

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANGELA D. BATES-CATER and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Alexandria, LA

*Docket No. 03-84; Submitted on the Record;
Issued March 11, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has met her burden of proof to establish that she is entitled to compensation for wage loss commencing March 14, 2002.

On April 4, 2000 appellant, then a 33-year-old flat sorting machine operator, filed an occupational disease claim alleging that on March 14, 2000 she first realized that her lung condition was caused or aggravated by factors of her federal employment. She worked from 6:00 p.m. until 2:30 a.m. Monday through Friday.

By letter dated November 20, 2001, the Office of Workers' Compensation Programs accepted appellant's claim for aggravation of preexisting respiratory disease based on the second opinion of Dr. Am Phuc Mai, a Board-certified internist.¹

Appellant submitted a March 12, 2002 duty status report of Dr. Bernadette S. Hee, a pulmonologist, who indicated that she examined appellant on March 12, 2002 and diagnosed chronic obstructive pulmonary disease. She noted that appellant was unable to perform her regular work duties, but that she could work as of March 14, 2002 within certain physical restrictions. Dr. Hee recommended that appellant work in an environment with no dust, fumes, chemicals and smoke.²

Appellant also submitted Dr. Hee's March 27, 2002 letter indicating that she had a history of multiple spontaneous pneumothoraces. Dr. Hee stated that this history put appellant at

¹ The record reveals that appellant stopped work on March 6, 1998 due to the collapse of her right lung. Appellant returned to limited-duty work on April 8, 1998. She stopped work again on November 9, 1998 when her left lung collapsed. Appellant returned to work on November 19, 1998. She was treated in a hospital emergency room on September 28, 1999 and was released to work on October 1, 1999. On January 15, 2000 appellant was again admitted to the hospital for left chest pains and returned to limited-duty work on January 21, 2000.

² Appellant submitted a February 17, 2000 report of Dr. Alexandre L. Slatkin, a Board-certified internist, wherein he recommended that she work in the daytime with certain physical restrictions.

risk for manual labor. She also stated that appellant's previous work at night involved working around machines, which generated significant portions of dust and some degree of fumes. Dr. Hee recommended that appellant work daytime hours to avoid exposure to these exacerbating factors, specifically noting that appellant should work from 8:00 a.m. until 4:00 p.m. or 6:00 p.m.

On March 14, 2002 appellant rejected the employing establishment's offer of limited-duty work indicating that it violated her physician's orders. She stopped work on that date. In an August 9, 2002 letter, the Office advised appellant that the offered position was suitable. She was notified of the penalty provisions of section 8106 and given 30 days to respond.

As a result of appellant's concerns about working at night around machines generating dust and fumes, the employing establishment conducted an independent respirable nuisance dust analysis to determine whether the levels of dust and/or fumes were further exacerbating appellant's condition. The analysis took place on April 15, 2002 between the hours of 8:00 p.m. and 10:00 p.m. while the machines were running. Copies of the test results and a May 10, 2002 memorandum from an employing establishment safety specialist indicated that dust levels were below the acceptable limits required by the Occupational Safety and Health Administration (OSHA).

By letter dated June 28, 2002, the Office noted Dr. Hee's opinion that appellant should not work at night because working around the machines generated significant portions of dust. The Office advised Dr. Hee about the results of the dust analysis and stated that the exacerbating factors she alluded to were nonexistent. The Office requested that Dr. Hee determine appellant's ability to work in view of the above. Dr. Hee did not respond.

In an August 16, 2002 response to the Office's August 9, 2002 letter finding the offered position suitable, appellant indicated that she returned to work on August 12, 2002 at 8:00 p.m. and within hours she developed a cough. She stated that she returned to work on August 13, 2002 and her cough became worse and she experienced shortness of breath. On August 14, 2002 after working a few hours, her cough and breathing became so bad that she left work and went to the emergency room of a local hospital. Appellant stated that, after being tested, she was diagnosed with pneumonia and put on medication and bed rest. She noted that several physicians did not want her to work at night because she stood the chance of having her pneumonia set in. Appellant requested that the Office reconsider the employing establishment's job offer and consider her health and family.

In an August 28, 2002 statement, appellant stated that she saw Dr. Hee on August 19, 2002 and Dr. Hee believed that she should not work at night. She noted that on August 22, 2002 she returned to work for approximately two hours before returning to the emergency room due to a cough and difficulty in breathing. Appellant stated that on August 28, 2002 she followed up with Dr. Jerome M. Ellender, a Board-certified internist, who was very concerned with the effects that working at night had on her health.

Appellant submitted documents from the hospital emergency room indicating that she received treatment for pneumonia on August 15, 2002 and her cough on August 23, 2002.

In a September 30, 2002 decision, the Office found the evidence of record insufficient to establish that appellant was totally disabled commencing March 14, 2002.³

The Board finds that appellant has failed to meet her burden of proof to establish that she is entitled to compensation for wage-loss commencing March 14, 2002.

As used in the Federal Employees' Compensation Act,⁴ the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁵ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁶ 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 as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.⁷ 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 his or her employment, he or she is entitled to compensation for any loss of wages.

In this case, the Office accepted that appellant sustained an aggravation of preexisting respiratory disease. Although the Office accepted that appellant sustained an employment injury, appellant still has the burden of establishing that her accepted condition resulted in disability for work for the specific claimed period.⁸ To meet this burden for the period beginning March 14, 2002 appellant must submit medical evidence that establishes that the residuals or sequelae of her accepted condition, an aggravation of preexisting respiratory disease, was such that from a medical standpoint it prevented her from continuing in her employment beginning March 14, 2002. Appellant has not submitted such medical evidence in this case.

Appellant submitted medical reports and letters from Dr. Hee, a pulmonologist, and prescription from a physician whose signature is illegible indicating that she should not work at night in an environment of dust, fumes, chemicals and smoke. Neither physician provided any medical rationale explaining how or why working in this environment by appellant aggravated her accepted employment injury or caused her disability for work beginning March 14, 2002.

³ In its September 30, 2002 decision, the Office also found that its August 9, 2002 job suitability letter had been issued in error.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

⁶ See *Fred Foster*, 1 ECAB 21 at 24-25 (1947) (finding that the Act provides for the payment of compensation in disability cases upon the basis of the impairment in the employee's capacity to earn wages and not upon physical impairment as such).

⁷ See *Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

⁸ See *Dorothy J. Bell*, 47 ECAB 624 (1996).

Dr. Hee did not address appellant's ability to work at night, as requested by the Office, in light of testing of the air quality at the employing establishment, which revealed dust levels below the acceptable limits set forth by OSHA. The above evidence is insufficient to establish appellant's burden.

The hospital emergency room documents indicating that appellant received treatment for her cough and pneumonia on August 15 and 23, 2002, respectively, did not address appellant's disability for work beginning March 14, 2002.

Appellant has failed to submit any probative medical evidence to support her claimed period of total disability beginning March 14, 2002 and she has not established her entitlement to compensation for wage loss for that period.

The September 30, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 11, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member