United States Department of Labor
Employees' Compensation Appeals Board

D.E., Appellant	)	
and	)	**Docket No. 07-855**
	)	**Issued: February 8, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 7, 2007 appellant filed a timely appeal from a January 16, 2007 Office of Workers' Compensation Programs' hearing representative's decision and a May 25, 2006 decision, finding that she had not established a recurrence of her accepted left carpal tunnel, cervical and thoracic conditions on December 21, 2005. Under 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 sustained a recurrence of her accepted left carpal tunnel, cervical and thoracic conditions as of December 21, 2005.

FACTUAL HISTORY

Appellant, a 46-year-old letter carrier, filed a Form CA-2 claim for benefits on January 2, 2002, alleging that she developed a degenerative disc condition in her neck causally related to factors of employment. The Office accepted the claim for left carpal tunnel syndrome, aggravation of herniated nucleus pulposus at C6-7 and left thoracic outlet syndrome.

In a January 2, 2002 form report, Dr. Dan Shamir, Board-certified in physical and rehabilitative medicine and appellant's treating physician, outlined work restrictions for appellant: intermittent lifting, less than 5 pounds continuously and no more than 10 pounds intermittently, not exceeding six hours per day; no sitting for more than three to five hours per day, if driving; no walking more than four to five hours per day; no climbing more than two hours per day; no bending/stooping, twisting, or pulling/pushing more than one to two hours per day; no simple grasping more than five hours per day; no fine manipulation more than six hours per day; and no reaching above the shoulder for more than two hours per day.

On March 9, 2004 appellant accepted a light-duty job from the employing establishment. The position entailed casing mail, making collections and working the Automated Vehicle Utilization System. The job offer did not list physical requirements.

In a March 29, 2004 Form CA-17, Dr. Shamir outlined updated work restrictions for appellant. These included: intermittent lifting, less than 5 pounds continuously and no more than 10 pounds intermittently, not exceeding six hours per day; no climbing at unprotected heights; no kneeling, bending/stooping or twisting; no pulling/pushing more than 10 pounds; no simple grasping, fine manipulation or reaching above the shoulder more than three hours with the left hand and six hours with the right hand per day; and no restrictions on driving. In an April 1, 2004 report, Dr. Shamir indicated that appellant's work restrictions were permanent and precluded her from carrying mail.

In a statement of accepted facts dated June 8, 2004, the Office indicated that appellant had been working with restrictions since January 7, 2001.

On June 15, 2004 in order to determine appellant's current condition, the Office referred her to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated July 9, 2004, Dr. Kaffen advised that appellant continued to have residuals of her work-related carpal tunnel syndrome, which required the imposition of work restrictions. He noted that these restrictions consisted of no repetitive use of the left upper extremity and no pushing, pulling or lifting more than 10 to 15 pounds with the left upper extremity. Dr. Kaffen indicated in a July 9, 2004 work capacity evaluation that there was no reason appellant could not work an eight-hour day. In a supplemental report dated July 28, 2004, he stated that she no longer experienced residuals from the accepted condition of thoracic outlet syndrome.

On November 23, 2004 the employing establishment offered appellant a light-duty job within her physical restrictions of no lifting or pulling over 15 pounds and no repetitive motions of the left wrist or elbow. The job description stated:

"The modified job offer will involve the following duties and restrictions--

> Case routes as assigned; [t]ake out swings less than 15 pounds; verify delivery confirmation; collections (early and late); other duties as needed within your restrictions

> Carrier office -- casing mail into case with right hand; lifting up to five pounds intermittently
>
> Carrier street -- picking up mail from collection boxes; dropping off mail for routes; intermittent driving."

On December 3, 2004 appellant accepted the job offer; she stated in a written annotation that she was accepting it "under protest."

In a December 14, 2005 Form CA-17 report, Dr. Shamir reiterated his previous work restrictions.

In a December 20, 2005 report, Dr. Shamir indicated that he was providing an addendum to the December 14, 2005 form. He stated:

> "The term 'intermittent' in the restriction sheet means a third of an eight[-]hour workday. Therefore, in this case, 2.6 hours in an 8[-]hour workday would amount to an 'intermittent' basis."

In a statement dated February 23, 2006, appellant indicated that, a little more than a year ago, the employing establishment had added a second collection run to her work duties. She considered this beyond her limitations, though she stated that she was not sure until she ascertained that the additional collection run amounted to a total of 4.5 hours in collection hours. Appellant noted that Dr. Shamir had recommended that she perform no more than 2.6 hours of intermittent collection time. She asserted that working collections longer than 2.6 hours was too grueling, too continuous and that the extensive strain of lifting, pulling, heaving, reaching and bending without a break caused her severe pain. Appellant further stated that occasional breaks of a half minute to two minutes were not sufficient to constitute "intermittent" activity when performing these duties. She concluded that the original light duty she accepted in 2002 entailed no more than 3 hours of intermittent collections -- sufficiently close to Dr. Shamir's prescribed 2.6 hours -- but that the 4.5 hours of intermittent collections she worked after accepting the second collection run exceeded her physical restrictions and aggravated her work-related conditions.

On February 29, 2006 appellant filed a Form CA-7 claiming compensation for 36.58 hours of leave without pay from December 21, 2005 to February 17, 2006. She asserted that the strain of working two collection shifts caused her to be excused from work for an average of 1 to 2 hours per day during this period, amounting to a total of 36.58 hours.

By letters dated March 1 and 17, 2006, the Office requested additional information from appellant in support of her recurrence claim. The Office requested a statement from her explaining that her light-duty assignment had changed and indicating that it no longer met the restrictions set by her physician. The Office also requested a medical opinion from appellant's treating physician supporting her claim that a worsening in her work-related condition had occurred.

In a March 25, 2006 statement, appellant reiterated her previous contentions that the Office had increased her intermittent hours from approximately 3 hours of collection to 4.5 hours per day and that in December 2005 Dr. Shamir stated that she should not engage in intermittent activity for more than 2.6 hours a day; therefore, she was "being worked beyond my already established restrictions and [was] being sent home."

The employing establishment submitted a March 27, 2006 "Attachment A" indicating that the collections job was divided between the following duties: driving a postal vehicle from one collection box to another, which constituted about 70 to 80 percent of the total collection time; getting in and out of a vehicle, which constituted about 5 to 10 percent of the total collection time; unlocking the collection box, scanning the barcode and taking mail out of the collection box, which constituted about 10 to 15 percent of the total collection time; and sorting mail back at the office, which constituted about 10 percent of the total collection time.

Appellant submitted an April 12, 2006 statement in which she responded to the employing establishment's "Attachment A." In a handwritten annotation to Attachment A, she stated:

> "My station manager, Mr. Jernovoi stated the 50 collection boxes are approximately one minute apart, hence, one hour out of four hours is driving time spent which averages out to approximately 25 percent for driving, nowhere near the 70 to 80 percent he indicated. The 75 percent balance is pure labor (3 hours, over my restriction of 2 hours and 40 minutes). This whole attachment is incorrect."

By letter dated April 25, 2006, the Office requested additional factual and medical information in support of appellant's recurrence claim, reiterating the requirements stated in its March 1 and 17, 2006 letters. The Office advised her that it was enclosing Dr. Kaffen's second opinion report, which established her restrictions. It stated:

> "Your treating physician did agree with those restrictions. Then he tried to establish a time frame for working. Your treating physician cannot arbitrarily say in an eight[-]hour day that you cannot work 2.6 hours. He should evaluate you on the job you do. For example, he should know the number of pickups you do per day, the time it takes to do the pickups, the time you spend driving and then he could suggest some restrictions. But a general statement is too vague."

By decision dated May 25, 2006, the Office denied appellant compensation for a recurrence of her accepted conditions. The Office stated that appellant failed to meet her burden to establish that the December 2004 job offer exceeded her work restrictions or that in December 2005 she had an objective worsening of her work-related back and neck conditions.

In a May 3, 2006 report, Dr. Shamir diagnosed C6-7 herniated nucleus pulposus, myofascial neck and shoulder pain and possible bursitis or tendinitis. He stated:

> "There is a letter from [the Office] stating that the treating physician cannot arbitrarily say in an eight[-]hour work[day] [that] to you cannot work 2.6 hours. I believe this is in reference to a letter we had sent defining the term intermittent.

> In my opinion, they are misinterpreting the intent of the letter and what the letter says as well as her restrictions. They need to go back and look at the restrictions in a more detailed fashion. It should also be noted that the term intermittent is on [the Office] form and there should be no reason to define it for them. If they have the term on their form, they should know what it means. If they do n[o]t know what it means, they should never have it on their form."

By letter dated June 2, 2006, appellant's attorney requested an oral hearing, which was held on November 8, 2006.

Dr. Shamir submitted a September 20, 2006 report in which he reviewed appellant's history of treatment, stated findings on examination and concluded that she had a 13 percent left upper extremity impairment based on left-sided carpal tunnel syndrome and an 8 percent left upper extremity impairment based on left-sided sensory deficit.

On December 11, 2006 the Office granted appellant a schedule award for a 20 percent permanent impairment of the left upper extremity for the period September 1, 2002 to November 11, 2003 for a total of 62.4 weeks of compensation.[1]

At the hearing, appellant indicated that she had worked at the light-duty job which she had accepted in December 2004 for eight hours per day until December 2005. She asserted that she had tried to convey to Dr. Shamir at the time that she accepted it that the job exceeded her work restrictions; she could not handle all the bending, pulling mail out, lifting and returning to the truck and it was hard to straighten up because she experienced an incredible amount of pain. Appellant stated that she also tried to tell the employing establishment that the job exceeded her work restrictions, but they told her that her doctor had allowed her to perform these duties on an intermittent basis; she, however, stated that she was not familiar with the term "intermittent."

Appellant was asked whether Dr. Shamir had told her in December 2005 that she could not do four hours per day of bending and lifting while picking up mail and whether he had changed his opinion with regard to her ability to perform her light-duty job. She answered this question by stating that Dr. Shamir told her that he had determined what the term "intermittent" meant. When appellant was asked whether Dr. Shamir "all of a sudden" decided in December 2005 that she should not bend or lift more than 2.5 or 2.6 hours, she responded, "right." Her attorney was advised that, if appellant's work restrictions did in fact increase as of December 2005, she needed to provide a medical report indicating the reasons to support the change in restrictions. Appellant's attorney requested that the record be held open for 30 days for a report from Dr. Shamir explaining why there was a change in restrictions in December 2005.[2] No additional medical evidence was received by the Office.

By decision dated January 16, 2007, an Office hearing representative affirmed the May 25, 2006 decision.

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[1] This decision is not contested on appeal.

[2] Appellant stated at the hearing that she filed an Equal Employment Opportunity complaint on January 27, 2006, alleging that she was discriminated against when the employing establishment gave her work that exceeded her work restrictions.

LEGAL PRECEDENT

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[3]

ANALYSIS

In the instant case, the record does not contain any medical opinion showing a change in the nature and extent of appellant's injury-related conditions. Indeed, she has failed to submit any medical opinion containing a rationalized, probative report which relates her condition or disability as of December 21, 2005 to her employment injury. For this reason, appellant has not discharged her burden of proof to establish her claim that she sustained a recurrence of disability as a result of her accepted employment injury.

The only medical evidence which appellant submitted consisted of Dr. Shamir's December 14, 2005 Form CA-17 duty status report and December 20, 2005 and May 3, 2006 reports explaining that the term 'intermittent' in the restriction sheet meant a third of an 8-hour workday, so that 2.6 hours in an 8-hour workday would amount to an 'intermittent' basis. However, Dr. Shamir did not provide any rationalized, probative medical opinion sufficient to establish that appellant's claimed partial disability as of December 21, 2005 was causally related to her accepted left carpal tunnel, cervical and thoracic conditions. He, therefore, failed to explain how her alleged recurrence of disability was caused or aggravated by her accepted conditions.

Dr. Shamir's reports do not constitute sufficient medical evidence demonstrating a causal connection between appellant's employment injury and her alleged recurrence of disability. Causal relationship must be established by rationalized medical opinion evidence. The reports submitted by appellant failed to provide an explanation in support of her claim that she was partially disabled as of December 21, 2005. These reports did not establish a worsening of her condition and, therefore, do not constitute probative, rationalized opinion evidence demonstrating that a change occurred in the nature and extent of the injury-related condition.[4]

In addition, the Board finds that the evidence fails to establish that there was a change in the nature and extent of appellant's limited-duty assignment such that she no longer was physically able to perform the requirements of her light-duty job. The record indicates that she had been working for the employing establishment since January 7, 2001 at several light-duty jobs with restrictions entailed by her work-related left carpal tunnel, cervical and thoracic conditions. On December 3, 2004 appellant accepted a light-duty job within her prescribed restrictions of no lifting or pulling over 15 pounds and no repetitive motions of the left wrist or

[3] *Terry Hedman*, 38 ECAB 222 (1986).

[4] *William C. Thomas*, 45 ECAB 591 (1994).

elbow. The job description indicated that she would work collections, both early and late, which involved picking up mail from collection boxes, dropping off mail for routes and intermittent driving. Appellant accepted the job under protest because the employing establishment had added a second collection run to her work duties. Although she suspected that this additional collection run would exceed her physical and work limitations, she stated that she was not sure of this until she began working 4.5 hours doing collections in December 2005. Appellant asserted that working collections longer than 2.6 hours was too grueling, too continuous and that the strain of lifting, pulling, heaving, reaching and bending without sufficient breaks caused her severe pain. She stated that, while she could perform the original light duty she accepted in 2002, with only 2.6 to 3 hours of intermittent collections, the second collection run added in December 2005 exceeded her physical restrictions and aggravated her work-related conditions. Appellant asserted that, because of the physical strain and pain caused by the job, she had to be excused from work for an average of one to two hours per day. She sought a total of 36.58 hours in wage-loss compensation from December 21, 2005 to February 17, 2006. This representing the total number of hours for which she was sent home due to the strain caused by doing a job which exceeded her work conditions and aggravated her accepted left carpal tunnel, cervical and thoracic conditions.

The employing establishment controverted appellant's claim. In its March 27, 2006 "Attachment A" describing the collections job, the employing establishment indicated that the job appellant accepted in December 2004 was within the physical restrictions outlined by Dr. Shamir, as she spent 70 to 80 percent of her time driving her vehicle. Appellant rejected this assessment, stating that she spent only 25 percent of her time driving. In its April 25, 2006 letter, however, the Office indicated that Dr. Shamir had agreed with Dr. Kaffen's restrictions and had no factual basis to challenge the employing establishment's assertion that working 4.5 hours of collections was within her restrictions. At the hearing, appellant testified that she reluctantly accepted the new light-duty job in December 2004, because she believed Dr. Shamir had allowed her to perform these duties on an intermittent basis, although she did not understand what "intermittent" meant. However, she indicated that Dr. Shamir did not tell her in December 2004 that she could not do four hours per day of bending and lifting while picking up mail; *i.e.*, doing collections. In addition, neither appellant nor her attorney were able to provide a reason or an explanation at the hearing as to why Dr. Shamir changed his opinion in December 2005 with regard to her work restrictions and her ability to perform the light-duty job she accepted in December 2004. Her attorney requested that the record be held open for 30 days so that he could submit a report from Dr. Shamir explaining the reasons why there was a change in restrictions in December 2005; however, Dr. Shamir did not submit such a report.

Accordingly, as appellant has not submitted any factual or medical evidence supporting her claim that she was partially disabled from performing her light-duty assignment as of December 21, 2005 as a result of her accepted left carpal tunnel, cervical and thoracic conditions, she failed to meet her burden of proof. The Office properly found in its January 16 and May 25, 2006 decisions that appellant was not entitled to compensation based on a recurrence of her employment-related disability.

CONCLUSION

The Board finds that appellant has not met her burden to establish that she was entitled to compensation for a recurrence of disability as of December 21, 2005 causally related to her accepted left carpal tunnel, cervical and thoracic conditions.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2007 and May 25, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 8, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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