United States Department of Labor
Employees' Compensation Appeals Board

H.D., Appellant	)	
and	)	**Docket No. 11-358**
	)	**Issued: September 27, 2011**
U.S. POSTAL SERVICE, BAY VALLEY PERFORMANCE CLUSTER, Oakland, CA, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 23, 2010 appellant filed a timely appeal from the May 27, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for a period of total disability. Pursuant to the Federal Employees' Compensation Act (FECA)[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 appellant met her burden of proof to establish that she had total disability beginning April 2, 2009 due to her work-related right shoulder injury.

FACTUAL HISTORY

On November 17, 2008 appellant, then a 36-year-old modified city carrier, filed an occupational disease claim alleging that she sustained a right shoulder injury due to her repetitive

[1] 5 U.S.C. §§ 8101-8193.

work duties. OWCP accepted that appellant sustained impingement syndrome of her right shoulder.

Appellant did not stop work but began working in a light-duty position for six hours per day. The job restricted her to casing mail with her left hand. Appellant was restricted from repetitive reaching with her right hand at or above mid chest level and could not lift more than 10 pounds on an intermittent basis. She was allowed to rest her right arm for 2 to 3 minutes every 20 to 30 minutes and she engaged in express mail delivery for up to one hour per day with her right hand. This modified work was based on restrictions recommended by Dr. Jerald Gerst, an attending Board-certified internist.

On December 9, 2008 Dr. Gerst indicated that on examination, November 13, 2008, appellant exhibited tenderness of the supraspinatus tendon, just proximal to the acromion process, and tenderness over the distal infraspinatus tendon and in the subacromial area. There was markedly decreased range of motion of the right shoulder, with forward flexion limited to 110 degrees and abduction limited to 135 degrees. Impingement testing of the right shoulder was positive. Dr. Gerst indicated that when appellant was seen on November 25, 2008 there was somewhat less tenderness of the right shoulder as well as freer range of motion. Impingement testing was only very slightly positive at that time.

Magnetic resonance imaging (MRI) scan testing obtained on January 27, 2009 showed findings consistent with impingement syndrome of the right shoulder (including a Type II acromion process) and moderate overall supraspinatus tendinosis with focal bursal surface partial tearing (50 percent of tendon). On February 5, 2009 Dr. Gerst indicated that there was no significant change in his examination of appellant's right shoulder condition. He diagnosed right shoulder impingement syndrome.

In a March 31, 2009 report, Dr. Gerst stated that on examination appellant exhibited tenderness of her right shoulder. Right shoulder flexion was to about 145 to 150 degrees and abduction was to about 125 to 130 degrees with discomfort on the last 20 degrees of shoulder motion. Dr. Gerst diagnosed right shoulder impingement syndrome and partial thickness right rotator cuff tear. He indicated that he was taking appellant off work and stated that he was hoping that, with the combination of corticosteroid injection and rest, right shoulder surgery could be avoided.[2] Dr. Gerst posited that, if she could not get reasonable relief and could not resume her home exercise program, the possibility of surgery would have to be considered. He indicated that appellant should take off work until the next appointment on April 10, 2009.

Appellant filed claims alleging that she had total disability beginning April 2, 2009 due to her work-related right shoulder injury.

In an April 27, 2009 report, Dr. Gerst stated that appellant had been on modified work status for some time, but noted that her right shoulder symptoms did not resolve. Diagnostic testing from January 2009 demonstrated a Type II acromion process (a downsloping acromion) and a 50 percent fraying or tearing of the supraspinatus tendon. Dr. Gerst noted that by the time

[2] On March 23, 2009 Dr. Robert Malstrom, an attending Board-certified orthopedic surgeon, performed a corticosteroid injection of appellant's right subcromial space and returned her to modified-duty employment.

of appellant's March 23, 2009 visit to Dr. Malstrom she had not experienced much improvement. He stated that, in order to maximize the potential benefit from Dr. Malstrom's corticosteroid injection, appellant was taken off work. Dr. Gerst noted that appellant had been on vacation for about a month, from mid-February to mid-March 2009, and had improved significantly in that interval. He diagnosed right shoulder impingement syndrome, secondary to rotator cuff tendinitis, with a 50 percent partial thickness tear of the supraspinatus tendon and stated:

> "Although I did consider sending [appellant] back to modified work I felt that our best chance of avoiding surgery depended upon a combination of cautious resumption of rotator cuff strengthening and continued avoidance of repetitive use of the right upper extremity. [Appellant] is at something of a mechanical disadvantage, with the Type II acromion, and I felt that she needed the extra advantage that being off work provided. It is my intention to return her to modified work status at her next visit with me, which is on May 18, 2009."

In a May 7, 2009 decision, OWCP denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained total disability beginning April 2, 2009 due to her work-related right shoulder injury. It indicated that Dr. Gerst took appellant off work due to a fear of future injury, but that this was not a valid reason to find total disability.

In a July 1, 2009 statement, appellant requested reconsideration of her claim and noted, "My doctor stated that if I did return to work, even with modified tasks, a full tear is possible which would result in surgery."

In a May 18, 2009 report, Dr. Gerst indicated that he was keeping appellant off work from May 18 to June 15, 2009. He indicated that she was still exhibiting signs of right rotator cuff impingement and stated, "I feel that she is vulnerable to recurrence of her problem, with possible extension of a partial-thickness rotator cuff tear to a full-thickness tear, if a return to modified work is attempted at this point."

In a May 26, 2009 report, Dr. Gerst indicated that he was explaining why he had kept appellant off work since April 2009. He stated:

> "We are actually trying to avoid two rather different surgeries. The simpler surgery would be a subacromial decompression, and, while what I said certainly applies to that surgery, I would have been much more inclined to return her to work sooner if that were all that was at risk. However, the much greater risk is that we would extend her partial thickness rotator cuff tear to a full-thickness tear, necessitating a repair and a much longer post-operative recuperative period (of probably six to eight months, possibly up to a year), and a compromised recovery. In my experience, and that of every orthopedist I know, full-thickness tears, with repairs, are never quite the same, no matter how skillful the surgeon.
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> "I was, quite frankly, unpleasantly surprised that she had a full-thickness tear on MRI [scan]. I did not suspect this clinically, and I usually have a reasonably good suspicion of this degree of damage. Therefore, I was significantly more inclined

to be more protective, in order to prevent this complication, which would have been far more expensive, in terms of both actual medical treatment and lost time postoperatively, and would have, with a high degree of certainty, left her with a substantially lesser functional outcome.

"It is my intention to bring her back to work gradually and cautiously; backing off if her symptoms should flare, and requesting repeat orthopedic evaluation in this eventuality."

In a September 2, 2009 decision, OWCP affirmed its May 7, 2009 denial of appellant's disability claim.

In an October 9, 2009 report, Dr. Gerst stated that it appeared that the denial of appellant's claim was based upon the presumption that he kept her off work solely because of his concern that a full-thickness tear could develop from her partial-thickness tear. He indicated that he felt that it was likely that the partial thickness tear had developed while she was on modified duty. The existence of the tear, as demonstrated by the January 27, 2009 MRI scan of the right shoulder, implied that while appellant was working modified duty since November 13, 2008 she was progressively grinding her way through her rotator cuff. Dr. Gerst stated that appellant was progressively symptomatic from November 13, 2008 until she left for about a month's vacation from mid February to mid March 2009. Shortly after her return, appellant was seen by Dr. Malstrom and was given a corticosteroid injection which really did not produce much relief. Dr. Gerst further stated:

"She only worked a few days in March, after her return from vacation, before I took her off work. During those few days, she was getting worse. I had, I feel, both at the time and in retrospect, solid, objective evidence that her symptoms represented a progressive, gradual tearing (actually a grinding-through) of the rotator cuff by her Type II (downsloping) acromion process, even with modified work, with marked restriction of the use of the right upper extremity. This is not speculation or fear, it is prudent extrapolation. I felt, both at the time and in retrospect, that the only course of action that stood any chance of avoiding a full-thickness tear was to halt the process that was causing it and to allow her to focus on strengthening the rotator cuff muscles, and their tendons, with exercise, so that she could return to modified work (and, it is to be hoped, eventually regular work)."

In a May 27, 2010 decision, OWCP affirmed its September 2, 2009 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally

related to the employment injury.[3] The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable 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.[4] It is well established that the possibility of future injury constitutes no basis for the payment of compensation.[5]

ANALYSIS

In the present case, OWCP accepted that appellant sustained impingement syndrome of her right shoulder. Starting in November 2008, appellant began working in a light-duty position for six hours per day. The modified work was based on restrictions recommended by Dr. Gerst, an attending Board-certified internist.[6] Appellant worked at modified duty until mid February when she was off work for approximately a month for vacation. She then returned to modified duty until March 31, 2009. Appellant filed claims alleging that she had total disability beginning April 2, 2009 due to her work-related right shoulder injury.

In several reports dated between March and October 2009, Dr. Gerst posited that appellant should be kept off work beginning in April 2009. In a March 31, 2009 report, Dr. Gerst stated that on examination appellant exhibited tenderness of her right shoulder. Right shoulder flexion was to about 145 to 150 degrees and abduction was to about 125 to 130 degrees with discomfort on the last 20 degrees of shoulder motion. Dr. Gerst diagnosed right shoulder impingement syndrome and partial thickness right rotator cuff tear.[7] He indicated that he was taking appellant off work and stated that he was hoping that, with the combination of a March 2009 corticosteroid injection and rest, right shoulder surgery could be avoided. In his later reports, Dr. Gerst reported similar examination findings and repeated his assertion that he was keeping appellant off work to avoid a progression of her right rotator cuff tear and a possible need for surgery to repair a full-thickness right rotator tear at a later date.

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

[4] *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

[5] *Gaeten F. Valenza*, 39 ECAB 1349, 1356 (1988).

[6] The job restricted appellant to casing mail with her left hand. She was restricted from repetitive reaching with her right hand at or above mid chest level and could not lift more than 10 pounds on an intermittent basis. Appellant was allowed to rest her right arm for 2 to 3 minutes every 20 to 30 minutes and she engaged in express mail delivery for up to one hour per day with her right hand.

[7] MRI scan testing obtained on January 27, 2009 showed findings consistent with impingement syndrome of the right shoulder (including a Type II acromion process) and moderate overall supraspinatus tendinosis with focal bursal surface partial tearing (50 percent of tendon).

The Board finds that these reports are of limited probative value to support work-related total disability beginning April 2, 2009. It is well established that the possibility of future injury constitutes no basis for the payment of compensation.[8] It appears that Dr. Gerst kept appellant off work to avoid a worsening of her right rotator cuff tear in the future. Dr. Gerst did not provide a rationalized medical opinion addressing how appellant's claimed total disability was due to the accepted work injury, impingement syndrome of the right shoulder. He did not explain how this condition had worsened to the point that appellant could no longer perform her limited-duty position. Dr. Gerst noted that she performed modified duty under his limitations from November 2008 and noted no significant change to her shoulder on February 5, 2009. Thereafter, appellant was away from work on vacation until mid March. Dr. Gerst did not record any history of appellant or her activities while away from work.

In an October 9, 2009 report, Dr. Gerst indicated that avoiding surgery was not the only reason he kept appellant off work since April 2009. Rather, he indicated that her right shoulder condition had deteriorated as evidenced by a partial right rotator cuff tear which was observed on diagnostic testing in January 2009. Dr. Gerst posited that this tear occurred while appellant was performing modified work since November 2008. The Board notes, however, that OWCP did not accept that she sustained a work-related right rotator cuff tear. Moreover, Dr. Gerst has not provided a sufficiently rationalized medical opinion explaining the specific work factors which caused or contribute to such a condition, or eliminated any intervening activities while appellant was on vacation as causative. Such rationale is necessary as she had been performing limited duties with her right arm since November 2008.

For these reasons, appellant has not established that she sustained total disability beginning April 2, 2009 due to her work-related right shoulder injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained total disability beginning April 2, 2009 due to her work-related right shoulder injury.

[8] *See supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 27, 2011
Washington, DC

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

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

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