

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

S.P., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Fayetteville, NC, Employer)

Docket No. 07-2252
Issued: February 15, 2008

Appearances:
Martin Kaplan, 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 September 4, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 19 and August 3, 2007 merit decisions denying her claim for periods of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant had total disability for the periods July 22 to December 4, 2005 and October 11, 2006 to February 20, 2007 due to her February 26, 2005 employment injury.

FACTUAL HISTORY

In April 2005, the Office accepted that on February 26, 2005 appellant, then a 39-year-old licensed practical nurse, sustained a left forearm contusion when her left arm and left leg

were bumped by a vehicle which was backing up in the employing establishment parking lot.¹ She stopped work on February 26, 2005 and received continuation of pay for periods of disability.

On February 26, 2006 Dr. Abdul Khan, an attending Board-certified internist, stated that appellant reported that a vehicle hit her left elbow but, that she did not fall, sustain a laceration or injure any body part other than her left arm. He indicated that appellant had some tenderness in her left arm but had full motion of the elbow. On February 27, 2006 Dr. Godfrey S. Fondinka, an attending Board-certified family practitioner, indicated that appellant reported that she was hit by a vehicle in her left forearm and lumbar area. He stated that appellant had tenderness and swelling over the lower third of her left forearm but did not have significant tenderness in her lumbar area. Dr. Fondinka diagnosed left forearm contusion. The findings of February 27, 2005 x-rays of appellant's left forearm showed no fractures or bony abnormalities.

On April 13, 2005 Dr. Maria J. Wilson, an attending physician specializing in rheumatology, indicated that appellant reported that she had joint pain in her wrists, hips, knee and ankles since 2000 which seemed to get worse in 2004. Appellant indicated that on February 26, 2005 she was hit by a vehicle on her left upper arm and noted that she had increased arm pain and suffered back pain for the first time. Dr. Wilson noted that examination of appellant's joints was normal and diagnosed joint pain of multiple joints, low back pain and leg pain. She indicated that appellant did not exhibit evidence of fibromyalgia but that she had a chronic pain syndrome.

On April 28, 2005 Dr. Elizabeth Sengstaken, an attending Board-certified family practitioner, recommended that appellant stay off work from April 28 to May 11, 2005 due to a "back injury." On April 29, 2005 Dr. Meisha Abbasinejad, an attending Board-certified physical medicine and rehabilitation physician, indicated that appellant reported that she had generalized aches and pains which started prior to being hit by a vehicle on February 26, 2005 but worsened after the accident. He reported normal examination results except for low back tenderness and end range back extension limited by pain complaints. Dr. Abbasinejad diagnosed "back pain, secondary to motor vehicle accident with likely lumbar strain" and "generalized myalgias and arthralgia, etiology unclear" and indicated that appellant could return to work with restrictions.

On June 3, 2005 appellant filed a Form CA-7 claiming employment-related disability from April 14, 2005 to the present.² In reports dated in June 2005, Damon Arrington, an attending nurse practitioner, diagnosed myofascial pain due to the February 26, 2005 accident and indicated that appellant had disability since that date. He asserted that her back pain was

¹ The Office later accepted that appellant also sustained a lumbar strain on February 26, 2005. The driver of the vehicle indicated that she did not detect any impact with appellant at the time of the accident. Another witness stated that appellant was "slightly hit" by the backing vehicle. Appellant indicated on her claim form that her "body was threw [sic] by the vehicle" but none of the witness statements indicate that she fell to the ground or that her body was pushed to a significant extent by the impact.

² Appellant asserted that she sustained a back injury when she was hit on February 26, 2005.

related to the February 26, 2005 accident.³ On September 8, 2005 appellant filed another Form CA-7 asserting that her employment-related disability extended from April 14 to July 21, 2005.

In a November 1, 2005 decision, the Office denied appellant's claim that she sustained an employment-related disability from April 14 to July 21, 2005 on the grounds that she did not submit medical evidence establishing this period of disability.

On November 8, 2005 Dr. Daniel C. Uba, an attending Board-certified internist, stated that appellant reported developing back pain after a vehicular accident in February 2005 which had not existed prior to the accident. He noted that the results of imaging studies had been unremarkable and stated, "My professional opinion is that it is at least as likely as not that the accident may have caused or aggravated her lower back pain."⁴

On December 5, 2005 appellant returned to limited-duty work for the employing establishment without loss of wages.

In an April 20, 2006 decision, the Office vacated its November 1, 2005 decision. It accepted that appellant sustained a low back strain in addition to a left forearm contusion on February 26, 2005 and accepted that she had employment-related disability from April 14 to July 21, 2005.⁵

Appellant submitted several reports, beginning in early to mid 2006, in which Mr. Arrington diagnosed myofascial pain syndrome, chronic lumbago and depression and indicated that she could only perform limited-duty work. On June 13, 2006 Dr. Uba indicated that appellant sustained myofascial pain syndrome, lumbago and depression due to being struck by a vehicle as a pedestrian on February 26, 2005. He stated that she was partially disabled from February 26, 2005 to the present. On June 27, 2006 appellant filed a Form CA-7 alleging that she had employment-related disability from July 22 to December 4, 2005.⁶

On September 27, 2006 the employing establishment requested that appellant submit medical evidence showing that she was required to perform limited-duty work due to residuals of her employment injury. The employing establishment asked appellant to submit this evidence by October 11, 2006. She stopped work on October 11, 2006. Appellant later claimed that she stopped work on that date because the employing establishment withdrew her limited-duty work.

On December 1, 2006 Dr. Surendrapal Mac, a Board-certified orthopedic surgeon, to whom the Office referred appellant, discussed the February 26, 2005 accident and appellant's history of medical treatment. He stated that she had some lumbar area and bilateral shoulder

³ On November 8, 2005 Mr. Arrington diagnosed myofascial pain syndrome, chronic lumbago and depression and indicated that appellant could only perform limited-duty work.

⁴ On May 11, 2005 Dr. Uba stated that appellant had to be excused from work between May 11 and June 16, 2005.

⁵ The Office subsequently paid appellant compensation for lost wages during the period April 14 to July 21, 2005.

⁶ The record contains evidence indicating that appellant was in leave without pay status from July 22 to December 4, 2005.

pain but had full range of motion of her arms and did not have any weakness in her legs. Dr. Mac diagnosed resolved left forearm contusion, resolved lumbar strain and “multiple joint arthralgia with myofascial pain, unrelated to her injury.” He posited that appellant did not have any residuals of her February 26, 2005 employment injury and therefore did not have any disability due to her employment injury.

On February 5, 2007 appellant filed a Form CA-7 alleging that she had employment-related disability from October 11, 2006 to February 2, 2007.⁷ On March 26, 2007 Mr. Arrington diagnosed low back pain, myofascial pain syndrome and depression and indicated that appellant could resume “normal activities.”

In two April 19, 2007 decisions, the Office denied appellant’s claim that she had employment-related disability from July 22 to December 4, 2005 and from October 11, 2006 to February 2, 2007 on the grounds that she did not submit medical evidence establishing these periods of disability.⁸ In a May 29, 2007 decision, the Office terminated appellant’s compensation effective May 25, 2007 on the grounds that she had no residuals of her February 26, 2005 employment injury after that date. The Office based its termination on the opinion of Dr. Mac.⁹

In connection with the Office’s April 19, 2007 decision, appellant requested a review of the written record by an Office hearing representative.¹⁰ Appellant’s attorney argued that the Office impermissibly placed the burden of proof on appellant to show entitlement to compensation for the period July 22 to December 4, 2005 because the Office had approved compensation for the period April 14 to July 21, 2005. Counsel also argued that appellant had disability beginning October 11, 2006 because the employing establishment withdrew her limited-duty work on that date. In an August 3, 2007 decision, the Office hearing representative affirmed the Office’s April 19, 2007 decisions. The Office determined that appellant had the

⁷ Appellant’s counsel resubmitted evidence showing that she was in leave without pay status from July 22 to December 4, 2005.

⁸ In an April 19, 2007 memorandum, the Office indicated that it had previously assumed that appellant performed limited-duty work from July 22 to December 4, 2005. The Office indicated that it had received evidence which showed that she actually was in leave-without-pay status during this period.

⁹ Appellant has not appealed the Office’s May 29, 2007 termination decision to the Board and the matter is not currently before the Board.

¹⁰ Appellant submitted additional reports of Mr. Arrington dated May 28 and June 15, 2007.

burden of proof to show entitlement to compensation for the period July 22 to December 4, 2005.¹¹

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,¹² once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.¹³ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹⁴ The fact that the Office accepts an employee's claim for a specified period of disability does not shift the burden of proof to the employee to show that she is still disabled.¹⁵ The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁶

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 of record establishes that she can perform the light-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 show that she cannot perform such light duty. 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 light-duty job requirements.¹⁷ Office procedure provides that a recurrence of disability can be caused by withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.¹⁸

¹¹ The Office stated, "[Appellant's counsel] has argued that this burden shifted to the Office as they paid compensation through July 21, 2005. While this would be true [if] the claimant was receiving regular payments of compensation for wage loss due to her inability to work in this case, however, the claimant's disability was initially denied and later on April 20, 2006 the accepted condition expanded, disability for wage loss was accepted through July 21, 2005 and the claimant advised that pay for this period would be authorized. At that time the claimant was advised that the disability was only for the period April 14 to July 21, 2005 as this was the only claim for wage loss on file. The Office did not receive a claim for wage loss for the period after July 21, 2005 until June 27, 2006 over a year later. As such, I find that the claimant had no expectation of continued compensation for wage loss at the time of the first payment and the burden did not shift to the Office."

¹² 5 U.S.C. §§ 8101-8193.

¹³ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

¹⁴ *Id.*

¹⁵ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999).

¹⁶ *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

¹⁷ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(c) (January 1995).

ANALYSIS

The Office initially accepted that appellant sustained a left forearm contusion on February 26, 2005 when her body was bumped by a vehicle which was backing up in the employing establishment parking lot. She stopped work on February 26, 2005 and received continuation of pay for a period. Appellant claimed that she had employment-related disability from April 14 to July 21, 2005 and, in a November 1, 2005 decision, the Office denied her claim. In an April 20, 2006 decision, the Office vacated its November 1, 2005 decision. The Office accepted that appellant sustained a low back strain in addition to a left forearm contusion on February 26, 2005 and accepted that she had employment-related disability from April 14 to July 21, 2005.

In April 19 and August 3, 2007 decisions, the Office denied appellant's claim that she had employment-related disability from July 22 to December 4, 2005 on the grounds that she did not meet her burden of proof to submit medical evidence establishing these periods of disability. The Office reasoned that, even though it accepted disability between April 14 and July 21, 2005, the burden to show employment-related disability after July 21, 2005 rested with appellant.

The Board finds that the Office impermissibly shifted the burden of proof to appellant to establish that she had employment-related disability for the period July 22 to December 4, 2005. Once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits and the fact that the Office accepts an employee's claim for a specified period of disability does not shift the burden of proof to the employee to show that she is still disabled.¹⁹ Given that it had been accepted that appellant had employment-related disability from April 14 to July 21, 2005, the Office did not provide sufficient argument to justify shifting the burden of proof to her for establishing disability for the period July 22 to December 4, 2005.²⁰ The Office retained the burden of proof to show that she did not have disability due to her February 26, 2005 employment injury after July 21, 2005, but it did not submit medical evidence showing that she ceased to have residuals of her employment injury after July 21, 2005.²¹ Therefore, the Board finds that appellant had employment-related disability for the period July 22 to December 4, 2005 and she would be entitled to disability compensation for this period.²²

¹⁹ See *supra* notes 13 through 15 and accompanying text.

²⁰ The mere fact that appellant received compensation retroactively for the period July 22 to December 4, 2005 (rather than receiving "regular payments of compensation") or that she did not file a formal claim for compensation for this period until mid 2006 would not serve to shift the burden of proof to her. The record reveals that she was in leave-without-pay status for the period July 22 to December 4, 2005.

²¹ See *supra* note 16 and accompanying text regarding the need for the Office to submit rationalized medical evidence. The record does not contain any medical reports showing that appellant did not have employment-related disability during the period July 22 to December 4, 2005. Moreover, the record contains reports of Dr. Uda, an attending Board-certified internist, which indicate that she continued to have employment-related back problems during this period.

²² On December 5, 2005 appellant returned to limited-duty work for the employing establishment without loss of wages and she did not file another claim for employment-related disability until after she stopped work on October 11, 2006.

Appellant stopped work on October 11, 2006 and claimed that she had employment-related disability from October 11, 2006 to February 2, 2007. She asserted that she stopped work on October 11, 2006 because the employing establishment withdrew her limited-duty work. Because appellant stopped work after a return to limited-duty work, she would have the burden of proof to establish disability for the period October 11, 2006 to February 2, 2007.²³ Office procedure provides that a recurrence of disability can be caused by withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.²⁴ However, appellant did not present clear evidence that the employing establishment withdrew her limited-duty work (for reasons other than misconduct or nonperformance of job duties) on October 11, 2006 or any date thereafter. Therefore, in order to establish entitlement to disability compensation for the period October 11, 2006 to February 2, 2007, appellant would have to submit medical evidence showing that she had employment-related disability during this period.

The Board finds that appellant did not submit medical evidence showing that she had disability during the period October 11, 2006 to February 2, 2007 due to her February 26, 2005 employment injury. Appellant submitted a March 26, 2007 report in which Mr. Arrington, an attending licensed practical nurse, indicated that she continued to have back problems. However, this report does not constitute probative medical evidence as a nurse is not a “physician” as defined under the Act and cannot render a medical opinion.²⁵ Appellant did not submit any medical evidence discussing the cause of her claimed disability for the period October 11, 2006 to February 2, 2007. Moreover, Dr. Mac, a Board-certified orthopedic surgeon, who served as an Office referral physician, indicated that appellant no longer had residuals of her February 26, 2005 injury at the time of his December 1, 2001 examination. Therefore, the Office properly denied appellant’s claim for disability compensation for the period October 11, 2006 to February 2, 2007.

CONCLUSION

The Board finds that appellant is entitled to receive disability compensation for the period July 22 to December 4, 2005. The Board further finds that appellant did not meet her burden of proof to establish that she was disabled from October 11, 2006 to February 20, 2007 due to her February 26, 2005 employment injury.

²³ See *supra* note 18 and accompanying text.

²⁴ See *supra* note 17 and accompanying text.

²⁵ See 5 U.S.C. § 8101(2); *Bertha L. Arnold*, 38 ECAB 282, 285 (1986).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 3 and April 19, 2007 decisions are affirmed to the extent that they found that appellant was not entitled to disability compensation for the period October 11, 2006 to February 20, 2007. The Office's August 3 and April 19, 2007 decisions are modified to reflect that appellant is entitled to receive disability compensation for the period July 22 to December 4, 2005.

Issued: February 15, 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