United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 10-1209**
	)	**Issued: April 13, 2011**
DEPARTMENT OF VETERANS AFFAIRS, LOUIS STOKES MEDICAL CENTER, Brecksville, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 29, 2010 appellant filed a timely appeal from the September 29, 2009 merit decision of the Office of Workers' Compensation Programs, which reduced compensation for wage loss beginning January 26, 2009. Pursuant to the Federal Employees' Compensation Act[1] and 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 the Office properly reduced appellant's compensation for wage loss beginning January 26, 2009.

FACTUAL HISTORY

On August 4, 2008 appellant, a 46-year-old sleep lab technician, sustained a traumatic injury in the performance of duty while trying to transfer a patient from a bed to a wheelchair.

[1] 5 U.S.C. § 8101 *et seq.*

She stopped work that day. The Office accepted her claim for sprains of the neck, lumbar back, right shoulder and upper arm, right leg and knee, left hand (metacarpophalangeal), and for left third trigger finger. Appellant received continuation of pay through September 18, 2008 and compensation for temporary total disability thereafter on the daily rolls.

Appellant saw her orthopedic surgeon, Dr. Bruce T. Cohn, on January 21, 2009. Her left hand had improved but her back and neck were still painful. She felt she could go back to work with restrictions. Dr. Cohn examined her and released her to limited duty four hours a day, three days a week.

The employer offered a sedentary assignment within Dr. Cohn's restrictions at the same grade and step as her date-of-injury position. Appellant's tour was to begin at 8:00 p.m. on January 26, 2009. She went to the health unit at 1:21 p.m. that day and told the internist who saw her that she wished to return to work, but she felt incapable of doing so at that time because of pain. Appellant filed a Form CA-7 to claim compensation for temporary total disability.

Appellant saw Dr. Cohn on January 30, 2009. She advised that she was in a great deal of pain and was essentially no different than she was on the last examination. Appellant was adamant that she could not return to work "because the work simply served to aggravate her condition." Based on this, Dr. Cohn deferred her orthopedic examination. "[Appellant] seems to be getting somewhat aggravated."

Dr. Cohn saw appellant again on February 23, 2009. He examined her, diagnosed cervical and lumbar spine strain/sprain/spasm, and kept her off work for another month.

In a decision dated March 18, 2009, the Office found that appellant had not met her burden of proof to establish that she was partially disabled (12 hours a week) beginning January 26, 2009 as a result of her August 4, 2008 employment injury. It reduced her compensation for wage loss from 40 hours per week to 28 hours beginning January 26, 2009.

Dr. Manhal A. Ghanma, an orthopedic surgeon and Office referral physician, examined appellant, reviewed her history and medical record, and concluded that she no longer had findings or residuals consistent with the August 4, 2008 incident at work or the accepted medical conditions. He felt that her presentation was more consistent with abnormal illness behavior and symptom magnification than with any work injury. Dr. Ghanma found that appellant had no disability related to the accepted injury.

Dr. Cohn disagreed with Dr. Ghanma. He found that appellant continued to demonstrate findings consistent with cervical and lumbar strain. Dr. Cohn found that appellant was currently unable to work.

The Office found a conflict between Dr. Ghanma and Dr. Cohn and referred appellant, together with the medical record and a statement of accepted facts, to Dr. James H. Rutherford, a Board-certified orthopedic surgeon, for an impartial medical evaluation. Dr. Rutherford reviewed appellant's history and medical record and described his findings on physical examination. He found that appellant still had residual symptoms and clinical findings related to the accepted cervical and lumbar sprain/strains and the left third finger sprain/strain with evidence of trigger finger. Dr. Rutherford found that she no longer had residual symptoms

related to the right knee sprain/strain or right shoulder sprain/strain. He concluded that residuals of the August 4, 2008 employment injury prevented appellant from performing her date-of-injury duties as a sleep lab technician without limitation. Dr. Rutherford found, however, that she was capable of full-time sedentary activities, occasionally lifting 15 pounds and occasionally standing and walking.

In a decision dated September 29, 2009, an Office hearing representative affirmed the denial of compensation for total disability. The hearing representative found that the medical evidence failed to demonstrate total disability beginning January 26, 2009.

On appeal, appellant found it very difficult to understand how she was supposed to have been fully recovered and forced to rush back to work without being adequately treated. She emphasized that there was not enough time following her injury to receive therapy, see various doctors, and schedule and wait for appointments "for me to go from totally disabled to able to work as an asset to the job and not a liability!" Appellant notes that the medical evidence stated she was unable to return to regular duties. She submitted a substantial number of documents with highlights and comments.[2]

LEGAL PRECEDENT

Under the Act the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[3] Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5] 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.[6] A short-lived and unsuccessful attempt to return to duty, however, does not automatically discharge the Office's burden to justify termination of compensation.[7]

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall

[2] The Board has no jurisdiction to review documents that were not in the case record at the time the Office issued its September 29, 2009 decision. 20 C.F.R. § 501.2(c)(1).

[3] 5 U.S.C. § 8102(a).

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

[5] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

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

[7] *Janice F. Migut*, 50 ECAB 166 (1998) (where the employee returned to work for two days, the burden remained on the Office to justify terminating her benefits).

make an examination.[8] When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS

The Office accepted appellant's claim and paid compensation for temporary total disability on the daily rolls from September 19, 2008 through January 25, 2009. When prolonged disability is expected (over 90 days) compensation for wage loss should be paid on the periodic rolls.[10] If the Office abuses its discretion by retaining an employee on the daily rolls in the face of prolonged disability, it has the burden of proof to justify any termination or modification of compensation.[11]

The Office reduced appellant's compensation for wage loss effective January 26, 2009, after she had been disabled for nearly half a year. The Board therefore finds that the Office carried the burden of proof to justify the reduction.

The attending orthopedic surgeon, Dr. Cohn, released appellant to limited duty on January 21, 2009. He found, in effect, that she was no longer totally disabled for work. Indeed, appellant advised that she felt she could go back to work with restrictions. The employing establishment accommodated her with a modified assignment that complied with her work tolerances, one that would have resulted in no wage loss. When appellant decided that she hurt too much to return to work, she filed a claim for compensation for total disability beginning January 26, 2009. None of these circumstances shifted the burden of proof to appellant to reestablish her entitlement to compensation for total disability.

In *Fred Reese*,[12] the attending physician released the employee to return to work "under current restrictions." The employee returned to a modified position tailored to his restrictions but stopped work at the end of the day. He filed both a Form CA-7 claim for compensation and a Form CA-2a recurrence of disability claim. The Office placed the burden of proof on the employee to show that he was totally disabled from his light duty. The Board found, however, that the employee's short-lived return to work did not shift the burden of proof when the medical evidence did not establish that he could continue to perform light duty. All the medical evidence

[8] 5 U.S.C. § 8123(a).

[9] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.4 (March 2010); *see id*., *Disability Management*, Chapter 2.600.5.b (September 2010) (when the medical evidence indicates that the disability is expected to continue for more than 60 to 90 days, compensation should usually be paid on the periodic rolls).

[11] *E.B.*, Docket Nos. 09-1509, 09-1682 (issued May 4, 2010) (the Office retained the employee on the daily rolls for over a year).

[12] 56 ECAB 568 (2005).

indicated that he was either partially or totally disabled after the attempted return to work. There was no probative medical evidence that the employment-related condition had ceased or that the employee's inability to perform light duty was unrelated to the employment injury.[13]

Unlike the employee in *Reese*, appellant did not return to work, not even for a day.[14] She visited the employing establishment's health unit before her shift was to begin on January 26, 2009 and advised that she felt incapable of returning to work at that time because of pain. So she did not have even a short-lived return to work. Dr. Cohn kept her off work thereafter.

A conflict arose between Dr. Cohn and Dr. Ghanma, an orthopedic surgeon and Office referral physician, who found appellant had no disability related to the accepted injury. When such a conflict arises, the Act requires the Office to refer the claimant to an impartial medical specialist, or referee, to resolve the matter. The Office referred appellant to Dr. Rutherford, a Board-certified orthopedic surgeon, to resolve the conflict.

Dr. Rutherford concluded that appellant could not return to her date-of-injury position as a sleep lab technician due to injury-related residuals but that she could return to light duty. The light duty he described -- sedentary activities, occasionally lifting up to 15 pounds, occasional standing and walking -- was consistent with the modified assignment the employer made available on January 26, 2009. He was never asked to review the particular position description to determine its suitability.

This did not discharge the Office's burden of proof. Dr. Rutherford did not address the relevant issue, namely, whether appellant was able to return to the specific position made available to her on January 26, 2009.[15] His opinion, about six months after the fact, addressed only her current ability. The record does not make clear whether light duty within her restrictions was still available at that time. More to the point, the Office did not reduce appellant's compensation for wage loss as of the date of Dr. Rutherford's opinion. It reduced compensation effective January 26, 2009 and found, in the negative, that Dr. Rutherford's opinion failed to demonstrate total disability beginning January 26, 2009. The burden is on the Office to positively demonstrate by the weight of the evidence that appellant was only partially

[13] *See George J. Hoffman*, 41 ECAB 135 (1989) (where the attending physician released the employee to return to work by a certain date, the Board found that the Office carried the burden of proof and should have further developed the evidence by asking why the attending physician initially believed the employee could return to work and why he subsequently changed his mind).

[14] *See Carl C. Graci*, 50 ECAB 557 (1999) (where the employee returned to light duty for two hours and then filed a recurrence claim, the Board found that the Office improperly shifted the burden to the employee to establish total disability).

[15] *Id.* (where the impartial medical specialist concluded on July 16, 1997 that the employee could not return to the date-of-injury position but "is able to return to work in a sedentary position," the Board held that he did not resolve whether the employee was able to work the offered light duty as of May 9, 1997); *see Terry R. Hedman*, 38 ECAB 222 (1986) (when an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish a recurrence of total disability and show that she cannot perform such light duty).

disabled for work on January 26, 2009 and was able to perform the modified assignment made available to her at that time, thereby justifying the reduction of compensation for wage loss.

The Office's burden of proof requires rationalized medical opinion evidence based on a proper factual and medical background.[16] As the impartial medical specialist did not resolve whether appellant was able to return to the light duty available on January 26, 2009, the Board finds that the Office did not meet its burden of proof to reduce her compensation for wage loss at that time. The Board will therefore reverse the Office's September 29, 2009 decision.

To address appellant's contentions on appeal, the Board notes that although certain physicians, including Dr. Ghanma, felt that she had fully recovered from her August 8, 2008 employment injury, the Office did not deny compensation for total disability based on those medical opinions. Instead, because Dr. Ghanma's opinion created a conflict with Dr. Cohn's, the statute required the Office to ask an impartial medical specialist to resolve the dispute. No one was rushing her back to work, certainly not to her date-of-injury position or to work outside her established physical tolerances, and certainly not without adequate treatment for established residuals of the accepted injury. Appellant herself reported on January 21, 2009 that she felt she could go back to work with restrictions. Dr. Cohn released her with significant restrictions. When appellant then refused, that became the issue in her case: not whether she could return to her date-of-injury position as a sleep lab technician, but whether she was able to return to the modified assignment on January 26, 2009. Dr. Rutherford did not address that particular issue, so the Office did not meet its burden of proof to reduce her compensation for wage loss.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation for wage loss beginning January 26, 2009. The weight of the medical evidence did not establish that she could return to light duty at that time.

[16] *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 13, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board