U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANICE J. GREEN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Decatur, Ga.

Docket No. 96-874; Submitted on the Record;
Issued February 2, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant is entitled to wage-loss compensation benefits under the Federal Employees' Compensation Act on and after April 15, 1995 because of an inability to work.

On January 5, 1995 appellant, then a 39-year-old teller, filed a traumatic injury claim, alleging that she reaggravated a rated disability in her lower back when she stooped to pick up a french fry on the cafeteria floor and a wheelchair bound patient rolled on her skirt causing her to fall off balance when she attempted to stand up. Appellant stopped work on January 5, 1995 and returned to work for four hours a day on March 13, 1995. On April 14, 1995 appellant was terminated for cause on the grounds that she accepted gratuities and gifts from patients in violation of employing establishment "station policy" thereby exhibiting conduct prejudicial to the government and misusing authority for personal gain. By decision dated April 27, 1995, the Office of Workers' Compensation Programs advised appellant that her claim was accepted for lumbar strain but that she must file CA-7 forms and provide medical reports for any period of time beyond the 45-day continuation of pay period. By decision dated May 19, 1995, the Office noted that appellant's physician advised that she would be fit for light duty on March 14, 1995 and that compensation was approved for March 14 to April 14, 1995. Appellant was advised to submit CA-8 forms for any further periods of claimed compensation. By decision dated June 30, 1995, the Office denied appellant's claims for wage-loss compensation on or after April 15, 1995 on the grounds that her removal from employment was due to termination for cause and not disability.

The Board finds that appellant is entitled to partial wage-loss compensation benefits under the Act on and after April 15, 1995 because of an inability to work.

Section 8102(a) of the Act[1] sets forth the basis upon which an employee is eligible for compensation benefits. That section provides:

> "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...."

In general the term "disability" under the Act means "incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury."[2] This meaning, for brevity, is expressed as "disability for work."[3]

Appellant is entitled to compensation for wage loss on and after April 15, 1995 if she was still disabled; *i.e.*, if she was unable to earn the wages that she was receiving on January 5, 1995.

The record reveals that the employing establishment provided work for appellant within the work restrictions outlined by her physician, Dr. Patricia D. Glenn, a Board-certified internist. Consequently, appellant was working a four-hour day and was deemed partially disabled when she returned to work on March 13, 1995. Appellant, however, was terminated from her position by the employing establishment effective April 14, 1995 because she violated the employing establishment's policy against taking gratuities or gifts from patients. In a letter dated May 3, 1995, the employing establishment specifically stated that employment within appellant's work restrictions would still be available to her if her conduct had been acceptable. In a form report dated May 2, 1995, Dr. Glenn indicated that appellant was still partially disabled and could only work four hours a day through May 10, 1995. While there is no evidence in the record that appellant was terminated due to her physical inability to perform her assigned duties, nor is there evidence that appellant stopped work due to her physical condition, there is evidence that she remained partially disabled at the time she was terminated for cause. As there is no evidence in the record that appellant was not capable of performing her assigned limited duties for four hours a day after April 14, 1995, appellant is not entitled to wage-loss compensation for the four hours a day she was capable of working.[4] Nonetheless, this case must be remanded to the Office for a computation of appellant's wage-loss compensation due to her continued partial disability at the time she was terminated for cause.[5]

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[1] 5 U.S.C. § 8102(a).

[2] *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

[3] *John W. Normand*, *supra* note 2; *Clarence D. Glenn*, 29 ECAB 779 (1978).

[4] *See generally, Allen C. Godfrey*, 37 ECAB 334 (1976); *cf. Kimper Lee*, 45 ECAB 565 (1994).

[5] It is noted that on appeal appellant asserted that her removal for cause had been overturned by the Merit Systems Protection Board. However, she did not submit any evidence to substantiate this assertion nor would the Board be allowed to consider any evidence that was not before the Office at the time it rendered its decision. 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated June 30, 1995 is affirmed in part, vacated in part and this case is remanded for further proceedings in accordance with this decision.

Dated, Washington, D.C.
February 2, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member