United States Department of Labor
Employees' Compensation Appeals Board

THOMAS A. ANTICO, Appellant	)	
	)	**Docket No. 04-23**
and	)	**Issued: April 13, 2004**
DEPARTMENT OF THE TREASURY, BUREAU OF MINT, Philadelphia, PA, Employer	)	

Appearances
Jeffrey P. Zeelander, Esq., for the appellant,
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 30, 2003 appellant, through counsel, filed a timely appeal from the Office of Workers' Compensation Programs' September 11, 2003 merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability effective January 5, 2002 causally related to a June 11, 2001 employment injury; and (2) whether the Office properly denied appellant's request for subpoenas. On appeal appellant's counsel asserts that the recurrence of disability claim should be approved because his modified-duty position was no longer available effective January 5, 2002.

FACTUAL HISTORY

On June 13, 2001 appellant, then a 47-year-old seasonal coin press operator filed a traumatic injury claim alleging that on June 11, 2001 he tripped and fell while in the performance of duty. On July 31, 2001 the Office accepted the claim for sprain and strain of the

neck, lumbar region, shoulder and knee.[1] He stopped work and returned on June 12, 2001. On June 23, 2001 appellant was released from work as a seasonal employee for an annual shutdown and returned to limited duty on July 9, 2001.

Dr. Steven Valentino, an osteopath treated appellant for the June 11, 2001 injury. In a June 11, 2001 duty-status report, he was found capable of full-time limited-duty work, but restricted to lifting no more than 10 pounds, carrying no more than 20 pounds, sitting, standing or walking for no more than 6 hours a day. The record contains numerous physical therapy notes and medical reports including one from Dr. Valentino dated June 13, 2001, which described the June 11, 2001 work injury and diagnosed cervical and lumbar facet strains and a history of strain and contusion of the right upper and lower extremity. He released appellant to full, sedentary work at that time. In medical reports commencing June 18, 2001, Dr. Valentino continued appellant on full-time work in a sedentary position, except for periods of disability due to treatment of his continuing symptoms of radiating neck pain.[2]

On December 13, 2001 appellant filed a notice of recurrence of disability alleging that the employing establishment would no longer have limited duty for him effective January 5, 2002.[3] He also submitted a CA-7 claim for compensation for wage loss beginning January 5, 2002.

In a letter dated January 8, 2002, the employing establishment advised that appellant was an on-call employee and had been released from work after January 4, 2002 due to the lack of work and budgetary constraints. In a letter dated February 8, 2002, the employing establishment addressed appellant's job duties; noting that he worked in the die manufacturing division in a light-duty capacity, assisted material expeditors in their duties and performed clerical duties including logging in and out die boxes and pushing die carts to the loading dock for shipping and receiving. The employing establishment noted that at no time during appellant's assignment in die manufacturing was his light-duty limitations jeopardized. On February 11, 2002 the employing establishment advised that appellant had been on a light-duty status from April 2000 to January 4, 2002.

[1] The Office accepted a previous right shoulder contusion sustained September 25, 1998. That case was before the Board on June 4, 2001 following several denials by the Office that a claimed recurrence of disability on February 24, 1999 was causally related to the September 25, 1998 accepted injury. Appellant was off work until April 24, 2000 and then returned to light duty based on his nonoccupational condition. Docket No. 01-1840.

[2] Dr. Valentino referred appellant to Dr. Mark Lazarus, a Board-certified orthopedic surgeon, who began treating him on September 25, 2001 for right shoulder complaints. Dr. Valentino diagnosed right shoulder rotator cuff tendinitis/contusion and post-traumatic acromioclavicular arthropathy and recommended continued physical therapy. In a November 14 and December 3, 2001 report, Dr. Valentino indicated that appellant continued to suffer from right shoulder and knee pain with radicular symptoms. The physician did not discuss work restrictions related to appellant's shoulder condition in either report.

[3] The record reflects that on December 11, 2001 the employing establishment advised appellant that all seasonal employees were being placed in a nonpay status after January 4, 2002 due to a lack of work and budgetary constraints.

In a January 2, 2002 report, Dr. Valentino indicated that appellant was examined that day for continued shoulder, low back and right leg complaints. He discussed his findings on examination and found that appellant could continue to work in a light/limited-duty fashion beginning January 4, 2002. In a February 6, 2002 report, Dr. Valentino indicated that appellant continued to experience previously reported symptoms and that he remained limited to a light-duty position although he had been laid off.

In a February 11, 2002 letter, counsel contended that although appellant was subject to a lay off, there had not been a generalized lay off or reduction-in-force at the employing establishment and that he had not been terminated. He argued that appellant's light-duty position had been withdrawn by the employing establishment which entitled him to compensation for a recurrence of disability.

By decision dated March 8, 2002, the Office denied appellant's claim for disability effective January 5, 2002, on the grounds that the evidence failed to establish that he stopped work due to his employment injury.

Appellant requested the written record before an Office hearing representative. On May 7, 2003 an Office hearing representative requested additional information from the employing establishment regarding whether appellant's modified duty due to a preexisting shoulder injury prior to the accepted June 11, 2001 work injury had changed after June 11, 2001. The hearing representative requested that if there were written job offers before and after appellant's June 11, 2001 injury that they be submitted with other pertinent documentation.

In a June 5, 2003 letter, appellant's counsel contended that there were at least five employees under the same seasonal contract as appellant who were not furloughed. He argued that there was no evidence that appellant was working in a light-duty assignment designed to accommodate his work-related injury.

On July 21, 2003 the employing establishment noted that appellant sustained a work-related shoulder contusion on September 25, 1998 for which he did not incur any medical expenses or claimed time loss. The employing establishment indicated that appellant later claimed a recurrence of the disability related to the 1998 injury, which was denied by the Office and appellant was out of work from February 22, 1999 to April 24, 2000. Therefore, he began light duties for the die manufacturing department beginning April 24, 2000. Appellant transferred to the coining division in April 2001 and was assigned light work in the die vault section which included collecting spent feed fingers, defacing feed fingers and destroying dies. At the time of the June 11, 2001 injury, appellant still worked in a light-duty capacity in the coining division and there was no written job offer given to appellant at the time of the injury. The employing establishment indicated that Dr. Valentino was notified on June 15, 2001 that light duty was available to appellant and that his physical restrictions would be accommodated.

The employing establishment also submitted medical evidence recommending light duty for appellant following the 1998 injury; a functional capacity assessment of March 21, 2001 and the duty status report previously submitted from Dr. Valentino outlining restrictions related to the June 11, 2001 accepted work injury.

In a letter dated July 24, 2003, appellant's counsel reviewed his request for an oral hearing and requested subpoenas for cross examination regarding the information submitted by the employing establishment. He reiterated that appellant was entitled to approval of the recurrence claim based on the absence of work available within his restrictions.

By decision dated September 11, 2003, the Office hearing representative affirmed the March 8, 2002 decision finding that the evidence of record failed to substantiate a material worsening of appellant's medical condition or a consequential condition that disabled him from continuing work. She determined that the evidence of record did not support that appellant was working in a position outside of his medical restrictions, that the modified duty was withdrawn or that he had a spontaneous change in his medical condition, but that appellant stopped work due to a furlough that occurred related to his position as an on-call seasonal employee. The Office hearing representative further denied appellant's request to subpoena witnesses at a hearing on the basis that a review was undertaken of the written documentation of record and there was no reason to delay the decision by scheduling a hearing.

LEGAL PRECEDENT -- ISSUE 1

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

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[5] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[6] Where no such rationale is present, medical evidence is of diminished probative value.[7]

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Federal Employees' Compensation Act states: "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles." This section of the Act gives the Office discretion to grant or reject requests for subpoenas. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.

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[4] 20 C.F.R. § 10.5(x) (1999).

[5] *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

[6] *Lourdes Davila*, 45 ECAB 139 (1993); *Mary S. Brock*, 40 ECAB 461 (1989).

[7] *Michael Stockert*, 39 ECAB 1186 (1988).

ANALYSIS -- ISSUE 1

In this case, appellant did not stop work on January 4, 2002 because of a spontaneous change in his medical condition resulting from the previous employment injury or from a new exposure to the work environment that caused the illness. He stopped work because of a general layoff affecting seasonal and on-call employees. The general layoff had nothing to do with appellant's June 11, 2001 employment injury, his injury-related condition or the medical restrictions resulting there from. The general layoff in this case, is likened to a reduction-in-force, in that it does not establish a recurrence of disability.[8] The layoff was not directed solely at injured workers.

The record in this case fails to establish that it was the residuals of appellant's employment injury that prevented him from continuing in his employment beyond January 5, 2002. To the contrary, the medical record repeatedly shows that although appellant had continuing residuals of the work injury for which he still sought medical treatment, he was able to perform sedentary full-time work. Appellant is not entitled to compensation for total disability beginning January 5, 2002.

ANALYSIS -- ISSUE 2

In requesting a subpoena, appellant's counsel needed to explain why the testimony is relevant to the issues in the case and why a subpoena is the best method to obtain such evidence because there is no other means, by which the testimony could have been obtained.[9] The Office hearing representative retains discretion on whether to issue subpoenas. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonably exercise of judgment or action taken, which is clearly contrary to logic and probable deductions from established facts.[10] The Board finds that the Office hearing representative did not abuse her discretion in denying subpoenas, as she found that the written documentation which appellant's counsel referred in his request was provided to him for review and further testimony on such evidence would cause unnecessary delay in issuing a decision.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a recurrence of disability beginning January 5, 2002 causally related to the original work injury that occurred on

[8] A reduction-in-force or termination of employment following a temporary appointment does not, of itself, rise to a compensable disability. *See Brenda L. Frazier,* Docket No. 00-660 (issued February 6, 2001); *Jerome R. Wise*, Docket No. 93-2112 (issued January 10, 1995). When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity. *See Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

[9] 20 C.F.R. § 10.619.

[10] *Dorothy Bernard*, 37 ECAB 124 (1985).

June 11, 2001. The Board further finds that the Office hearing representative properly refused to issue subpoenas in this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 11, 2003 is affirmed.

Issued: April 13, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member