United States Department of Labor
Employees' Compensation Appeals Board

T.W., Appellant	)	
and	)	**Docket No. 09-1859**
	)	**Issued: June 23, 2010**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Seattle, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 13, 2009 appellant filed a timely appeal from a January 14, 2009 merit decision of the Office of Workers' Compensation Programs denying her claim for wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established a recurrence of total disability during the period December 29, 2007 through February 2, 2008 due to her employment injury.

On appeal, appellant contends that the employing establishment modified her light-duty requirements by changing her start time to 5:00 a.m., which did not conform to her physician's restriction that she did not start work until 11:30 a.m.

FACTUAL HISTORY

The Office accepted that on June 14, 2006 appellant sustained a lumbar strain while lifting a bag for a quarterly bag test. Appellant stopped work on June 19, 2006. The record reveals that she returned to light duty on June 25, 2006 with shifts beginning at 5:00 a.m. Appellant was off work intermittently at this time.[1]

In a November 19, 2007 report, appellant's treating physician, Dr. Steven Litsky, Board-certified in physical medicine and rehabilitation, stated that appellant continued to experience pain involving the low back and S1 joints. There was no overall change on physical examination with regard to muscle, strength, reflexes or sensation compared to an October visit. Dr. Litsky diagnosed chronic pain syndrome, history of lumbar strain, cervicalgia, hip strain, bilateral knee pain, possible S1 joint involvement, right S1 radiculopathy per patient and lumbago. He opined that "it would be nice" if appellant could work the 11:00 a.m. shift as another physician was concerned about her getting enough sleep, which was likely contributing to some of her emotional distress. Dr. Litsky provided a physical assessment form advising that she could work full time but providing work restrictions due to chronic pain syndrome and lumbar strain. He indicated that appellant's prognosis was guarded due to her chronic pain syndrome. Dr. Litsky provided work restrictions limiting walking and standing to 4 hours a day and 15 minutes continuously, sitting to 30 minutes continuously, reaching above the shoulder to 2 hours a day, pushing and pulling to 1 hour a day and a total restriction on kneeling, bending, stooping and twisting. He also provided lifting restrictions of 10 pounds limited to one hour a day. Dr. Litsky commented that appellant needed to work the 11:00 a.m. shift.

On November 19, 2007 the employing establishment changed appellant's shift start time to 11:00 a.m.

In a December 17, 2007 report, Dr. Litsky stated that appellant should start work at 11:30 a.m. which would help facilitate transportation and her therapy. He provided a physical assessment form for December 17, 2007 through March 17, 2008 reiterating his prior restrictions and stating that she needed to work an 11:30 a.m. shift.

In an undated memorandum, a nurse at the employing establishment requested that Dr. Litsky provide an explanation for changing appellant's recommended shift start time from 11:00 a.m. to 11:30 a.m. On December 21, 2007 Dr. Litsky clarified that appellant requested the time change so that she could use the employee shuttle system.

On December 29, 2007 the employing establishment offered appellant a modified-duty position within the physical restrictions provided by Dr. Litsky except with a start time of 5:00 a.m. Appellant rejected the limited-duty position stating that there was no documentation to show that her physician changed her restrictions.

[1] Appellant filed a claim for January 8 and May 20, 2007 recurrences alleging that she was still experiencing pain and that she had not recovered. By letter dated November 7, 2007, the Office notified her that her claim was still open for medical treatment and that it was not going to take further action on her recurrence claim.

In a January 17, 2008 report, Dr. Litsky noted that there was no overall change on physical examination with regard to muscle, strength, reflexes or sensation. He added a diagnosis of S1 joint dysfunction. Dr. Litsky opined that appellant would benefit from taking the vanpool as it would help her with more restorative sleep, as well as making it easier for her to go back and forth to work and sparing the S1 joint and back injury. He "guessed" this restriction could be considered medically necessary, by definition. In a physical assessment form, Dr. Litsky reiterated appellant's work restrictions. He stated that she would benefit from an 11:30 a.m. shift that allowed her to sleep and use a van. Appellant also submitted physical therapy notes dated January 3 through February 15, 2008.

On February 15, 2008 appellant filed a claim for total wage-loss compensation (Form CA-7) for the period December 29, 2007 through February 2, 2008.

In a January 31, 2008 letter, Dr. Litsky recommended that appellant be referred to another medical examiner to look at her condition and suggest ideas. He stated that another physician would also help decide if she was able to go back to work and whether she would benefit from changing shifts, different transportation or light duty. On February 14, 2008 Dr. Litsky diagnosed S1 joint and lumbar strain. He noted that appellant would benefit from using a van to reduce her walking distance and that she should work an 11:30 a.m. shift.

By letter dated February 29, 2008, the Office notified appellant that the medical evidence of record did not support her claim for total disability from December 29, 2007 through February 2, 2008. It advised her of the medical evidence necessary to establish her claim and provided her 30 days to submit additional evidence.

In a March 13, 2008 medical report, Dr. Litsky stated that he disagreed with the employing establishment's characterization of the appellant's need to use a van as an administrative decision. He opined that her use of a van was a clinical decision. Dr. Litsky stated that studies had been conducted to show that circadian rhythms and interruption could affect health and noted that a workers' compensation case in Canada established a precedent on that issue.

The Office referred appellant to Dr. Richard Hall, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the nature and extent of her employment injury. In a February 21, 2008 report, Dr. Hall noted her complaint that she was being forced to work at 5:00 a.m. instead of at 11:30 a.m. He diagnosed lumbar strain probably related to the described June 14, 2006 work injury. Dr. Hall found that appellant had reached maximum medical improvement and that no further medical treatment would be curative. Appellant could perform her usual job contingent on approval of the attending physician.

In a March 24, 2008 letter, appellant stated that she was not totally disabled from December 29, 2007 to February 2, 2008 but had been available to work after 11:30 a.m. as listed by Dr. Litsky in her physical assessment. She contended that the change of her start time to 5:00 a.m. was retaliation by her employer and contrary to her work restrictions. Appellant maintained that the 11:30 a.m. start time allowed her to participate in the employee vanpool and kept her from having to use public transportation, which caused back pain. She also claimed that the later

shift would aid her recovery by creating union with her circadian rhythm and support her body with proper rest.

By decision dated April 15, 2008, the Office denied appellant's claim for wage-loss compensation from December 29, 2007 through February 2, 2008. It found that the medical evidence did not establish that she was precluded from working light duty. Further, the Office found that Dr. Litsky did not offer adequate medical rationale to support an 11:00 a.m. start time.

On May 13, 2008 appellant requested an oral hearing before an Office hearing representative that was held on November 13, 2008. She reiterated that the 5:00 a.m. shift time did not comply with her work restrictions and noted that the employing establishment had accommodated an 11:30 a.m. shift from February 3 to May 1, 2008. On November 26, 2008 appellant claimed that she was placed on leave without pay status on May 1, 2008 due to her rejection of a job offer. She returned to full duty, with a 5:00 a.m. shift, on July 20, 2008 but was terminated due to unexcused absences on November 11, 2008.

On June 12 and September 11, 2008 the Office requested that Dr. Hall clarify his opinion regarding whether appellant's accepted condition had resolved and her current work restrictions. On September 22, 2008 Dr. Hall stated that her examination was without significant positive findings in light of normal findings with limited pain presentation. He advised that appellant had reached maximum medical improvement and that her injury had resolved to a fixed and stable condition.

In a June 12, 2008 medical report, Dr. Litsky stated that there seemed to be a problem regarding the recommended 11:30 a.m. shift and noted appellant's claim that sleep was affecting her injury. He noted that shift work was not usually accepted as a causative agent in industrial injuries even though it was related. On July 10, 2008 Dr. Litsky released appellant to full duty. In a September 11, 2008 report, he stated that he was being coached to address the necessity for appellant to work a later shift. Dr. Litsky stated that, generally, workers' compensation did not regard shift work changes as being medically necessary, however, it might be in her case if it regards stability and muscle strength.

In a January 14, 2009 decision, the Office hearing representative affirmed the April 15, 2008 decision denying wage-loss compensation from December 29, 2007 through February 2, 2008. Appellant's refusal to work the available limited duty was not based on a reasoned medical rationale from her treating physician. Rather, it was due to an administrative matter regarding her ability to use the shared vanpool. Appellant also noted that S1 joint dysfunction was not an accepted condition and that she did not submit a medical opinion addressing how the condition was related to her employment.

LEGAL PRECEDENT

A 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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that

caused the illness."[2] A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[3] Where no such rationale is present, medical evidence is of diminished probative value.[4]

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."[5]

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 change in the nature and extent of the light-duty requirements.[6] To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[7]

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[2] *R.S.*, 58 ECAB 362 (2007); 20 C.F.R. § 10.5(x).

[3] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008)*; Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[4] *See Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[5] *J.F.*, 58 ECAB 124 (2006); *Elaine Sneed*, 56 ECAB 373, 379 (2005); 20 C.F.R. § 10.5(x).

[6] *Albert C. Brown*, 52 ECAB 152, 154-155 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986); 20 C.F.R. § 10.5(x) quoted in body of text.

[7] *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Maurissa Mack* 50 ECAB 498, 503 (1999).

ANALYSIS

The Office accepted that appellant sustained a lumbar strain on June 14, 2006 in the performance of duty. Appellant was disabled from June 19 through 26, 2006, when she returned to light duty with a shift start time of 5:00 a.m. On November 19, 2007 the employing establishment changed her start time to 11:00 a.m. at the request of her treating physician, Dr. Litsky. On December 29, 2007 the employing establishment offered appellant a modified-duty position with a 5:00 a.m. start time, which she rejected. Appellant stopped work that day and did not return until February 3, 2008 when the employing establishment provided a shift starting at 11:30 a.m. The issue is whether she established that she was disabled due to residuals of her accepted condition from December 29, 2007 through February 2, 2008.

As appellant had returned to a light-duty position following her June 14, 2006 employment injury, she has the burden of proof to establish that she could not perform light duty from December 29, 2007 through February 2, 2008. She must establish that she experienced a change in the nature and extent of her employment-related condition or show that there was a change in the nature and extent of the light-duty requirements.[8]

Appellant did not contend that she experienced a change in the nature and extent of her employment-related condition during the claimed period. The medical evidence does not establish that she experienced any change in her accepted lumbar strain as Dr. Litsky provided the same work restrictions. In November 19, 2007 and January 17, 2008 reports, Dr. Litsky acknowledged that there were no overall changes on physical examination.

On December 29, 2007 the employing establishment offered appellant a modified-duty position that complied with the physical restrictions provided by Dr. Litsky with a start time of 5:00 a.m. The Board has held that a change in an employee's duty shift may, under certain circumstances, be a factor of employment.[9] However, for an employee to establish disability due to a change of light-duty shift time, she must establish that she was precluded from working the different shift due to residuals from her employment-related condition.[10] Appellant contends that she was medically required to work a later morning shift so that she could use the vanpool to get to work and to obtain proper restful sleep. This is a medical issue and must be established by probative medical evidence.[11]

In a November 19, 2007 report, Dr. Litsky stated that "it would be nice" if appellant could work an 11:00 a.m. shift due to concern about getting enough sleep, which was potentially contributing to her emotional distress. Appellant's claim has not been accepted for any emotional condition. The note of Dr. Litsky did not address how residuals of her accepted lumbar strain would preclude commencing work prior to 11:00 a.m. This report does not

[8] *See Chester J. Catterton*, 40 ECAB 1217 (1989).

[9] *See e.g., L.S.*, 58 ECAB 249 (2006); *Charles J. Jenkins*, 40 ECAB 362 (1988).

[10] *See C.G.*, Docket No. 09-52 (issued August 21, 2009). *See also Kim Klitz*, 51 ECAB 349 (2000).

[11] *See Cecelia M. Corley*, 56 ECAB 662 (2206).

establish that appellant was required to work a later shift due to residuals of her employment injury.[12]

In a December 17, 2007 report, Dr. Litsky stated that appellant should begin work at 11:30 a.m. in order to facilitate transportation and therapy. On December 21, 2007 he noted that she requested a schedule change in order to use the employee shuttle system. In a January 17, 2008 report, Dr. Litsky opined that appellant would benefit from taking an employee vanpool as it would help her obtain more restorative sleep and make it easier for her to go back and forth to work. He "guessed" that the restriction could be considered medically necessary by definition. Dr. Litsky repeated this restriction on February 14, 2008 and stated that using an employee van would reduce appellant's walking distance.

Dr. Litsky did not provide a rationalized explanation for how the accepted lumbar strain required appellant to work a later morning shift. He did not provide restrictions that prevented her from utilizing other commuting options, such as driving or taking public transportation. Dr. Litsky stated that taking the employee vanpool would spare appellant's S1 joint and back injury but did not describe how this mode of transportation was necessary due to her lumbar strain.[13] He did not address why a specific mode of transportation would alleviate her employment-related condition. The Board notes that S1 joint dysfunction is not an accepted condition. Dr. Litsky appears to have based his listing of a later start time primarily on appellant's stated preference for working at 11:00 a.m.[14] He did not address the medical necessity for such a restriction in terms of the accepted lumbar strain. For this reason, Dr. Litsky did not provide adequate rationale establishing that the mid-morning shift was medically necessary due to residuals of the accepted condition.

In a March 13, 2008 report, Dr. Litsky opined that appellant's use of an employee van was not administrative decision, but a clinical decision. He referred to studies that showed that circadian rhythms and interruption could affect health and noted that a workers' compensation case in Canada had established this precedent. Dr. Litsky addressed to relate the shift restriction on terms of appellant's ability to use the van for her general health. He did not relate the restriction to her accepted lumbar strain or provide rationale as to why her employment injury would specifically preclude her from working an earlier schedule or otherwise use public transportation.[15]

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[12] *See C.G., supra* note 10.

[13] *See E.R.*, Docket No. 06-1175 (issued May 14, 2007) (where the Board denied appellant's claim that the nature and extent of her light-duty position was changed when the employing establishment moved her shift time, requiring her to commute in rush hour. The Board found that there was no medical evidence to show that appellant could not work the later shift due to residuals of her employment injury).

[14] The Board notes that appellant submitted additional medical evidence after the January 14, 2009 decision. Pursuant to 20 C.F.R. § 510.2(c), the Board is precluded from reviewing new evidence for the first time on appeal. However, appellant may submit a formal, written request for reconsideration under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

[15] *See Earl W. Foster*, Docket No. 97-1312 (issued March 24, 1999) (where the Board found that appellant did not meet her burden to demonstrate, by the submission of sufficient, rationalized medical evidence, that he was medically unable to begin work at 8:30 a.m. instead of 6:00 a.m. due to his accepted condition).

On June 12, 2008 Dr. Litsky reported appellant's claim that sleep was affecting her injury. He noted that shift work was not usually accepted as a causative agent in industrial injury. In a September 11, 2008 report, Dr. Litsky stated that he was being coached to address the necessity for appellant to work a later shift. He noted that workers' compensation law does not generally regard shift work changes as medically necessary, however, it might be in appellant's case if it is regarding stability and muscle strength. Dr. Litsky's opinion regarding her starting shift is speculative.[16]

Dr. Hall, a second opinion physician, found no significant positive findings on physical examination that precluded appellant from retiring to full-duty work. Appellant's examination was normal with limited presentation of pain. Dr. Hall opined that she had reached a fixed and stable condition with regard to her accepted lumbar strain. Although he noted appellant's complaint that she was forced to work at 5:00 a.m. instead of 11:30 a.m., he did not find that she was unable to work an earlier shift but that she could return to duty without restrictions contingent on the approval of her treating physician.

The Board finds that appellant did not establish that she experienced a change in the nature and extent of her light-duty position such that she was precluded from working due to her employment injury. Therefore, appellant is not entitled to wage-loss compensation from December 29, 2007 through February 2, 2008.

On appeal, appellant contends that the claims examiner did not sufficiently develop the issue of her work restrictions and that he did not request additional evidence from her treating physician. By letter dated February 29, 2008, the Office notified her of the medical evidence required to establish her claim for disability. Appellant retains the burden of proof to establish her claim.[17]

CONCLUSION

The Board finds that appellant did not establish a recurrence of total disability during the period December 29, 2007 through February 2, 2008 due to her employment injury.

[16] Medical opinions which are speculative or equivocal in character have little probative value. *See Linda I. Sprague*, 48 ECAB 386 (1997).

[17] *See Doris J. Wright*, 49 ECAB 230 (1997).

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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