

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

N.D., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
Tampa, FL, Employer)

Docket No. 10-1813
Issued: May 18, 2011

Appearances:

Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2010 appellant, through her attorney, filed a timely appeal of a January 8, 2010 Office of Workers' Compensation Programs' merit decision denying compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she was disabled from August 26, 2008 through July 1, 2009.

On appeal counsel argued that the employing establishment did not provide appellant with light-duty work within her restrictions.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 14, 2008 appellant, then a 55-year-old medical support assistant, filed a traumatic injury claim alleging that she developed pain in her neck and back when moving a chair on February 4, 2008. Her position was described as sedentary work with reaching, bending, stretching, walking and carrying light loads of supplies. Appellant's initial work restrictions from the employing establishment clinic included no lifting, carrying or pulling over 10 pounds, no reaching over the shoulder and no repeated bending of the neck.

Appellant's attending physician, Dr. Geoffrey Cronen, a Board-certified orthopedic surgeon, released appellant to return to light-duty work on March 7, 2008 with no significant lifting, bending or twisting. In a form dated March 26, 2008, he advised that appellant could return to work without restrictions.

On April 2, 2008 the Office accepted appellant's claim for sprains of the neck and thoracic spine. Appellant filed a claim for compensation for the period March 18 through April 18, 2008 which the Office denied by decision dated June 24, 2008. She requested a review of the written record on June 30, 2008.

Appellant filed a claim for compensation on August 11, 2008 requesting wage-loss compensation from April 19, 2008. The Office requested additional factual and medical evidence, in a letter dated September 2, 2008.

Dr. Vipul V. Kabaria, a Board-certified neurosurgeon, examined appellant on August 11, 2008 and listed her work restrictions as no lifting over 10 pounds and no repetitive bending at the neck. On August 25, 2008 he performed a cervical epidural steroid injection. Dr. Kabaria examined appellant on September 2 and 15, 2008. He performed a second epidural steroid injection on September 8, 2008 and a third injection on September 29, 2008. Dr. Kabaria examined appellant on October 6, 2008. He completed a form report on that date providing findings and medical treatment.

Appellant testified at the oral hearing of October 7, 2008 and described her work duties as answering the telephone, without a headset, taking notes and messages, moving files, copying and carrying packages to the mailroom as well as looking up from behind her desk and reaching over her shoulder. The employing establishment responded on November 18, 2008 and stated that appellant was supplied with a headset, that she was not required to carry boxes to the mailroom or carry anything weighing over 10 pounds. Appellant's supervisor stated that she supplied a work release note for the period February 4 through 11, 2008 but did not provide any further documentation requesting sick leave on March 19, 2008. From February 11, 2008 appellant's work status was without pay as she did not provide information regarding her work status. Appellant's supervisor stated that after February 4, 2008 appellant failed to return to work or provide evidence of the need for accommodations.

By decision dated December 16, 2008, the Branch of Hearings and Review affirmed the Office's June 24, 2008 decision denying appellant's claim for compensation for the period March 18 through April 18, 2008.

By decision dated November 25, 2008, the Office denied appellant's claim for compensation for the period April 19 to August 25, 2008. Appellant requested a review of the written record on December 15, 2008.

Dr. Kabaria examined appellant on December 22, 2008 and February 4, 2009. He indicated on February 4, 2009 that appellant's work status was "not applicable."

Appellant testified at the oral hearing on April 9, 2009. By decision dated June 23, 2009, the Branch of Hearings and Review affirmed the Office's November 25, 2008 decision.

Appellant, through her representative, requested reconsideration of the December 16, 2008 decision on April 15, 2009. She submitted a report from Dr. Gary Levine, an osteopath and a Board-certified family practitioner, dated April 13, 2009. Dr. Levine opined that appellant was not experiencing cervicgia or cervical radiculitis prior to the February 4, 2008 employment injury. He stated that appellant's February 4, 2008 fall had aggravated the displacement of the cervical disc, but was the cause of cervical radiculitis and radicular symptomology of the upper extremity as well as cervicgia. Dr. Levine listed appellant's work restrictions as no lifting more than 10 pounds and no repetitive bending. By decision dated June 17, 2009, the Office denied modification of the December 16, 2008 decision.

Appellant filed a claim for compensation on April 24, 2009 requesting wage-loss compensation commencing August 26, 2008. In reports dated April 14 and May 11, 2009, Dr. Levine repeated his earlier findings and conclusions. In a report dated June 9, 2009, he also attributed appellant's current conditions to a June 4, 2004 injury. The Office denied this claim by decision dated July 1, 2009. Appellant requested an oral hearing on July 22, 2009.

Dr. Levine completed a report on July 7, 2009 making no new findings or diagnoses. He concluded that appellant was totally disabled and opined that her condition was due to June 4, 2004 and February 4, 2008 injuries.

Dr. Wayne L. Wittenberg, a Board-certified neurosurgeon and Office second opinion physician, completed a report on August 4, 2009. He noted that appellant's report of neck pain since 2004 when she fell at work and a reinjury in 2008. Dr. Wittenberg diagnosed cervical radiculopathy and suggested anterior cervical discectomy and fusion at C4-5.

On October 21, 2009 the Office accepted the additional conditions of herniated discs at C3-4, C4-5, C6-7 as well as cervical radiculitis as due to appellant's February 4, 2008 employment injury.

Appellant testified at the oral hearing on November 12, 2009. She stated that her condition worsened after the 2008 employment injury. Appellant stated that she attempted to return to work, but that the employing establishment did not provide her with a new limited-duty position. The employing establishment terminated her and she had not worked since March 20, 2008.

Appellant submitted a report from Dr. Wittenberg dated December 2, 2009. Since February 4, 2008, his restrictions would have included no lifting over 10 pounds, no repetitive use of either upper extremity and no repetitive bending or flexing of the neck.

Appellant's supervisor, Howard B. Cooley, submitted a statement of December 10, 2009, noting that appellant did not report to work from March 20 through June 24, 2008 and did not request leave. He stated that April 2 and June 11, 2008 letters directed appellant to report to work, but that she failed to do so or to provide acceptable medical documentation.

By decision dated January 8, 2010, an Office hearing representative found that in the absence of rationalized medical evidence establishing appellant's claim for disability August 26, 2008 through July 1, 2009, appellant had failed to meet her burden of proof.²

LEGAL PRECEDENT

An employee seeking benefits under the Act³ has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁵

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁶ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings 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 The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁸

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.⁹ Rationalized medical evidence is medical

² The hearing representative directed the Office to double the case with file number xxxxxx886 as the injuries were for a similar condition or the same part of the body.

³ 5 U.S.C. §§ 8101-8193.

⁴ *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

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

⁷ *Id.*

⁸ *Id.*

⁹ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

evidence which includes 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. The opinion of the physician 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 Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹¹

ANALYSIS

The Office accepted that appellant sustained an injury on February 4, 2008 while moving a chair resulting in sprains of the neck and thoracic spine as well as herniated discs at C3-4, C4-5, C6-7 with cervical radiculitis. Appellant's job requirement included sedentary work with reaching, bending, stretching, walking and carrying light loads of supplies. The employing establishment stated that she was provided with a telephone headset and that she was not required to carry more than 10 pounds. Appellant did not return to her position after her February 4, 2008 employment injury or provide the employer with work restrictions or requests for accommodations. She filed a claim for compensation requesting wage-loss compensation from August 26, 2008 through July 1, 2009.

Dr. Cronen indicated that appellant could return to light-duty work on March 7, 2008 with no significant lifting, bending or twisting. He stated that she could return to her date-of-injury position on March 26, 2008. These notes do not support appellant's total disability for work as Dr. Cronen found that she was capable of work beginning March 7, 2008 and could return to full duty on March 26, 2008. These reports do not support appellant's claim for total disability beginning August 26, 2008.

Dr. Kabaria examined appellant on August 11, 2008 and provided the work restrictions of no lifting over 10 pounds and no repetitive bending at the neck. This report does not support appellant's claim for total disability on or after August 26, 2008. Dr. Kabaria found that appellant was capable of performing work duties with restrictions. Furthermore, as this report predates appellant's alleged period of total disability it is not sufficient to meet appellant's burden to establish that she became totally disabled on August 26, 2008. Dr. Kabaria submitted a form report dated February 4, 2009 indicating that appellant's work status was "not applicable." This report does not provide a clear statement that appellant was totally disabled. The mere finding that work status is not applicable without further explanation and medical reasoning is not sufficient to establish a period of total disability or meet appellant's burden of proof.

Dr. Levine completed a report on April 13, 2009 listing appellant's work restrictions as no lifting more than 10 pounds and no repetitive bending, but listed the history of injury as a fall

¹⁰ *Leslie C. Moore*, 52 ECAB 132 (2000).

¹¹ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

on February 4, 2008. This report does not provide an accurate history of injury, establish any period of total disability or support appellant's claim for total disability on or after August 26, 2008. Dr. Levine advised that appellant was capable of returning to work in some capacity and provided work restrictions. Without a medical statement that appellant was totally disabled on or after August 26, 2008 based on an accurate history of injury and supportive reasoning attributing appellant's disability to her accepted employment injury, this report is not sufficient to meet appellant's burden of proof.

In a July 7, 2009 report, Dr. Levine determined that appellant was totally disabled due to June 4, 2004 and February 4, 2008 injuries. On August 6, 2009 he recommended surgery. Dr. Levine indicated that appellant was involved in a motor vehicle accident on February 4, 2008. These reports are based on an inaccurate history of injury as Dr. Levine described a motor vehicle accident rather than the accepted employment injury of moving a chair on February 4, 2008. Furthermore, Dr. Levine did not provide any detailed findings or medical reasoning to support of his conclusion that appellant was totally disabled on July 7, 2009.

On August 4, 2009 Dr. Wittenberg, the Office second opinion physician, noted appellant's report of neck pain since 2004 and her second neck injury in 2008. He diagnosed cervical radiculopathy and suggested anterior cervical discectomy and fusion at C4-5. On December 2, 2009 Dr. Wittenberg stated that appellant's restrictions beginning in February 2008 would have included no lifting over 10 pounds, no repetitive use of either upper extremity and no repetitive bending or flexing of the neck. While his reports are based on an accurate history of injury and included specific work restrictions, he did not find that she was totally disabled on or after August 26, 2008. Dr. Wittenberg did not explain how he reached his work restrictions or explain how appellant was prevented from returning to her date-of-injury position.

The Board finds that there is no reasoned medical opinion evidence supporting appellant's claim that she became totally disabled for work from August 26, 2008 and July 1, 2009. The Board notes that counsel's argument that the employing establishment failed to provide appellant with light-duty within her restrictions is not supported by the record. The employing establishment disputed appellant's claim that her date-of-injury position was beyond her work restrictions. It asserted that she failed to provide work restrictions or medical documentation to support her total disability or prevented her from performing her date-of-injury position. As appellant has failed to provide the necessary medical evidence to support her claim for compensation, the Board finds that the Office properly denied her claim.

CONCLUSION

Appellant has not provided sufficient medical opinion evidence to establish her disability for work for the period August 26, 2008 through July 1, 2009.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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