United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	**Docket No. 07-755**
	)	**Issued: November 9, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Lexington, VA, Employer	)	

Appearances:
John P. Vita, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 24, 2007 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's merit decision dated July 28, 2006 finding that she did not establish a recurrence of disability on July 24, 2002 causally related to her federal employment, and a nonmerit decision dated November 8, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability as of July 24, 2002; and (2) whether the Office properly declined to reopen her claim for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 19, 2002 appellant, then a 41-year-old rural carrier filed a traumatic injury claim alleging that she injured her lower back when she bent down to lift a tray of letters. The

Office accepted her claim for lumbar sprain and strain on May 21, 2002. Appellant's attending physician, Dr. Robert Wilder, Board-certified in physical medicine and rehabilitation, released her to return to light-duty work on December 31, 2002. He indicated that appellant could lift 2 pounds continuously and 10 pounds intermittently for four hours a day. Dr. Wilder found that appellant could sit and grasp intermittently for four hours a day. Appellant could stand and walk as well as push and pull intermittently for one hour a day. She could perform fine manipulation continuously for four hours a day and reach above the shoulder intermittently for two hours a day. Appellant accepted a light-duty job offer based on these restrictions on January 6, 2003 filing, answering the telephone, marking mail and aiding the box clerk and completing rent notices and filing for four hours a day. She worked four hours a day from December 31, 2002 to February 10, 2003.

Appellant continued to miss work due to back pain. She underwent a discogram on February 6, 2003 which demonstrated a degenerated disc with a posterior annular tear at L5-S1. Appellant stopped work on February 25, 2003. Dr. Donald P.K. Chan, a Board-certified orthopedic surgeon of professorial rank, recommended spinal fusion surgery. The Office authorized surgery on March 27, 2003. On April 9, 2003 appellant underwent a posterolateral uninstrumented fusion from L5-S1 and left-sided L5-S1 decompression consisting of partial medial facetectomy and forminotomy and iliac crest bone graft. The Office entered appellant on the periodic rolls on April 25, 2003.

Dr. Chan released appellant to perform light-duty work on October 14, 2003 lifting 5 to 10 pounds continuously and 20 pounds intermittently for four hours a day. He indicated that she could sit for five hours continuously and standing for three hours continuously. Dr. Chan found that appellant could walk intermittently. He further indicated that appellant should bend, stoop, twist, push and pull for no more than one hour a day intermittently. Dr. Chan found that appellant could perform simple grasping and fine manipulation intermittently for eight hours a day. He concluded that she could reach above the shoulder two hours a day intermittently and drive a vehicle continuously for four hours a day. Appellant returned to sedentary work eight hours a day on October 27, 2003.

Dr. Chan examined appellant on April 20, 2004 as a one-year follow-up to the spinal fusion. He stated that appellant would be prone to backaches with increased activities. Dr. Chan stated that she required permanent light-duty work. He provided work restrictions of lifting 15 pounds continuous and 25 pounds intermittently four hours a day. Dr. Chan indicated that appellant could sit, stand and drive a motor vehicle for five hours a day. He indicated that she could walk, bend, stoop, twist as well as push and pull intermittently up to one hour a day. Dr. Chan stated that appellant could grasp intermittently for eight hours a day and reach above the shoulder intermittently for three hours a day.

By decision dated July 27, 2004, the Office reduced appellant's compensation to reflect her actual earnings as a modified rural carrier with wages of $866.40 per week. The Office found that appellant's actual earnings as of December 31, 2002 fairly and reasonably represented her wage-earning capacity. The Office concluded that she had no loss of wage-earning capacity.

Appellant filed a claim for compensation on August 5, 2004 requesting wage-loss compensation from July 26 to August 6, 2004. She submitted a form report dated September 2,

2004 from Dr. Vincent Arlet, a surgeon of professorial rank, diagnosing failed back and indicating with a checkmark "yes" that appellant's condition was due to her employment. Dr. Arlet stated that appellant was totally disabled from July 26 to August 30, 2004.

Appellant filed a recurrence of disability on September 2, 2004 alleging that she had sustained a recurrence of disability on July 23, 2004 causally related to her March 11, 2002 employment injury. She noted that she had stopped work on July 26, 2004. Appellant's supervisor completed the reverse of the form and indicated that following her accepted employment injury appellant's duties included answering the telephone, filing, monitoring the lobby area and verify undelivered bulk business mail. In a report dated August 2, 2005, Dr. Arlet opined that appellant had sustained an acute flare-up of her low back pain and indicated with a checkmark that this condition was due to her accepted employment injury. He stated that appellant was currently totally disabled and required an evaluation for a change of work and work restrictions. On August 5, 2004 Dr. Arlet diagnosed acute flare-up of back pain. He stated that appellant had experienced an exacerbation of her existing back pain. In a note dated August 27, 2004, Dr. Arlet found that appellant was totally disabled through September 4, 2004.

In a letter dated September 16, 2004, the Office requested additional factual and medical information from appellant supporting her claim for recurrence of disability.

Dr. Arlet examined appellant on September 2, 2004 and diagnosed low back pain. He suggested a discogram and appellant requested a second opinion. Dr. Arlet referred appellant to Dr. Frances H. Shen, a Board-certified orthopedic surgeon of professorial rank, who completed a form report on October 22, 2004 diagnosing failed back syndrome and indicating with a checkmark "yes" that this condition was due to her employment activity. Dr. Shen found that appellant was totally disabled and referred appellant to Dr. David S. Rubendall, an osteopath Board-certified in physical medicine and rehabilitation, for evaluation on October 22, 2004. In form reports dated October 27 and November 2, 2004, Dr. Rubendall indicated that appellant was totally disabled through December 2, 2004. On November 2, 2004 he reported that appellant's nerve conduction studies and electrodiagnostic test results were normal.

By decision dated November 19, 2004, the Office denied appellant's claim for a recurrence of disability, finding that she had not established a change in the nature and extent of her injury-related condition, or a change in the nature and extent of her light-duty job requirements.

Appellant requested an oral hearing on November 30, 2004. Dr. Rubendall completed a form report on November 18, 2004 and indicated that appellant was totally disabled due to her chronic lumbar pain due to her accepted employment injury. On December 2, 2004 he opined that appellant could resume light-duty work based on her November 18, 2004 functional capacity evaluation. This evaluation indicated that appellant could occasionally lift and carry up to 20 pounds, stand for 30 minutes, sit for 40 minutes and walk for 30 minutes frequently. Appellant returned to full-time light-duty work on December 17, 2004. On January 3, 2005 Dr. Rubendall reviewed appellant's light-duty job requirements and approved her position. He stated that appellant should have consecutive days off to provide for adequate recovery.

Appellant testified at the oral hearing on May 26, 2006 and stated that following her July 26, 2004 recurrence of disability her light-duty job requirements changed. She stated that prior to July 26, 2004 she was cancelling letters, filing change of address cards and taking the business bulk mail. Appellant also performed computer work and helped carriers case letters and drove carriers on their routes. She stated that her back began swelling and her back pain increased. Following her return to work in December 2004 appellant no longer prepared the business bulk mail and no longer drove carriers or ran errands.

Appellant's attorney submitted a report dated June 26, 2006 from Dr. Rubendall noting that on October 27, 2004 appellant exhibited chronic low back and bilaterally leg pain and numbness continuing from her April 2003 surgery. He noted that he provided work restrictions in December 2004.

By decision dated July 28, 2006, the hearing representative found that appellant had not submitted sufficient medical opinion evidence to establish a change in the nature and extent of her injury-related condition. The hearing representative concluded that appellant had not met her burden of proof in establishing a recurrence of disability beginning July 26, 2004.

Appellant, through her attorney, requested reconsideration on August 30, 2006 and alleged that appellant had submitted sufficient medical evidence to establish a change in the nature and extent of her injury-related condition. In support of this request, appellant submitted an impairment rating from Dr. Rubendall finding that she had 23 percent impairment of the whole person. She also submitted a new position description.

By decision dated November 8, 2006, the Office denied reconsideration without further merit review.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability is the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment which caused the illness. The term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[1] When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-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 to show that she cannot perform such limited-duty work. 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 limited-duty job requirements.[2] The Office is not

[1] 20 C.F.R. § 10.5(x).

[2] *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.[3]

ANALYSIS -- ISSUE 1

On September 2, 2004 appellant alleged a recurrence of total disability due to her accepted injuries of lumbar sprain and strain and lumbar fusion. In support of her claim, she submitted medical evidence pertaining to her medical condition as of July 23, 2004. Dr. Arlet, a surgeon of professorial rank, completed reports on August 2 and 5, 2004 and opined that appellant had sustained a "flare-up" of her low back pain and indicated with a checkmark "yes" that this condition was due to her employment injuries. He did not offer new diagnosis or any opinion regarding a change in appellant's condition in his initial report. Dr. Arlet merely indicated that appellant had experienced an exacerbation of her low back pain. On September 2, 2004 he diagnosed failed back. Dr. Arlet indicated with a checkmark "yes" that appellant's condition was due to her accepted employment injuries. These reports are not sufficient to meet appellant's burden of proof in establishing a change in the nature and extent of her injury-related condition as Dr. Arlet did not offer any medical reasoning explaining how her current diagnosed condition of failed back was related to her accepted employment injuries. Furthermore, the Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such a report is insufficient to establish causal relationship.[4]

Dr. Shen, a Board-certified orthopedic surgeon of professorial rank, diagnosed failed back syndrome on October 22, 2004 and also indicated with a checkmark "yes" that appellant's condition was due to her employment injuries. He found that appellant was totally disabled. This report is not sufficient to establish that appellant sustained a change in the nature and extent of her injury-related condition such that she was totally disabled. As noted, the Board has held that a physician must submit medical reasoning in support of an opinion and a mere checkmark is not sufficiently detailed to constitute probative medical rationale.[5]

Appellant submitted several reports from Dr. Rubendall, an osteopath Board-certified in physical medicine and rehabilitation, diagnosing chronic lumbar pain and indicating that appellant was totally disabled. Dr. Rubendall did not explain how appellant's lumbar condition had worsened following her April 2003 surgery and October 27, 2003 return to a sedentary work position. While he offered new work restrictions, he did not specify a new diagnosis or explain why he felt that appellant's condition had worsened necessitating new work restrictions. Without medical reasoning explaining that appellant had indeed sustained a change in the nature

[3] *Sandra D. Pruitt*, 57 ECAB ___ (Docket No. 05-739, issued October 12, 2005); *but see Katherine T. Kreger*, 55 ECAB 633 (2004) (the Board found that when a lengthy period of disability was suggested that the appropriate issue was not whether appellant had established a recurrence of disability, but whether the existing wage-earning capacity determination should have been modified).

[4] *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

[5] *Id.*

and extent of her injury-related conditions, Dr. Rubendall's reports are not sufficient to meet appellant's burden of proof in establishing a recurrence of total disability.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[6] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[7] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[8]

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the hearing representative's July 28, 2006 decision on August 30, 2006 and submitted additional evidence and argument. She, through her attorney, alleged that she had submitted sufficient medical evidence to establish her claim. This statement is not sufficient to show that the Office erroneously applied or interpreted a specific point of law and does not advance a relevant legal argument not previously considered by the Office as this argument addresses the central issue previously considered by the Office and the hearing representative, whether appellant has in fact met her burden of proof in establishing a change in the nature and extent of her employment-related condition.

Appellant also submitted a permanent impairment rating from Dr. Rubendall and a new position description. These documents while not previously considered by the Office and therefore are new, an impairment rating and a position description are not relevant and pertinent to appellant's claim for a recurrence of disability in July 2004 and are insufficient to require the Office to reopen appellant's claim. Neither of these documents address the central issue of appellant's claim, whether she sustained a change in the nature and extent of her injury-related condition on or after July 24, 2004 rendering her totally disabled.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained a recurrence of total disability. The Board further finds that appellant did not submit evidence or argument in support of her request for reconsideration which would require the Office to reopen her claim for consideration of the merits.

[6] 5 U.S.C. §§ 8101-8193, § 8128(a).

[7] 20 C.F.R. § 10.606(b)(2).

[8] 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the November 8 and July 28, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 9, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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