United States Department of Labor
Employees' Compensation Appeals Board

B.T., Appellant	)	
and	)	**Docket No. 08-389**
	)	**Issued: June 12, 2008**
U.S. POSTAL SERVICE, SNAPPER CREEK POST OFFICE, Miami, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2007 appellant filed a timely appeal from the September 19, 2007 merit decision of the Office of Workers' Compensation Programs, which denied her recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant sustained a recurrence of disability on October 31, 2006.

FACTUAL HISTORY

On January 7, 2001 appellant, then a 50-year-old mail processing clerk, sustained an injury in the performance of duty when she struck her left ankle on a gurney. On February 6, 2004 the Office accepted her claim for left ankle sprain.[1] On June 30, 2004 appellant accepted a limited-duty assignment at no wage loss.

[1] OWCP No. 062046824.

Also on June 30, 2004 appellant filed a claim alleging that her left ankle tendinitis was a result of her federal employment. The Office accepted her claim for left ankle tendinitis and left ankle degenerative arthritis.[2] Appellant underwent an arthroscopic synovectomy on January 19, 2006. She returned to limited duty on March 20, 2006. Appellant's podiatrist, Dr. Mark A. Maederer, Jr., excused her from work from July 24 through August 8, 2006 following an aspiration of her left ankle. Dr. Maederer continued appellant's previous restrictions but limited her lifting to 20 pounds.

On September 25, 2006 appellant asked Dr. Maederer for time off to file for disability retirement and consider her options. She was concerned because her employer was planning to switch her to the third shift. Dr. Maederer stated that appellant was unable to work the third shift because she took medication in the evening that caused drowsiness. He noted soreness and diffuse swelling around the left ankle "which is worsened with increased ambulation." Dr. Maederer diagnosed chronic degenerative arthritis, left ankle.

On October 19, 2006 Dr. Maederer reported that appellant was doing much better after her period of rest and was ready to go back to work the next day. He reported minimal inflammation, minimal soreness "and everything is being well controlled with the Richie brace." Dr. Maederer released appellant with the following restrictions: "She is to continuing (sic) with restricted duty, consisting of eight-hour shift. [Appellant] may sit as much as desired, but should walk and stand only 15 minutes each intermittently during the entire shift. Maximum carrying and lifting is 20 pounds intermittently. [Appellant] will return to the office for follow up in [six] weeks for recheck or sooner if necessary."

Appellant's application for disability retirement was approved with a finding that she was totally disabled for her position as a mail processing clerk due to degenerative arthritis of the left ankle. Her last day in a pay status was October 31, 2006.

Appellant filed a claim for wage loss beginning October 31, 2006. Dr. Maederer supported appellant's claim in a January 28, 2007 report:

> "This is a letter of clarification regarding the disability status of the patient listed above. This patient has been diagnosed with a permanent disability of her left ankle due to severe degenerative changes as a result of her previous work injury on October 3, 2003. I have set the date of her permanent disability as of October 31, 2006 since that is when it became apparent to me that she will NOT improve beyond her current condition and that she will require permanent work restrictions of 8 hours of seated duty with 15 minutes of walking and standing per shift and a maximum of 20 [pounds] of lifting.
>
> "The patient initially filed for a formal disability claim since she was having a great deal of difficulty getting her employer to cooperate with her work restrictions. This has caused numerous flare-ups of her condition, requiring injection of her ankle and release from work. When [appellant's] employer finally agreed to comply with the conditions, they decided to transfer her to a

[2] OWCP No. 062121112 (master).

facility requiring her to work [third] shift, overnight. This patient takes Darvocet (a synthetic narcotic) periodically for pain to her left ankle, in addition to Celebrex. When [appellant] takes Darvocet during the day, she is able to function, but if she takes it in the evening, it causes a debilitating degree of drowsiness. This is due to the body's natural diurnal sleep cycle and its response to darkness. This is the reason for her disability application, since once again, her employer failed to meet her required work restrictions in a reasonable manner. [Appellant] is medically unable to work an overnight shift safely due to the facts I have just described.

"If [appellant's] employer can meet her required restrictions, as described above, in a reasonable fashion, [she] will happily continue working. Indeed, she prefers to work rather than taking disability. It seems to me that her employer has been intentionally making this more difficult than necessary for [appellant] due to some sort of personal spite regarding her condition. Please help us to resolve this matter in a timely and appropriate fashion." (Emphasis in the original.)

In a decision dated March 14, 2007, the Office denied appellant's claim of recurrence. An Office hearing representative vacated this decision and remanded the case for further development, including a statement from the employer on appellant's allegation that she had to retire because she was forced to walk and stand in excess of her doctor's restrictions.[3] On August 30, 2007 the employer responded that at no time from March 20 to October 31, 2006 did appellant perform duties that were not in accordance with the restrictions provided by her treating physician and at no time during that period did she advise that she was unable to perform her assigned duties. The employer added that appellant's duties were not changed and that at no time was the employer unable to accommodate her restrictions. The employer stated that appellant's allegations were unfounded.

In a decision dated September 19, 2007, the Office denied appellant's claim of recurrence.

LEGAL PRECEDENT

The Federal Employees' Compensation Act pays compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[4] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[5]

[3] The hearing representative also found a conflict in medical opinion on whether appellant recovered from her left ankle conditions, as a second-opinion physician reported. On remand, however, the Office noted that appellant's claim was subsequently expanded to include other conditions, that she underwent surgery for the accepted conditions and that she was returned to work with restrictions. So the Office determined that the opinion of the second-opinion physician was no longer valid.

[4] 5 U.S.C. § 8102(a).

[5] 20 C.F.R. § 10.5(f) (1999).

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-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 to show that she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[6]

ANALYSIS

Appellant stopped work on October 31, 2006, but she has not shown that she stopped because of a change in the nature and extent of her injury-related condition. The medical evidence shows that she was able to work within the restrictions set by her podiatrist, Dr. Maederer, who reported on October 19, 2006 that appellant was rested and ready to go back to work. Appellant's inflammation and soreness was "minimal" and "everything was being well controlled with the Richie brace." Dr. Maederer released appellant to return to work within her previous restrictions and noted that she would return to the office for follow-up in six weeks or sooner if necessary. So 12 days before appellant stopped work, her podiatrist cleared her to continue working.

After appellant stopped work, Dr. Maederer reported that she was still physically capable of working within her restrictions. On January 28, 2007 he clarified that appellant would happily continue working "if her employer can meet her required restrictions, as described above, in a reasonable fashion." So the issue is not whether appellant stopped work because of a change in the nature and extent of her injury-related condition. The issue is whether she stopped work because of a change in the nature and extent of her limited-duty job requirements.

About a month before she stopped work, appellant told Dr. Maederer that her employer was planning to switch her to the third shift. But her employer did not take that action. Appellant continued in the same position until the day her retirement became effective. Her concern over the possibility, at some point in the future, of having to work such a shift is no basis for the payment of compensation. The Board has held that a fear of future injury is not a compensable factor of employment.[7]

Appellant also told Dr. Maederer that she was having a great deal of difficulty getting her employer to cooperate with her work restrictions. The Office further developed the factual evidence and received a statement from the employer that appellant's allegation was unfounded. The employer stated that from the time appellant began her limited duty on March 20, 2006 to the date of her retirement on October 31, 2006, she never performed duties that were not in accordance with her restrictions. Further, appellant never complained that she was unable to perform her assigned duties. Her duties did not change and the employer was always able to accommodate her. Given this evidence, it is not established as factual that the employer did not cooperate with appellant's restrictions.

[6] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[7] *Mary A. Geary*, 43 ECAB 300, 309 (1991).

If appellant was having difficulty with employer cooperation, she did not mention this to Dr. Maederer when she saw him on September 25, 2006. Dr. Maederer stated that appellant was asking for time off to file for disability retirement and consider her options because she was concerned that her employer was planning to switch her to the third shift, not because the employer was currently failing to cooperate with restrictions. When Dr. Maederer released appellant to return to work on October 19, 2006, he again mentioned nothing about a cooperation or compliance issue.[8] The Board finds that the evidence does not establish a change in the nature and extent of appellant's limited-duty job requirements.

As noted, "disability" under the Act means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. This is different from the standard used to approve appellant's application for retirement. The employer approved her application because she was totally disabled for useful and efficient service in her position as a mail processing clerk. Appellant was nonetheless capable of performing limited duty at no wage loss, as she demonstrated from March 20 to October 31, 2006, not counting a couple of weeks to recover from an aspiration. So in the absence of evidence establishing a change in the nature and extent of her injury-related condition or a change in the nature and extent of her limited-duty job requirements, appellant has not met her burden to establish a recurrence of disability beginning October 31, 2006. The Board will affirm the Office's September 19, 2007 decision denying compensation.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of disability on October 31, 2006.

[8] In his January 28, 2007 report, Dr. Maederer stated that appellant's employer "finally agreed" to comply with the restrictions but decided to transfer her to a facility requiring her to work the third shift. If compliance was at one time an issue, this statement indicates that it was an issue no longer and that appellant's motivation for seeking retirement was simply her fear of future injury, which is not compensable.

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board