United States Department of Labor
Employees' Compensation Appeals Board

TRACY L. FULLER, Appellant	)	
and	)	**Docket No. 05-941**
	)	**Issued: September 14, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Stroudsburg, PA, Employer	)	

Appearances:
C. Daniel Higgin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 15, 2005 appellant, through her attorney, filed an appeal from the December 10, 2004 merit decision of the Office of Workers' Compensation Programs, which affirmed its February 11, 2004 decision, terminating her wage-loss benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's wage-loss benefits effective February 11, 2004, on the grounds that she had no further disability due to her accepted October 8, 1998 employment injury.

FACTUAL HISTORY

On October 8, 1998 appellant, a 26-year-old rural carrier, filed a traumatic injury claim for injuries sustained in a motor vehicle accident that occurred in the performance of duty. Her claim was accepted for cervical strain and strain of the left rotator cuff. Appellant underwent

surgical procedures related to her accepted injury on August 10, 2000 and October 15, 2002. On March 14, 2003 she accepted a light-duty assignment as an office assistant.

In a report dated January 24, 2003, appellant's treating physician, Dr. Maurizio Cibischino, a Board-certified orthopedic surgeon, supported her need for restricted duty with a 10-pound lifting restriction. He provided a diagnosis of left shoulder multidirectional instability and opined that she had "decreased range of motion and strength and was unable to lift and carry." In notes dated April 24, 2003, Dr. Cibischino opined that appellant should be in a light-duty occupation without lifting for the remainder of her career due to the laxity she continued to experience.

In a report of a second opinion examination dated March 18, 2003, Dr. Anthony Salem, a Board-certified orthopedic surgeon, concluded that she had reached maximum medical improvement and was capable of resuming regular employment. Dr. Salem found that appellant had full range of motion, full flexion and full abduction in both shoulders; that there was no atrophy present; and that the reports of the magnetic resonance imaging scans of appellant's cervical spine and shoulder showed no objective changes as a result of the work-related incident. He opined that her disability associated with her complaints of pain and weakness in her left shoulder involving the acromioclavicular joint was not related to the work-related accident, but rather was secondary to congenital shoulder instability. He found that appellant's total disability from the work-related injury should have endured for no more than a couple of months and opined that she was capable of performing her preinjury job and should be released to full duty. The Office found that a conflict of medical opinion was created between Dr. Cibischino and Dr. Salem.

By letter dated June 3, 2003, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Gregory J. Menio, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a report dated July 15, 2003, Dr. Menio discussed appellant's history of injury, reviewed the evidence of record and listed detailed findings on physical examination. He concluded that she had a cervical strain, left shoulder injury/sprain with labral tear and pain superimposed on multidirectional instability. He reported that appellant's complaints included shoulder pain with activity and minor neck pain, which did not interfere with her function. His examination revealed full range of motion in appellant's shoulders; 5/5 strength to shoulder abduction, elbow flexion and extension, grip and finger abduction; and no tenderness in the paracervical region. Dr. Menio opined that appellant should return to work eight hours per day, initially with a 20-pound lifting limit and, over the course of two to three weeks return to full-duty capacity. In conjunction with his report, Dr. Menio provided a work capacity evaluation dated July 15, 2003, reflecting that appellant could lift intermittently up to 70 pounds.

By letter dated August 7, 2003, the Office asked Dr. Menio to clarify his opinion regarding whether appellant could return to work in her regular position as a rural mail carrier in a full-time capacity represented by 24 hours per week. In a letter dated August 14, 2003, Dr. Menio stated his opinion that appellant could return to work in her regular position working 24 hours per week at that time.

Appellant submitted a duty status report dated December 4, 2003 from Dr. Cibischino, reflecting a 10-pound lifting restriction. On December 8, 2003 appellant filed a claim for recurrence of disability, on the grounds that her limited-duty position had been withdrawn on November 18, 2003.

On December 15, 2003 the Office issued a notice of proposed termination of appellant's wage-loss benefits. Appellant was allowed 30 days to submit evidence or argument in response to the proposed termination.

Appellant submitted an undated statement that was received by the Office on January 19, 2004 contending that Dr. Menio's report was inaccurate because it incorrectly reflected that Dr. Cibischino had allowed her to lift 70 pounds one hour per day. She also alleged that the regular duties of a mail carrier require activities that exceed the limitations outlined by Dr. Menio. Appellant also submitted a statement from the postmaster dated January 9, 2004 outlining general duties of a rural mail carrier. The statement indicated that mail carriers case mail in the office 3 to 4 hours per day; retrieve their flats and letter mail; pull mail down into bundles; take it to the dock to load in their vehicles; and must be able to lift up to 70 pounds. The statement further reflected that a carrier driving a left-hand-drive vehicle would be required to steer with her left arm and distribute mail through the passenger side window.

Appellant's representative submitted a letter dated January 14, 2004, contesting the accuracy of Dr. Menio's July 15, 2003 report regarding his reference to a 70-pound lifting allowance; contending that Dr. Menio's restrictions conflict with appellant's job description; and alleging that the report was speculative.

By decision dated February 11, 2004, the Office terminated appellant's wage-loss benefits effective February 11, 2004 on the grounds that the weight of the evidence established that she had no further injury-related disability.

On March 8, 2004 appellant requested a schedule award.[1] Appellant submitted a report dated June 1, 2004 from Dr. James B. Kim, a Board-certified physiatrist, which reflected his opinion that appellant had a 14 percent upper extremity impairment and that she had reached maximum medical improvement.

On March 12, 2004 appellant requested an oral hearing, which was held on September 15, 2004. Appellant testified that she had a permanent partial impairment and was unable to perform the duties of her preinjury job.

In a decision dated December 10, 2004, an Office hearing representative affirmed the February 11, 2004 decision, finding that the opinion of Dr. Menio was sufficiently rationalized to

[1] The Office granted appellant a schedule award on April 28, 2005. The Board does not have jurisdiction over the schedule award issue, which was an interlocutory matter before the Office at the time of the filing of this appeal. *See* 20 C.F.R. § 501.2(c).

represent the weight of the medical evidence in establishing that appellant was capable of returning to her preinjury employment.[2]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of wage-loss benefits.[3] The Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[4] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

Once the Office meets its burden of proof to terminate appellant's wage-loss benefits, the burden shifts to appellant to establish that she had disability causally related to her accepted injury.[6] To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.[7] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[8] Rationalized medical evidence is 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.[9] Neither the 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.[10]

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[2] The Board notes that appellant submitted additional evidence after the Office rendered its December 10, 2004 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36n.2 (1952). Therefore, the newly submitted evidence cannot be considered by the Board.

[3] *See Beverly Grimes*, 54 ECAB ___ (Docket No. 03-42, issued April 18, 2003).

[4] *Id.*

[5] *James M. Frasher*, 53 ECAB 794 (2002).

[6] *Manuel Gill*, 52 ECAB 282 (2001).

[7] *Id.*

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

[9] *Leslie C. Moore*, 52 ECAB 132 (2000).

[10] *Ernest St. Pierre*, 51 ECAB 623 (2000).

Section 8123(a) of the Federal Employees' Compensation Act[11] provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[12] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[13]

ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's wage-loss benefits effective February 11, 2004.

In the instant case, the Office found that a conflict in medical opinion was created between Dr. Cibischino appellant's treating physician and Dr. Salem, who provided a second opinion examination for the Office, regarding whether appellant was capable of performing her preinjury job. The Office properly referred appellant to Dr. Menio for an impartial medical evaluation.

The Board finds that Dr. Menio's opinion, which is based on a proper factual and medical history, is well rationalized and supports that on the date of his examination appellant was no longer disabled by her accepted work-related condition and that she was able to return to work full duty as of August 14, 2003. Dr. Menio accurately summarized the relevant medical evidence, provided findings on examination and reached conclusions regarding appellant's condition which comported with his findings. He opined that appellant should be able to perform the duties required by her job, including lifting up to 70 pounds. In response to the Office's request, Dr. Menio clarified his opinion, stating that appellant could return to work in her regular position working 24 hours per week. As Dr. Menio provided a detailed and well-rationalized report based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.

The remaining evidence of record submitted by appellant subsequent to Dr. Menio's report and prior to the Office's termination of compensation is insufficient to outweigh the special weight accorded to Dr. Menio's opinion as the impartial medical examiner. Appellant submitted a duty status report dated December 4, 2003 from Dr. Cibischino reflecting a 10-pound lifting restriction. However, Dr. Cibischino, appellant's attending physician, was on one side of the conflict resolved by Dr. Menio. Therefore, the physician's report is insufficient to overcome the weight of the impartial medical specialist's reports or to create a new conflict of medical opinion.[14] The June 1, 2004 report from Dr. Kim, reflecting his opinion that appellant

[11] 5 U.S.C. §§ 8101-8193.

[12] 5 U.S.C. § 8123(a).

[13] *See Beverly Grimes, supra* note 3. *See also Willie M. Miller*, 53 ECAB 697 (2002).

[14] *See Michael Hughes*, 52 ECAB 387 (2001).

had a 14 percent upper extremity impairment and that she had reached maximum medical improvement is not relevant to the issue of appellant's ability or inability to perform her preinjury job. Appellant submitted an undated statement received by the Office on January 19, 2004 and a letter from her representative dated January 14, 2004, contending that Dr. Menio's report was inaccurate because it incorrectly reflected that Dr. Cibischino had allowed her to lift 70 pounds one hour per day. Supporting her allegation that the regular duties of a mail carrier require activities that exceed the limitations outlined by Dr. Menio, appellant also submitted a statement from the postmaster dated January 9, 2004 outlining general duties of a mail carrier. Dr. Menio's opinion regarding appellant's ability to return to full duty was not based on his reading of a 2002 report by Dr Cibischino; therefore, his statement misquoting Dr. Cibischino as to the weight restriction does not diminish the probative value of Dr. Menio's July 2003 report, in which he specifically found that as of July 15, 2003 appellant was capable of lifting up to 70 pounds intermittently, which is the maximum amount she is required to lift as a mail carrier. Moreover, appellant's contention that the requirements of her job exceeded Dr. Menio's limitations is without merit. The Board finds that Dr. Menio has not articulated any limitations on appellant's activities which conflict with the duties of a rural mail carrier as delineated by the postmaster's January 9, 2004 statement. The Board further finds that Dr. Menio's report is not speculative regarding appellant's ability to return to full duty. His statement that she had not reached maximum medical improvement as of July 15, 2003, is not inconsistent with her ability to perform the functions of her job.[15] His opinion, as stated in his letter dated August 14, 2003, that appellant could return to work in her regular position working 24 hours per week at that time, is unequivocal.

The Board finds that Dr. Menio's opinion as the impartial medical examiner is entitled to special weight and establishes that appellant was capable of returning to her preinjury employment. Consequently, the Board finds that the Office discharged its burden of proof to terminate appellant's compensation effective February 11, 2004.[16]

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective February 11, 2004, on the grounds that she had no further disability due to her accepted employment injury.

[15] The Board notes that Dr. Menio stated that his belief that appellant had a partial disability but should be able to return to full-time employment. Taken in context, it appears that Dr. Menio used the term "disability" to mean "residual," rather than inability to work. "Disability," as used in the Act, means incapacity to work. *See James C. Stevens*, 32 ECAB 1270 (1981). *See also Clarence Glenn*, 29 ECAB 779.

[16] The Board notes that the Office has not issued a final decision on appellant's December 8, 2003 claim for a recurrence of disability. Appellant's claim for benefits from November 18 through December 8, 2003 is interlocutory in nature and, therefore, the Board has no jurisdiction over this matter. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 10, 2004 is affirmed.

Issued: September 14, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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