U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA E. McCANTS and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Cleveland, OH

Docket No. 03-1224; Submitted on the Record;
Issued August 5, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant was entitled to wage-loss compensation for the period May 29 through June 10, 2002 due to her accepted employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On December 6, 2001 appellant, then a 46-year-old office clerk, filed a traumatic injury claim alleging that on November 27, 2001 she felt sharp pains in her lower middle back while lifting heavy supplies and bending over to pick them up. She was released to return to limited-duty work on December 6, 2001.

By letter dated January 24, 2002, the Office accepted appellant's claim for a lumbar strain. Subsequently, the Office expanded the acceptance of her claim to include subluxations of the lumbar and thoracic spines and authorized manual chiropractic manipulations for the period January 8 through April 8, 2002.

On July 19, 2002 appellant filed a Form CA-7, claim for compensation requesting wage-loss compensation for the period May 20 through June 7, 2002. An accompanying time analysis form indicated the number of hours of leave without pay for which appellant sought compensation during the period May 29 through June 10, 2002. The form also indicated that appellant was placed on leave without pay on May 29, 2002 due to low-mail volume.

In an August 12, 2002 letter, the Office advised appellant to submit factual and medical evidence supportive of her claim.

By decision dated September 25, 2002, the Office found that appellant was entitled to wage-loss compensation for four hours of medical treatment she received on May 29 and June 5, 2002 due to the November 27, 2001 employment injury, but that disability for these days would not be payable as they were the waiting days for an injury causing disability for less than 14 days. The Office further found the medical evidence of record insufficient to establish that

appellant was disabled for work on the other dates during the period May 29 through June 10, 2002 due to her accepted employment injury.[1]

By letter dated December 17, 2002, appellant requested reconsideration. She contended that during the period May 29 through June 7, 2002 she was placed on limited duty and she was sent home early due to low-mail volume and placed on leave without pay status.[2] Appellant's request was accompanied by a time analysis form and a July 19, 2002 CA-7 form. A December 17, 2002 CA-7 form, requested compensation for the period May 29 through June 7, 2002. A December 17, 2002 attending physician's report from Dr. Omar Qureshi, a chiropractor, revealed a diagnosis of subluxations of the thoracic and lumbar spine that were causally related to the November 27, 2001 employment injury. Dr. Qureshi stated that appellant was disabled for work during the period April 8 through May 14, 2002.

By decision dated February 12, 2003, the Office denied appellant's request for modification on the grounds that the evidence submitted was irrelevant and thus, insufficient to warrant further review of its prior decision.[3]

The Board finds that the case is not in posture for a decision as to whether appellant was entitled to wage-loss compensation for the period May 29 through June 10, 2002 due to her accepted employment injury.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or 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 he or she cannot perform such light duty. As part of this burden, the

[1] The record reveals that, by letter dated August 26, 2002, the Office referred appellant to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for a second opinion medical examination to determine whether she had any residuals due to her November 27, 2001 employment injury, whether appellant could perform her regular job duties and whether ongoing chiropractic treatment was necessary. Dr. Kaffen submitted a September 30, 2002 report, which reviewed a history of her November 27, 2001 employment injury and medical treatment and noted her complaints of pain in the lower back, thoracic spine and extremities. He provided his findings on physical examination and reviewed appellant's medical records. Dr. Kaffen diagnosed lumbar strain and stated that there was no evidence of subluxation based on history; and physical and x-ray examination; and no objective findings of residuals of appellant's lumbar sprain. He opined that appellant was capable of performing the regular duties of a manual distribution clerk and that ongoing chiropractic manipulation treatment were neither medically necessary nor appropriate. An accompanying x-ray report dated September 20, 2002 revealed a normal thoracic spine and a work capacity evaluation indicated that appellant could work without physical restrictions. In its September 25, 2002 decision, the Office noted that it had not yet received Dr. Kaffen's report. The Board finds that his report is not relevant to the issue in this case of whether appellant is entitled to wage-loss compensation as the Office did not ask him to determine whether appellant was disabled for work during the claimed period.

[2] Although appellant requested compensation for the period May 29 through June 10, 2002 she did not contest the Office's explanation regarding the three-day waiting period pursuant to 5 U.S.C. § 8117.

[3] On appeal appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c).

employee must show either 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.[4]

In this case, appellant did not allege that she could not perform the modified-duty position. Rather, she alleged that her hours were reduced by the employing establishment during the period May 29 through June 10, 2002 due to low-mail volume.

The Office's procedure manual states: "If the claim for recurrence of disability for work is based on modification of the claimant's duties or on the physical requirements of the job, the claimant should be asked to describe such changes and the employing establishment should be asked to comment."[5] Although the Office asked appellant to provide the reasons for the lost wages on the dates other than May 29, 2002 in its August 12, 2002 letter, it did not ask the employing establishment to comment on appellant's allegation that her hours were reduced due to low-mail volume. The case will be remanded for such action, to be followed by an appropriate decision on appellant's claim for wage-loss compensation for the period May 29 through June 10, 2002.[6]

The February 12, 2003 and September 25, 2002 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
August 5, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[4] *Mary A. Howard*, 45 ECAB 646 (1994); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrrences*, Chapter 2.1500.7a(3) (May 1997).

[6] In light of the Board's decision on this issue, it is unnecessary for the Board to address the issue of whether the Office abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).