United States Department of Labor
Employees' Compensation Appeals Board

V.B., Appellant	)	
	)	
and	)	**Docket No. 08-2331**
	)	**Issued: March 3, 2009**
U.S. POSTAL SERVICE, POST OFFICE, O'Fallon, MO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 25, 2008 appellant filed a timely appeal of a May 29, 2008 merit decision of an Office of Workers' Compensation Programs' hearing representative who affirmed a November 24, 2007 decision denying continuation of pay from December 7 through 17, 2006. 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 established entitlement to continuation of pay from December 7 through 17, 2006.

FACTUAL HISTORY

On December 5, 2006 appellant, then a 48-year-old letter carrier, filed a traumatic injury claim alleging that she sustained injuries to her neck and back on that date when she slipped on ice and fell while in the performance of her federal duties. On January 15, 2007 the Office accepted her claim for strain of the back, lumbar and thoracic region and sprain of the neck.

Appellant stopped work on the date of injury and returned to limited duty on December 18, 2006. She requested continuation of pay for the time that she missed work.

Appellant sought medical treatment from Dr. Ronald Pearson, Board-certified in emergency and occupational medicine. In a December 5, 2006 report, Dr. Pearson noted that appellant slipped and fell on ice and was experiencing neck and back pain. He advised that appellant was ambulating slowly and rather stiffly and was guarded in her spontaneous movements. X-rays of the thoracic and lumbar spine showed mild degenerative changes and a marked scoliosis. No evidence of acute fracture or vertebral body subluxation was seen. Dr. Pearson diagnosed acute cervical strain and thoracolumbar strain. Appellant was to follow up in 48 hours and, if no improvement was demonstrated, a course of physical therapy would be offered. In a December 5, 2006 duty status report, Form CA-17, Dr. Pearson indicated that appellant was unable to perform light duty. The CA-17 form indicated "limited duty is available and will be provided within your recommendations."

On December 7, 2006 Dr. Pearson advised that there was no improvement and that appellant's back pain seemed somewhat worse. He indicated that she was tolerating her medication satisfactorily. Appellant reported that driving to the appointment caused her marked pain from sitting in her car. Mild spasm in the cervical spine was noted along with a reduction in range of motion by approximately 25 percent. Tenderness was noted in the thoracic and lumbar regions with active range of motion severely restricted in all planes, especially with flexion and extension. Dr. Pearson opined that appellant was unable to perform any work. He referred her to physical therapy and told her to continue her medication. In a December 7, 2006 CA-17 form, Dr. Pearson was informed limited duty was available; however, he advised that appellant was unable to perform light duty. Appellant began a course of physical therapy on December 7, 2006.

In a December 15, 2006 report, Dr. Pearson noted that appellant had completed five sessions of physical therapy and a marked overall improvement in her neck (75 percent better) and in her lower back (60 percent better) since her last visit. Examination of the cervical and thoracic spine revealed mild tenderness with no acute spasms. Active range of motion of the cervical spine was almost completely full. The lumbar spine was noted to have right paravertebral muscle tenderness with some slight spasm. Active range of motion had improved considerably with a 25 percent reduction in all planes secondary to pain. Dr. Pearson diagnosed improving cervical strain and improving thoracolumbar strain. He advised that appellant was unable to perform any work December 15 through 17, 2006, but could begin limited duty on December 18, 2006 with restrictions. Appellant returned to limited duty on December 18, 2006.

In a December 22, 2006 report, Dr. Pearson provided examination findings and assessed resolving cervical and thoracolumbar strain. He discharged appellant from medical treatment and physical therapy, but noted that she should continue with a home exercise program. Dr. Pearson advised that she could return to regular duty, eight hours per day on December 26, 2006 and could return to unrestricted duty on January 15, 2007. In a CA-17 dated December 22, 2006, he reported that appellant could work a limited work shift of eight hours per day until January 15, 2007.

The employing establishment's inspection service conducted an investigation of appellant's activities following her December 5, 2006 injury. It provided evidence that appellant was seen, and admitted to, driving herself from point to point, shopping, running personal errands, playing with her dog and getting her hair done at a local beauty salon while she was off work. Investigating agents conducted multiple surveillance operations, some of which included video documentation, during the period December 6 through 26, 2006. On December 12, 2006 appellant was observed in her back yard "repeatedly walking, kneeling and turning all while playing with a large breed canine." She was also observed climbing approximately two to three stairs. On December 13, 2006 appellant was observed entering and exiting the residence, while traversing the stairs from the back yard. She was seen bending and crouching while playing with her dog, and observed carrying multiple bags from a grocery store and opening her vehicles left rear door without any apparent difficulty. Appellant was also observed entering a hair salon and sitting in a chair getting her hair colored and cut.

Appellant was interviewed by the inspectors on January 4, 2007. She stated that she "did all my normal things except come to work." Those activities included going to therapy, taking her children places, hair appointments, laundry and light house work, which she claimed "were all OK with the doctor to do." Appellant was aware that the employing establishment had limited-duty assignments for claimants with documented disabilities or injuries. She confirmed that she could have performed some type of limited-duty assignment from December 7, 2006, but did not inform Dr. Pearson that she felt she could perform work. Appellant did not advise supervisory personnel at the employing establishment of her current condition. She admitted to calling local law enforcement authorities with regard to the federal law enforcement agents and attempted to evade surveillance following a two-hour hair appointment by having an individual pull her motor vehicle to the rear of the shopping facility and departing through the rear entrance. Appellant maintained that she was following the instructions of Dr. Pearson.

On January 4, 2007 postal inspectors interviewed Dr. Pearson, who advised that appellant did not tell him that the employing establishment had limited duty available. On December 7, 2006 he prescribed physical therapy for appellant and kept her off work because she was still guarded in her movements, complained of discomfort and stated that she felt worse than she did on the date of her injury. Dr. Pearson denied telling appellant that she could continue "normal" activities with the exception of work. He advised that, when he restricts a patient, they were restricted at both home and work. Dr. Pearson stated, "I wanted her to rest and stay on her meds and I told her that." He commented that appellant should not have been operating a motor vehicle under the influence of her medication. Dr. Pearson would not have allowed appellant to drive up to 20 miles at a time, power shop for two to three hours at a time or get her hair done for a period of two to three hours during the period December 5 through 15, 2006. He noted that appellant did not inform him that she was participating in such activities and did not consider these activities normal for a person under a doctor's care for a neck and back injury. After being shown surveillance videotape footage of appellant from December 12, 2006, Dr. Pearson noted that she engaged in activities which were inconsistent with the way she presented herself to him.

On January 4, 2007 Dr. Pearson completed a questionnaire provided by the employing establishment. He stated that, "beginning approximately December 13, 2006," it was "true" that "after meeting with these agents and viewing the videotaped activities of [appellant], it appears that [appellant] is physically capable of performing the duties of a mail carrier, such as limited

lifting, walking, operating a motor vehicle, standing and sitting." Dr. Pearson responded "false" to the next question which stated "It also appears that [appellant] may have misrepresented her symptoms and capabilities to me." He stated that, "during the initial phase of treatment, I expected [appellant] to rest, take her medication as directed and go to physical therapy. I would not have recommended that she perform extended driving, shopping, or visits to the hairdresser."

On September 12, 2007 the Office informed appellant that the employing establishment controverted her claim for continuation of pay from December 6 to 26, 2006. It requested that appellant provide a written explanation as to how she was able to continue performing her day-to-day activities but not work at any job. The Office also requested that she provide additional medical evidence establishing that she was totally disabled from her federal employment from December 6 to 26, 2006. A copy of the investigative report was provided to appellant.

On September 26, 2007 appellant maintained that Dr. Pearson told her not to work and rest, take medication and attend physical therapy. She stated that "at no time did we discuss whether I could or could not perform any essential life functions but only to continue to attend therapy which would facilitate continued improvement of my condition." Appellant contended that the employing establishment never offered her limited duty or contacted Dr. Pearson. She stated that she was in a great deal of pain from December 5 to 7, 2006. However, after the first two physical therapy sessions, appellant had improved to the point where she could perform light housework, feed her dog, pick up her children from school, do light grocery shopping and keep a hairdresser's appointment. She opined that those functions complied with Dr. Pearson's restrictions "at least with my limited conversation with him."

By decision dated November 14, 2007, the Office denied appellant's claim for continuation of pay from December 6 through 25, 2006. It found that the medical evidence did not support that she was totally disabled.

Appellant disagreed with the Office's decision and a telephonic hearing was held before an Office hearing representative on March 12, 2008. The issue was her entitlement to continuation of pay from December 6 through 17, 2006, as she returned to limited-duty work on December 18, 2006. After the hearing, appellant submitted excerpts from the employing establishment's *Employee and Labor Relations Manual*.

By decision dated May 29, 2008, the Office hearing representative affirmed the November 14, 2007 decision, as modified, to find that appellant was not entitled to continuation of pay from December 7 through 17, 2006.

LEGAL PRECEDENT

In order to establish entitlement to continuation of pay, an employee must establish, on the basis of reliable, probative and substantial evidence, that she was disabled as a result of a traumatic employment injury. As part of this burden, she must furnish medical evidence from a qualified physician who, based on a complete and accurate history, concludes that the

employee's disability for specific periods was causally related to such injury.[1] As used in the Federal Employees' Compensation Act, the term disability means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury.[2] In other words, if an employee is unable to perform the required duties of the job in which she was employed when injured, the employee is disabled.[3]

The Office procedures under Chapter 2.807.7(c) further state that "[w]here the agency has advised that it is willing to accommodate the employee's work limitations, the employee must so advise the attending physician and ask him or her to specify the limitations imposed by the injury … [and] the employee must provide the agency with a copy of the physician's response."[4]

ANALYSIS

The Office accepted that on December 5, 2006 appellant sustained sprains of the lumbar thoracic and cervical spine. Appellant claimed continuation of pay. The Office found that she was not entitled to continuation of pay from December 7 through 17, 2006[5] as she did not submit medical evidence establishing that she was disabled for this period.

The Board finds that appellant did not submit medical evidence establishing that she was disabled from December 7 through 17, 2006. In a December 7, 2006 report, Dr. Pearson advised that appellant reported no improvement and that her back pain seemed somewhat worse. He referred her to physical therapy, told her to continue her medications and stated that she could not perform any work. In a December 7, 2006 CA-17 form, Dr. Pearson advised that appellant was unable to perform light duty. On December 15, 2006 he noted that appellant's back strains were improving following physical therapy. Dr. Pearson released her to perform limited duty as of December 18, 2006 with restrictions.

However, Dr. Pearson was presented with evidence of appellant's activities during the period December 7 through 15, 2006. This included driving up to 20 miles at a time, shopping for two to three hours and getting her hair done for two to three hours. Dr. Pearson did not consider such activities normal for a person under a doctor's care for a neck and back injury. In a January 4, 2007 interview with the employing establishment inspectors, he stated that "during the initial phase of treatment, I expected [appellant] to rest, take her medication as directed and go to physical therapy. I would not have recommended that she perform extended driving,

[1] *Carol A. Dixon*, 43 ECAB 1065 (1992); *Virginia Mary Dunkle*, 34 ECAB 1310 (1983). *See Carol A. Lyles*, 57 ECAB 265 (2005); 20 C.F.R. § 10.205(a) (to be eligible for continuation of pay, a person must: (1) have a traumatic injury which is job related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury).

[2] *Marvin T. Schwartz*, 48 ECAB 521 (1997).

[3] *Id.*

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.7(c) (March 2004).

[5] Appellant returned to limited-duty work December 18, 2006.

shopping, or visits to the hairdresser." Dr. Pearson was not ever aware that appellant was participating in such activities. He also denied telling appellant that she could continue "normal" activities with the exception of work. After viewing a surveillance videotape of appellant from December 12, 2006, Dr. Pearson agreed that, based on the way appellant presented herself on examination, she should not have been able to perform the activities depicted on the surveillance footage. He further indicated that "beginning approximately December 13, 2006," appellant appeared to be physically capable of performing the duties of a mail carrier, such as limited lifting, walking, operating a motor vehicle, standing, and sitting."

While Dr. Pearson had held appellant off work with orders to rest, she was seen and acknowledged going shopping, running errands, getting her hair done, and playing with her pet while she was off work. Appellant indicated in a January 4, 2007 interview with postal inspectors that, while she was aware the employing establishment provided limited duty to assignments to injured employees she did not inform Dr. Pearson. She provided the Form CA-17 duty status report to Dr. Pearson, which clearly indicated that limited duty was available. Appellant had a responsibility to advise Dr. Pearson of the activities in which she was engaging and let the physician accurately determine her work status.[6] She failed to advise Dr. Pearson that she felt capable of performing limited duty as of December 7, 2006 or that she had been performing what she considered to be normal activities despite his instructions for her to rest. Appellant had the responsibility to ask Dr. Pearson to provide work restrictions, which she failed to do.

Appellant did not submit sufficient medical evidence based on an accurate factual background establishing that she was totally disabled from December 7 through 17, 2006. Therefore, the Office properly found that she was not entitled to continuation of pay from December 7 through 17, 2006.

CONCLUSION

The Board finds that appellant is not entitled to continuation of pay for the period December 7 through 17, 2006.

[6] *See* 20 C.F.R. § 10.210(e).

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 3, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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