United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 10-1165**
	)	**Issued: February 1, 2011**
U.S. POSTAL SERVICE, CFS-NTX, Coppell, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 24, 2010 appellant filed an appeal from merit decisions of the Office of Workers' Compensation Programs dated September 25 and December 22, 2009. Pursuant to 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 was entitled to additional disability compensation for the period May 11 to October 19, 2009. On appeal she asserts that she was given incorrect appeal rights by the Office and that the medical reports of Dr. Nicole Tran, a chiropractor, established her claim.

FACTUAL HISTORY

On May 12, 2009 appellant, then a 30-year-old automated mark-up clerk, filed a traumatic injury claim alleging that on Saturday, May 9, 2009, she injured her shoulders, neck and back when she tried to prevent buckets of mail from falling toward her while unloading a mail cart. In additional statements, she noted that Acting Supervisor Sang Ho gave assistance but as appellant picked up a bucket, she felt a pulling sensation in her back. Appellant returned to keying mail and rested on Sunday, May 10, 2009, but the pain continued and when she

returned to work on Monday, May 11, 2009, she was in tremendous pain and asked that someone take her to the doctor. She received continuation of pay for the period May 15 to June 3, 2009.

The employing establishment controverted the claim, noting that appellant was issued a discipline on April 21, 2009 for unsatisfactory attendance, that she did not have any annual or sick leave, and that her mother worked for the Department of Labor. In statements dated May 11 and June 8, 2009, Supervisor Ho advised that, on May 9, 2009, appellant helped hold a bucket so the mail would not fall and stated that it did not seem as if appellant was injured at that time but on Monday, May 11, 2009, appellant advised she was injured. In a May 11, 2009 statement, Johnnie Johnson, supervisor of mail forwarding operations, described the incident and signed a Form CA-16, authorizing medical treatment, advising that there was doubt whether the employee's condition was caused by an injury sustained in the performance of duty. The employing establishment submitted reports regarding disciplinary actions, advised that appellant worked May 11, 12 and 14 and June 16, 2009, and that limited duty was available within prescribed limitations.

In reports dated May 11, 2009, Dr. Lawrence N. Alexander, a Board-certified surgeon, stated that left and right shoulder and lumbosacral spine x-rays were negative, and that a cervical spine x-ray demonstrated straightening of the cervical spine but was otherwise negative. He provided examination findings, described the clinical findings as generalized soreness, and diagnosed shoulder, cervical, thoracic and lumbar strains and shoulder pain. Dr. Alexander advised that appellant should be off work the rest of her shift but could return to restricted duty on May 12, 2009. In reports dated May 14, 2009, Dr. Lawrence reiterated his diagnoses and advised that appellant could perform restricted duty.

Dr. Nicole Tran, a chiropractor, provided an initial evaluation on May 15, 2009. She advised that appellant should be off work for one week to avoid aggravation of her injuries and submitted form reports dated May 15 to June 19, 2009 advising that appellant should not work.

In reports dated May 27 and June 10, 2009, Dr. Daniel Sunwoo, a Board-certified physiatrist, noted the history of injury and appellant's complaints of headaches and constant bilateral shoulder pain radiating into her arms. He noted tenderness over the cervical and lumbar spines and bilateral trapezius and rhomboid areas on physical examination, and diagnosed cervical, thoracic and lumbar sprain/strain and myofascial pain.

A June 3, 2009 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated one- to two-millimeter disc bulges with no significant central canal or neural foraminal narrowing and disc bulges in the upper thoracic spine. A June 20, 2009 MRI scan of the thoracic spine demonstrated multilevel minimal one-millimeter thoracic bulging discs. Dr. Tran continued to submit form reports and on June 15, 2009 advised that appellant could return to two hours of limited duty daily.

On June 29, 2009 the Office accepted that appellant sustained employment-related bilateral sprains of the shoulder, upper arm and rotator cuff, neck sprain and thoracic and lumbar sprains.[1]

[1] On July 1, 2009 appellant's case was transferred to a different district because her mother was a Dallas claims examiner.

Dr. Jonathan Walker, a Board-certified neurologist, performed a July 6, 2009 upper extremity electromyography (EMG) and nerve conduction study (NCS) that he interpreted as normal with no evidence of radiculopathy, plexopathy or neuropathy.

On form reports dated July 6 and 10, and August 3, 2009, Dr. Tran advised that appellant could not work. A functional capacity evaluation, performed by Linda Singleton, an occupational therapist, on July 17, 2009 advised that appellant exhibited consistent effort and had significant pain, range of motion limitations of the cervical spine, poor work endurance, poor ability to perform even simple functional activities of daily living and moderate depression and severe anxiety. A multidisciplinary rehabilitation effort was recommended.

In an attending physician's report dated August 11, 2009, Dr. Tran described appellant's injury as overexertion while unloading mail. She diagnosed cervical and thoracic disc bulges, as shown on MRI scan testing, and advised that appellant was totally disabled from May 15 to June 15, 2009 and was released to light work on June 16, 2009 but was unable to perform her duties. Dr. Tran recommended work hardening. On August 12, 2009 she advised that appellant was totally disabled and should be able to return to full duty within the next six months. Dr. Tran continued to submit reports describing appellant's treatment and findings, advising that appellant could not work.

By letter dated August 18, 2009, the Office informed appellant that the reports from Dr. Tran were insufficient to establish total disability because she was not a physician as defined under the Federal Employees' Compensation Act.[2] Appellant was advised to provide a detailed medical report from an orthopedic physician, to include a discussion of objective evidence found to support total disability from all forms of gainful employment. Work hardening was authorized on August 28, 2009.

In an August 27, 2009 report, Dr. Ronnie D. Shade, Board-certified in orthopedic surgery, noted a reported history that buckets of mail fell toward appellant and she was pinned against the buckets to keep them from falling on her. He described her complaints of neck, shoulder, arm, back and leg pain with numbness, tingling and weakness and provided physical examination findings of cervical and lumbar tenderness, slightly decreased cervical range of motion with normal motor and sensory examinations and a negative straight leg raise test. Dr. Shade reviewed x-rays and MRI scan studies and diagnosed chronic cervical strain with bilateral upper extremity radiculitis. He concluded that appellant was off work from August 27 through September 15, 2009 due to persistent neck and midback spasms.

In reports dated August 31, 2009, Dr. Stephen Becker, a Board-certified physiatrist, described the history of injury and appellant's complaint of cervical pain with radiation to both upper extremities with numbness and tingling and hand cramping and weakness. He advised that physical examination demonstrated diminished cervical extension with normal flexion and right and left rotation, normal strength and intact sensation in all dermatomes with the exception of digits one through five of both hands and that EMG and NCS testing demonstrated bilateral C6-8 cervical radiculopathy with no evidence of generalized peripheral neuropathy, plexopathy or entrapments.

[2] 5 U.S.C. §§ 8101-8193.

In a September 18, 2009 report, Dr. Tran described the May 9, 2009 employment injury and noted that appellant had not worked since May 2009 as a result of the incident. She opined that appellant sustained injuries of cervical and thoracic disc bulges, and subluxations to her cervical, thoracic and lumbar spine from the employment injury and was continuing to experience trauma. Dr. Tran noted that appellant was released to light-duty work in June 2009, but she was unable to perform her job functions and was currently participating in a work hardening program. She recommended that appellant remain off work to avoid aggravations to her injuries. Appellant began work hardening on September 15, 2009.

By decision dated September 25, 2009, the Office denied appellant's claim for wage-loss compensation for the period beginning on May 15, 2009 on the grounds that the medical evidence of record did not establish that she was totally disabled. On October 1, 2009 appellant filed a Form CA-7, claim for compensation, for the period May 15 to October 1, 2009, and in an October 2, 2009 letter, the Office explained that any claims could not be paid until she provided medical evidence establishing total disability but that she could file claims for medical appointment even though her claim for total disability beginning May 15, 2009 was denied. Appellant returned to modified duty on October 19, 2009. On October 29, 2009 the Office informed her that her claim had been approved for compensation for medical appointments at a maximum of four hours a day, and she received compensation at that rate when supported by the record for the period June 29 through October 1, 2009. This included payment for medical appointments and for eight hours a day, beginning September 15, 2009, when appellant started work hardening. On November 4, 2009 appellant filed a claim for compensation while attending work hardening from October 2 to 14, 2009.

On November 5, 2009 appellant requested reconsideration and asked that her accepted conditions be expanded to include the diagnoses listed by Dr. Tran. She submitted records from a work hardening program, including a chronic pain evaluation dated August 10, 2009 in which Richard Snider, a licensed professional counselor, advised that appellant was developing a chronic pain disorder with anxiety, depression, fear avoidance, frustration and irritability. During work hardening, appellant was treated by Mr. Snider, a chaplain, an occupational therapist, and Richard Slaughter, Psy.D., a licensed psychologist who described group sessions. On September 29, 2009 Dr. Slaughter advised that appellant's pain level had increased while in the program and recommended consultation with a neurosurgeon. Appellant completed the program on October 14, 2009.

In form reports dated August 31 to December 9, 2009, Dr. Tran described appellant's treatment. In an October 21, 2009 letter, she stated that she recommended that appellant not work due to limited range of motion of the shoulders, cervical, thoracic and lumbar spine, severe pain, weakness and hypoesthesia of the upper extremities, and swelling of the paraspinal musculature, as documented by her examinations. Dr. Tran reported the MRI scan and functional capacity evaluation findings, and advised that she diagnosed subluxations of the cervical, thoracic and lumbar regions.

Dr. Shade, in reports dated September 11, 2009, noted that appellant was initially evaluated on August 27, 2009 and still had complaints of significant posterior cervical pain, spasms, and bilateral arm pain with numbness and tingling, significant upper back pain and spasms, and significant depression and anxiety. He described physical examination findings, reiterated his diagnoses and advised that, in view of her financial situation, appellant could return

to limited duty on September 14, 2009 with restrictions to her physical activity, stating that she would have difficulty performing even sedentary work. In an October 14, 2009 report, Dr. Shade advised that the muscle spasms appellant experienced were directly related to the May 9, 2009 employment injury.

A functional capacity evaluation dated October 28, 2009 indicated that appellant showed consistent effort and concluded that she could work at a medium level with a 50-pound occasional lifting restriction. In an October 28, 2009 treatment note, Dr. Jacob Rosenstein, a Board-certified neurosurgeon, noted appellant's report that the employment injury occurred when an overload of mail fell on her, that she had completed work hardening and had returned to work but her pain continued, with headaches and constant neck and bilateral trapezial burning, stabbing pain that radiated to both arms and thoracic and lumbar pain that radiated to both legs with numbness and tingling. He provided physical examination findings and diagnosed central disc protrusion at C4-5 and C5-6 with bulge at C6-7, bilateral C6-8 cervical radiculopathy by EMG, neck and bilateral trapezial pain, thoracic pain and low back pain and recommended epidural injections and a computerized tomography (CT) scan. A November 17, 2009 CT scan of the lumbosacral spine demonstrated a small central L5-S1 protrusion without stenosis. On November 25, 2009 Dr. Rosenstein reported the CT findings provided physical examination findings and reiterated his diagnoses with the addition of MRI scan findings. In a December 16, 2009 report, he advised that appellant was working regular duty as no light duty was available. Dr. Rosenstein provided examination findings and advised that appellant was to have an epidural injection that day.

On December 16, 2010 appellant was paid compensation for the period October 2 through 14, 2009. By decision dated December 22, 2009, the Office denied modification of the September 25, 2009 decision on the grounds that the medical evidence was insufficient to support disability for work.[3] Appellant was provided a form showing that she could request reconsideration with the Office or file an appeal with the Board. On January 15, 2010 she requested reconsideration with the Office and on March 24, 2010 filed an appeal with the Board. By letter dated April 12, 2010, the Office advised appellant that, as she had filed an appeal with the Board, no further action would be taken on her reconsideration request and the Office could not review the same decision pending before the Board.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,[4] the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[5] Disability is thus not synonymous with physical impairment which may or

[3] The Office continued to develop appellant's claim for other conditions as caused by the May 9, 2009 employment injury, and in a December 18, 2009 report, an Office medical adviser opined that there was no documentation to support acceptance of additional orthopedic or musculoskeletal diagnoses. A final decision on this question has not been issued. Appellant filed a second claim for an injury sustained on January 11, 2010, adjudicated under Office file number xxxxxx302. The Office doubled the two files with the instant case the master file.

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Prince E. Wallace*, 52 ECAB 357 (2001).

may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act,[6] and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[7] Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.[8]

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[9] Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.[10]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[11] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated 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.[12] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[13]

ANALYSIS

Appellant sustained an employment-related injury on May 9, 2009 and was off work, except for brief periods, until she returned to modified duty on October 19, 2009. She received continuation of pay from May 15 to June 3, 2009, and thereafter submitted claims for disability compensation. Appellant received monetary compensation for attending medical examinations and treatment, and for the period September 15 through October 14, 2009, when she attended a

[6] *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

[7] *Donald E. Ewals*, 51 ECAB 428 (2000).

[8] *Tammy L. Medley*, 55 ECAB 182 (2003); *see Donald E. Ewals, id.*

[9] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[10] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[11] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[12] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[13] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

work-hardening program. The Board finds that she did not meet her burden of proof to establish that she was totally disabled for additional periods.

It is the employee's burden to establish disability,[14] and whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.[15] In this case, the medical evidence is insufficient to establish that appellant was totally disabled for the period May 11 to October 19, 2009 due to the accepted conditions.

The medical evidence relevant to the claimed period of disability includes reports dated May 11 and 14, 2009 in which Dr. Alexander advised that appellant could perform restricted duty. While Dr. Shade provided physical examination findings of cervical and lumbar tenderness and decreased cervical range of motion, and advised that appellant could not work from August 27 to September 15, 2009 due to persistent neck and midback spasms, he prefaced his opinion on her subjective complaints rather than discussing the impact of objective findings. Pain is a symptom, not a compensable medical diagnosis[16] and a pain condition has not been accepted as employment related. Without objective findings of disability being shown, a physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[17] Thus, Dr. Shade's opinion is insufficient to meet her burden to show that she was totally disabled for the claimed period.

The Board also finds that Dr. Tran's reports do not constitute probative medical evidence. Section 8101(2) of the Act provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.[18] While Dr. Tran diagnosed subluxations in her reports dated September 18 and October 21, 2009, the record does not reflect that these were based on x-rays. Thus, as Dr. Tran did not diagnose a subluxation by x-ray, she is not a "physician" under the Act.[19] Likewise, Mr. Snider, the chaplain, and the occupational therapist at the pain management clinic are lay individuals and are not competent to render a medical opinion under the Act.[20] While Dr. Slaughter advised that appellant's pain level had increased in the program, he offered no opinion on whether she could work. Similarly, neither Dr. Sunwoo, Dr. Walker, nor Dr. Becker offered an opinion on appellant's ability to work. Likewise, Dr. Rosenstein, who did not see appellant until after she returned to work in October 2009, had no opinion on whether appellant

[14] *See Yvonne R. McGinnis*, 50 ECAB 272 (1999).

[15] *Tammy L. Medley*, *supra* note 8.

[16] *C.F.*, 60 ECAB ___ (Docket No. 08-1102, issued October 10, 2008).

[17] *S.F.*, 59 ECAB 525 (2008).

[18] 5 U.S.C. § 8101(2); *see A.O.*, 60 ECAB ___ (Docket No. 08-580, issued January 28, 2009).

[19] *Id*.

[20] *See David P. Sawchuk*, 57 ECAB 316 (2006).

was disabled for the period in question. Their opinions are therefore not relevant to appellant's claim for additional disability compensation for the period May 11 to October 19, 2009.

Finally, in regard to appellant's argument on appeal that she was not provided the correct appeal rights, the record shows that in its September 25, 2009 decision, appellant was provided with the right to request an oral hearing or review of the written record within 30 calendar days of issuance of the decision, the right to reconsideration within one-calendar year, and the right to file an appeal with the Board within 180 calendar days. She thereafter requested reconsideration on November 5, 2009. With the December 22, 2009 merit decision denying modification of the September 25, 2009 decision, appellant was also provided proper appeal rights, consisting of the right to file another request for reconsideration within one-calendar year or to file an appeal with the Board within 180 calendar days. She was not entitled to a hearing at that time because, as stated in section 10.616(a) of the Office's regulations, a claimant who has received an adverse decision must not have previously submitted a reconsideration request.[21]

While appellant subsequently requested reconsideration with the Office, she concurrently filed an appeal with the Board. The Office and the Board may not have simultaneous jurisdiction over the same issue in the same case. Following the docketing of an appeal with the Board, the Office does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction.[22] The Office therefore properly informed appellant on April 12, 2010 that no further action would be taken on her reconsideration request.

CONCLUSION

The Board finds that appellant did not establish that she was entitled to additional wage-loss compensation for the period May 11 to October 19, 2009.

[21] 20 C.F.R. § 10.616(a); *see R.T.*, 60 ECAB ___ (Docket No. 08-408, issued December 16, 2008).

[22] *Linda D. Guerrero*, 54 ECAB 556 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 22 and September 25, 2009 be affirmed.

Issued: February 1, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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