

establishment reported that appellant's disability retirement was approved by the Office of Personnel Management (OPM) effective February 5, 2002.

In a March 26, 2002 letter, appellant stated that she underwent spinal surgery on June 8, 1998 and September 7, 1999, that she returned to full duty on April 15, 2001 after a period of limited duty, and that she was able to work with the residual pain in her low back and right leg and foot by changing positions frequently and by lying prone during her off-duty hours. Appellant continued that by September 2001 her pain had progressed to the point that it was severe and constant, that her right leg and foot were alternately throbbing or numb, that she was unable to case mail or lift trays of mail without severe back pain, and that she stopped work on November 10, 2001, as she was unable to perform her duties as a letter carrier.

In an April 5, 2002 report, Dr. Ward Jankus, a Board-certified physiatrist, noted appellant's history of disc surgery at L5-S1 followed by a fusion around the end of 1999, and her complaints of constant lower lumbosacral and right leg pain, numbness into the lateral right foot, a walking, standing and sitting tolerance of about 10 to 15 minutes, and a lifting and carrying restriction of 10 to 15 pounds. On physical examination, Dr. Jankus found some restricted range of back motion and, on neurological examination, "obvious S1 nerve root damage with some calf atrophy, mild calf weakness and the absent ankle reflex." Dr. Jankus diagnosed "[c]hronic back pain, status post fusion with right S1 nerve damage," and stated that appellant had provided "pretty reasonable activity estimates." In an April 5, 2002 report, Dr. Clifford B. Tribus, a Board-certified orthopedic surgeon, noted that appellant's underlying condition of L5-S1 spondylolisthesis had "most likely been with her since she was an adolescent," but that her work at the employing establishment "has exacerbated her low back and lower extremity pain over the years, which ultimately lead to spinal reconstructive surgery." Dr. Tribus stated:

"Proving cause and effect in these situations is always quite difficult, but one thing has been fairly clear in my relationship with [appellant] is that, the act of continued working both preoperatively and postoperatively has caused her a fair amount of symptoms. Even postoperatively she was able to return to work, but over the two years subsequent to her surgery standing as long as she needed to work as well as working for eight hours a day has substantially inhibited her quality of life. I've had lengthy discussions with her in the past regarding the situation as to whether or not she feels that she can [perform] other levels of employment at the [p]ostal [s]ervice, and it has been her position with me that all available options have been exhausted. ... [S]he has reported that the persistent pain was making work untenable. Knowing her underlying condition I certainly think this is a reasonable possibility and I do feel her symptoms are concordant with what I know of her back condition."

By letter dated June 11, 2002, the Office advised appellant that it had accepted an exacerbation of L5-S1 spondylolisthesis. The Office paid appellant compensation for temporary total disability from June 16 to July 13, 2002. On August 29, 2002 appellant elected, effective November 10, 2001, to receive benefits under the Federal Employees' Compensation Act in preference to those available from the OPM for retirement. In a June 25, 2002 statement, an injury compensation specialist at the employing establishment reported that appellant "had been carrying her entire carrier route, without any restrictions, until November 9, 2001 when she

stopped working. I discussed with [appellant] her various options including performing limited-duty work and [appellant] indicated that she would be unable to do that because she was uncomfortable sitting for extended periods of time.” This statement continued that appellant had filed a claim for a recurrence of disability under her existing claim, but when that was denied on January 25, 2002, she filed her current claim on the advice of her union representative.

In response to an August 16, 2002 inquiry, whether appellant’s condition had resolved and whether she was able to perform her regular duties, Dr. Tribus stated in a September 6, 2002 report that the fact that the exacerbation of her underlying spondylolisthesis was treated, even with surgery, did not mean that the underlying condition was completely gone, and certainly did not mean that her spine had been returned to normal. Dr. Tribus stated that objectively appellant’s fusion had healed nicely, that he thought appellant was “capable of some sort of gainful employment,” that he “was a bit surprised when she voluntarily applied for leave from work,” but that appellant “was attempting to make a quality of life decision for herself and finding the repetitive lifting necessary at her job was simply causing her too much pain.”

By letter dated October 10, 2002, the Office advised appellant that there was no medical evidence to support that she was totally disabled from November 10, 2001 to June 30, 2002, and requested that she submit records of all treatment she received for her back condition since September 1, 2001, plus a detailed medical report supporting that she was unable to work during the period claimed. Appellant submitted an August 20, 1998 report from Dr. Paul A. Kornaus, a Board-certified family practitioner, and a September 1, 1998 report from Dr. Steven Toutant, a Board-certified neurosurgeon, both of whom stated that appellant’s herniated disc and her surgery were related to her employment. She also submitted a September 13, 2001 report from Dr. Tribus noting that appellant had “continued to work despite persistent residual back pain and right lower extremity pain” that were improved by her surgery but did not completely resolve and had gradually worsened over the past two years, though it was unclear why. Dr. Tribus stated that x-rays showed her L5-S1 spinal fusion was solidly healed, and that on examination her right Achilles’ reflex was absent and she had difficulty toe and heel walking on the right due to pain. Appellant complained “that she is finding it exceedingly difficult to make it through the workdays and to enjoy any quality of life at all due to the severity of her pain,” which she stated was exacerbated by walking or prolonged sitting.

By decision dated July 30, 2003, the Office found that the medical evidence did not support that appellant was totally disabled from November 10, 2001 to June 30, 2002.

Appellant requested a review of the written record, stating that her spinal surgeries were approved by the Office, that she returned to her full duties on April 15, 2001 but was accommodated with a lesser workload and the ability to change positions frequently, that she was not offered a specific limited-duty job, and that she felt that disability retirement was the only option. Appellant submitted a copy of her application for disability retirement, on which the employing establishment stated, on September 28, 2001, that appellant had not been reassigned to a light-duty position, but that “When employee complains of back pain we provide her assistance in the completion of her route. Or provide her the type(s) of delivery that causes less back pain!” The employing establishment also stated: “Dr. Gregory R. Kaftan, Contract Medical Officer, has reviewed medical documents submitted by [appellant] and indicates that accommodation is not possible. [Appellant] is unable to perform the functional requirements of

the city carrier position due to back pain related to prior surgery.” In an October 21, 2003 report, Dr. Tribus stated that appellant had “consistent low back and lower extremity complaints felt to be related to L5-S1 spondylolisthesis, which is quite objective on plain radiographs and MRI [magnetic resonance imaging] [scan],” and that her “inability to continue working has been further objectified by a functional capacity evaluation [FCE] taken on December 13, 2002¹ at which point despite good effort on her part she tested at less than sedentary level.”

By decision dated January 15, 2004, an Office hearing representative found:

“The medical evidence supports that the claimant was unable to perform the job duties of a letter carrier, as her limitations were not in accordance with the physical demands of the job. However, the findings of the functional capacity evaluation and the opinion of Dr. Tribus support that she can work with restrictions as outlined in the FCE. While the limitations are somewhat restrictive, the employing agency advised that the claimant was offered limited duty as one of her options on November 10, 2001, but she opted for voluntary retirement instead. The claimant indicated that there was no appropriate offer made to her. Without evidence to support that a suitable job offer was made, and with the allegations of the agency that such offer was made, a determination cannot be made that there was no job made available to the claimant within her work restrictions. As such, she has failed to establish that she was totally disabled from November 10, 2001 and continuing.”

LEGAL PRECEDENT

Appellant has the burden of proving by the preponderance of the reliable, probative, and substantial evidence that he or she is disabled for work as a result of an employment injury or condition. This burden includes the necessity of submitting medical opinion evidence, based on a proper factual and medical background, establishing such disability and its relationship to employment.² Pain due to an employment-related condition can be the basis for payment of compensation under the Federal Employees’ Compensation Act, if there is a proven basis for the pain.³

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-resulted impairment prevents the employee from engaging in the kind of work she was doing when she was injured.⁴ If an

¹ This evaluation was authorized by the Office.

² *David H. Goss*, 32 ECAB 24 (1980).

³ *Fereidoon Kharabi*, 52 ECAB 291 (2001); *Barry C. Peterson*, 52 ECAB 120 (2000).

⁴ *Frazier V. Nichols*, 37 ECAB 528 (1996).

employing establishment's actions prevent an employee from working due to a work-related condition, that employee is disabled within the meaning of the Act.⁵

ANALYSIS

The Office accepted that appellant's employment caused an exacerbation of her preexisting spondylolisthesis. Appellant's attending Board-certified orthopedic surgeon, Dr. Tribus, concluded that appellant's low back pain was related to her spondylolisthesis, and her attending Board-certified physiatrist, Dr. Jankus, concluded that appellant's stated lifting restriction of 10 to 15 pounds and walking, standing and sitting tolerance of 10 to 15 minutes were "pretty reasonable activity estimates." These restrictions would prevent appellant from performing the duties of her position of letter carrier, as reflected in the position description. The Board finds that these reports support that appellant was disabled for her regular job of letter carrier by an employment-related condition, although both were prepared after November 10, 2001.

That appellant was disabled beginning November 10, 2001 is established not by these reports but by the employing establishment's statements on appellant's application for disability retirement. The employing establishment stated that, following her surgeries, appellant was accommodated with assistance in the completion of her route and provision of types of delivery that caused less back pain. Although appellant was not reassigned to a light-duty position, neither was she performing the full duties of her position of letter carrier. The employing establishment determined that appellant was unable to perform the duties of her position due to back pain, and the employing establishment's contract medical officer, Dr. Kaftan, reviewed appellant's medical reports and determined that accommodation was not possible. Through the employing establishment's actions, appellant's work-related condition prevented her from performing any position there. The Board finds that this establishes that she was disabled within the meaning of the Act.

In a January 15, 2004 decision, an Office hearing representative recognized that appellant was unable to perform the duties of a letter carrier, but found that she was not disabled because the employing establishment offered her limited duty. The Office regulation states that offers of limited duty must be in writing,⁶ and the record contains no written offer. The Board finds that the Office hearing representative's statement that a determination could not be made that no job was made available given that there was no evidence to support an offer reflects a misunderstanding of the proof required to establish facts, and is contrary to the employing establishment's statement in appellant's disability retirement application that no accommodation was possible.

CONCLUSION

The evidence establishes that appellant was disabled for any position at the employing establishment from November 10, 2001 to June 30, 2002.

⁵ *Claude E. Pilgreen*, 33 ECAB 566 (1982).

⁶ 20 C.F.R. §§ 10.505, 10.507.

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2004 and July 30, 2003 decisions of the Office of Workers' Compensation Programs are reversed and the case remanded to the Office for payment of appropriate compensation.

Issued: December 2, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member