United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
and	)	**Docket No. 09-1256**
	)	**Issued: April 15, 2010**
U.S. POSTAL SERVICE, POST OFFICE, San Bernardino, CA, Employer	)	

Appearances:
Appellant, pro se
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 April 16, 2009 appellant filed a timely appeal of the September 2, 2008 and February 18, 2009 merit decisions of the Office of Workers' Compensation Programs denying her recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of total disability commencing February 21, 2006 causally related to her employment-related injuries.

FACTUAL HISTORY

On February 1, 2001 appellant, then a 36-year-old city letter carrier, filed an occupational disease claim alleging that on November 1, 1996 she became aware of her carpal tunnel syndrome. On February 25, 1997 she realized that her condition was caused by repetitive work duties. The Office accepted her claim for right thumb de Quervain's disease, bilateral wrist strains and bilateral carpal tunnel syndrome. It authorized a right first dorsal compartment

release, which was performed on June 25, 2001 by Dr. Barry E. Watkins, an attending Board-certified orthopedic surgeon. In an October 18, 2001 report, Dr. Watkins released appellant to return to work with restrictions as of that date with the use of wrist and thumb splints. He restricted appellant from lifting more than 40 pounds on an intermittent basis.[1]

In a January 20, 2004 work restriction form, Dr. Watkins advised that appellant could not perform her regular work duties. He restricted her from walking routes when the ambient temperature was below 70 degrees or routes with circulars. Appellant could not perform fine manipulation and repetitive simple grasping more than 3 hours continuously without a 30-minute break from either activity. She could not lift more than 30 pounds continuously and 10 to 40 pounds intermittently, sit, bend, stoop and twist more than four hours, climb more than six hours or push and pull more than two to six hours per day. Appellant was permitted to stand, walk, reach above the shoulder, drive a vehicle and work in fumes/dust for eight hours and noise for four hours per day.

Appellant stopped work on March 18, 2005 due to the death of a family member. The record reflects that on May 3, 2005 the employing establishment issued a notice of removal; however, the matter went to arbitration and she was reinstated in her employment. By letter dated January 30, 2006, the employing establishment advised her that she would be reinstated to her former position effective February 1, 2006 based on the arbitration decision and would be paid administrative leave until offered a position within her physical restrictions.

On February 6, 2006 the employing establishment offered appellant a modified city carrier position based on the restrictions set forth in Dr. Watkins' January 20, 2004 report. The record reflects that she met with her supervisor and the postmaster; however, on February 21, 2006, she rejected the job offer. Appellant contended that each time she was moved from one position to another, it caused an aggravation of her preexisting injury. She also alleged erroneous administrative actions and circumvention the National Association of Letter Carriers' agreement.

By letter dated March 2, 2006, the employing establishment requested that the Office make a suitability determination regarding the February 6, 2006 job offer. It noted that appellant was issued a notice of removal dated May 3, 2005 for unacceptable work performance, mishandling mail and unacceptable conduct. The employing establishment noted that appellant previously worked in the San Bernardino main employing establishment as a rehabilitated employee with permanent restrictions. Based on the grievance decision, it offered her the February 6, 2006 limited-duty position. The position was located in a satellite office in the San Bernardino area within 30 miles of appellant's prior workstation.

On March 8, 2006 appellant filed Form CA-7 claims alleging that she sustained a recurrence of disability from February 21 to March 3, 2006. By letter dated March 17, 2006, the Office requested that she submit additional factual and medical evidence in support of her claim.

[1] By decisions dated March 29 and May 16, 2002, the Office granted appellant schedule awards for 10 percent impairment of the right upper extremity and 5 percent impairment of the left upper extremity.

By letter dated April 10, 2006, the employing establishment requested that Dr. Watkins review its February 6, 2006 limited-duty job offer and address whether appellant could perform the duties of the position.

On April 26, 2006 the employing establishment advised the Office that Dr. Watkins did not concur with the job offer at that time because it required excessive repetitive grasping and manipulation. Dr. Watkins offered to reconsider his opinion if he was provided with input and an evaluation from an onsite medical reviewer regarding the offered position.

In a May 12, 2006 letter, appellant contended that the arbitration decision directed reinstatement to her pretermination position and reimbursement of back pay. She stated that the offered position was located further away from her home which violated the decision and constituted an act of retaliation. Appellant also rejected the position because her request to conduct a walkthrough of the new route was denied.

In a July 25, 2006 report, James Kolbeck, a physical therapy assistant, provided findings after an onsite evaluation of the offered position. A current light-duty employee who worked in the offered position cased mail within one and one-half to two hours depending on the volume of mail. She worked at her own pace which was slow/moderate. Casing mail required the employee to take mail from a tote and place it into the forearm of the nondominate arm. She used the wrist of the other hand in a neutral position while the thumbs held the mail in the hand to place it into a slot on a shelving unit. Mr. Kolbeck stated that nitrile medical gloves were provided to help with grasping and to protect the employee from unwanted residue on the parcel pieces. During the sorting process, she was able to stand or sit at will. Mr. Kolbeck noted that sorted mail did not include advertisements and penny savers which were part of the outgoing mail four and one times per week, respectively. They were separated on the route. Mr. Kolbeck advised that, after casing was complete, the mail was placed into flats, loaded into a cart and pushed and loaded into a mail vehicle. At apartment buildings on the route, the mail was placed onto a hand truck and taken to the mailroom. Mr. Kolbeck stated that it took the employee about one hour to place the mail in each unit box, depending on mail volume while it would take an inexperienced employee two to three hours to complete this task. He noted that all the mailrooms were on the first floor but, sometimes oversized parcels and certified mail had to be hand delivered to an apartment unit. Mr. Kolbeck concluded that the remaining duties of the route were accurately listed in the February 2006 job offer. On July 27, 2006 he found that appellant was able to perform the duties of the modified position under restrictions specified by Dr. Watkins.

On August 3, 2006 Dr. Watkins reviewed Mr. Kolbeck's report and a description of the duties under the February 6, 2006 job offer. He approved the modified position as within appellant's work capabilities.

In letters dated September 28 and 30, 2006, appellant contended that on August 25, 2006 the employing establishment withdrew the February 6, 2006 modified job offer. In an October 7, 2006 letter, she stated that she did not receive a response from Carmen Davis, an injury compensation specialist, regarding her request for a return to work date. On October 17, 2006 appellant filed a claim alleging a recurrence of disability commencing February 23, 2006. By

letter dated October 20, 2006, the Office advised her to submit additional factual and medical evidence.

In letters dated October 10, 2006, the employing establishment advised appellant that the offered position was still available. Appellant was advised to contact the postmaster to discuss a return to work date. In an October 13, 2006 letter, the employing establishment reiterated that the February 6, 2006 offered position remained open to appellant.

In an October 20, 2006 letter, appellant's attorney stated that on February 23, 2006 Postmaster Cassidy removed appellant from administrative leave and placed her back on leave without pay (LWOP) status. On March 18, 2006 appellant's leave status was changed to LWOP under a suspension/termination status code. On March 27, 2006 she was advised by Sue Massengale, an employing establishment employee, that this code would not be changed. On April 3, 2006 appellant's former route was placed up for bid. Her bid for the position was denied. The bids appellant placed between April 10 and July 27, 2006 for positions within her restrictions were also denied. As a result, she filed a complaint with the Equal Employment Opportunity Commission against the employing establishment alleging retaliation and disability discrimination. Counsel contended that on August 23, 2006 the employing establishment refused to continue further attempts to return appellant to work.

In an October 30, 2006 decision, the Office denied appellant's claim of a recurrence of disability. It found that the evidence did not establish that the employer had failed to provide work within her restrictions.

On November 27, 2006 appellant requested a review of the written record by an Office hearing representative. In a November 7, 2006 report, Dr. Watkins advised that he found her capable of returning to the offered position as of August 3, 2006, after he reviewed the onsite evaluation of Mr. Kolbeck. The record reflects that on December 29, 2006 appellant accepted the employing establishment's job offer as a modified city carrier.

By decision dated January 9, 2007, the Office denied appellant's recurrence of disability claim, finding that the offered limited-duty position fell within her physical restrictions. On February 1, 2007 appellant requested a review of the written record by an Office hearing representative.[2]

In a June 1, 2007 decision, an Office hearing representative affirmed the October 30, 2006 and January 9, 2007 compensation orders. She found that the medical evidence did not establish that appellant's employment-related conditions had materially worsened to establish a recurrence of disability. The hearing representative also found that the limited-duty position had not been withdrawn.

On May 28, 2008 appellant requested reconsideration of the June 1, 2007 decision. She contended that she was entitled to compensation while waiting for Dr. Watkins' opinion

[2] On February 20, 2007 appellant accepted the employing establishment's February 16, 2007 job offer for a third modified city carrier position.

regarding the offered position. Alternatively, appellant contended that the employing establishment should have offered her an interim position.

In a May 24, 2007 certification form, Dr. John Kang, an internist, advised that appellant suffered from carpal tunnel syndrome with pain in her hands. He opined that she was totally disabled for work.

In a July 31, 2008 note, Dr. Watkins advised that he had not treated appellant since April 13, 2006. He would not change her physical restrictions unless she was reexamined and such changes were found to be medically necessary.

By decision dated September 2, 2008, the Office denied modification of its prior decisions. It found that the medical evidence was insufficient to establish that appellant sustained a recurrence of total disability commencing February 23, 2006.

On November 28, 2008 appellant requested reconsideration.

In a February 18, 2009 decision, the Office denied modification of the September 2, 2008 decision. It found that appellant did not sustain a recurrence of disability commencing February 23, 2006 as the evidence failed to establish that her employment-related conditions had worsened or that there was a change in the nature and extent of her limited-duty job.

LEGAL PRECEDENT

A recurrence of disability means an 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 that caused the illness.[3] This 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.[4]

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.[5]

[3] 20 C.F.R. § 10.5(x).

[4] *Id.*

[5] *James H. Botts*, 50 ECAB 265 (1999).

ANALYSIS

The record reflects that, following the acceptance of her claim and surgery of June 25, 2001, appellant was released to return to work at modified duty by Dr. Watkins as of October 2001. She continued in such modified duty until she stopped work on March 18, 2005 for reasons unrelated to her accepted condition, the death of a family member. On May 3, 2005 the employer issued a notice of removal for unacceptable work performance, the mishandling of mail and unacceptable conduct; again, reasons unrelated to residuals of her accepted injury or physical condition. There is no contemporaneous medical evidence of record to establish that appellant became unable to work due to her accepted right thumb de Quervain's disease or bilateral carpal tunnel and wrist strains. Appellant's inability to continue in her employment was based on her alleged misconduct. As noted, this is not a basis for finding a recurrence of disability.

Based on an arbitration decision, the employing establishment advised appellant that she would be reinstated and paid administrative leave until it offered her a position within her work restrictions. On February 6, 2006 the employing establishment offered her a modified-duty carrier position at a satellite office. Appellant rejected the job offer on February 21, 2006. In April 2006, Dr. Watkins advised the employer that he did not approve of the job offer as being appropriate for appellant as it required excessive grasping and fine manipulation. In July 2006, Mr. Kolbeck conducted an onsite evaluation of the work duties appellant would be performing under modified duty. On August 3, 2006 Dr. Watkins reviewed the onsite evaluation and approved the modified duty. Appellant subsequently contended that the employing establishment withdrew the February 6, 2006 job offer and that she had not been given a date for returning to work. On October 10, 2006 the employing establishment advised appellant that the modified-duty job offer was available and to contact the postmaster to discuss a return to work date.

Following the denial of appellant's claim by the Office on October 30, 2006, Dr. Watkins submitted a November 7, 2006 report in which he noted that appellant was initially unable to return to work at the limited-duty position as presented in February 2006. He advised that his opinion on disability did not change until August 3, 2006, when he reviewed the onsite evaluation findings. Appellant subsequently accepted the employing establishment's job offer of December 27, 2006. She accepted a further job offer on February 16, 2007.

Appellant did not sustain a recurrence of disability for the period commencing February 6, 2006, based on the job offer of the employing establishment that date. This is not a case in which she was performing work at limited or modified duty prior to stopping work on February 6, 2006 due to residuals of her accepted conditions. Rather, appellant had stopped work in 2005 due to the death of a family member and received a notice of removal for cause on May 3, 2005. She was not in receipt of wage-loss compensation from the Office upon stopping work in 2005.

The matter went to arbitration and appellant's reinstatement at the employing establishment was directed, apparently with back pay. As a copy of the arbitration agreement is not of record, this aspect of her work stoppage is not clearly set out in the record on appeal. In early February 2006, a dispute arose as to whether the February 6, 2006 job offer was consistent

with the arbitration decision, as appellant was to be located some miles from her former workstation. Paul Vega, supervisor of customer service, noted that he sent appellant a letter advising of her reinstatement as of February 1, 2006. Thereafter, he met with her on that date, advised her that she was reinstated and that a job offer would be prepared. In accordance with the arbitration decision, the position would be located outside the San Bernadino main office. The postmaster advised appellant that, during the job selection process, she would receive administrative leave. Mr. Vega noted that she did not provide any input other than she wanted to return to the main employing establishment. In subsequent meetings, appellant reiterated her preference to work at the main employing establishment; however, the arbitrator clarified that she was not to be returned to the main employing establishment. After a meeting on February 23, 2006, the postmaster advised her that if she refused the job offer, she would no longer be paid administrative leave as of that date. Appellant declined the job offer and the postmaster inquired as to what type of leave she preferred. She replied "no leave." Mr. Vega stated that appellant chose a form of leave that did not provide an income. It was agreed that she would request LWOP. Based on the arbitration decision, the employing establishment subsequently removed appellant from her former bid assignment at the main employing establishment. Mr. Vega noted that she received "full payment for Administrative Leave for February 1 through 23, 2006."

Under the arbitration agreement, appellant was to be reinstated back pay and placed on administrative leave until her acceptance of a modified job offer. She received payment under administrative leave through the meeting of February 23, 2006. Thereafter, appellant's loss of income was based not on residuals of her accepted conditions but on her election of LWOP based on her disagreement with the employing establishment as to the location of appropriate modified duty. Her remedy lies under the arbitration agreement as she was to receive administrative leave until such time as reinstated and returned to a position within her physical limitations. Dr. Watkins advised the employing establishment in April 2006 that he did not approve of the February 6, 2006 job offer and clarified that he did not approve of any modified duty until August 3, 2006, after he reviewed the onsite work evaluation. Appellant's loss of income commencing February 23, 2006 was based on the decision of the postmaster to stop payment under administrative leave. As to the subsequent elimination of her bid assignment at the main employing establishment, the Office's federal regulations provide:

> "In general, an employee will not be considered to have experienced a compensable recurrence of disability as defined in [section] 10.5(x) merely because his or her employer has eliminated the employee's light[-]duty position in a reduction[-]of[-]force or some other form of downsizing."[6]

Under the terms of the arbitration agreement, appellant was not to be returned to the main employing establishment and could not continue in her bid position. The situation in this case is analogous to the elimination of a position through downsizing or a reduction-of-force. Appellant's return to work in May 2005 was precluded by the administrative action removing her for cause. Such action was subsequently overturned following arbitration. The agreement directed that appellant not return to her former duty station, the main employing establishment.

[6] 20 C.F.R. § 509(a).

Appellant has failed to establish that she sustained compensable disability for work due to residuals of her accepted condition.

CONCLUSION

The Board finds that appellant failed to establish that she sustained a recurrence of total disability commencing February 23, 2006 causally related to her accepted employment-related injuries or based on the withdrawal of her bid assignment.

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2009 and September 2, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 15, 2010
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