

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

<p>A.J., Appellant</p> <p>and</p> <p>U.S. POSTAL SERVICE, POST OFFICE, Grand Rapids, MI, Employer</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 08-671</p> <p>Issued: December 16, 2008</p>
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<p><i>Appearances:</i></p> <p><i>Alan J. Shapiro, Esq., for the appellant</i></p> <p><i>Office of Solicitor, for the Director</i></p>	<p><i>Case Submitted on the Record</i></p>
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DECISION AND ORDER

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

JURISDICTION

On January 9, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 18, 2007 which denied her claim for intermittent disability from April 14, 2003 to November 16, 2004.¹ Pursuant to 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 that she was totally disabled for intermittent periods between April 14, 2003 and November 16, 2004 causally related to her June 11, 2001 employment injury.

¹ Appellant has claimed compensation for other time periods however as the last merit decision addresses only the intermittent periods from April 14, 2003 to November 16, 2004, the Board only has jurisdiction to review these time periods. Other time periods were addressed under separate decisions. Appellant's claim for a schedule award was also addressed under a separate decision which was not appealed.

FACTUAL HISTORY

On October 18, 2002 appellant, then a 32-year-old mail processing clerk, filed an occupational disease claim for Morton's neuroma.² On April 4, 2003 the Office accepted her claim for lesions of plantar nerve and injury to dorsal aspect of the right foot. It subsequently accepted injury to other specified nerves of the pelvic girdle and right leg and reflex sympathetic dystrophy on the right.

In an April 14, 2003 note, Dr. Katherine Young, Board-certified in family medicine, noted that appellant was under her care from April 14 through June 14, 2003 and would return to work on June 15, 2003. She stated that appellant was "unable to work due to right foot injury reasons." Dr. Young noted that appellant had missed 21 days of work out of the prior month because of the pain in her foot. The physical examination of appellant's foot showed evidence of tenderness in the anterior cuboid/cuneiform bones with slight swelling. On April 15, 2003 Dr. Young reported that appellant was not able to bear weight on her right foot for any length of time and required a sit-down job. She reiterated that appellant would be off work from April 14 through June 14, 2003.

Appellant filed claims for intermittent wage-loss compensation commencing April 14, 2003. She also filed claims for compensation for the following dates: October 4, 17, 18 and 31, November 1, 15 and 28 and December 13, 26 and 27, 2003; January 9, 10, 23 and 24, February 6, 7 and 20, March 6, 19 and 20, April 2, 3, 16, 20, 21, 23, 25 and 26, May 17, June 2, 19 and 21, July 6 and 7, October 10, 11, 12, 13, 27 and 29 and November 9 and 16, 2004.

An undated note received April 21, 2003 from an unknown health care provider reported that appellant missed work repeatedly in March 2003 due to the right foot injury and was now off from April 14 through June 14 due to the same injury.

In a May 5, 2003 physician's report, Dr. Young again found appellant to be totally disabled from April 14 through June 28, 2003 and required a sitting job with no standing or lifting.

In a May 6, 2003 letter, the Office requested that appellant submit a medical report from her physician addressing her total disability from work due to the accepted work injury to her right lower extremity and not because of her pregnancy.

In a May 13, 2003 note, Dr. Young reiterated that appellant was completely disabled and unable to work from April 14 through June 28, 2003.

In a June 3, 2003 letter, Dr. Young stated that appellant was seen on April 14, 2003 at which point she was having pain to the point where she could not walk and was also in pain at rest. At that time, she elected to take appellant off work to try and help her get back into the pain

² Appellant has an accepted June 11, 2001 traumatic injury claim for acute contusion of the right foot, which occurred when a gate fell onto her foot. The occupational disease claim is for an aggravation of this accepted condition. The two cases have been combined.

clinic and on medication to control pain. Dr. Young opined that appellant was physically unable to work.

In a June 24, 2003 decision, the Office denied appellant's claim for compensation finding that the medical evidence did not establish whether her disability was due to her right foot injury or whether it was due to her pregnancy.

On July 6, 2003 appellant requested an oral hearing regarding the June 24, 2003 decision.

In a July 16, 2003 report, Dr. David Krencik, an osteopath, discussed his plan for appellant's pain management due to drugs contradicting with breastfeeding. He noted that appellant had reflex sympathetic disorder in the right lower extremity after an on-the-job injury. On August 19, 2003 Dr. Krencik reevaluated appellant.

In an October 21, 2003 Dr. Young excused appellant from work on that day noting that complications with right foot injury made it hard to walk. On November 4, 2003 she excused appellant from work on November 4, 2003 due to "complications with right foot injury, hard to walk."

In a January 7, 2004 letter, Dr. Young stated that appellant was off work from April 15 through June 19, 2003, due to problems with her right foot injury and chronic foot pain. She described the pain as to the point where appellant could not stand for any length of time and would be unable to work at any job. Moreover, appellant was unable to focus or concentrate on her work due to the severity of the pain. Dr. Young noted that there was increased tenderness and that appellant was seen frequently through the pain clinic and in her office. She clarified that appellant was absent from June 20 to August 28, 2003 due to maternity leave and from August 29 through September 23, 2003 due to nonwork injury-related surgery and postoperative recovery.

On January 24, 2004 Dr. Young explained how the June 21, 2001 incident caused a fracture to appellant's foot. She advised that appellant was incapacitated due to her work-related injury for intermittent days starting on March 9, 2002, including April 15 and June 6, 2003 and thereafter. Dr. Young opined that, had appellant been in a preinjury status, she would have been able to work until approximately two weeks prior to the birth of her child on June 20, 2003.

An oral hearing was held on January 27, 2004 regarding appellant's claim for intermittent compensation.

In a March 1, 2004 note, Dr. Young stated that the injury from June 2001 was permanent.

In a March 8, 2004 letter, the employing establishment noted that on November 27, 2002 appellant was provided a limited-duty job consisting of "sit down work" which she accepted. In a June 20, 2002 note, Dr. Jeffrey Recknagel, an orthopedic surgeon, stated that appellant could return to light duty in a sit-down only job. In a September 4, 2002 note, Dr. John G. Anderson, an orthopedic surgeon, also found that appellant could return to work in a sit-down position only.

A March 18, 2004 duty status report, from Dr. Young stated that appellant was unable to stand or walk at all. On March 21, 2004 she excused appellant from work on March 17, 19 and 20, 2004 due to complications with her right foot injury as it was hard to walk.

On April 5, 2004 appellant filed a recurrence of disability claim but provided no date of recurrence. She stated that nothing happened to make her condition worse but that she experienced lingering pain from the original injury. Appellant explained that she took strong medication which put her out and that she took off March 17 to 20 and 29, 2004 off for her injury.

An April 9, 2004 offer of modified assignment provided that appellant would sit down with her right foot elevated for eight hours with no pulling down or lifting more than 10 pounds. The duties were for manual hand sorting of mail for eight hours, facing the mail for one hour and addressing rips and tears for two hours.

On April 13, 2004 Dr. Young stated that appellant experienced right foot pain related to the June 11, 2001 injury and, due to the reflex sympathetic disorder condition, she took medication and required time off from work. She stated that appellant was released to return to work on September 24, 2003 and had been absent from April 14 through September 23, 2003 due to right foot complications, maternity leave and gastric bypass surgery.

In an April 22, 2004 decision, the Office affirmed the denial of appellant's claim for intermittent compensation.

On May 7, 2004 appellant appealed the April 22, 2004 decision to the Board.

In a June 24, 2004 letter, the Office requested additional information from appellant regarding the intermittent disability from May 31 through July 25, 2003, October 4, 2003 to April 16, 2004 and May 17 to June 2, 2004. It noted that she had returned to limited duty on June 19, 2002.

In an October 19, 2004 note, Dr. Young excused appellant from work on October 12, 2004 due to complications with her right foot injury as it was hard to walk. On November 16, 2004 she also excused appellant from work.

In a November 23, 2004 letter, the Office requested that appellant clarify whether she stopped work on November 16, 2004 due to a change in her light-duty position or due to a worsening in her employment-related condition.

In an undated letter, received December 20, 2004, appellant contended that she did not need to submit medical documentation as she was never released back to full duty.

In a December 1, 2004 decision, the Board remanded the case for further development on appellant's claim for intermittent disability as it was not clear what specific hours or dates she was absent from work or the specific physical restrictions provided for in her limited-duty position.

A December 25, 2004 modified assignment was offered and accepted by appellant. It permitted hand sorting of mail within restrictions for four to eight hours and intermittent standing and walking for one to two hours.

On September 30, 2005 Dr. Young explained that appellant was off for the time period from January 1 through April 4, 2003, due to pain issues related to her foot neuropathy not due to her pregnancy. On October 27, 2005 she provided a list of the dates in 2003, 2004 and 2005 that appellant missed work due to her reflex sympathetic disorder.

In a June 29, 2006 letter, the Office requested additional information from appellant covering the period July 31, 2003 through November 17, 2005, specifically the number of hours of sick or annual leave used for each claimed date.

In an April 10, 2007 decision, the Office denied appellant's claim for compensation for wage loss for the intermittent time period from May 31, 2003 through November 16, 2004. It found that the factual and medical evidence did not support that she was disabled from work due to her employment-related injury.

On April 13, 2007 appellant, through her representative, requested an oral hearing.

In an October 18, 2007 decision, an Office hearing representative reviewed the written record and affirmed the previous decision finding that the medical evidence failed to establish that appellant was totally disabled from her limited-duty position from April 14, 2003 to November 16, 2004 due to her employment-related injuries.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁴

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 of establishing 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

³ 20 C.F.R. § 10.5(x) (1999).

⁴ *Id.*

employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements.⁵

ANALYSIS

Appellant did not claim that there was a change in her limited-duty position. Therefore she can only establish that she was entitled to compensation if she was totally disabled from performing her limited-duty position during intermittent time periods between April 14, 2003 and November 16, 2004.⁶

The evidence indicates that appellant was performing a limited-duty position of “sit[-]down work” as of November 27, 2002. The issue is whether the medical evidence submitted establishes that appellant was incapable of performing “sit[-]down work” as a result of her employment-related conditions on the intermittent dates in question.

The Board finds that appellant was totally disabled from her light-duty position for the period April 15 through June 6, 2003. Dr. Young provided a thorough and rationalized explanation of how appellant’s right foot condition caused her pain which was so great that she could not stand on her foot for any length of time, that she was unable to focus or concentrate on her work due to the pain and provided a medical opinion that she would have been unable to perform at any job during the identified time period. Although she identifies the dates of disability as being from April 15 through June 19, 2003 in her January 7, 2004 letter, in her January 24, 2004 letter, she opined that if appellant was in her prework injury condition she would only have been able to work until two-weeks prior to her son’s birth on June 6 to 20, 2003, which is why the Board finds the period of disability to be from April 15 through June 6, 2003. There is no medical evidence to the contrary. The Board also finds that appellant is not entitled to compensation for the period June 6 through July 25, 2003 as Dr. Young identified her as being incapable of work due to her pregnancy for the period June 6 to 20, 2003 and on maternity leave from June 20 through August 28, 2003.

Regarding the time period from October 4, 2003 through November 16, 2004, the Board finds that appellant has not met her burden of proof. Appellant was unclear in her claims for compensation exactly how many hours of work were missed on each claimed date. She frequently included two dates, for example October 4 and 17, 2003 and would indicate that eight hours were missed between the two days. Dr. Young provided a list of all the dates in 2003, 2004 and 2005 that appellant missed work and opined that it was due to continued problems with reflex sympathetic disorder to her foot. However, the list of dates does not include the number of hours missed from work.

⁵ *Barry C. Peterson*, 52 ECAB 120, 125 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ Documents not addressing appellant’s physical condition during the claimed dates or providing a general explanation of the development of her condition are not relevant and were not included in the decision.

CONCLUSION

The Board finds that appellant is entitled to disability compensation for the period April 14 through June 6, 2003, that she is not entitled to disability compensation for the period June 6 through July 25, 2003 and that she has not met her burden of establishing entitlement for the remaining period in 2003 and 2004.

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2007 decision of the Office of Workers' Compensation Programs is affirmed, in part, and reversed, in part.

Issued: December 16, 2008
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