United States Department of Labor
Employees' Compensation Appeals Board

C.X., Appellant	)	
and	)	**Docket No. 10-1807**
	)	**Issued: April 4, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Glendale, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 29, 2010 appellant filed a timely appeal from a June 7, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] and 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 has established an employment-related disability from February 7 to March 16, 2003 or May 24 to November 7, 2003.

FACTUAL HISTORY

The case was before the Board on a prior appeal with respect to a schedule award.[2] By decision dated April 6, 2005, the Board affirmed a July 8, 2004 Office decision finding that

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 05-230 (issued April 6, 2005). Appellant's claim is accepted for herniated disc L4-5.

appellant had a six percent left leg permanent impairment. The history of the case as provided in the prior Board decision is incorporated herein by reference.

The reverse of the claim form appellant filed on March 13, 2003 stated that she had been off work since December 28, 2002. In a March 18, 2003 statement, an employing establishment supervisor indicated that appellant had returned to work on March 14, 2003, worked her mail carrier route and then the following day submitted a January 21, 2003 medical report indicating she could only work light duty.

With respect to the medical evidence, a January 21, 2003 treatment note from Dr. Michael Lee, a family practitioner, indicated that appellant was treated for back pain. Dr. Lee recommended that she work in the office with no carrying of mail. In a March 1, 2003 report, Dr. Emerson Jou, a physiatrist, stated that appellant had back pain due to carrying heavy mail since June 2000. He stated that she could work light duty six hours a day, three days a week.

In a report dated April 1, 2003, Dr. John Chiu, a neurologist, diagnosed lumbar disc disease. He indicated appellant could work full-time light duty, with no carrying of mail. Appellant also submitted reports from Dr. Steve Huang, a family practitioner, commencing May 6, 2003. Dr. Huang diagnosed chronic lumbosacral strain with possible radiculopathy and indicated that she could work light duty.

Appellant submitted a list of hours worked from February 14 to November 12, 2003. She worked intermittently at four, five or six hours a day.[3] On February 27, 2004 an employing establishment compensation specialist indicated that appellant was a part-time flexible (PTF) employee, scheduled as needed. As to pay at the time of injury, the employing establishment stated that appellant worked an average of 7.53 hours a day at $12.27 an hour. By letter dated March 11, 2004, the Office advised her that compensation for 151 hours of leave without pay was being paid from March 17 to May 23, 2003.

In a claim for compensation Form CA-7 dated November 15, 2006, appellant claimed compensation from February 7 to November 7, 2003. By letter dated August 30, 2006, she stated that prior to her injury she had averaged 7.53 hours a day, and since her injury the employing establishment did not provide the same number of hours.

By letter dated June 12, 2007, the Office requested that the employing establishment verify, for each date claimed, whether there was work available within appellant's employment-related work restrictions. In a letter dated December 6, 2007, an employing establishment human resources specialist stated that a PTF employee may be scheduled for less than 8 hours a day and 40 hours a week. The specialist stated that a PTF is scheduled to work when needed and there was no guarantee of work hours.

By decision dated March 13, 2008, the Office denied a claim for compensation from February 7 to March 16, 2003 and May 24 to November 7, 2003. It stated that from February 7 to 13, 2003, appellant received sick or annual leave. For the periods February 14 to March 14

[3] In September and October 2003, on several dates appellant worked eight hours a day.

and May 27 to September 20, 2003, the Office found that she was not entitled to compensation as she had worked from four to eight hours on numerous days, and a PTF employee was not guaranteed work. According to the Office, the employing establishment had found "there were several periods throughout the time [appellant] claimed where there was no need for a part-time flex carrier." The Office further stated that the period October 1 to November 7, 2003 was covered under a claim for an emotional condition that had been accepted.

Appellant requested a hearing before an Office hearing representative, which was held on August 26, 2008. Following the hearing the employing establishment submitted an October 1, 2008 letter from a human resource specialist, stating in relevant part,

> "The procedure of 'opting' allows PTF carriers to 'hold down' vacant duty assignments of regular carriers who are on leave or otherwise unavailable to work for five or more days. An employee who opts for an assignment assumes the schedule hours and the nonscheduled day of the opted assignment and therefore is considered the 'regular' on the opted route. [Appellant] cannot compare herself to those PTF carriers who have opted on routes. That just leaves her as the only PTF left. [Appellant] was given all the available work in her office as she was the only PTF carrier in her office that had not opted on a route."

By decision dated January 8, 2009, the Office denied the claim for compensation from February 7 to March 6, 2003 and May 24 to November 7, 2003. The hearing representative found that appellant could not make "the assumption that she would have been able to work 7.53 hours" for her work injury. According to the hearing representative, PTF's are not guaranteed hours and she could not be guaranteed she would work the same hours as before the injury.

In a letter dated January 5, 2010, appellant requested reconsideration of her claim. By decision dated June 7, 2010, the Office reviewed the case on its merits and denied modification. The Office found the evidence did not establish appellant was prevented from working additional hours due to her employment injury.

LEGAL PRECEDENT

An employee seeking benefits under the Act[4] has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5] The term disability is defined as the incapacity because of an employment injury 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.[6]

[4] 5 U.S.C. §§ 8101-8193.

[5] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[7]

ANALYSIS

In this case, the Office found that appellant was not entitled to compensation for wage loss during the periods February 7 to March 16, 2003 and May 24 to November 7, 2003. Appellant had been working as a PTF carrier with an average of 7.53 hours a day in the year prior to the injury. During the period of claimed compensation, she worked intermittently at four to eight hours a day in a light-duty office position. The Office found that, since appellant was a PTF employee, she was not guaranteed any specific number of hours. The issue is not whether PTF employees are guaranteed work hours. The issue is whether, in appellant's specific case, her employment injury prevented her from earning the wages she was earning at the time of injury.

The Office appeared to make a finding that the employing establishment did not have work for appellant as a PTF, regardless of her work injury. The evidence from the employing establishment, however, did not support such a finding. The October 1, 2008 letter from the human resources specialist indicated that other PTF employees had "opted" for mail routes, while appellant did not "opt" for a mail route and was given available office work. The medical evidence indicates that she could not carry mail. If the reason appellant was unable to opt for a mail route and work the hours available to a PTF employee carrying mail, then the employment injury may prevent her from earning the wages she was earning at the time of injury. While the employing establishment states that she "cannot compare herself to those PTF carriers who have opted on routes," if the employment injury prevented her from opting on routes, as she had before the employment injury, then she may establish an employment-related disability.

The case will be remanded to the Office for additional development. The Office should secure relevant evidence from the employing establishment as to the availability of work and make proper findings with respect to earnings during the periods claimed. If the evidence establishes that appellant was unable to earn the wages she was receiving at the time of injury due to her employment injury, then she has an employment-related disability and would be entitled to appropriate wage-loss compensation. After such further development as the Office deems necessary, it should issue an appropriate decision.

[7] *Terry R. Hedman*, 38 ECAB 222 (1986).

CONCLUSION

The Board finds the Office did not make proper findings with respect to appellant's claim for compensation from February 7 to March 16, 2003 or May 24 to November 7, 2003 and the case is remanded for further development.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 7, 2010 is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: April 4, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board