

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

TAMARA LUM, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Los Angeles, CA Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-111
Issued: December 6, 2005**

Appearances:
Tamara Lum, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 13, 2004 appellant filed a timely appeal from decisions of an Office of Workers' Compensation Programs' hearing representative dated July 6, 2004 which denied her claims for disability on May 10 and November 5, 11 and 27, 2003. Pursuant to 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 disability for work on May 10 and November 5, 11 and 27, 2003.

FACTUAL HISTORY

On November 23, 1988 appellant, then a 29-year-old letter carrier, filed a traumatic injury claim (Form CA-1), alleging that on November 18, 1988 she was bitten by a dog on the right rear and thigh and fell on her back while in the performance of duty. She did not immediately stop workbut appellant began working light duty. The Office accepted the claim for lumbosacral strain and herniated disc L5-S1 and disc bulge at L4-5. Appellant received total

disability from January 19, 1996 to September 10, 1997, when she returned to work in a light-duty capacity.¹

In a decision dated January 28, 1999, the Office found that appellant's actual earnings in her modified-duty position as a distribution clerk of \$721.96 per week fairly and reasonably represented her wage-earning capacity effective September 12, 1998. The Office noted that she had demonstrated the ability to perform the job and that the position was considered suitable to her partially disabled condition. The Office found that appellant's actual earnings met or exceeded the current wages of the job she held when injured and advised that her wage-loss benefits would be reduced.

Appellant continued to work and sought periodic medical treatment for her employment-related condition.

In a May 7, 2003 work status report, Dr. Giambetti, an emergency room physician, diagnosed acute exacerbation of chronic back pain. Appellant was placed off work until she was examined by her primary medical provider. A separate report of the same date, signed by a nurse, indicated that she exacerbated a back injury. In an additional May 7, 2003 report, Dr. Giambetti, advised that appellant experienced pain two-weeks prior and had a work-related back history.

In a May 8, 2003 treatment note, Dr. Vernon Williams, a Board-certified neurologist and appellant's treating physician, diagnosed lumbar and myofascial pain and lumbar radiculopathy and recommended restrictions on lifting over 10 pounds and repetitive bending and twisting.

On May 16, 2003 appellant filed a Form CA-7 for disability from May 3 to 13, 2003. On May 23, 2003 she filed a Form CA-7 for disability for May 10, 2003.²

By letter dated June 10, 2003, the Office advised appellant that the medical evidence was inadequate to support her wage-loss claim. She was advised to submit a report from her physician with objective findings to support an increase in the injury-related conditions and afforded appellant 30 days to submit additional evidence.

By decision dated July 24, 2003, the Office denied appellant's claim for disability compensation on May 10, 2003. The Office noted that she used sick leave when she was off work on May 3, 7 and 9, 2003. The Office advised that the medical evidence did not show any increase in objective findings, nor explain any worsening of appellant's condition.

On August 22, 2003 appellant requested a hearing.

¹ The record reflects that the Office accepted a February 23, 1998 recurrence on June 4, 1998. Appellant's claim was developed and in a June 10, 1999 decision, the Office denied her claim for a recurrence on January 21, 1999. By decision dated June 1, 2000, the Office denied her claim for temporary total disability beginning February 2 to 12, 2000. In separate decisions dated February 21, 2001, the Office denied appellant's claims for disability for the period February 12, 2000 and for disability in 1999.

² The record reflects that appellant filed a Form CA-7B for leave buyback from May 3 to 13, 2003.

In a November 6, 2003 emergency room report, Dr. Williams diagnosed lumbar spine degenerative joint disease, lumbar spine radiculopathy, chronic pain and requested authorization for a magnetic resonance imaging (MRI) scan. He indicated that appellant was disabled for two weeks. In a separate report also dated November 6, 2003, Dr. Williams diagnosed lumbar degenerative joint disease, lumbar radiculitis and chronic pain and advised that she was totally disabled for two weeks. In a November 7, 2003 MRI scan, Dr. Hannah S. Sim, a radiologist, advised that appellant had back pain with a mild to moderate diffuse disc bulge at L4-5, along with mild bilateral facet disease and ligamentum flavum hypertrophy, with evidence of partial annular tear along the central canal stenosis. She noted a moderate diffuse disc bulge at L5-S1 along with bilateral facet disease and ligamentum flavum hypertrophy, along with degenerative disc disease at L4-5 and L5-S1. In a separate report dated November 7, 2003, Dr. Sim advised that appellant had chronic lower back pain since the 1988 injury. She noted that appellant had a herniated disc with bilateral radiculopathy and determined that she had intractable back pain.

In a November 17, 2003 treatment note, Dr. Williams diagnosed a lumbar spine injury and lumbar spine radiculopathy with chronic pain and advised that appellant was totally disabled. In a November 18, 2003 treatment note, he requested authorization for a three level discogram and advised that she was temporarily totally disabled.

Appellant subsequently filed several CA-7 forms for wage loss covering intermittent periods of partial disability from November 15 to December 12, 2003.

By decision dated December 5, 2003, the Office denied appellant's claim for temporary total disability from her limited-duty position from May 3 to 9, 2003. The Office noted that she received medical treatment on May 7 and 8, 2003 and that appellant would be entitled to wage-loss four hours per day for those medical appointments. However, the Office determined that appellant had not submitted medical evidence to support that she was totally disabled from her limited-duty position from May 3 to 9, 2003.

By letter dated December 9, 2003, the Office advised appellant that additional factual and medical evidence was needed to establish her claim for disability for work beginning November 29, 2003. The Office advised her that the evidence was insufficient to establish a recurrence related to the original injury and that she should file a notice of recurrence on a CA-2a form. The Office noted that appellant would be paid four hours for the doctor's appointment on November 11, 2003.

By letter dated December 27, 2003, appellant alleged that her current disability was due to her original injury and that she was totally disabled from November 5, 2003 through her expected return to work date of January 22, 2004. On December 29, 2003 she filed a claim for a recurrence of disability due to the November 18, 1988 work injury for which she stopped work on November 5, 2003.

By decision dated January 14, 2004, the Office denied appellant's claim for wage loss for November 5, 11 and 27, 2003, as the evidence did not show that she was totally disabled from her limited-duty position. The Office noted that she received medical treatment from her physician on November 6, 17, 18 and December 11 and 20, 2003. The Office advised appellant

that she would receive payment for four hours of wage loss on each of those dates for lost time from work.

By letter dated January 23, 2004, appellant requested reconsideration of her claim.

In a November 17, 2003 report, received on February 24, 2004, Dr. Williams advised that appellant related that she had crippling and low back intense spasms and that she sought emergency room treatment on November 7, 2003. He advised that she had decreased range of motion of the spine, positive tenderness to palpation, a five out of five in the bilateral lower extremities, a positive antalgic gait and no sensory changes. Dr. Williams diagnosed lumbar degenerative joint disease, lumbar radiculitis, lumbar myofascial pain, chronic pain and annular fissure and referred appellant for a spine surgery consultation.

In a November 18, 2003 report, received on February 16, 2004, Dr. Dillin noted appellant's history of injury and conducted a physical examination. He diagnosed lumbar degenerative joint disease, degenerative disc disease at L4-5 and L5-S1 and advised that no treatment was recommended at this time.

In a May 8, 2003 report received by the Office on April 16, 2004, Dr. Williams noted that appellant had a worsening of her back pain. He advised that her restrictions remained the same and prescribed medication and additional physical therapy. In a second treatment note also dated May 8, 2003, Dr. Williams advised that appellant was temporarily totally disabled from May 9 to 10, 2003 and diagnosed lumbar myofascial pain, lumbar radiculopathy and lumbar degenerative disc disease. He advised restricted duty on May 13, 2003.

In a November 9, 2003 emergency room report, received by the Office on April 16, 2004, Dr. Barry Borm, Board-certified in emergency medicine, advised that appellant was treated for complaints of back pain and diagnosed myofascial strain.

By letter dated April 15, 2004, appellant requested that her prior request for reconsideration be changed to a request for a hearing and be combined with the prior hearing request.

Hearings were held on April 15, 2004 at which appellant clarified that wage loss was denied for May 10 and November 5, 11 and 27, 2003, the dates for which she sought payment.

By decision dated July 6, 2004, the Office hearing representative affirmed the January 14, 2004 decision which denied appellant's claim for compensation November 5, 11 and 27, 2003.

In a second decision also dated July 6, 2004, the Office hearing representative affirmed the Office's July 24, 2003 decision, denying compensation on May 10, 2003.

LEGAL PRECEDENT

Under the Act, 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 injury.³ Whether a particular injury causes an employee to be disabled for work and the duration of that disability are medical issues which must be proved by the weight of substantial and reliable medical evidence.⁴ The claimant has the burden of proving that he or she is disabled for the period claimed as a result of the employment injury. The medical evidence of record must directly address the particular period of disability for which compensation is sought; to do otherwise would essentially allow employee's to self-certify their disability and entitlement to compensation.⁵ The Office is not precluded from adjudicating a limited period of disability following issuance of a formal wage-earning capacity determination.⁶

ANALYSIS

The Office accepted that appellant sustained the conditions of lumbosacral strain and herniated disc at L5-S1 and disc bulge at L4-5 as a result of her federal employment. After returning to a modified-duty position, she filed claims for intermittent wage loss for May 10 and November 5, 11 and 27, 2003 due to the November 18, 1988 employment injury.

The relevant reports in support of her claim for disability on May 10, 2003, include a May 7, 2003 report in which Dr. Giambetti, an emergency room physician advised that appellant was seen for an exacerbation of chronic back pain and was placed off work until she was seen by her primary care provider. In a May 8, 2003 report, Dr. Williams, her treating physician, noted that appellant had experienced worsening of her back pain. In separate treatment notes also dated May 8, 2003, he diagnosed lumbar myofascial pain, lumbar radiculopathy and lumbar degenerative disc disease and advised that appellant was temporarily totally disabled from May 9 to 10, 2003. In an April 1, 2004 report, Dr. Williams explained that he recommended in May 2003 that appellant be placed off work from May 8 to 13, 2003, due to an exacerbation of her lumbar pain. The Board finds that the medical evidence is sufficient to establish that symptoms due to appellant's accepted lumbar condition rendered her totally disabled on May 10, 2003.

In support of her claim for disability on November 5, 11 and 27 2003, appellant submitted several reports including two reports dated November 6, 2003, in which Dr. Williams diagnosed lumbar spine degenerative joint disease and indicated that she was disabled for two weeks. In a November 17, 2003 treatment note, he diagnosed a lumbar spine injury and lumbar spine radiculopathy with chronic pain and advised that she was totally disabled. In a November 18, 2003 treatment note, Dr. Williams requested authorization for a three level discogram and advised that appellant was totally disabled. Appellant also submitted a

³ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁴ See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁵ *Id.* See also *William A. Archer*, 55 ECAB ____ (Docket No. 04-1138, issued August 27, 2004).

⁶ See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

November 7, 2003 report by Dr. Sim, who noted back pain and findings from an MRI scan that included disc bulges at L4-5, L5-S1 and degenerative disc disease at L4-5 and L5-S1. In a separate report dated November 7, 2003, she advised that appellant had chronic lower back pain since her 1988 work injury.

The reports of Dr. Williams support that appellant's lumbar condition deteriorated and that she was disabled November 11 and 27, 2003. The Board finds that she has established her claim for work-related disability on these dates.⁷ The medical evidence is not sufficient to establish her disability for November 5, 2003 as Dr. Williams did not find her to be disabled until November 6, 2003. The Board will affirm the denial of benefits for that date.

CONCLUSION

The Board finds that appellant has met her burden of proof to establish disability for work on May 10 and November 11 and 27, 2003. She has not established that she was disabled as of November 5, 2003.

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2004 decisions of the Office of Workers' Compensation Programs is affirmed, in part, and set aside, in part. The case is remanded to the Office for payment of appropriate compensation consistent with this decision.

Issued: December 6, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

⁷ The Board notes that appellant filed a claim for a recurrence on December 29, 2003; however, that aspect of the claim has not been adjudicated by the Office and is not presently before the Board.