

**United States Department of Labor
Employees' Compensation Appeals Board**

L.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Portland, OR, Employer)

Docket No. 09-1173
Issued: March 8, 2010

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 March 31, 2009 appellant filed a timely appeal of the November 17, 2008 decision of the Office of Workers' Compensation Programs, which affirmed the denial of her claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she was totally disabled beginning February 17, 2007 causally related to her accepted employment condition.

FACTUAL HISTORY

This case was previously before the Board. In an order dated August 30, 2005, the Board granted the Director of the Office's motion to set aside the November 16, 2004 Office decision, which reduced appellant's compensation benefits to zero on the grounds that she failed to

cooperate with directed vocational rehabilitation efforts.¹ In a decision dated December 23, 2008, the Board set aside Office decisions dated August 21, 2006 and May 3, 2007, finding that it did not use the correct pay rate in computing appellant's entitlement to compensation. The case was remanded for further development.² The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference.

On August 24, 2003 appellant, a 40-year-old registered nurse, injured her right thumb when attempting to restrain a patient. The Office accepted a right thumb sprain and authorized surgery on the first metacarpal on the right hand, which was performed on February 19, 2004. Appellant was hired as a part-time temporary employee, 20 hours per week, and began working on October 20, 2002. She received continuation of pay from August 25 to September 29, 2003. Appellant returned to part-time employment, four hours per day and stopped work on May 25, 2006 to undergo surgery.

Appellant came under the treatment of Dr. J. Theodore Schwartz, Jr., a Board-certified orthopedic surgeon, who noted a history of her work-related injury. On May 25, 2006 he performed a right wrist excision of the trapezium, interpositional arthroplasty and flexor carpi radialis tenodesis. On November 13, 2006 Dr. Schwartz released appellant to light-duty work, four hours daily, starting November 15, 2006 with restrictions of no strenuous pinching, pulling, grasping or lifting greater than two pounds with the right hand, keyboarding and writing to be limited to 15 minutes per hour.

On January 10, 2007 the employing establishment offered appellant a temporary light-duty position as an injury program manager, four hours a day subject to Dr. Schwartz's restrictions. On January 19, 2007 appellant noted that she neither accepted nor rejected the job offer but was submitting it to her rehabilitation counselor for review.³

A supplemental roll payment worksheet dated February 23, 2007 noted appellant was paid disability for 80 hours from February 3 to 16, 2007. A supplemental worksheet dated March 5, 2007 listed payment for 40 hours from February 17 to March 2, 2007 and March 3 to 16, 2007. In a March 27, 2007 supplemental roll payment worksheet, appellant was paid for 24 hours from March 19 to 26, 2007.

Beginning March 1, 2007, appellant filed claims for compensation (Form CA-7) for total disability for the period beginning February 17, 2007. In a January 24, 2007 report, Dr. Schwartz noted improvement in her right thumb following surgery with mild tenderness to palpation over the right thumb joint and a positive Tinel's sign at the right wrist. He released her to work, light duty, part-time four hours a day with restrictions.

¹ Docket No. 05-433 (issued August 30, 2005).

² Docket No. 08-224 (issued December 23, 2008). Appellant has a separate appeal pending before the Board with regard to her pay rate, docketed as 09-1816.

³ The record reflects that the Office did not perform a suitability determination with regard to the January 10, 2007 job offer, rather, in a decision dated March 27, 2007, reduced appellant's compensation to zero finding that she failed to cooperate with vocational rehabilitation. This decision was reversed on November 30, 2007 and the Office was directed to reinstate compensation benefits.

On March 19, 2007 the Office requested that appellant submit medical evidence to support total disability for the period in question. It noted that she was released to work four hours a day and a modified job offer was made. The Office advised appellant that future compensation would be calculated based on four hours a day.

In a March 9, 2007 report, Dr. Schwartz noted increasing numbness in appellant's right hand. He found a negative Tinel's sign at the wrist, positive Phalen's sign with decreased sensation to light touch in the thumb, index and long fingers and opined that appellant may have developed evolving right carpal tunnel syndrome. Dr. Schwartz released her to work light duty, keyboarding limited to 15 minutes per hour, no lifting, pinching, pulling or grasping greater than two pounds with the right hand. In reports dated April 23 and August 27, 2007, he noted complaints of numbness in the right hand made worse with repetitive pinching, pulling and grasping activities. Dr. Schwartz opined that appellant was permanent and stationary and released her to work with restrictions. A March 29, 2007 electromyogram (EMG) showed no abnormalities.

On December 21, 2007 Dr. Schwartz noted appellant's complaints of persistent pain in the right wrist, which was made worse with pinching, pulling and grasping activities. He returned appellant to work four hours per day with restrictions.

In a January 25, 2008 decision, the Office denied appellant's claim for compensation for total disability, eight hours per day, as of February 17, 2007 on the grounds that the evidence was not sufficient to establish her disability was due to her accepted work injury. It found that she was entitled to partial disability compensation for wage loss exceeding 20 hours a week commencing March 27, 2007. Appellant requested a review of the written record.

In a decision dated March 25, 2008, an Office hearing representative vacated the January 25, 2008 decision and remanded the case for further development.

Appellant submitted reports from Dr. Schwartz dated April 16 and May 25, 2008. Dr. Schwartz noted ongoing complaints of right hand pain, which worsened with pinching, pulling and grasping. He returned appellant to work four hours per day with restrictions. A magnetic resonance imaging (MRI) scan of the right wrist dated May 20, 2008 revealed degenerative changes.

In a decision dated May 20, 2008, the Office denied appellant's claim for eight hours of wage-loss compensation a day beginning February 17, 2007 as the medical evidence did not establish that she had total disability due to her accepted work injury. The Office noted that she was entitled to partial disability compensation for wage loss exceeding 20 hours per week commencing March 27, 2007.

Appellant requested a review of the written record. She submitted reports from Dr. Schwartz dated July 18 and October 20, 2008 who noted appellant's complaints of worsening right hand pain and returned appellant to work four hours per day with restrictions.

In a decision dated November 17, 2008, the hearing representative affirmed the May 20, 2008 decision, finding that the medical evidence did not establish that appellant was totally disabled due to her work injury beginning February 17, 2007.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of proof to establish the essential elements of her claim by the weight of the evidence.⁴ For each period of disability claimed, the employee has the burden of establishing that she was disabled for work as a result of the accepted employment injury.⁵ 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.⁶ To meet her burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.⁷

Under the Act, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁸ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁹ An employee who has a physical impairment causally related to her federal employment, but who nonetheless has the capacity to earn the wages she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹⁰ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wages.¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that she had disability commencing February 17, 2007 for which she did not receive appropriate wage-loss compensation. Appellant was hired as a part-time temporary employee, 20 hours per week, and began working on October 20, 2002. The Office accepted her claim for right thumb sprain and authorized surgery, which was performed on February 19, 2004. She received continuation of pay from August 25 to September 29, 2003 and returned to part-time employment, four hours per

⁴ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁵ See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

⁶ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁷ *A.D.*, 58 ECAB 149 (2006).

⁸ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

⁹ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹⁰ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹¹ *Id.*

day and stopped work on May 25, 2006 to undergo surgery. The record reflects that, at the time of surgery on May 25, 2006, appellant was receiving compensation for four hours a day. The Board notes that supplemental payroll worksheets reflect that appellant received wage-loss compensation for four hours a day, five days a week from February 17 to March 26, 2007. The Board notes that the Office accepted that appellant was partially disabled for four hours per day beginning March 27, 2007. The evidence of record supports that appellant was partially disabled due to the accepted injury and that she was properly paid compensation for her disability during this period.

The medical evidence submitted by appellant does not support that she is entitled to additional wage-loss compensation. The reports from Dr. Schwartz released her to work four hours a day with restrictions. His intermittently treatment notes found that appellant could work four hours a day with restrictions. The reports of the Dr. Schwartz's, contemporaneous with the period of claimed disability, do not establish that appellant was totally disabled for employment as of February 17, 2007 due to residuals of her August 24, 2003 employment injury. Rather, he consistently advised that she could work four hours a day with restrictions.¹² Although Dr. Schwartz noted appellant's complaint of right hand pain caused by repetitive pinching, pulling and grasping activities, he advised that she could continue to work four hours daily within restrictions. Therefore, the medical evidence is insufficient to establish appellant's claim of total disability.¹³

As noted, the record reflects that appellant received wage-loss compensation for four hours of disability each workday for the claimed period. Additionally, the medical evidence establishes that she had the capacity to work four hours daily within restrictions. Consequently, appellant is not entitled to additional wage-loss compensation. The record supports that she received appropriate wage loss for the period beginning February 17, 2007. There is no evidence to support that she was entitled to greater wage loss than that which she received.

CONCLUSION

The Board finds that appellant has failed to establish entitlement to wage-loss benefits for total disability beginning February 17, 2007.

¹² See *Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971) (where the Board has consistently held that contemporaneous evidence is entitled to greater probative value than later evidence).

¹³ The evidence also does not show that there was any wage loss for the period claimed that was incidental to treatment for an accepted injury. See 5 U.S.C. § 8103(a); *Daniel Hollars*, 51 ECAB 355 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 17 and May 20, 2008 are affirmed.

Issued: March 8, 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