

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN TANKO and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 03-407; Submitted on the Record;
Issued May 20, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant established that she had intermittent periods of disability for work between December 13, 2000 and July 7, 2002 causally related to her accepted employment injuries on July 23, 1999 and June 15, 2000.

On October 5, 1999 appellant, then a 42-year-old part-time mailhandler, filed a notice of traumatic injury alleging that on July 23, 1999 she was lifting tubs of mail in the dispatch area when she felt something pull on the right side of her back. The Office of Workers' Compensation Programs accepted that appellant sustained a work-related lumbar and thoracic strain. Appellant was off work from July 25 to October 5, 1999, when she returned to work in a limited-duty capacity, her position involved sitting at a table and patching torn mail.

Appellant filed a second notice of traumatic injury on July 5, 2000 alleging that on June 15, 2000 she developed a sharp pain in her lower back when she turned to put a piece of mail in a tub. The Office accepted the claim for muscle spasm of the back. Following the injury of June 15, 2000, appellant resumed her limited-duty position on October 4, 2000.¹

Appellant subsequently filed claims for wage-loss compensation claiming that she was totally disabled for work from December 13, 2000 to January 13, 2001, January 25 to 26, 2001, February 22 to 24, 2001, February 28 to March 1, 2001, March 28 to April 9, 2001 and July 5 to 7, 2001, due to her accepted work injuries.

In support of her claim for compensation, appellant submitted a duty status report (Form CA-17) dated March 2, 2001 from Dr. Carl Otten, Board-certified in preventative medicine, who indicated that appellant could work eight hours per day, five days per week with restrictions. He

¹ By decision dated January 17, 2001, the Office also denied continuation of pay from July 25 through September 7, 1999, since appellant did not file her CA-1 form within 30 days of the July 23, 1999 date of injury.

also noted, “Homebound when under 25 degrees F[ahrenheit].” Dr. Otten continued to submit intermittent duty status reports with no changes.

Appellant was referred to a second opinion physician to determine whether she had any residuals of her work-related injuries.

By report dated May 5, 2001, Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, indicated that appellant had intermittent low back pain and opined that it was related to her work injuries.² Dr. Kaffen opined that appellant had no residuals of the thoracic back injury and stated that she could work eight hours per day with a lifting restriction of 25 pounds.

The Office requested that Dr. Otten review Dr. Kaffen’s report and respond to specific questions regarding the extent of appellant’s disability. By report dated August 17, 2002, Dr. Otten stated that he agreed with the majority of Dr. Kaffen’s report, adding that appellant’s chronic pain condition limited her exposure to ambient temperatures below 25 degrees Fahrenheit. Regarding appellant’s time off from work he stated: “I cannot find any documentation supporting time off [from] work in December [and] January 2000 [and] March 2001, for the above work[-]related condition, other than time spent at [physician’s] offices.”

By letter dated October 30, 2001, the Office requested that Dr. Otten comment on appellant’s dates of alleged total disability for work, indicating that the Office had received disability slips for the periods in question but had no explanation for the disability.

Dr. Otten submitted two additional duty status reports (Form CA-17) dated September 19 and November 14, 2001 and again indicated that appellant should remain “homebound” when the temperature outside was less than 25 degrees. By report dated November 14, 2001, he also stated:

“Kaiser medical records available to me do not contain any off[-]work slips for the dates January 25 [through] 26, 2001, February 22 [through] 23, 2001, nor March 28 [through] April 2, 2001. The absences April 3 through 8, 2001 and July 5 through 7, 2001, were for conditions not on these claims. The June 19 [through] 21, 2001, absence was due to materially worsening of her right lumbar and right leg chronic pain at work on June 18, 2001 and continuing during that time period.”

By decision dated December 19, 2001, the Office denied appellant’s claim for wage-loss compensation for the periods in question, on the grounds that the evidence of record failed to establish that residuals of appellant’s work injuries prevented her from working on those dates.

Appellant disagreed with the Office’s decision and requested an oral hearing. At the hearing held on July 25, 2002 appellant testified that the injury to her back had caused extensive nerve damage in her legs, particularly her right leg. She alleged that exposure to cold weather

² The Board notes that Dr. Kaffen incorrectly reported the date of injury as October 8, 1999, because the questions that the Office sent him on April 3, 2001 referred to this date. The first page of Dr. Kaffen’s report, however, identifies the dates of injury as July 23, 1999 and June 15, 2000.

caused a burning sensation and extreme pain in her right leg and that she could not wear long pants or have any other clothing touching her leg in the winter. She testified that due to this nerve condition, Dr. Otten restricted her from going outside if the temperature was less than 25 degrees. Appellant claimed that she did not work on the intermittent days in question from December 13, 2000 to January 13, 2001 and from January 25 to 26, 2001, because the temperature on those days was less than 25 degrees. She claimed that she called her employing establishment and reported the temperature on each of those days and explained that she could not come into work. Appellant indicated, however, that the employing establishment did not have records of the temperature on the days in question because the employees did not properly record the information. Appellant also testified that she drove to work every day and walked from the parking lot to the employing establishment. She noted that the walk from the employee parking lots to the employing establishment ranged anywhere from a 10 to a 15-minute walk, depending on which lot she parked in. Appellant also stated that she did not see Dr. Otten on the days she missed work because she could not go outside and Dr. Otten had already instructed her not to leave the house when the temperature was less than 25 degrees. Appellant also stated that she was off work from March 28 to April 9, 2001 due to “head spasms,” which she maintained were caused by a pinched nerve, which was a result of her back injuries. She indicated that her absences from work in July 2001 were also due to “head spasms” and claimed that she received a shot in the back of the head on July 5, 2001.

By decision dated October 10, 2002, the Office hearing representative affirmed the December 19, 2001 decision denying appellant’s claim for wage-loss compensation.

The Board finds that appellant did not establish that she had intermittent periods of disability for work between December 13, 2000 and July 7, 2002, causally related to her accepted employment injuries.

A person who claims benefits under the Federal Employees’ Compensation Act³ has the burden of establishing the essential elements of his or her claim including the fact that an injury occurred in the performance of duty as alleged and that disability for employment was sustained as a result thereof.⁴

In this case, appellant met her burden of proof in establishing that she sustained a lumbar and thoracic strain and muscle spasm of the back in the performance of duty on July 23, 1999 and June 15, 2000 and the Office accepted appellant’s claims for these conditions. Appellant returned to work in a light-duty position. It is her burden of proof to establish that specific periods of total disability⁵ were employment related.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Daniel R. Hickman*, 34 ECAB 1220 (1983).

⁵ As used in the Act the term “disability” means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-related impairment prevents the employee from engaging in the kind of work he was doing when he was injured. See *Frazier V. Nichol*, 37 ECAB 528, 540 (1986).

Appellant claimed that her work-related injuries caused her disability for intermittent periods from December 13, 2000 to July 7, 2001. She alleged that the injuries to her back caused extensive nerve damage in her legs and that cold weather caused a burning sensation and extreme pain in her legs, particularly her right leg. She stated that she could not wear long pants or have any other clothing against her leg in the winter. Appellant testified that due to this nerve condition, which she claimed was a result of her back injuries, she could not go outside if the temperature was less than 25 degrees. She claimed that the temperature was less than 25 degrees on the days in question and for that reason she could not go outside and go to work.

However, whether a particular injury causes an employee disability for employment is a medical issue, which must be resolved by competent and rationalized medical evidence. Appellant has the burden of proof to submit rationalized medical evidence demonstrating that she was totally disabled and could not work on the dates in question, causally related to her accepted employment injuries.⁶

The Board finds that appellant has not submitted sufficient medical evidence to show that she was totally disabled for work on intermittent days between December 13, 2000 and July 7, 2002. Appellant submitted several duty status reports from Dr. Otten stating that she should not go outside and should remain “homebound” when the temperature was less than 25 degrees. Dr. Otten did not, however, submit a rationalized medical opinion report to support this restriction. He noted the restriction on three separate occasions, but did not support his statements with medical rationale. The Office, in letters dated June 20 and October 30, 2001, requested that Dr. Otten explain the relationship between his restriction and appellant’s accepted back conditions. Dr. Otten responded by stating that appellant’s chronic pain condition limited her exposure to temperatures below 25 degrees, but did not provide any medical rationale. Dr. Otten did not submit a rationalized medical opinion report explaining the relationship between appellant’s accepted back conditions and her inability to go outside in cold weather. Even though he noted that appellant’s chronic pain condition was the reason she could not go outside on these particular days, the Office only accepted the conditions of lumbar and thoracic strains as work related. The Office did not accept that appellant sustained a chronic pain condition in the performance of duty. Appellant also alleged at the oral hearing that the injuries to her back caused extensive nerve damage in her legs. The Office also did not accept nerve damage in the legs as a work-related condition. Appellant did not submit any medical evidence diagnosing this condition or explaining the relationship between the nerve damage condition and the accepted back injuries. Moreover, the Board notes that there is no evidence that the temperature was in fact less than 25 degrees on the days appellant missed work. Even if appellant had filed a claim for a nerve condition and the Office had accepted the condition as work related, there is no evidence in the case record showing the temperature on those days. Appellant alleged that she called her employing establishment on the days in question and told them to record the temperature, yet she herself admitted that the employing establishment has no records of the temperature on those days.

The Office also requested that Dr. Otten comment on the specific days of appellant’s alleged disability for work. He responded by stating that he could not find any documentation

⁶ See *John Tornello*, 35 ECAB 234 (1983).

supporting appellant's time off from work in December 2000, January, March and April 2001. He also indicated in his November 14, 2001 report, that appellant's absences from April 3 through 8, 2001 and July 5 through 7, 2001, were not related to her accepted work injuries. Appellant acknowledged at the oral hearing that she did not go to work during the periods of March 28 to April 9, 2001 and July 5 to 7, 2001, because of "head spasms" and claimed that she received a shot in the back of the head on July 5, 2001. The Office did not accept a "head spasm" condition as work related and appellant's own attending physician acknowledged that several days of the alleged disability for work were not work related.

Dr. Otten's duty status reports indicating "homebound" as a restriction with no supporting medical rationale and appellant's own opinion that her back condition caused nerve damage in her legs, are insufficient to establish total disability for work on the days appellant missed work. The record does not contain a rationalized medical opinion report explaining the relationship between appellant's accepted back conditions and the identified restriction of not going outside on days when the temperature was less than 25 degrees. As such, appellant has not met her burden of proof to establish that her loss of wages incurred on intermittent days between December 13, 2000 through July 7, 2001, were related to the accepted conditions of lumbar and thoracic strain and/or muscle spasms of the back and the Office properly denied her claim.

The decisions of the Office of Workers' Compensation Programs dated October 10, 2002 and December 19, 2001 are hereby affirmed.

Dated, Washington, DC
May 20, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member