United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 10-1780**
	)	**Issued: May 11, 2011**
U.S. POSTAL SERVICE, LOGISTICS & DISTRIBUTION CENTER, Kearny, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 22, 2010 appellant, through her representative, filed a timely appeal from the February 3, 2010 merit decision of the Office of Workers' Compensation Programs, which denied compensation for claimed recurrences. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office's April 22, 2010 nonmerit decision denying reconsideration.

ISSUES

The issues are: (1) whether appellant's December 2004 employment injury caused disability for work beginning January 2, 2006; (2) whether appellant sustained a recurrence of her medical condition on January 15, 2008; (3) whether appellant sustained an intervening injury at Skip's Snack Bar (Skip's) on January 15, 2008, thereby breaking any chain of causation with

[1] 5 U.S.C. § 8101 *et seq.*

her federal employment; and (4) whether the Office properly denied appellant's February 22, 2010 request for reconsideration.

FACTUAL HISTORY

In 2007 appellant, a 37-year-old Casual A or temporary employee, filed a claim for compensation alleging that her cervical and thoracic spine condition was a result of very hard work getting the mail out every day.[2] She noted that, in December 2004, she was pitching heavy mailbags and packages around Christmas when she heard a loud pop around her right shoulder. The Office accepted appellant's claim for cervical spondylosis with myelopathy.

Appellant did not stop work. She was terminated from her regular duties effective December 31, 2005. Her supervisor explained that both she and her husband worked at the employing establishment and were not reappointed for a second term because of their repeated violation of the employing establishment policy on conduct. They had three warnings by different supervisors and were on their last chance.[3]

In September 2006, appellant began work at Skip's filling vending machines. On January 15, 2008 she was working at the snack bar pulling the order for the day: "I reached up to one of the shelves to get the potato chips and felt a lot of pain from my back, down my right arm and into my hand." Appellant did not notify Skip's of an injury.

On May 9, 2008 appellant claimed wage-loss compensation beginning January 2, 2006. On June 12, 2008 she claimed a recurrence of her accepted medical condition on January 18, 2008. Appellant marked the box "Medical Treatment Only."

A March 27, 2006 note from Dr. Steven M. Lomazow, a Board-certified neurologist and assistant professor of neurology at the Mount Sinai School of Medicine, stated that appellant was disabled indefinitely. On August 9, 2007 he discussed his examination of her in March 2006 and May 2007. Dr. Lomazow offered his opinion on causal relationship:

> "[Appellant] is suffering from severely symptomatic cervical spondylosis, which will require extensive surgical decompression of the cervical spine. Changes of this type in [her] of this age are usually secondary to physical activity, not unlike that which [she] has been doing in her job at the [employing establishment].
>
> "Within a reasonable degree of medical probability, [appellant's] job is directly contributory to the symptomatology [she] has at the present time. She is for all intent purposes completely disabled."

[2] A casual mail handler loads mail onto a machine and clears minor jams; loads/unloads trucks; empties containers of mail; opens/dumps sacks of mail; transports mail and empties equipment throughout the facility; hand stamps odd/over-sized mail; requires the ability to lift and carry up to 25 pounds on a continuous basis and up to 70 pounds on an intermittent basis.

[3] The supervisor indicated on appellant's claim form that she was last exposed to the employment factors alleged to have caused her condition on December 31, 2005.

On April 3, 2008 Dr. Lomazow completed an attending physician's form report indicating that appellant's injury-related neuropathy had rendered her totally disabled for work from December 1, 2004 to the present. He stated that her condition had not improved.

On December 12, 2008 the Office denied appellant's claim for compensation benefits. It found that the evidence failed to establish that her disability beginning January 2, 2006 was causally related to the December 2004 employment injury. The Office also found that the incident at Skip's was intervening.

On June 17, 2009 an Office hearing representative affirmed, finding that Dr. Lomazow's opinion had no probative value in establishing entitlement to compensation beginning January 2, 2006. She also found that the incident at Skip's was intervening and therefore did not establish a recurrence.

Appellant requested reconsideration and submitted additional medical evidence. On November 3, 2009 Dr. Lomazow stated that the incident at Skip's was a direct consequence of the spondylitic changes in her cervical spine. On November 17, 2009 he explained that the underlying condition was cervical spondylosis with myelopathy, which was a consequence of appellant's federal employment: "The exacerbation sustained most recently at the snack bar was superimposed upon the severe cervical spondylitic changes that were diagnosed by me in 2006. Once again, this was a direct result of her work at the U.S. Postal Service."

In a decision dated February 3, 2010, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. It found that her decision to work in a position that required physical activity such as the lifting and reaching she performed at Skip's was unreasonable in light of her knowledge of her condition therefore the incident at Skip's was not considered to be the normal progression of her medical condition.

On February 22, 2010 appellant's representative requested reconsideration. He argued that the Office's February 3, 2010 decision focused on the incident at Skip's in January 2008, which could not be an intervening event to the disability that began in January 2006. The representative stated that the incident at Skip's was a direct consequence of the accepted work injury, as Dr. Lomazow reported. He attached appellant's statement and a copy of relevant portions of her testimony to document what happened at Skip's.[4] The representative stated that the medical evidence was clear that she had a very severe injury before she ever went to Skip's and there was no change in her condition since Skip's. Rather, he argued, appellant was not able to handle the job at Skip's because of her underlying work injury.

In a decision dated April 22, 2010, the Office denied a merit review of appellant's case. It found that the February 22, 2010 request for reconsideration neither raised substantive legal

[4] Appellant stated that she did not believe she was significantly injured at Skip's. She stated that the pop in her right shoulder was not significant. Appellant stated that she stopped work at Skip's because it was going to lead to further injury. (She testified before the hearing representative that Skip noticed that she was slacking off and dropping things more than usual, so he sat her down and told her it was not going to workout). Appellant stated that the postal service let her go in January 2006 because she was injured. She added that Dr. Lomazow was of the opinion that she suffered, at most, a temporary exacerbation at the snack bar.

questions nor included new and relevant evidence and therefore was insufficient to warrant a merit review of the prior decision.

On appeal, appellant's representative argues that the Office's reliance on appellant's subsequent employment at Skip's makes no sense as to her initial disability in January 2006. He adds that the Office has not cited one medical report of record that states that appellant's job at Skip's made her condition worse. The representative argued that there was no valid reason to term the Skip's job an intervening event. He concludes that appellant's neck injury was from her federal employment and that her recurrences were from the original injury, not from her job at Skip's.

LEGAL PRECEDENT -- ISSUE 1

The Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[5] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[6]

A claimant seeking benefits under the Act has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[7] including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.[8]

It is not sufficient for the claimant to establish merely that she has disability for work. She must establish that her disability is causally related to the accepted employment injury. The claimant must submit a rationalized medical opinion that supports a causal connection between her current disabling condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the employment injury and must explain from a medical perspective how the current disabling condition is related to the injury.[9]

ANALYSIS -- ISSUE 1

Appellant claims wage-loss compensation beginning January 2, 2006. She therefore has the burden of establishing that the disability for which she claims compensation is causally related to her accepted employment injury.

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[5] 5 U.S.C. § 8102(a).

[6] 20 C.F.R. § 10.5(f).

[7] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[8] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[9] *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

The basic question raised by this claim is why appellant stopped working in January 2006. She stated in her most recent reconsideration request that the employing establishment let her go in January 2006 because she was injured. However, there is no evidence of this in the record. Instead, appellant's supervisor explained that both appellant and her husband were not reappointed because of their repeated violation of the employing establishment policy on conduct. Apparently, they had three warnings by different supervisors and were on their last chance.

The factual record paints a different picture of appellant's work stoppage in January 2006 than is reflected in her claim and supporting statements. The record shows that she was terminated from her temporary appointment effective December 31, 2005 and for reasons unrelated to the injury she sustained in December 2004.

Dr. Lomazow, the attending neurologist, did not demonstrate his understanding of this factual background. He found that appellant was totally and continuously disabled for work since December 1, 2004. However, appellant did not stop work following her December 2004 employment injury. She worked her reappointed assignment in 2005 without claiming compensation for any disability and she continued to work regular duty until she was terminated on December 31, 2005. Dr. Lomazow did not acknowledge these facts or attempt to reconcile them with appellant's claim that what happened in December 2004 caused her to become medically disabled for work beginning January 2, 2006. Medical conclusions based on inaccurate or incomplete histories are of little probative value.[10]

Dr. Lomazow found that appellant was totally disabled since December 1, 2004. Consistent with this, he found on March 27, 2006 that she was disabled indefinitely. On August 9, 2007 Dr. Lomazow found that appellant was for all intents and purposes completely disabled. He made general references to "physical activity, not unlike that which [she] has been doing in her job at the [employing establishment]"[11] and to "her work at the U.S. Postal Service." However, Dr. Lomazow never described what appellant did at the postal service. He did not demonstrate an understanding of the position she held or its physical demands such that he could intelligently determine that her cervical spondylosis with myelopathy precluded her from engaging in her former duties. Again, medical conclusions based on inaccurate or incomplete histories are of little probative value.

So while Dr. Lomazow supported appellant's disability for work, he did not support that her disability began on January 2, 2006 and he did not demonstrate that he based his opinion on a proper factual history. The Board finds that his opinion has little probative value on her claim for wage-loss compensation beginning January 2, 2006. The Board will therefore affirm the Office's February 3, 2010 merit decision denying modification of its prior decision to affirm the denial of compensation for disability.

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[10] *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions). *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete).

[11] Dr. Lomazow's use of the present perfect progressive tense indicates an incorrect understanding that appellant continues to work at the employing establishment or just recently stopped.

LEGAL PRECEDENT -- ISSUE 2

A "recurrence of medical condition" means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage.[12]

ANALYSIS -- ISSUE 2

Appellant claimed a recurrence of her medical condition on January 15, 2008 when, while working at Skip's, she reached up to one of the shelves to get potato chips. She stated that she felt a pinch in her right shoulder blade and pain down her right arm and into her hand. However, Dr. Lomazow had not released appellant from treatment for her accepted cervical condition and it does not appear that she needed medical treatment as a result of what happened that day. Appellant explained that she did not significantly injure herself. She did not notify the snack bar proprietor. Appellant did not seek prompt medical attention. She saw Dr. Lomazow over a month later, but he made no mention of the incident in his April 3, 2008 report. So there appears to be no basis for appellant's claim that she sustained a "recurrence of medical condition" on January 15, 2008. Continued treatment for the original condition is not considered a renewed need for medical care nor is examination without treatment.[13]

The Board will affirm the Office's February 3, 2010 decision insofar as it denied appellant's claim of a recurrence of her medical condition.

LEGAL PRECEDENT -- ISSUE 3

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause attributable to the employee's own intentional conduct.[14] Once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have produced by an independent nonindustrial cause and so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances. A different question is presented when the triggering activity is itself rash in light of the claimant's knowledge of her condition.[15]

ANALYSIS -- ISSUE 3

The evidence does not establish an intervening injury on January 15, 2008. The incident itself -- reaching up to a shelf to get potato chips -- was minor, as was the result of the incident.

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[12] 20 C.F.R. § 10.5(y).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.a (May 1997).

[14] *John R. Knox*, 42 ECAB 193 (1990); *Lee A. Holle*, 7 ECAB 448 (1955).

[15] *Knox, id*.

Appellant described it as merely a warning signal. The Board does not consider her action "rash" in light of her December 2004 injury. It must be noted that appellant did not stop work as a result of this injury, but continued to perform the regular duties of her position through 2005, when her employment was terminated. It must also be noted that she worked at Skip's for almost a year and a half before the January 15, 2008 incident and did so without apparent injury from the duties she performed.

The mere fact that the incident in question occurred outside appellant's former federal employment is not sufficient to break the chain of causation. The only medical evidence developed on this issue comes from Dr. Lomazow, who supports that the January 15, 2008 exacerbation was superimposed on and a direct consequence of the accepted spondylitic changes in appellant's cervical spine. In other words, he supports that the real operative factor behind appellant's symptomatic manifestation was the compensable injury. The Office has therefore failed to establish that the incident at Skip's was wholly responsible for her cervical condition after January 15, 2008.[16] This does not mean that appellant has met her burden to establish that the incident in any way worsened her underlying cervical condition or caused any disability for work, only that the Office has not established a legal or medical break in the chain of causation on January 15, 2008.

The Board will set aside the Office's February 3, 2010 decision on the issue of intervening cause.

LEGAL PRECEDENT -- ISSUE 4

The Office may review an award for or against payment of compensation at any time on its own motion or upon application.[17] The employee shall exercise this right through a request to the district Office.[18]

An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by the Office in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[19]

[16] *Charles R. Hollowell*, 8 ECAB 352 (1955); *Rudolph P. Wirth*, 8 ECAB 271 (1955); *see Carl Hueneberg*, 4 ECAB 630 (1952) (having accepted the medical condition, the Bureau -- now the Office -- must assume the consequence of the condition unless it can establish an intervening cause).

[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.605.

[19] *Id*. at § 10.606.

A request for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[20] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the request for reconsideration without reopening the case for a review on the merits.[21]

ANALYSIS -- ISSUE 4

Following the Office's February 3, 2010 merit decision, appellant timely requested reconsideration. The question therefore is whether her request meets at least one of the three standards for obtaining a merit review of her case.

Appellant's representative argued that the Office's February 3, 2010 decision focused on the incident at Skip's in January 2008, not on appellant's disability beginning January 2006. It was he who submitted two reports from Dr. Lomazow focusing on the incident at Skip's. The Office, quite naturally, focused its decision on that very matter. That it did so in response to the evidence appellant's representative submitted in no way establishes that the Office erroneously applied or interpreted a specific point of law.

It is true, as appellant's representative suggested, that the issue of intervening cause in January 2008 has no bearing on disability in January 2006. But the Office did not contend otherwise. It did not deny appellant's claim for disability beginning January 2006 because of what happened at Skip's in January 2008. This is a mischaracterization of the Office's February 3, 2010 decision and does not show that the Office erroneously applied or interpreted a specific point of law.

Appellant's representative advanced no relevant legal argument not previously considered by the Office with respect to disability beginning in January 2006 or with respect to the incident at Skip's in January 2008. The evidence he submitted -- a statement from appellant on what happened at Skip's, together with copies of her testimony before the Office hearing representative -- is both cumulative and repetitive and does not constitute relevant and pertinent new evidence not previously considered by the Office.

Because appellant's February 22, 2010 request for reconsideration did not meet at least one of the three standards for obtaining a merit review of her case, the Board finds that the Office properly denied that request. The Board will therefore affirm the Office's April 22, 2010 nonmerit decision.

Appellant's representative argues on appeal that the Office's February 3, 2010 "reliance" on appellant's employment at Skip's makes no sense as to disability in January 2006. The Board has addressed this matter and considers this a simple misunderstanding of the Office's decision. Indeed, as appellant's representative states, the Office has cited not one medical report to support

[20] *Id*. at § 10.607(a).

[21] *Id*. at § 10.608.

that appellant's job at Skip's made her condition worse. The same may be said of appellant, who has submitted medical evidence supporting only a symptomatic manifestation of the accepted cervical condition on January 15, 2008, not a material worsening of the condition. The Board agrees with appellant's representative that the record offers no valid basis for considering the January 15, 2008 incident at Skip's an intervening cause. While the Office has accepted that appellant sustained a neck injury in the performance of duty, the evidence does not establish that her disability for work beginning January 2006 was a result of that injury or that on January 15, 2008 she sustained a recurrence of medical condition, as that phrase is defined.

CONCLUSION

The Board finds that appellant has not met her burden to establish that her December 2004 employment injury caused disability for work beginning January 2, 2006 nor has she established a recurrence of medical condition on January 15, 2008. The Board further finds that the Office has failed to establish that the incident at Skip's on January 15, 2008 was an intervening cause. The Board also finds that the Office properly denied appellant's February 22, 2010 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed. The Office's February 3, 2010 decision is set aside on the issue of intervening cause and is otherwise affirmed.

Issued: May 11, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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