United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 09-1572**
	)	**Issued: March 16, 2010**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Fresno, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 3, 2009 appellant, through her attorney, filed a timely appeal of the May 1, 2009 merit decision of the Office of Workers' Compensation Programs, finding that she had not established partial disability beginning February 18, 2008. 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 is entitled to compensation for partial disability beginning February 18, 2008.

FACTUAL HISTORY

On November 19, 2007 appellant, then a 55-year-old tax technician, filed a claim alleging that she developed shoulder pain in the performance of duty. The Office accepted her claim for sprain of the right shoulder and upper arm.

On November 28, 2007 Dr. Roy Levin, a Board-certified internist, diagnosed an acute shoulder strain and released appellant to work full time with restrictions, including no use of the right arm, shoulder or hand. He stated that her condition resulted from her employment activities, which involved working on a computer. Dr. Levin recommended a course of physical therapy, which was approved by the Office. In work excuses dated December 5 and 14, 2007, he advised appellant to stay off work due to her accepted injury until January 31, 2008. Appellant stopped working on December 10, 2007.

On January 24, 2008 Dr. Levin advised that appellant was able to work five hours per day, provided that she be restricted from any use of her right arm, shoulder or hand. He stated that she was experiencing tenderness in her right shoulder due to her accepted injury. On February 8, 2008 Dr. Levin stated that appellant was able to work 7 hours per day (28 hours per week). On February 15, 2008 he altered her restrictions to working 5 hours per shift, with a maximum of 20 hours per week.[1] Dr. Levin noted appellant's complaint of increasing pain when she worked more than five hours per day. On examination, he found right shoulder tenderness interiorly. Appellant was able to abduct to 90 degrees.

On February 20, 2008 appellant accepted a light-duty job offer in accordance with Dr. Levin's proposed restrictions. She was to perform the duties of a tax examiner assistant; however, her tour of duty would not exceed 5 hours per day (20 hours per week) and she would not be required to use her right shoulder, arm or hand.

In a March 21, 2008 report, Dr. Ken Jung, a treating physician, diagnosed tendinitis of the right shoulder due to appellant's accepted condition. He opined that she was able to work no more than five hours per day, with no use of the right arm, shoulder or hand.

Appellant filed claims for compensation for the period February 16 through 29, 2008.[2] On March 27, 2008 Dr. Gregory Benbow, the employing establishment medical officer, stated that her then current position as a union steward essentially required her to go to meetings. He contended that appellant should be able to resume a full-time position, as her repetitive duties had been eliminated.

In letters dated April 9 and 11, 2008, the Office informed appellant that the medical evidence of record was insufficient to establish that she was unable to work more than 5 hours per day (20 hours per week), particularly in light of the employing establishment's assertion that she was not required to perform repetitive motions in her current position. Appellant was advised to obtain a physician's report explaining why she was unable to work on a full-time basis.

The record contains a January 4, 2008 report of a magnetic resonance imaging (MRI) scan of the right shoulder reflecting some mild tendinisis involving the anterior leading edge of the supraspinatus tendon, consistent with intratendinous degenerative changes.

[1] Dr. Levin reiterated his restrictions of 5-hour workdays (20-hour weeks) on March 21, 2008.

[2] Appellant subsequently filed claims for compensation for periods through May 17, 2008.

On April 14, 2008 the Office provided Dr. Levin with a position description for a union steward and asked him to explain why appellant was limited to working in that position 5 hours per day, with a maximum of 20 hours per week with restrictions. He was asked to provide objective findings to support his opinion.

In a narrative report dated April 28, 2008, Dr. Levin stated that a right shoulder surgery, which occurred two years prior to the filing of this claim, caused significant scarring in the muscle. Appellant's employment duties at that time included jerking and moving her shoulder rapidly for 10 hours per day. Dr. Levin opined that, due to the different densities of scar tissue and muscle tissue itself, micro tears occurred, which became diffused enough to cause significant pain. He stated, "This is of course a clinical judgment, as an MRI [scan] is not yet sophisticated enough to pick up these subtle findings." Dr. Levin diagnosed an acute strain, not from one incident, but from several months of small tears. He reported that appellant had continued to experience a great deal of pain, exacerbated by muscle spasm and stress, while doing her work, even with restrictions. Dr. Levin, therefore, took her off work for awhile. When appellant returned to work on January 24, 2008, she was unable to tolerate working more than five hours per day, as just moving around for more than that caused quite severe pain, which made it difficult for her to function. Dr. Levin opined that she was not able to work more than five hours a day without exacerbating extreme pain. He also stated that appellant needed rehabilitation and intense pain management.

The record also contains notes from Dr. Levin from November 28, 2007 through September 15, 2008 documenting appellant's continuing right shoulder pain.

By decision dated November 26, 2008, the Office denied appellant's claims for compensation commencing February 18, 2008 on the grounds that there were no objective findings to support partial disability. Moreover, no rationalized medical evidence explained why she was unable to work more than five hours per day or why she could not perform the duties of a union steward on a full-time basis.

On December 3, 2008 appellant, through her representative, requested a telephonic hearing. At the March 25, 2009 hearing, counsel contended that Dr. Levin's April 28, 2008 report substantiated her claim that she was unable to work more than five hours per day beginning February 18, 2008.

Appellant submitted copies of physical therapy notes, MRI scan reports and physician's notes previously received and considered by the Office. She also submitted reports from Dr. Levin and Dr. Jung reflecting the progression of her right shoulder condition.

By decision dated May 1, 2009, the Office hearing representative affirmed the November 26, 2008 decision. He found that appellant had failed to establish that she sustained a recurrence of disability as of February 18, 2008.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,[3] the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[4] Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.[5] For each period of disability claimed, a claimant has the burden of proving that she is disabled for work as a result of her employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provided by preponderance of the reliable, probative and substantial medical evidence.[6]

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[7]

ANALYSIS

The Office accepted appellant's claim for a sprain of the right shoulder and upper arm. Appellant filed claims for wage-loss compensation for partial disability beginning February 18, 2008 alleging that she was able to work only five hours per day. In its May 1, 2009 decision, the Office hearing representative affirmed the denial of her claim. The Board finds that the medical evidence of record is insufficient to establish that appellant was partially disabled during the period in question.

In support of her claim, appellant submitted numerous work excuses from her attending physician. On February 15, 2008 Dr. Levin opined that she could work 5 hours per day with restrictions, subject to a maximum of 20 hours per week. He related appellant's complaint of increasing pain when she worked more than five hours per day. Dr. Levin stated that she had right shoulder tenderness interiorly and that she was able to abduct to 90 degrees. However, he did not provide detailed examination findings; nor did he offer any medical rationale to support his opinion. Without such rationale, Dr. Levin's report is of limited probative value and is not sufficient to establish that appellant was unable to work more than five hours per day due to her

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.5(f).

[5] *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

[6] *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

[7] *Id.*

accepted employment injury.[8] Subsequent disability slips from Dr. Levin and Dr. Jung, which repeated her work limitations but did not contain medical rationale explaining why she was restricted to a five-hour workday, is also insufficient to establish her partial disability.

On April 28, 2008 Dr. Levin stated that, when appellant returned to work on January 24, 2008, she was unable to tolerate working more than five hours per day, as just moving around for more than that caused quite severe pain, which made it difficult for her to function. He opined that, due to the different densities of scar tissue and muscle tissue itself in her right shoulder, micro tears occurred, which became diffused enough to cause significant pain. Dr. Levin noted that his opinion was "a clinical judgment, as an MRI [scan] is not yet sophisticated enough to pick up these subtle findings." He diagnosed an acute strain, not from one incident, but from several months of small tears and reported that appellant had continued to experience a great deal of pain, exacerbated by muscle spasm and stress, while doing her work, even with restrictions. However, Dr. Levin did not provide any objective signs of disability or address appellant's inability to perform the specific functions of her light-duty position. He did not describe her duties as a tax examiner or as a union steward. Dr. Levin did not discuss why appellant was unable to perform duties related to these positions with only her left upper extremity. Rather, he merely speculated, without documentation of their existence, that micro tears in her muscle tissue over a period of months caused an acute shoulder strain. As noted, when a physician's statements regarding an employee's ability to work consist of a repetition of the employee's complaints that she hurts too much to work, without objective signs of disability, the physician has not presented a probative medical opinion on the issue of disability or a basis for payment of compensation.[9] Moreover, Dr. Levin did not explain how an acute shoulder strain could be caused by micro tears. Without the necessary physical findings and medical reasoning, this report is not sufficient to meet appellant's burden of proof in establishing that she was partially disabled due to her accepted employment injuries.

The Board finds that the medical evidence does not establish that appellant was unable to work more than 5 hours per day or 20 hours per week, due to her accepted employment injury. The Board will affirm the hearing representative's May 1, 2009 decision.

On appeal, counsel argues that the Office's decision was contrary to fact and law. For reasons stated herein, the Board finds his contentions to be without merit.

[8] *Id*.

[9] *Id.*

CONCLUSION

The Board finds that the medical evidence of record is not sufficient to establish that appellant was partially disabled due to her accepted employment injury beginning February 18, 2008.

ORDER

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

Issued: March 16, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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