

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORA W. MOORE and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

*Docket No. 01-810; Submitted on the Record;
Issued December 20, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On September 28, 2000 appellant, then a 48-year-old clerk, filed a claim alleging that she injured her left forefoot when working on a mail machine. The Office accepted appellant's claim for a contusion of the left forefoot. Appellant stopped work on September 28, 2000 and returned to work on October 1, 2000.

In support of her claim appellant submitted an incident report dated September 28, 2000, hospital treatment notes from September 28 to October 18, 2000, and several duty status reports from September 28 to October 27, 2000. The incident report indicated that appellant injured the top of her left foot on September 28, 2000 while at work. The hospital treatment notes from September 28, 2000 indicated that appellant was treated for an injury to her left foot which occurred at work. X-ray's of the left foot were taken and revealed no fractures or dislocations. The note prepared by Dr. R. Walter, a specialist in emergency medicine, indicated that appellant could return to work the next shift with restrictions on standing and walking. The October 3, 2000 treatment note prepared by Dr. P.G. Carrsule, a specialist in orthopedics, noted that appellant had not returned to work and was being treated for continued complaints of pain and swelling of her left foot. Appellant was diagnosed with a contusion of the left forefoot. Dr. Carrsule indicated that appellant was able to wear normal shoes and, therefore, her injury did not interfere with her work. He further indicated that appellant could return to work. The October 18, 2000 note prepared by Dr. Carrsule indicated that appellant had not returned to work yet and complained of pain and swelling of her left foot. Appellant was diagnosed with a resolving contusion of her forefoot. Dr. Carrsule indicated that he did not believe appellant had enough findings to keep her off work. He further noted that appellant "either return to work or find another doctor, that I would not justify her being off work." Dr. Carrsule indicated that appellant would not have any permanent impairment and did not require further treatment for her

injury. The duty status reports from September 28 to October 27, 2000 noted that appellant could resume employment on September 29, 2000 with a recommendation for restricted duty for approximately two days following her injury and then unrestricted duty on October 3, 2000.

In a decision dated November 14, 2000, the Office accepted appellant's claim for a contusion of the left forefoot. However, the Office determined that appellant was not entitled to continuation of pay from September 28, 2000 forward on the grounds that the medical evidence failed to support that appellant's injury disabled her from work. The Office informed appellant that the decision only concerned continuation of pay and would not affect her entitlement to other compensation benefits.

In a December 21, 2000 letter, appellant requested reconsideration of her claim. She did not submit any additional evidence. Appellant noted that she had been off work for three months and during this period underwent surgery. She indicated that she spoke with a representative of the Office who informed her that she was entitled to continuation of pay.

By decision dated January 12, 2001, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of the prior decision.

The Board finds that the Office properly denied continuation of pay for appellant's claim based on its determination that the medical evidence did not support that appellant's contusion of the left forefoot disabled her from her regular work as alleged.

Section 8118¹ of the Federal Employees' Compensation Act provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to traumatic injury with his immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title."² The regulations implementing the Act provide that an employee is not entitled to continuation of pay unless the employee has sustained a traumatic injury.³

In the present case, appellant met her burden of proof in establishing that she sustained a contusion of her left forefoot while in the performance of duty on September 28, 2000 and the Office accepted appellant's claim for that condition. However, to establish entitlement to continuation of pay, it is not sufficient for an employee merely to establish that she sustained a work-related injury. Continuation of pay or monetary compensation benefits are paid to an employee who has sustained wage loss due to disability for employment resulting from the traumatic employment injury.⁴

¹ 5 U.S.C. § 8118.

² Section 8122(a)(2) provides that written notice of injury was given as specified in section 8119, which provides for a 30-day time limitation for filing a claim of a traumatic injury. 5 U.S.C. § 8119(a), (c), 8122(a)(2).

³ 20 C.F.R. § 10.205(a)(1).

⁴ 20 C.F.R. § 10.200(a)-(c).

Every injury does not necessarily cause disability for employment.⁵ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to continuation of pay or monetary compensation for any loss of wage-earning capacity resulting from such incapacity.⁶

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a reasoned medical opinion that supports a causal connection between the claimed disability and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain medically how the claimed disability is related to the injury.⁷

Appellant claims that the September 28, 2000 injury caused her disability from September 28, 2000 forward. However, whether a particular injury causes an employee disability for employment is a medical issue, which must be resolved by competent medical evidence. Dr. Walter reported on September 28, 2000 that appellant could return to restricted duty on September 29, 2000 and Dr. Carrsule indicated that appellant's injury did not interfere with her work and that she could wear normal shoes and return to work. The October 18, 2000 note prepared by Dr. Carrsule indicated that he did not believe appellant had enough findings to keep her off work. He further noted that appellant "either return to work or find another doctor.... I would not justify her being off work." Appellant did not submit any medical evidence supporting that she was totally disabled for work due to the accepted September 28, 2000 employment injury. Further, appellant returned to work within the restrictions available. Accordingly, she is not entitled to continuation of pay.

The Board further finds that the Office in its January 12, 2001 decision properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a), on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.⁸

Under section 8128(a) of the Act,⁹ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹⁰ which provides that a

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).

⁶ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987); 20 C.F.R. § 10.201.

⁷ *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

⁸ *See* 20 C.F.R. § 10.606(b)(2)(i-iii)

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b) (1999).

claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.¹¹

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law; she has not advanced a point of law or fact not previously considered by the Office; and she has not submitted relevant and pertinent evidence not previously considered by the Office. No new and relevant medical evidence accompanied the December 21, 2000 reconsideration request. This is important since the outstanding issue in the case, whether appellant’s injury prevented her from returning to work, is medical in nature. Appellant’s reconsideration request only asserted that an Office representative informed her that she would receive continuation of pay. However, this contention is irrelevant to the issue of appellant’s ability to return to work.

Additionally, appellant’s December 21, 2000 letter did not otherwise show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. For these reasons, the Office properly denied appellant’s reconsideration request without conducting a merit review of the record.¹²

¹¹ 20 C.F.R. § 10.608(b).

¹² With her appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

The decisions of the Office of Workers' Compensation Programs dated January 12, 2001 and November 14, 2000 are hereby affirmed.

Dated, Washington, DC
December 20, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member