

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EVELYN MELENDEZ and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Richmond, VA

*Docket No. 99-1836; Submitted on the Record;
Issued August 3, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met her burden to establish that she is entitled to continuation of pay and compensation from November 10, 1997 through February 2, 1998.

The Office of Workers' Compensation Programs accepted appellant's claim for contusion and meniscus tear of the left knee for a September 25, 1997 employment injury. Appellant returned to work on October 7, 1997. She filed a claim for continuation of pay and compensation from November 10, 1997 through February 2, 1998.

Appellant's usual work as a tax examiner was described as sedentary, "allowing the employee to sit comfortably to do the work, although there may be some walking, bending, or carrying of light items" and no special physical demands were required to perform the work.

In a report dated November 3, 1997, appellant's treating physician, Dr. Mario J. Arena, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination, and reviewed x-rays dated October 23, 1997 and current x-rays showing mild degenerative joint disease changes with no significant angular deformity. He diagnosed traumatic synovitis of the left knee with degenerative joint disease. Dr. Arena opined that appellant should continue to work desk duties with no work at any unprotected heights and only occasional stair climbing. In a disability note dated November 3, 1997, his restrictions included no significant walking. In a follow-up report dated November 10, 1997, he stated that, if appellant could not spend most of the time sitting at her desk, she should not work.

In a disability note dated November 10, 1997, Dr. Arena stated that appellant was unable to work her regular job and was having arthroscopic knee surgery. In a duty status report dated December 23, 1997, he restricted appellant from lifting more than five pounds, sitting more than seven hours per day and standing more than one hour a day. Dr. Arena stated that appellant could work eight hours but most of the day she should be sitting at her desk.

By letter dated January 16, 1998, the Office requested additional information from appellant stating that she must explain how her current job did not comply with Dr. Arena's restrictions.

In a report dated January 29, 1998, Dr. Arena reiterated that, as of the November 10, 1997 office visit, he told appellant not to work if she were not able to spend most of her work shift at her desk, and that she should not be involved with normal standing and walking.

By letter dated January 26, 1998, appellant's attorney stated that the employing establishment did not accommodate appellant's restrictions in that, while she had a desk job, the job involved "quite a bit" of walking, lifting and bending. The attorney noted that, since her doctor told her not to return to work if it was not within her restrictions, appellant stopped working.

In an interoffice memorandum dated February 5, 1998, appellant's supervisor, Patricia Williams, stated that appellant gave her a note from her doctor dated November 3, 1997 stating that appellant could continue desk work with certain restrictions of no unprotected heights, no climbing and no significant walking and the duty status report dated October 23, 1997 stating minimal standing, walking, squatting and climbing. She stated that appellant advised her that she could not get up and down to get faxes or prints from the printer but that her partner, Ms. Cavanaugh, would get them for her. Appellant's supervisor stated that she did not assign anyone to assist appellant in retrieving her prints, faxes or cases because she assumed that Ms. Cavanaugh would continue to retrieve them for her. She stated that, if appellant had asked for additional help, she would have provided it.

By decision dated March 16, 1998, the Office denied appellant's claim, stating that the evidence of record failed to establish that she was totally disabled for work from November 10, 1997 to February 2, 1998.

By letter dated March 31, 1998, appellant requested an oral hearing before an Office hearing representative which was held on October 27, 1998. At the hearing, appellant reiterated that the work provided by the employing establishment upon her return to work was not within her medical restrictions. Appellant also submitted statements from her coworkers, Ms. Cavanaugh and Maitreya Moore, respectively, dated March 20, 1998 stating that they had assisted her on one or two occasions either obtaining xerox copies or moving her work for her.

In an interoffice memorandum dated November 25, 1998, appellant stated that she was not accommodated in her work restrictions and was unable to retrieve faxes and xerox documents. She also stated that her inventory was consistently high as shown in supporting documents.

In an interoffice memorandum dated November 24, 1998, Ms. Williams stated that, from September 25 through November 10, 1997, appellant's work as a tax examiner included answering telephone and working "PRP" cases.

By decision dated February 10, 1999, the Office hearing representative affirmed the Office's March 16, 1998 decision.

The Board finds that appellant did not meet her burden to establish that she was totally disabled from November 10, 1997 to February 2, 1998.

Since appellant's entitlement to compensation was based upon the ongoing submission of documentation that she was disabled following the September 25, 1997 employment injury, appellant maintained the burden of establishing entitlement to disability compensation which was related to the employment injury.¹

In the present case, in his disability notes and reports dated from November 3, 1997 to January 29, 1998, appellant's treating physician, Dr. Arena, opined that appellant could work eight hours a day but should be sitting most of the time and should not lift more than five pounds, sit more than seven hours per day and stand more than one hour a day. Appellant's job description as a tax examiner was described as sedentary with some walking, bending or carrying of light items. In her February 5, 1998 statement, appellant's supervisor, Ms. Williams, stated that her understanding was that the job was within the medical restrictions set by Dr. Arena and that appellant's coworker, Ms. Cavanaugh, would assist appellant with her work if she needed it. She stated that she would have provided appellant with additional help if appellant required it.

Although appellant has consistently maintained that her work as a tax examiner exceeded her restrictions, she has not provided sufficient evidence to support her contention. Dr. Arena's restrictions that appellant should perform her work mostly sitting with light bending, walking and lifting is consistent with her job description. Appellant's coworkers' statements that they assisted her on one or two occasions is not sufficient to establish that appellant was unable to perform the work or that her employing establishment could not accommodate her physical limitations. Ms. Williams noted that she would have provided appellant with additional assistance if she had asked for it. The Office provided appellant with the opportunity to submit the requisite evidence to establish her claim, but appellant was not responsive to this request. Appellant has therefore failed to establish that she was totally disabled from November 10, 1997 to February 2, 1998.

¹ See *Donald Leroy Ballard*, 43 ECAB 882 (1992).

The decision of the Office of Workers' Compensation Programs dated February 10, 1999 is hereby affirmed.

Dated, Washington, D.C.
August 3, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member