United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 13-624**
	)	**Issued: June 26, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Reno, NV, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 10, 2013 appellant, through her attorney, filed a timely appeal from a November 6, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of total disability commencing October 11, 2011 causally related to an April 7, 2011 employment injury.

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the November 6, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On April 7, 2011 appellant, then a 56-year-old purchasing agent, sustained injury when she tripped over a telephone cord and fell on her face in the performance of duty. On May 2, 2011 OWCP accepted the claim for nasal bone fracture, contusion of right elbow and forearm, lumbar sprain, displacement of lumbar intervertebral disc without myelopathy and aggravation of degenerative disc disease, lumbar spine.

OWCP referred appellant to a second opinion evaluation by Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon. In a September 20, 2011 report, Dr. Swartz reviewed appellant's medical history, a statement of accepted facts and conducted a physical examination. He noted that the injury was five months old and she had not reached maximum medical improvement. Dr. Swartz opined that appellant was capable of light-duty work for four hours a day until January 1, 2012 with the following restrictions: standing, twisting, bending and stooping no more than one hour a day; pushing, pulling and lifting no more than 10 pounds for one to two hours a day.

On October 11, 2011 appellant accepted an offer of part-time limited duty effective that day. It provided following restrictions: standing, bending, stooping and twisting no more than one hour a day; pushing, pulling and lifting no more than 10 pounds for one to two hours a day. Appellant was scheduled to work four hours a day from 12:30 p.m. to 4:30 p.m.

On November 21, 2011 appellant, through her attorney, filed a notice of recurrence commencing October 11, 2011. She noted obtaining medical treatment on October 21, 2011. Appellant indicated that reaching, typing and answering the telephone in her limited-duty position caused intolerable pain in her back, right shoulder and right arm. She stated that she had worked four hours a day in a limited-duty capacity for the period October 11 to 21, 2011.

Appellant submitted reports dated October 24 through November 9, 2011 from Dr. Jay K. Morgan, a Board-certified neurosurgeon, who indicated that she injured her back and right shoulder on April 7, 2011. Dr. Morgan took her off work on November 9, 2011 and indicated that she would need to be off of work until a myelopathic workup was completed.

A November 8, 2011 magnetic resonance imaging (MRI) scan of the cervical spine revealed multilevel degenerative disc disease with multilevel foraminal stenosis.

By letter dated December 30, 2011, OWCP notified appellant of the deficiencies of her claim and requested a comprehensive medical report from a treating physician, which addresses her work restrictions and disability for work. It allotted 30 days for her to submit additional evidence and respond to its inquiries.

By decision dated March 8, 2012, OWCP denied appellant's recurrence claim on the basis that the medical evidence submitted was not sufficient to establish that she sustained disability commencing October 11, 2011 due to her accepted injury.

On March 16, 2012 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative. She submitted an August 17, 2011 report from Dr. Morgan, who indicated that she fell and sustained injury at work on April 11, 2011. Dr. Morgan diagnosed

low back pain and bilateral radiculopathy and opined that appellant should be off work for approximately six weeks while she underwent physical therapy. On September 30, 2011 he noted upper thoracic pain that radiated around her anterior chest wall where she was having spasms. Dr. Morgan took appellant off work for approximately four weeks. He stated that she was required to do heavy lifting, bending and twisting at work, which was painful for her. On December 27, 2011 Dr. Morgan reiterated that appellant was injured due to a fall at work and unable to do any bending or twisting since that time. Appellant had physical therapy and her pain was manageable on medication, but she could not do any bending or twisting. Dr. Morgan opined that she was capable of working two to four hours a day, but would need frequent breaks throughout the week secondary to pain. He specified the following restrictions: no sitting greater than one hour; no lifting greater than 15 pounds repetitively; and no walking greater than 30 minutes continuously with frequent rest.

In reports dated to January 27 through April 11, 2012, Dr. Kenneth W. Pitman, a Board-certified anesthesiologist, diagnosed chronic neck pain, chronic back pain, lumbar radiculopathy, cervical radiculopathy, cervical degenerative disc disease, cervical spinal stenosis and myofascial pain. Appellant also submitted August 23, 2011 physical therapy notes and reports from Christine Canner Peterson, a nurse practitioner, dated August 17 and November 1, 2011.

An October 14, 2011 MRI scan of the thoracic spine showed degenerative disc disease at T6-7 through T9-10 and at T12-L1. A chest x-ray dated November 7, 2011 revealed no acute pulmonary process.

A telephonic hearing was held before an OWCP hearing representative on June 15, 2012. Appellant provided testimony and OWCP's hearing representative held the case open for 30 days for the submission of additional evidence.

Appellant submitted reports dated May 9 through July 12, 2012 from Dr. Pitman diagnosing rotator cuff tendinitis. Additional physical therapy notes dated April 9, 2012 were also received.

By decision dated September 10, 2012, OWCP's hearing representative affirmed the March 8, 2012 decision finding the medical evidence submitted was not sufficient to establish that appellant sustained a recurrence of disability commencing October 11, 2011 due to a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of her employment-related condition.

On September 27, 2012 appellant, through her attorney, requested reconsideration. She submitted reports dated August 30, 2011 through January 27, 2012 from Dr. Pitman reiterating his diagnoses and documenting his administration of steroid injections.

By decision dated November 6, 2012, OWCP denied modification of the September 10, 2012 decision finding that the medical evidence submitted was insufficient to establish that appellant sustained a recurrence of disability due to a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the employment-related condition.

LEGAL PRECEDENT

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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[3] This 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.[4]

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[5]

ANALYSIS

OWCP accepted appellant's claim for nasal bone fracture, contusions of the right elbow and forearm, lumbar sprain, displacement of a lumbar intervertebral disc without myelopathy and aggravation of degenerative disc disease, lumbar spine. Appellant returned to work following the acceptance of the employment injury in a part-time limited-duty capacity. The issue on appeal is whether she has established a recurrence of total disability commencing October 11, 2011 causally related to the accepted employment injury. Appellant has the burden of proof to establish a change in the nature and extent of her injury-related condition or a change in the nature and extent of her limited-duty job requirements.

On September 20, 2011 Dr. Swartz opined that appellant was capable of light-duty work for four hours a day until January 1, 2012. He set the following work restrictions: standing, twisting, bending and stooping no more than one hour a day; pushing, pulling and lifting no more than 10 pounds for one to two hours a day. Thereafter, appellant accepted an offer of part-time limited duty effective October 11, 2011 with the following restrictions: standing, bending, stooping and twisting no more than one hour per day; pushing, pulling and lifting no more than 10 pounds for one to two hours a day.

[3] 20 C.F.R. § 10.5(x). *See T.S.*, Docket No. 09-1256 (issued April 15, 2010).

[4] *Id.*

[5] *See A.M.*, Docket No. 09-1895 (issued April 23, 2010). *See also Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

On November 21, 2011 appellant claimed a recurrence of disability on the basis that reaching, typing and answering the telephone in her limited-duty position caused intolerable pain in her back, right shoulder and right arm. A September 30, 2011 report from Dr. Morgan stated that she was required to do heavy lifting, bending and twisting at work. On December 27, 2011 Dr. Morgan noted that appellant was injured due to a fall at work and opined that she was unable to do any bending or twisting since that time. He noted that she had undergone physical therapy and that her pain was manageable on medication, but she could not do any bending or twisting. Dr. Morgan also noted that frequent breaks were necessitated due to appellant's two- to four-hour-a-day workweek.

The Board finds a conflict in medical opinion. OWCP's second opinion physician, Dr. Swartz, found that appellant was capable of part-time light duty four hours a day until January 1, 2012. He set restrictions on bending and twisting no more than one hour a day. Appellant's attending physician, Dr. Morgan, found that appellant was not capable of work as of October 24, 2011. He kept her off work and precluded any bending or twisting. The issue of whether appellant sustained a recurrence of disability as a result of a change in the nature and extent of her injury-related condition is unresolved. Under section 8123(a) of FECA, she should be referred, together with the medical record and a statement of accepted facts, to an impartial medical specialist.[6] After this and such other development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

[6] *See D.P.*, Docket NO. 10-121 (issued July 23, 2010).

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: June 26, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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