United States Department of Labor
Employees' Compensation Appeals Board

AMELIA S. JEFFERSON, Appellant	)	
and	)	**Docket No. 04-568**
	)	**Issued: October 26, 2005**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Kansas City, KS, Employer	)	

Appearances:
Amelia S. Jefferson, pro se
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument October 13, 2005

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 24, 2003 appellant filed a timely appeal from a November 21, 2003 decision of the Office of Workers' Compensation Programs which denied wage-loss benefits for the period September 28, 2000 to March 31, 2001. She also appealed decisions dated November 25 and December 18, 2003 regarding her pay rate for compensation purposes and which found that she was not entitled to compensation benefits for the period January 4 through February 11, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether appellant is entitled to wage-loss compensation for the period September 28, 2000 to March 31, 2001 for intermittent disability; (2) whether the Office properly rescinded acceptance of total disability for the period January 4 through February 11, 2003; and (3) whether the Office properly determined appellant's pay rate for the period beginning February 12, 2003.

FACTUAL HISTORY

On November 25, 1996 appellant, then a 50-year-old mail clerk, filed a claim alleging injury on November 10, 1996 while throwing magazine bundles from a belt. She stopped work on November 21, 1996 and was released for light duty on November 25, 1996.[1] Her claim was accepted by the Office for a right shoulder strain.

On April 1, 1997 appellant filed a claim for injury on March 31, 1997. She noted that she was on light duty but experienced muscle spasms while sitting and casing letters that date. She was diagnosed by Dr. Gregory L. Bono, an attending physician, as having right bicipital tendinitis and was released to return to limited duty that date. On April 6, 1997 he released appellant to regular duty. Her claim was accepted for right bicipital tendinitis. On April 24, 1997 Dr. Bono noted that appellant could work regular duty without restriction but, on April 30, 1997, she was placed on work restrictions of left-handed lifting to a maximum of 10 pounds.

On May 1, 1997 appellant filed a claim for injury that date to her left arm. She stopped work and was treated by Dr. Bono, who released her to return to modified duty as of May 5, 1997. By decision dated July 25, 1997, the Office denied appellant's claim for her left upper extremity, finding that the medical evidence was insufficient to establish causal relationship. However, on September 30, 1997 the Office vacated the July 25, 1997 decision and accepted the claim for a left shoulder strain. Appellant's claim for continuation of pay from May 5 to 13, 1997 was denied, as the medical evidence established her release to work on May 5, 1997.

On July 29, 1997 the employing establishment advised that appellant was assigned to a limited-duty mail clerk position at grade level 05/Step C, at a saved pay rate.

On December 2, 1997 appellant filed a CA-7 claim for compensation for the period July 21 to 28, 1997. She also filed a CA-1 traumatic injury claim for her left shoulder on July 29, 1997 and a CA-2 occupational disease claim for her left upper extremity on July 31, 1997. The claims were consolidated and, by decision dated February 10, 1998, the Office found that there was insufficient medical evidence to establish her disability for work from July 21 to 28, 1997.

The record reflects that appellant was also treated by Dr. Charles Orth, an osteopath, who obtained a magnetic resonance imaging scan which did not reveal a tear of the right rotator cuff. He diagnosed degenerative disease changes of the right acromioclavicular joint with biceps tendinitis and impingement syndrome of the right shoulder. His reports note that he continued appellant on limited duty, which the employing establishment indicated was available.

[1] The record indicates that appellant did not return to work until December 23, 1996. Appellant worked at the employing establishment from 1990 to April 25, 2001.

On September 21, 1998 appellant filed a CA-7 claim for compensation for the period December 10 to 15, 1997 to repurchase leave.[2] The form listed her base pay as $34,276.00 per year, or $659.15 per week, and noted her salary included night pay differential. On November 3, 1998 the Office advised appellant that, under the Act, the first three days of disability due to a work-related injury are waiting days and were noncompensable. The Office prepared a pay rate memorandum, noting that, as of December 12, 1997, the date disability began, she had a base salary of $659.15 a week and $45.32 a week in night differential for a total weekly pay rate of $704.47.

On October 7, 2000 appellant filed a recurrence of disability claim, noting that the date of recurrence was September 28, 2000. By letter dated April 16, 2001, the Office informed appellant that the September 28, 2000 recurrence claim and her condition of degenerative disease of the acromioclavicular joints, bilaterally, were accepted as employment related. She was advised to file a CA-7 claim for any wage loss. The record reflects that, from November 15, 1999 to April 28, 2001, appellant worked 40 hours a week as a computer operator at the Kansas University Medical Center. She resigned from the employing establishment in April 25, 2001 and moved to Texas where she obtained private employment. On November 20, 2001 she filed a CA-7 claim for compensation for the period September 28, 2000 to March 31, 2001, alleging intermittent disability for that period contending that no limited-duty work was made available.

The medical evidence pertaining to this period includes treatment notes from the Kansas University Department of Family Medicine. On September 28, 2000 appellant was seen for bilateral shoulder and neck pain. Her condition was assessed as tendinitis and she was provided ibuprofen. On October 3, 2000 Dr. Ed Wilson noted that appellant should not perform repetitive overhead work. An October 31, 2000 note indicated that medication was refilled and the restrictions of Dr. Wilson were repeated. On November 16, 2000 Dr. Wilson noted her current lifting restrictions. Subsequent reports noted appellant's complaints regarding a sinus condition and treatment of allergies.[3] In a December 29, 2000 report, Dr. Stephen W. Munns, a Board-certified orthopedic surgeon, provided restrictions of no overhead activities or repetitive throwing and no pushing or pulling or lifting over 10 pounds. On March 8, 2001 Dr. Wilson noted that an orthopedic referral had recommended surgery on appellant's right shoulder as physical therapy has provided only modest results. A March 16, 2001 treatment note addressed appellant's complaints of right foot pain. The employing establishment advised that limited-duty work was available for appellant during this period.

Appellant moved to Georgia and on January 17, 2002 indicated that she worked for IBM in Alpharetta, Georgia. She then moved to Florida and, on January 22, 2003, filed a CA-7 claim for compensation commencing January 4, 2003 for total disability. She submitted reports dated January 16 and 23, 2003 in which Dr. Edward D. Young, Board-certified in orthopedic surgery, diagnosed right shoulder impingement and degenerative joint disease of the right shoulder. He discussed treatment options with appellant, noting that she wished to proceed to surgery.

[2] On that date, appellant also filed a CA-2a notice of recurrence of disability as of September 18, 1998. It was noted that she did not stop work but sought medical treatment.

[3] On December 8, 2000 Dr. Wilson listed appellant's restrictions as no lifting over 20 pounds or 10 pounds on a repetitive basis and to avoid repetitive motion with the arms raised.

Dr. Young advised, however, that appellant could work eight hours a day with restrictions of no repetitive arm activity or overhead lifting and a weight restriction of five pounds. Appellant was placed on the periodic rolls, effective January 4, 2003, at a weekly pay rate of $772.93.[4]

In reports dated February 12, 2003, Dr. Jon E. Minter, a Board-certified osteopath specializing in orthopedic surgery, noted that appellant had recently moved to Georgia and came under his treatment. He diagnosed a rotator cuff tear of the right shoulder, recommended surgery, and advised that she could not work. Appellant underwent right shoulder surgery on April 3, 2003 and surgery was performed on her left shoulder on June 27, 2003.

Appellant reported that in April and May 2002 she had been employed by Craftmatic, earning $1,261.80. Key Financial Corporation provided financial information indicating that she was employed as a loan officer for 40 hours a week from June 26, 2002 to January 10, 2003.[5]

In an August 5, 2003 report, Dr. Minter advised that appellant could return to work on August 11, 2003 with restrictions to her physical activity.

By decision dated November 21, 2003, the Office denied appellant's claim for wage-loss compensation for the period September 28, 2000 to March 31, 2001. It found that light-duty work was available at the employing establishment during this period and that the medical evidence did not establish that she was found totally disabled for work.

In a November 25, 2003 decision, the Office found that appellant had been paid at an erroneous pay rate for the period January 4 to November 29, 2003. The Office noted that the employing establishment provided pay rate information of $38,076.00 per annum effective September 28, 2000, the date of the claimed recurrence of disability, with an additional night differential of $1.58 per hour times 8 hours, for a total weekly pay rate of $772.93. However, as appellant had not established a recurrence of total disability for the period commencing September 28, 2000, the proper pay rate was $704.47, based on the date disability began on December 12, 1997.[6]

In a December 18, 2003 decision, the Office found that appellant was not entitled to wage-loss benefits for the period January 4 to February 11, 2003, which effectively rescinded acceptance of this period. The Office noted that appellant had been employed until she resigned from private employment on January 10, 2003 and the medical evidence did not establish that she was totally disabled until February 12, 2003 when her physician took her off work. In a second December 18, 2003 decision, the Office amended the November 25, 2003 decision to find that appellant's pay rate was $704.47 beginning February 12, 2003 for purposes of wage loss for total disability.

[4] The Office noted that this pay rate was based on a recurrence of disability commencing September 28, 2000.

[5] Payroll records from Key Financial list a gross salary of $27,927.32.

[6] The Office noted that appellant had actual earnings in private industry for 45 weeks from March 1, 2002 to January 10, 2003 in the amount of $29,189.12 from Craftmatic and Key Financial. It divided this amount by 45 weeks to find an average weekly pay rate of $648.05.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[7] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[8] Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[9] The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.[10]

The Office's procedure manual provides that wages lost for compensable medical examination or treatment may be reimbursed.[11] It notes that a claimant who has returned to work following an accepted injury or illness may need to undergo examination or treatment and such employee may be paid compensation for wage loss while obtaining medical services and for a reasonable time spent traveling to and from the medical provider's location.[12] The absence from work for the purpose of medical evaluation does not constitute a recurrence of disability and, therefore, such absence from work will not entitle the claimant to a higher pay rate under section 8101(4).[13]

ANALYSIS -- ISSUE 1

Appellant's claim was accepted for a right shoulder strain and bicipital tendinitis, left shoulder strain, bilateral degenerative disease of the acromioclavicular joints and a right rotator cuff tear. She filed claims for wage-loss compensation for intermittent periods from September 28, 2000 to March 31, 2001 for sick leave and leave without pay utilized during the period. The Office advised appellant that to claim lost time from work she must file a CA-7 and support her disability for work with medical evidence. It found that she did not support her claim of disability, noting that she was employed at the Kansas University Medical Center during this period, light duty was available to her at the employing establishment, and the medical evidence did not establish total disability for work.

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[7] *See Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

[8] *See David H. Goss*, 32 ECAB 24 (1980).

[9] *See Edward H. Horton*, 41 ECAB 301 (1989).

[10] *See William A. Archer*, 55 ECAB ___ (Docket No. 04-1138, issued August 27, 2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.16 (December 1995).

[12] *See also Daniel Hollars*, 51 ECAB 355 (2000); *Jeffrey R. Davis*, 35 ECAB 950 (1984).

[13] *See supra* note 11 at Chapter 2.901.16(b).

On September 28, 2000 appellant used 4 hours of sick leave and .92 hours of leave without pay. The record reflects that she was examined that day at the Kansas University Medical Center for complaint of bilateral shoulder pain and provided with ibuprofen. However, appellant was not excused from work. She was next seen at the clinic on October 3, 2000, a day she claimed eight hours of leave without pay. Appellant was treated for right shoulder pain and Dr. Wilson reiterated her restrictions for work. Dr. Wilson did not indicate that appellant was totally disabled for work. The leave records reflect that appellant worked October 5 through 14, 2000, and used four hours of sick leave and four hours leave without pay on October 17, 2000. She worked October 18 through 26, 2000 and used leave without pay starting October 27 through November 4, 2000. She was seen on October 31, 2000 at the medical clinic for right shoulder pain, and her limited-duty restrictions were reviewed. Appellant worked November 7, 8 and 9, 2000and again utilized leave without pay from November 10 to December 14, 2000.[14] The November 16, 2000 medical clinic record indicated that appellant had improved range of motion of the right shoulder and noted her lifting restrictions. On December 1, 2000 she was again treated for right shoulder pain and a course of physical therapy with home exercises was provided. The December 8, 2000 records indicate that she was treated for right shoulder pain, depression and sinusitis as part of a well-woman examination. There is no indication that appellant was found totally disabled for work.

Appellant worked on December 15, 2000 and again utilized leave without pay from December 16 to 22, 2000. She returned to work December 23 through January 9, 2001, utilizing leave for part of the 10th, 11 and 12th. Appellant worked January 16 through February 6, but utilized .9 hours leave on January 25, 2001 when she was examined at the medical center. However, her treatment that day did not address her accepted employment-related shoulder conditions. Rather, her examination was for complaint of a sinus infection. The leave analysis records from the employing establishment do not contain entries after February 9, 2001.

As noted under the Office procedure manual, appellant would be entitled to compensation for wage loss related to a reasonable time spent traveling to and being examined for her accepted shoulder conditions on September 28, October 3 and 31, November 16 and December 1 and 8, 2000 as there is medical evidence from the Kansas University Medical Center addressing treatment of her shoulder conditions for those specific dates. However, she is not entitled to compensation for wage loss for other intermittent dates of leave without pay claimed, as the medical evidence of record is not sufficient to establish that she was totally disabled for work for those dates. Rather, the leave records reflect that appellant's light-duty job remained available at the employing establishment and that she did, in fact, return to work during the period as described above, nor would appellant be entitled to wage-loss compensation for the dates of medical treatment for conditions not accepted by the Office as causally related to her employment injuries. For example, her treatment on January 25, 2001 was for sinusitis and not her accepted shoulder conditions. Appellant is not entitled to wage-loss benefits for this date. With regard to the period February 9 through March 31, 2001, the case is not in posture for decision as the record on appeal does not contain a complete absence analysis from the

[14] In a December 8, 2000 form report, Dr. Wilson indicated that appellant was incapacitated for the period November 10 to December 8, 2000. However, he did not provide any opinion advising the medical condition found to be disabling. The form listed appellant's work restrictions. A physician's opinion on a form report that does not address the issue of causal relationship is of diminished probative value. *See Gary J. Watling*, 52 ECAB 278 (2001).

employing establishment for these dates.[15] The case will be remanded for further consideration by the Office as to this aspect of appellant's claim.

LEGAL PRECEDENT -- ISSUE 2

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute.[16] The Office's burden of justifying termination or modification of compensation holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[17]

ANALYSIS -- ISSUE 2

In its December 18, 2003 decision rescinding acceptance of wage-loss compensation paid for the period January 4 to February 11, 2003, the Office noted that appellant resigned from private employment on January 10, 2003. In reports dated January 16 and 23, 2003, Dr. Young advised that she could work with her specified restrictions, and it was not until February 12, 2003 that Dr. Minter advised that appellant was disabled and should not work in anticipation of shoulder surgery.

The record establishes that on February 6, 2003 the Office placed appellant on the periodic rolls effective January 4, 2003. The medical evidence consisted of Dr. Young's reports, and he advised that appellant was considering surgery. On January 16, 2003 the physician noted that appellant could work for eight hours a day within her specified restrictions. Dr. Young practices medicine in Jacksonville, Florida, where she then resided. During February 2003, however, appellant moved from Florida to the Atlanta, Georgia area and came under the care of Dr. Minter. He advised on February 12, 2003 that she could not perform any work. Right shoulder surgery was performed on April 3, 2003 and left shoulder surgery was performed on June 27, 2003.

The Office also received information from appellant's private employer, Key Financial Corporation, which stated that she was employed until January 10, 2003. This employer submitted earnings and leave statements noting payments of salary to appellant for pay periods including December 27 to January 9 and January 10 to 23, 2003. Appellant, therefore, received wage-loss compensation from January 4 to 23, 2003, while she was still employed in private industry and earning salary. Furthermore, the evidence establishes that, although surgery had initially been scheduled in Florida under Dr. Young, appellant relocated to Georgia and came under the treatment of Dr. Minter. He did not advise that appellant was totally disabled until

[15] Appellant resigned from the employing establishment on April 25, 2001.

[16] *See Stephen N. Elliott*, 53 ECAB 659 (2002).

[17] *See Delphia Y. Jackson*, 55 ECAB ___ (Docket No. 04-165, issued March 10, 2004).

February 12, 2003. Surgery was not performed until April 2003 with a second surgery performed in June 2003. The Board finds that the Office properly rescinded acceptance of wage loss for total disability for the period January 4 to February 11, 2003.[18]

LEGAL PRECEDENT -- ISSUE 3

Section 8105(a) of the Federal Employees' Compensation Act provides: "If disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known has his basic compensation for total disability."[19] Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater…."[20]

ANALYSIS -- ISSUE 3

Appellant sustained injury on November 10, 1996. At that time she was a regular full time postal employee at Grade 05/Step C, with a fixed annual rate of pay. The record reflects that she utilized continuation of pay for intermittent dates and did not make any claim for wage-loss compensation. As she did not stop work or have continuous disability from the date of injury, her pay rate as of that date was not utilized by the Office.[21] She filed subsequent claims for injury on March 31 and May 1, 1997, for which she again utilized continuation of pay and made no claim for wage loss. On July 29, 1997 she was assigned to a limited-duty position as a mail clerk at a saved pay rate of Grade 05/Step C. On December 2, 1997 she filed a claim for compensation for the period July 21 to 28, 1997 which was denied by the Office as the medical evidence was insufficient to establish her disability for work.

On September 21, 1998 appellant filed a claim for wage loss for the period December 10 to 15, 1997 to repurchase leave. Her claim was accepted by the Office and it advised that it used December 12, 1997 at the date her disability began. The employing establishment noted that, at that time, appellant's base pay was $34,276.00 per year, or $659.15 per week. Added to this was night differential of $45.32 a week, for a total weekly pay rate of $704.47.[22]

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[18] *See Andrew Wolfgang-Masters*, 56 ECAB ___ (Docket No. 05-1, issued March 22, 2005).

[19] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three-fourths of an employee's monthly pay when the employee has one or more dependents. *See* 5 U.S.C. § 8110(b).

[20] 5 U.S.C. § 8101(4).

[21] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5 (March 1996).

[22] *See Sue A. Sedgwick*, 45 ECAB 211 (1993) (when the job held at injury includes additional elements of pay, such as night differential, such additional pay must be reflected in the pay rate for the job).

The Board notes that appellant subsequently filed a recurrence of disability claim for the period September 28, 2000 to March 31, 2001. However, under the procedure manual, her absence from work for the purpose of obtaining medical treatment does not constitute a recurrence of disability.[23] Moreover, her claim for wage loss for this period was denied by the Office as the medical evidence of record did not establish that she was totally disabled for work. Rather, the record reflects that she worked for a substantial portion of this period. Therefore a recurrence of disability pay rate is not applicable. The Board notes that the Office utilized appellant's pay rate effective September 28, 2000 to initially compute her compensation entitlement as of January 4, 2003, when it accepted her claim of employment-related disability. This was error, which the Office subsequently corrected when it noted that the recurrence of disability claim was not accepted. The Board finds that, for the purposes of wage-loss compensation, the pay rate the date disability began on December 12, 1997 should be utilized.[24]

CONCLUSION

The Board finds that appellant did not establish that she is entitled to wage-loss compensation for intermittent dates from September 28, 2000 to March 31, 2001. However, she is entitled to reimbursement for wages lost for medical treatment and the case is remanded for further development in conformance with this decision. The Board finds that the Office properly rescinded acceptance of total disability for the period January 4 to February 11, 2003. The Board also finds appellant's pay rate under section 8101(4) was determined to be the date disability began on December 12, 1997.

[23] *See* note 11, and accompanying discussion.

[24] Appellant worked as a full-time mail clerk for substantially the whole year prior to the injury, in a position for which there was a fixed annual rate of pay based on a 40-hour work week. *See* 5 U.S.C. § 8114(d)(1).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 18 and November 25 and 21, 2003 be affirmed, in part, and set aside, in part, and remanded for further proceedings consistent with this decision.

Issued: October 26, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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