

**United States Department of Labor
Employees' Compensation Appeals Board**

R.B., Appellant)	
)	
and)	Docket No. 09-2165
)	Issued: June 14, 2010
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 28, 2009 appellant filed a timely appeal from a June 29, 2009 decision of the Office of Workers' Compensation Programs denying her claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that she sustained a recurrence of disability from August 2 to 14, 2008 causally related to her accepted bilateral upper extremity condition.

On appeal, counsel asserts that the Office's June 29, 2009 decision is contrary to fact and law.

FACTUAL HISTORY

The Office accepted that on or before March 10, 2005 appellant, then a 43-year-old part-time flexible clerk working 40 hours a week, sustained bilateral ulnar nerve lesions and an aggravation of right medial epicondylitis due to repetitive upper extremity motion in the

performance of duty.¹ Following the claim, appellant worked part-time light duty for approximately 24 hours a week. She had intermittent work absences.

On September 9, 2005 appellant underwent a right cubital tunnel release and transposition of the right ulnar nerve. Her condition did not improve despite physical therapy, stellate ganglion nerve blocks and an implanted pain pump. Appellant remained off work.

Dr. Alan H. Wilde, a Board-certified orthopedic surgeon and second opinion physician, advised on July 17, 2006 that the accepted conditions had resolved and that appellant could return to full duty 24 hours a week. In an August 30, 2006 report, Dr. Hong Shen, an attending Board-certified physiatrist, agreed with Dr. Wilde, but on September 13, 2006 he restricted appellant's lifting to 25 pounds. The Office found a conflict of medical opinion between Dr. Shen and Dr. Wilde as to appellant's work capacity due to residuals of the accepted conditions. It selected Dr. Robert C. Corn, a Board-certified orthopedic surgeon, to resolve the conflict. In an October 30, 2006 report, Dr. Corn opined that the bilateral ulnar neuritis had not resolved. He found appellant capable of 20 hours of work a week at light duty, with lifting limited to 10 pounds and no climbing.

Beginning in March 2007, appellant returned to work for 20 hours a week performing miscellaneous light-duty work without a written job offer. The Office compensated her for the remaining four hours.² Appellant had intermittent work absences.

In an April 14, 2008 report, Dr. Harry Hoyen, an attending Board-certified orthopedic surgeon, noted that appellant had increased ulnar nerve symptoms, including "an episode at work where she had pain that radiated distally and proximally. It was severe. It lasted significantly for 24 hours. She had some ecchymosis."³

On June 11, 2008 the Office obtained a second opinion report from Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, who reviewed the medical record and examined appellant's upper extremities.⁴ Dr. Kaffen opined that appellant had residuals of the accepted bilateral ulnar nerve lesions. He found her able to work 40 hours a week at light duty, with no repetitive wrist or elbow movements, no pulling or pushing and lifting limited to five pounds.

As of July 18, 2008, appellant was assigned to sit and watch a monitor to alert management of automation equipment problems. She stopped work on August 2, 2008. In an

¹ The record indicates that appellant worked as a part-time flexible clerk, reporting to several duty stations for a total 40-hour workweek. As of March 10, 2005, she worked eight hours a day, five days a week.

² The Office computed compensation based on her actual earnings using the *Shadrick* formula. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.7(d).

³ In July 2, 2008 electromyography (EMG) and nerve conduction velocity (NCV) studies showed mild left carpal tunnel syndrome and mild to moderate left ulnar nerve entrapment.

⁴ The Office initially referred appellant for a second opinion examination by Dr. Karl V. Metz, a Board-certified orthopedic surgeon. Appellant reported for the scheduled May 2, 2008 appointment but stopped the examination. The Office issued a notice of proposed suspension on May 7, 2008.

undated slip received by the employing establishment on September 5, 2008, Dr. Hoyen stated that appellant required a “chair with arms for b[oth] UE [upper extremities].”

On September 12, 2008 appellant filed a claim for compensation for 36 hours of intermittent work absences from August 2 to 14, 2008. She attributed her disability to being transferred from Tour 1 to Tour 3, not being provided a chair with armrests, and cold temperatures at her workstation. The Office developed the claim as one for recurrence of disability.

In a September 18, 2008 letter, the Office advised appellant that Dr. Hoyen’s note was insufficient to establish that she sustained a recurrence of disability from August 2 to 14, 2008. It advised her to submit evidence supporting a change in the accepted medical conditions, a change in her light-duty job requirements or that she required a chair with armrests. Appellant did not respond.

By decision dated December 16, 2008, the Office denied appellant’s claim for a recurrence of disability from August 2 to 14, 2008.

In a December 20, 2008 letter, appellant requested an oral hearing, held on April 20, 2009. In a July 24, 2008 report, Dr. Hoyen opined that appellant required an ulnar nerve decompression at the left elbow. He stated that on September 4, 2008 appellant required a “chair with arms.” Dr. Hoyen opined that appellant had “very impressive findings on clinical examination,” with a positive Tinel’s sign radiating distally, affecting the middle finger. He reiterated this opinion on March 10, 2009.

At the hearing, counsel asserted that, prior to March 10, 2005, appellant worked 40 hours a week. After the injury, she was only able to work 20 hours. Appellant attributed her disability to sitting four hours a day in a hard chair without armrests, cold temperatures at her workstation and being moved from Tour 1 to Tour 3 on standby with nothing to do. She felt unproductive on Tour 1. Counsel contended that, in effect, the employing establishment withdrew her light-duty job and that the Tour 1 position was not within her medical restrictions. The hearing representative left the record open for 30 days to allow appellant to submit additional evidence but nothing was received.

By decision dated and finalized June 29, 2009, an Office hearing representative affirmed the December 16, 2008 decision, finding that appellant had not established that she sustained a recurrence of disability from August 2 to 14, 2008. The hearing representative found that appellant did not establish that she required a chair with armrests as of August 2, 2008, or that she was made to work outside her medical restrictions or that the accepted conditions worsened as of August 2, 2008. Although appellant was transferred from Tour 1 to Tour 3, she did not establish that the job requirements of sitting for four hours violated her work restrictions.

LEGAL PRECEDENT

The Office’s implementing regulations define a recurrence of disability as “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.”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 establishes that the employee 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 to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁶ An award of compensation may not be based on surmise, conjecture or speculation or on appellant’s unsupported belief of causal relation.⁷

ANALYSIS

The Office accepted that appellant sustained bilateral ulnar nerve lesions and an aggravation of right medial epicondylitis, necessitating a right cubital tunnel release and ulnar nerve transposition. Appellant was placed on light duty due to residuals of her accepted conditions. On September 20, 2008 she claimed wage loss for intermittent disability from August 2 to 14, 2008. Appellant attributed her disability for work to new work factors of sitting in a chair without armrests for four hours a day, cold temperatures at her workstation and being moved from Tour 1 to Tour 3. To meet her burden of proof, appellant must establish either a spontaneous change in the accepted upper extremity conditions or in her assigned light duties such that she could no longer perform her job requirements.⁸ She has the burden of providing rationalized medical evidence to establish causal relationship.⁹

Appellant attributed her condition to prolonged sitting at work in a chair with no armrests and to being exposed to cold temperatures. The exposure to these new work factors after appellant returned to light duty do not establish a spontaneous change in her accepted upper extremity conditions.¹⁰ On April 14, 2008 Dr. Hoyen, an attending Board-certified orthopedic surgeon, related that appellant experienced an episode of severe, radiating ulnar nerve pain at work. Although he did not specify the date of this episode, his opinion supports that new work factors may have caused or aggravated the accepted conditions. This evidence does not support a spontaneous recurrence of disability.

Appellant did not submit sufficient medical evidence to establish that her assigned duties had changed such that she was not medically able to perform them. She asserted that being reassigned from Tour 1 to Tour 3 aggravated her upper extremity conditions. Appellant contended that sitting at a table for four hours in a chair without armrests did not conform to her

⁵ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

⁶ *Carl C. Graci*, 50 ECAB 557 (1999); *Mary G. Allen*, 50 ECAB 103 (1998); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

⁷ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

⁸ *Carl G. Graci*, *supra* note 6.

⁹ *Ricky S. Storms*, 52 ECAB 349 (2001).

¹⁰ *Bryant F. Blackmon*, 56 ECAB 752 (2005).

medical restrictions. She did not submit adequate medical evidence to support that her assigned duties from August 2 to 14, 2008 exceeded her medical limitations. Dr. Hoyen stated generally that appellant should be provided a chair with arms. Appellant did not provide this information to the employing establishment until September 5, 2008. Dr. Hoyen's opinion did not address whether she required a chair with armrests from August 2 to 14, 2008, the period of disability claimed. His general recommendation of a chair with arms does not establish that appellant's assigned work location or tour exceeded her physical limitations.

On appeal, counsel contends that the denial of the claimed recurrence of disability is contrary to fact and law. As noted, appellant did not establish a change in the nature and extent of her accepted conditions or in her light-duty position she has not established that her disability for work from August 2 to 14, 1008 was due to her accepted conditions. For these reasons, the Office's denial of the claimed recurrence of disability was proper under the law and facts of the case.

CONCLUSION

The Board finds that appellant did not establish that she sustained a recurrence of disability from August 2 to 14, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 29, 2009 is affirmed.

Issued: June 14, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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