 report, Dr. Dozor repeated that "prolonged sitting" was the cause of appellant's back pain. He also noted, in a January 26, 2006 report, that while she received an ergonomic chair, the ergonomic recommendations, which included insuring that the telephone was within arm's reach were not implemented and her back pain was exacerbated having to bend and stretch to reach the telephone several times per hour. Dr. Dozor also indicated that the rest of appellant's work space was cramped with a backlog of mail which made maneuvering almost impossible. He opined that the position she returned to did not comply with his restrictions. In an August 7, 2006 report, Dr. Dozor reiterated that the employing establishment never rectified the prominent cause of appellant's condition, which was that her workstation was not ergonomic. He indicated that he saw her on June 10, 2004 and advised that it was apparent that she had "suffered a recurrence of her previous back injury due to the exact same ergonomic inadequacies of her workstation." Dr. Dozor explained that he would never have sent appellant back to work if he knew the employing establishment would ignore his recommendations. He repeated his opinion in his reports dated February 28, 2008 and January 21, 2009. Dr. Dozor explained further that the work surface provided in the registry cage was a table with a work surface that was higher than the elbows of the seated person. He explained that the "raising of one's hands above one's elbows to manipulate objects increased the load-on-the-spine and caused the back muscles to contract to counter the increased load." Dr. Dozor indicated that the "over use of the back muscles increases muscle tension" and "in extension the intervertebral discs are flattened (pinched) at the posterior edge." He opined that the lumbar irritation/inflammation that appellant experienced was "consistent with a person manipulating objects at an excessive height, exacerbated by downward pressure (repetitive application of a rubber stamp). I am certain that this is the mechanism of her injury."

The Board finds that appellant's short-lived return to the light-duty position was not sufficient for the Office to shift the burden to appellant. It remains the Office's burden of proof to terminate compensation and the Board finds that the Office essentially terminated wage-loss benefits without sufficient supporting medical evidence.

CONCLUSION

The Board finds that the Office did not establish that appellant was not entitled to appropriate wage-loss compensation beginning June 10, 2004.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 1, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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