United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket No. 10-968**
	)	**Issued: February 1, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case submitted on the record

DECISION AND ORDER

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

JURISDICTION

On February 23, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 1, 2010, which denied her claim for a recurrence of disability. 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 met her burden of proof to establish a recurrence of partial disability beginning May 5, 2009 causally related to her November 14, 2002 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[1] In a November 17, 2003 decision, the Board affirmed the Office's May 20 and July 9, 2003 decisions, which denied appellant's claim for occupational disease. It found that appellant did not establish that her condition was causally

[1] Docket No. 03-1880 (issued November 17, 2003).

related to factors of her federal employment.[2] The facts and history contained in the prior appeal are incorporated by reference. The facts germane to the present claim include that the Office accepted appellant's claim for a traumatic lumbosacral sprain/strain sustained on November 14, 2002.[3] The Office also accepted a herniated disc at L5-S1. Appellant returned to limited duty full time with a 20-pound lifting restriction.

In a February 5, 2009 report, Dr. Scott Massien, a Board-certified internist, noted that appellant had low back and right leg pain. He continued the 20-pound lifting restriction. On March 25, 2009 Dr. Massien advised that appellant reached maximum medical improvement. In an April 24, 2009 duty status report, he diagnosed lumbar disc herniation with myelopathy. Dr. Massien noted that appellant related that she was supposed to have two 1-hour breaks during the workday but she was not getting them. As a result, it exacerbated her lumbar discomfort. Dr. Massien continued the 20-pound lifting restriction and advised that appellant should have two 1-hour breaks during the day.

In a May 7, 2009 emergency room report, Dr. Sarah Klemencic, an emergency room physician, noted complaints of worsening back pain for two weeks. She examined appellant and diagnosed acute chronic back pain. Dr. Klemencic stated that an emergency condition had not been identified. Appellant was discharged to return home and follow up with her primary care physician.

On May 26, 2009 appellant accepted a modified-duty assignment as a flat sorter/mail handler working for six hours a day. The position included the actions of standing, walking, simple grasping and reaching above shoulder for no more than four hours per day; casing letters for no more than two hours per day, a one-hour break and a one-hour lunch.

In a June 1, 2009 work capacity evaluation, Dr. Massien diagnosed lumbar disc herniation and advised that appellant could perform limited-duty work for six hours a day. He noted the restrictions were permanent.

On June 12, 2009 the Office received a May 22, 2009 claim for compensation. Appellant requested compensation for a total of 27.41 hours of leave without pay from May 4 to 15, 2009. In an attached statement, she indicated that she was only working six hours a day under her new restrictions of April 24, 2009. The Office also received a Form CA-7 requesting compensation for a total of 30.64 hours of leave without pay from May 19 to June 5, 2009.

[2] Claim number xxxxxx396.

[3] This was developed in claim number xxxxxx422. Other claims were also doubled with this file including claim number xxxxxx218 in which the Office denied appellant's 2005 claim for a traumatic back injury. The Board affirmed this denial in a December 6, 2006 decision. Docket No. 06-1668.

In a letter dated June 19, 2009, the Office informed appellant of the evidence needed to support her claim.[4] It requested that she submit additional evidence within 30 days. Appellant submitted a claim requesting compensation for 50.12 hours of leave without pay from June 8 to July 14, 2009.

In a letter dated July 13, 2009, the Office again advised appellant of the additional evidence needed to support her claim. It explained that the current evidence was not sufficient to support how her current partial disability beginning on May 5, 2009 and continuing was connected to her accepted condition. Appellant was again advised that no further action would be taken regarding the aforementioned periods until a formal decision was rendered regarding her claim for a recurrence of partial disability beginning on May 5, 2009.

In a July 22, 2009 report, Dr. Massien responded to the Office's request for additional information, including why appellant was only working six hours per day. He last saw appellant on April 24, 2009. Dr. Massien noted her complaint of progressive pain in the low back and weakness in the legs. On examination, appellant had 4/5 strength in her legs, her Romberg was intact and she had straight leg raise "positivity." Dr. Massien recommended an electromyography scan for which he was awaiting approval. Due to appellant's progressive disease and lumbar herniation with myelopathy, sciatica and weakness, he recommended two 1-hour breaks per day. Dr. Massien explained that this would be "an eight[-]hour day with two 1[-]hour breaks incorporated in those days." In reports dated August 7, 2009, he noted that appellant worked six hours a day with two 1-hour breaks per day. Dr. Massien recommended a 10-pound lifting restriction.

By decision dated August 27, 2009, the Office denied appellant's claim for compensation beginning on May 5, 2009. In a September 2, 2009 decision, it denied her claim for compensation for 51.51 hours from August 3 to 29, 2009.

On September 5, 2009 appellant's representative requested a hearing, which was held on December 7, 2009.

In a September 15, 2009 report, Dr. Massien repeated that appellant was able to work for six hours a day with two 1-hour breaks per day. He recommended a 10-pound lifting restriction.[5]

[4] Additionally, the Office advised appellant that the evidence showed that she had worked full-time limited duty eight hours per day with a 20-pound lifting restriction until May 5, 2009 when she began working only six hours per day. It advised her that, if she stopped working full time (eight hours per day) due to a spontaneous worsening of her work-related conditions, her treating physician must fully explain the progressive worsening of her condition leading up to a partial disability. The Office also noted that the April 24, 2009 forms from her treating physician, Dr. Massien, were not sufficient to support partial disability beginning on May 5, 2009. Appellant was also advised that no further action would be taken regarding her Form CA-7's, requesting compensation for a total of 58.05 hours of leave without pay for the time periods May 4 to 15 and May 19 to June 5, 2009.

[5] The record also contains a September 23, 2009 report from Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon to whom appellant was referred by the Office to evaluate whether she had permanent impairment of a scheduled body member due to her accepted conditions. In noting his findings, Dr. Ghanma stated that appellant had no disabling injury residuals of her work injury but likely had preexisting degenerative disc disease.

On December 21, 2009 the Office received various documents pertaining to a grievance filed by appellant regarding the employing establishment. Appellant indicated that it failed to abide by her physician's restrictions.

In a February 1, 2010 decision, an Office hearing representative affirmed the September 2 and August 27, 2009 decisions finding that appellant had not established a recurrence of disability.

LEGAL PRECEDENT

Section 10.5(x) of the Office's regulations provide that 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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. The 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 (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[6]

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 substantive 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 light-duty job requirements.[7]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.[8] This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.[9] The physician's opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[10]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of

[6] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[7] *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[8] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[9] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[10] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.[11]

ANALYSIS

Appellant's claim was accepted for lumbosacral sprain/strain and a herniated disc at L5-S1. She subsequently alleged a recurrence of partial disability commencing May 5, 2009. On June 19 and July 13, 2009 the Office advised appellant of the medical and factual evidence needed to establish her claim for a recurrence of disability.

Appellant has not alleged a change in the nature and extent of her light-duty job requirements. The record indicates that she was provided full-time light duty consistent with her restrictions after her work injury but, beginning May 5, 2009, her physician limited her to working six hours daily within restrictions. Appellant must provide medical evidence to establish that she was disabled due to a worsening of her accepted work-related conditions.[12]

Appellant submitted reports from Dr. Massien in support of her claim; however, he did not relate any reduced hours to the accepted work-related conditions. On April 24, 2009 Dr. Massien diagnosed disc herniation with myelopathy and noted that she was supposed to have two 1-hour breaks during an eight-hour workday but she was not getting them. He explained that the absence of breaks was exacerbating appellant's lumbar discomfort. Dr. Massien continued the 20-pound lifting restriction and reiterated that she should have two-1 hour breaks during the day. The Board notes that he did not offer any opinion regarding how the accepted condition spontaneously worsened and resulted in two hours of disability daily, or the capacity to work six hours.[13] Dr. Massien provided a June 1, 2009 work capacity evaluation which contained a diagnosis and recommendation for limited-duty work for six hours a day. Again, he offered no opinion as to why the hours were reduced as a result of appellant's accepted work-related conditions. On July 22, 2009 Dr. Massien responded to the Office's request for additional information regarding why appellant was only able to work six hours per day. He generally noted appellant's complaints of progressive pain in the low back and weakness in the legs, which he attributed to her progressive disease and lumbar herniation with myelopathy, sciatica and weakness. Dr. Massien did not adequately explain why she was unable to work two hours daily beginning May 5, 2009 as a result of her November 14, 2002 employment injury. The Board notes that the Office has not accepted myelopathy or sciatica as being employment related. For those conditions not accepted as employment related, the need for medical rationale is particularly important to explain the reasons why her ability to work for six hours daily is due to the accepted conditions and not to other nonaccepted conditions. Dr. Massien's subsequent reports dated August 7 and September 15, 2009 did not address or offer any opinion as to why appellant was disabled due to her November 14, 2002 employment injury and they would be of limited probative value.

[11] *Walter D. Morehead*, 31 ECAB 188 (1986).

[12] *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman supra* note 7.

[13] *See J.F.*, 61 ECAB ___ (Docket No. 09-1061, issued November 17, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

No other medical reports of record support that appellant had work-related disability beginning May 5, 2009 causally related to her November 14, 2002 work injury.

Appellant has not met her burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty requirements, which would prohibit her from performing the light-duty position she assumed after she returned to work

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish a recurrence of disability beginning May 5, 2009 causally related to her November 14, 2002 work injury.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 2011
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